



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. MISC. 397 OF 2010**

**EQUITY BANK LIMITED.....PLAINTIFF**

**VERSUS**

**DAVID GITAU MWANGI.....1<sup>ST</sup> DEFENDANT**  
**ROSE WANJIRU.....2<sup>ND</sup> DEFENDANT**  
**(Being sued in their capacity as Proprietors of)**  
**EMAGRAFA INSURANCE AGENCY.....3<sup>RD</sup> DEFENDANT**

**RULING**

This Ruling is delivered in the Chamber Summons dated 8<sup>th</sup> September 2010, brought under **Order V1 Rule 13(b), (c) and (d)** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**, wherein the Applicant seeks orders of this court as follows:

- 1. That the Defence dated 22<sup>nd</sup> July 2010 and filed in court on the 27<sup>th</sup> July 2010 be struck out and judgment be entered in favour of the Plaintiff in the sum of KShs. 12,257,824.81 as prayed in the Plaintiff.**
- 2. That the costs of this application and the entire suit be borne by the Defendants.**

The application is premised on the grounds that the Respondents are truly indebted to the Applicants in the sum claimed, together with interest thereon as prayed in the Plaintiff and that the Defence filed by them is a sham, being a mere denial and an abuse of the process of the court, with the result that it may

prejudice, embarrass or delay the fair trial of the suit. It is opposed on the strength of a Replying Affidavit sworn by the 1<sup>st</sup> Defendant/Respondent and said to have been filed on 7<sup>th</sup> February 2001, and Grounds of Opposition alluded to in the written submissions filed for the Respondents.

The application proceeded on the basis of written submissions filed as follows:-

**1. Applicant's submissions dated 22<sup>nd</sup> March 2011 and filed on 23<sup>rd</sup> March 2011**

**2. The Respondent's submissions filed on 8<sup>th</sup> April 2011**

The Applicant's claim against the Respondents is based on a loan agreement represented by a Letter of Offer dated 15<sup>th</sup> July 2008, on the strength of which the Applicant claims to have advanced the Defendant's a loan of KShs. 9,897,730/=. The Applicant states in paragraph 5 of the Plaintiff that it "*will crave leave of the court to adduce the said Letter of Offer during the hearing.*" The agreement, and the terms thereof, as itemized in paragraph 5 (a) to (e) of the Plaintiff, in setting out the contents/particulars of the Letter of Offer, have been specifically denied in the defence filed and the Applicants put to the strict proof thereof. Breach of the agreement is also denied as is the debt as claimed.

In the submissions filed for the Respondents, it is stated that they rely on the Grounds of Opposition and the Replying Affidavit filed to oppose the application. Unfortunately, the said documents were not on the court file at the time of writing this Ruling. The court is therefore not able to make out the Respondent's reply to the application before it. I note however, that in the Further Affidavit filed for the Applicant on 22<sup>nd</sup> February 2011 the said Replying Affidavit must have been served in view of what is deponed to in paragraph 7 and 8 which read as follows:

**"7. THAT without prejudice to the foregoing, I am advised by our advocates on record, which advice I verily believe to be true that the issues raised in the Replying Affidavit are of no consequence as the same are not pleaded in the Statement of Defence.**

**8. THAT the Replying Affidavit shows clearly that the Defendants do admit being indebted to the bank save that as per paragraphs 4 and 5, they dispute only three items amounting to no more than KShs. 335,550/= meaning in effect that the debt is admitted save for only this comparatively small portion of it and it would be in order for the court to enter judgment for the bank based on our application and further on the Defendant's admissions herein."**

I must state, firstly that since a Defendant is entitled to show by either affidavit, orally or otherwise that he has a right to defend a suit, the fact that the depositions in the Replying Affidavit are not in the Defence does not defeat his defence to an application for summary judgment. The Applicant cannot dismiss the contents of the Replying Affidavit as being of no consequence and at the same time rely on them to find an admission in its favour as it seeks to do under paragraph 8 of the Further Affidavit. Even without seeing the Replying Affidavit and the Grounds of Opposition, it is clear to me that this is not a plain and obvious case where summary judgment can issue, seeing that the Plaintiff/Applicant has itself stated that it will crave leave, **at the hearing** to rely on the Letter of Offer to prove the loan agreement giving rise to its claim. The agreement and the terms thereof have been denied. Moreover, the depositions in paragraph 6 of the Further Affidavit clearly show that there are matters of contention in relation to the facts and circumstances of lending which ought to go to trial. I find this not to be a matter where the court can exercise its discretion in favour of the Applicant. In the interests of justice, the matter should proceed to a full trial and I so order.

Accordingly, the application is dismissed with costs in the cause.

**DATED, SIGNED and DELIVERED at NAIROBI this 14<sup>TH</sup> day of OCTOBER, 2011**

**M.G. MUGO**  
**JUDGE**

**In the presence of:**

Mr. Muchiri holding brief for Ms Njoroge For the Applicant

Mr. Ndungu For the Respondent