REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 775 OF 2009

AMREEN KUTBUDDIN MUKADAM
NOREEN ASHIQ HASSAN SHEIKH ……..…… PLAINTIFFS

VERSUS
ECOBANK KENYA LIMITED ……..…… DEFENDANT

R U L I N G

1. It is indicative of the delays occurring in Courts that the Application which is before me for consideration is the Chamber Summons dated 23 December 2009 filed by the Advocates for the plaintiffs. The chamber Summons is supported by an Affidavit sworn by the 1st Plaintiff on 23 December, 2009.

2. The Application seeks orders from this Court to strike out the Defendant's Defence, set-off and Counterclaim herein with costs as well as the Defendant's Memorandum of Appearance dated 10 November 2009, filed herein on 11 November 2009. It requests for Judgment to be entered for the Plaintiff as claimed in the Plaint plus costs of this Application, which is brought under **Order VI Rules 13 (1) (b) (c)** and **(d)**, **Order VIII Rule 1 (2)** and **Order IX Rule 2 (3)** of the old *Civil Procedure Rules*.

3. The grounds upon which the Application is based is that the Defendant's said Memorandum of Appearance and the Defence were filed out of time and without leave contravening the mandatory provisions of the **Order VIII Rule 1 (2)** and **Order IX Rule 2 (3)** of the old *Civil Procedure Rules*. Further, that the Counterclaim and set-off introducing a new party and a new cause of action to the suit was not accompanied by a verifying Affidavit as required under the mandatory provisions of **Order VII Rule 2** of the old *Civil Procedure Rules*. Further Grounds to support the Application is that the Defence herein is evasive, does not answer the Plaintiffs' case, introduces extraneous matter, is an abuse of the Court process and is made up of general and bare denials not sufficient to answer the Plaintiffs' claim.

4. In the Affidavit in support of the Application, the 1st Plaintiff has deponed to the fact that the Summons herein was served on the Defendant on 26 October 2009. Judgment in default of Appearance and Defence was applied for by the Plaintiffs' advocates on 10 November 2009. According to the deponent, this Court entered Judgment in default but before the same was signed, the Defendant entered its Appearance on 11 November 2009. Thereafter in the said Affidavit, the deponent details what the

Plaintiffs' advocates have informed her as to what is set out in the Grounds of Opposition as noted above in terms of where the Defendant has failed to comply with various mandatory rules of the old Civil Procedure Rules. Thereafter, the deponent details that the Plaintiffs opened a Term Deposit Account and were issued a receipt therefore by the Defendant in the amount of Shs.3,628,597/83. Apparently according to the deponent, the Defendant engaged the Plaintiffs in unnecessary correspondence and attached copies thereof as "AKM 4 A-J". Finally, the deponent stated that the Defence did not answer sufficiently the Plaintiffs' claim is an abuse of the process of this Court.

5. A Replying Affidavit sworn by one Wilfred Oroko on the 11 February 2010, was filed herein on the next day. The deponent thereto describes himself as the Company Secretary and Head of the Legal (Department) of the Defendant. Mr. Oroko deponed to the position as regards the filing of the Defendant's Memorandum of Appearance on 12 November 2009 followed by the Defence and Counterclaim. He gave no reason for the Memorandum of Appearance being filed out of time but stated that he believed the Defendant had a good bona fide and/or reasonable Defence. He detailed that a company known as Impulse Printers Ltd. (hereinafter *"the company"*) had applied for an overdraft facility for Shs.3 million from the Defendant and the Plaintiffs were the guarantors thereof, as directors of the said company. Thereafter, Mr. Oroko set out the main terms of a Credit Agreement entered into by the company as regards the provision of security for the said overdraft facility which included a Joint & Several guarantee and Indemnity for Kshs. 3 million to be provided by the Plaintiffs.

6. Mr. Oroko then went on to depone to the fact that the company failed to meet its contractual obligations in spite of several requests:
"then necessitating the calling in of the securities the subject Fixed Deposite inclusive".

Attached to Mr. Oroko's said affidavit were a copy of a letter to the company dated 23 June 2003 as regards Banking Facilities together with a Memorandum of Acceptance dated 25th June, 2003 which appears to have been signed by the Plaintiffs for and on behalf of the company. The Schedule (presumably to the Banking Facility letter) seems to indicate amount the Security items a *"Lien over Fixed Deposit Receipt No. 4-13-23727 for Shs.3,320,340/70 with EABS Westminister Hounse Branch in the name of Mrs. Amrean Katbuddin Mukadam and Norean Ashiq Hassan Shiekh"*. There is also detailed as item No. 5 a *"Letter of Lien and Set-off in respect of the FDR referred to above"*.

7. Also exhibited by Mr. Aroko is a copy of an undated Guarantee/Indemnity for Akiba Bank Ltd. For Shs. 3 million which appears to have been signed on each page by Amreen Kutbuddin and Noreen Sheikh but is unwitnessed and not under seal. There is a copy of another Guarantee/Indemnity dated 20th December, 2007 in the amount of Shs.200,000/= signed by K. Mukalam but again unwitnessed and not under seal. Mr. Aroko exhibited at pages 6 and 7 what are entitled *"Demand Promissory Note one dated 20th December, 2003 for Shs.200,00/= and the other dated 24th June, 2003 for Shs. 3 million. The rate of interest is not specified and supposedly these documents emanate from the company although they are not under seal"*. Finally, there is a series of letters, correspondence etc dating from October 2003 to August 2006 as between the Defendant (then Akiba Bank Ltd.), the company and the Defendant's (associate?) entity East African Building Society for which Mr. Oroko does not have much explanation other than to say that the document support the averments of the Replying Affidavit. However, I noted a photocopy of what is termed a *"Term Deposit Confirmation Receipt"* dated 24 March 2005 for Shs.3,519,275.98 in the names of Amreen K. Mukadam & Norreen A. H. Sheikh. The maturity date detailed thereon is 23 June 2005 and a maturity value of Kshs.3,580,694.60.

8. On 17 February 2010, Koome J. gave leave to the Plaintiffs to file a supplementary Affidavit and such was again sworn by the First Plaintiff on the 26 February 2010 and filed herein on 1 March 2010. The affidavit makes the point that the Plaintiffs never requested the Defendant for an overdraft facility for the company. It also draws attention to the deficiency as regards the execution of the said Memoranum of Acceptance and the securities including the latter of lien and set-off dated 20 December 2003, the two Demand Promissory Notes dated 24 June 2003 and 20 December 2003, the Guarantee for Shs.200,000/=, the Guarantee for Shs.3 million and the Credit Agreement dated 25 June 2003. Further, the deponent pointed out that the security documentation attached to Mr. oroko's Replying Affidavit had been executed

to a large extent on behalf of the company by one Kutbaddin Mukadam who was described as: *"the Chief architect of this scam perpetrated with the connivance and/or condonation by the Defendant"*.

9. There were two million touched upon by the 1st Plaintiff in her Supplementary Affidavit which are of some impact. Firstly, at papagraph 11 thereof she remarked that the Fixed Deposit widened by the copy of the receipt in her first Affidavit was still valid and that Mr. Oroko had not commented in his Affidavit as regards the same. Secondly, the deponent drew this Court's attention to paragraph 20 of Mr. Oroko's Replying Affidavit to the extent that he made comment that this, the Plaintiffs' Application had merit.

10. The Applicant filed its written submissions herein on 28 September 2010. The Respondent filed its submissions on 28 February 2011. It is unfortunate that this Court's file has come before four Judges of this Division of the High Court before me. I have not had the advantage of being closely acquainted with the contents of the Court's file, the proceedings and particularly this application.

The Applicant's written submissions commenced by detailing the orders sought in the Application as well as the Grounds upon which the Application is premised. Thereafter, the Plaintiff went into detail of such Grounds commencing with the Memorandum of Appearance and Defence being filed out of time in contravention of the requirements of **Order IX Rule 2 (3)**. The Plaintiff detailed that as the Defendant's pleadings were filed without the leave of the Court, they are a nullity and should be struck out. To this end, the Plaintiff attached the Court of Appeal authority of **Solomon Munywoki & 2 Others vs. Park Towers Ltd. & 2 Others**, *Civil Appeal No. 256 of 2001* as per Tunoi, J.A. (as he then was):

"Normally, the power of the court to strike out in the cases specified in the rules or under its inherent jurisdiction is discretionary and the court will exercise its discretion with great care and circumspection".

11. The Respondent in its written submissions on this point details that the right to enter appearance is alive and exercisable up to and until the court has entered judgment in default of appearance. It points out that despite judgment having been applied for and drawn up, it was never signed and thus never appeared as such on the Court record. It went on to point out that the Defence and Counterclaim herein were validly served as per **Order IX Rule 1**. It also submitted that the Counterclaim was validly founded and pleaded and that the introduction of a new Defendant (the company) was within **Rules 7** and **8** of **Order VIII** of the old *Civil Procedure Rules*.

12. This Application was made under the old Rule which is perhaps just as well so four as the Defendant is concerned on this point. The old **Order IX rule 1** seems to me to be quite clear:

"A defendant may appear at any time before final judgment, and may file a defence at any time before interlocutory judgment is entered against him, or if no interlocutory judgment is so entered, at any time before final judgment".

It is just as well that this application was filed before the new *Civil Procedure Rules 2010* came into force as **Order 6 rule 1** now reads:
"Where a defendant has been served with summons to appear he shall unless some order be made by the court, file his appearance within the time prescribed in the summons".

Therefore, it appears to me that interlocutory judgment having not been entered as against the Defendant, the Plaintiff cannot succeed on this point No. 2 of the Chamber Summons dated 23rd December, 2009.

13. The next point submitted upon by the Plaintiff was in relation to the Counterclaim not being verified by a supporting affidavit. The Plaintiffs detailed the provisions of **Order VII rule 2** of the old *Civil Procedure Rules* which reads:

"The plaint shall be accompanied an affidavit sworn by the plaintiff verifying the correctness of the averments in the Plaint.

Then **Order VII sub-rule 3** details:

"The Court may of its own motion or on the application of the defendant order to be struck out any plaint which does not comply with sub-rule 2 of this rule".

The Defendant in response to the Plaintiff's submission in this regard submitted that the now repealed *Civil Procedure Rules* did not contemplate the verifying of a counterclaim as the Plaintiffs are suggesting. It went on to say that there is case law on the point which settles this moot submission. Unfortunately the Defendant did not go on to cite any authorities in that regard. In the event that it had, the Defendant may have taken the argument that there is a long line of cases which basically find that such a rule of procedure if not followed may be curable upon timely application. Here again, the Defendant is fortunate as if its Defence and Counterclaim had been filed under the *Civil Procedure Rules 2010*. Order 7 Rule 5 (a) is quite clear that when there is a counterclaim, an Affidavit under **Order 4 rule 1 (2)** (as applies to Plaints) shall accompany the Defence and Counterclaim. However, in this Application I find that a Defence and Counterclaim, filed under the old *Civil Procedure Rules*, need not have a verifying affidavit accompanying it as regards the contents of the Counterclaim.

14. The next point raised by the Plaintiff in their submissions herein is whether the Defence and Counterclaim is evasive, an abuse of the Court process or consists of mere denials. Such prayers are based and brought under the provisions of **Order VI Rule 13 (1) (b) (c)** and **(d)**. I have considered the persuasive authority cited by the Plaintiffs being **Day vs. William Hill (Park Lane) Ltd.** [1949] 1 All ER 219 where in the first finding thereof it was held that:

"if documents were referred to in a pleading, they became part of the pleading, and it was open to the court to lash at them without the necessity for any affidavit exhibiting them".

I accept that premise and believe that even if the documents exhibited to the Replying Affidavit sworn by Wilfred Oroko and dated the 11 February 2010 had not been before this Court, it could still lash at those documents as party of the pleading as most of the same are mention and included in the Counterclaim herein.

15. It is the Plaintiffs' submission that if this Court lash at the various documents commencing with the letter of offer dated 23 June 2003, they have no relevance to the plaintiffs' suit before Court. The Plaint is claiming payment from the Defendant of a deposit amount of Shs.3,628,597.83 evidenced by a confirmation receipt number 01-50101787 with a value date of 29 September 2005. The letter of offer and the Memorandum of Acceptance are dated 2 years before, as are the other documents (which are dated or otherwise) referred to in the Counterclaim. I have looked long and hard at the letter of Lien and Set-off at page 5 of the Bundle exhibited to the Replying Affidavit. This document is not signed by the Plaintiffs and again, is dated 2 years before the Fixed Deposit receipt detailed in the Plaint. Similarly, the Demand Promissory Notes at pages 6 and 7 of the said Exhibit are given by the company. The second of them dated 24th June, 2003 may be signed by the 1st Plaintiff but clearly is so in her capacity as a director of the company.

16. In response to the Plaintiffs' submissions as to the documents before the Court, the Defendant has detailed 3 submission points:

"(a) that there was a facility grounded by the Defendant bank to the Impress Printers Ltd. As shown in the documents exhibited in Oroko's Affidavit (supra) at page 1 to 21.

(b) there were instruments executed by parties to secure such facility.

(c) the Fixed Deposit was such security (refer to pages 32 and 33 of annextures in Oroko's Affidavit".

I have re-looked at these documents referred to as pages 1 – 20 attached to Mr. Oriko's said Affidavit. They are all dated (and some undated) in the year 2003, thus, I fail to see the relevance of the

same to this suit. However, the copy of the Term Deposit Confirmation Receipt at page 21 of the exhibited bundle has more relevance. It bears the same Receipt No. – 0150101787 as is detailed in the Plaint although the amount differs – Shs.3,518,275.98 (Maturity value Shs.3,580,894.60) in the Term Deposit Receipt and Shs.3,628,597.83 in the Plaint. Somebody and there is no evidence as to who, has detailed in handwriting on the exhibited copy the words **"UNDER LIEN"**. Do such words mean anything and are they evidence of the deposit being *"charged"* to the Defendant.

17. I may have presumed so save for the 2004 correspondence exhibited to Mr. Oroko's Replying Affidavit starting with the copy Fixed Deposit Receipt at page 27 for Shs.3,398,716.40 dated 8 April 2004, No. 4-13 24920. At the top of that certificate is detailed in type **"CERTIFICATE UNDER LIEN WITH AKIBA BANK LTD. – KSHS.3,398,716.40**. At page 32 the Plaintiffs writing to the East African Building Society requests the presumed uplift of the deposit and to issue a cheque in their names drawn on Akiba Bank Ltd. Typed on the copy of that letter, at the bottom, are the words: *"Please place our funds in a fixed deposit account in our names at best available rates"*. At page 34, it appears that the Assistant Manager of the Defendant bank forwarded the Original Fixed Deposit receipt by letter dated 17th June, 2004 and requests *"a cheque for the principal and interest amount as per enclosed customer instructions"*. Can it be presumed that those customer instructions were acted upon in June 2004?

18. What is the connection between that correspondence, the lien for the lending facility which may have been paid off and the Receipt No. 01-50101787 at page 21 and the Receipt referred to in the Plaint? Unfortunately, Mr. Oroko's said Further Affidavit does not tell us, nor does the Counterclaim which concentrates upon its claim against the company not the Plaintiffs other than to say that they jointly and severally to pay and to satisfy the Defendant bank or demand all or any sum of money which would be owing to the Defendant bank from the company. Unfortunately, for the Defendant bank, it does not seem to have the documentation to support this contention. However, it may be able to produce such at the trial in due course. The real question before me is whether the Defendant's current pleadings before this Court are going to give it that opportunity?

19. I have perused the other authorities submitted to me by the Plaintiff being **Chatte vs. National Bank of Kenya Ltd.** – *Civil Appeal No. 50 of 1996*. The application for striking out in that case was brought under the old **Order VI rule 13 (1) (a)** on the grounds that the Defence was unreasonable. Such is of little assistance to me here. Further, the case of **Akiba Commercial Bank Ltd. vs. Raya & Another** [2008] 1 EA 8 dealt with the amendment of issues in final submissions and I doubt that in this case the Plaintiffs were seriously suggesting that the Defendant is doing that here bearing in mind that the Defendant filed its submissions herein after the Plaintiffs had filed theirs.

20. I have also looked at the last authority cited to me by the Plaintiffs namely Kenindia Assurance Co. Ltd. vs. Alpha Knits Ltd. & another [2003] 2 EA 512. Again I do not consider that case as being of much relevance here, as it largely covered in Waki, J.A.'s judgment, the principles of trade usage and custom. However at page 517 Kwach, J.A. had this to say on point:

"Mr. Fraser referred us to a number of authorities laying down the principles applicable on application for striking out pleadings. The principles are clear and the courts will not deny a defendant who has a genuine defence, as opposed to a sham defence, the right to ventilate it".

21. The Defendant in its submissions quoted the case of **D.T. Dobie & Co. (Kenya) Ltd. vs. Muchina** [1982] KLR per Madan J. where it was stated:
"……. The power to strike out should only be exercised after the court has considered all facts, but must not embark on the merits of the case itself which is solely the preserve for the trial judge at the trial as the court is not usually informed so as to deal with the merits sithout discovery, without oral evidence tested by cross-exdamination in the ordinary way ….. the court should aim at sustaining rather than terminating a suit".

The Defendant also cited the case of **Crescent Construction Co. Ltd. vs. Delphis Bank Ltd.** [2007] eKLR. Again, I did not find much assistance in this authority as such involved the striking out of Plaint

and again examined the option under the old **Order VI rule 13 (1) (a)**.

22. As to the striking out of a defence, I was able to get some comfort from the Ruling of Ojwang J. in **Kimonjo Family Co. Ltd. vs. Kimonjo Family Company & Partners Ltd. & 3 Others** [2005] eKLR where the learned Judge quoted from the Ugandan case **of Sebei District Administration vs. Gosgali & Others** [1968] EA 300 as per Sheridan J. at page 302:

"The nature of the action should be considered; the defence if one has been brought to the notice of the Court, however irregularly, should be considered; the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be conserved; and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a Court".

23. The quotation from the **Sebei** case (supra) must also be considered alongside the words of the learned judges of the Court of Appeal in **Eastern Radio vs. Tiny Tots** [1967] EA 292 by which I am bound.

As per Sir Charles Newbold P. at page 397:

"If a litigant in the course of the proceedings for the determination of such further matters wilfully disregards an order of the Court, the Court must have an inherent jurisdiction to make an appropriate order. In addition to this inherent jurisdiction, I consider that Order 10 Rule 20, when it speaks of the liability of a plaintiff *"to have his suit dismissed"* must be construed in such circumstances as meaning a liability to have those issues which remain for determination in the suit dismissed. I see absolutely no difficulty in so construing that rule and every reason so to do".

Order 10 has now been done away with as indicated above but we are still left with the inherent jurisdiction of the court.

Sir Clement De Lestang, V.P. had this to say at page 397:

"The authorities show, and there is no dispute about it, that a court ought not to impose the penalty of dismissing a suit except in extreme cases and as a last result and should only do so where is it is satisfied that the plaintiff is avoiding a fair discovery or is guilty of willful default".

Further, Spry, J.A. had this to say at page 400:

"It is well established that the power to dismiss a suit or strike out a defence is only to be exercised in the last resort".

24. I have commented above on what I considered was the Defendant's points of claim again the Plaintiffs in its Counterclaim. I indicated that I felt that the Counterclaim seemed to be more directed at the company rather than the Plaintiffs. What then of the Defence? Does it raise triable issues as between the parties or is it a sham as submitted by the Plaintiffs? I have closely examined the Defence filed herein by the Defendant on 25 November 2009. At paragraph 5 thereof the Defendant admits the Plaintiff's Term Deposit Confirmation Receipt No. 01-50101787 of 29 September 2005 but says it was issued in consideration of facilities issued at the request of the company. Then at paragraph 7 of the Defence, the Defendant repeats that the sum deposited by the Plaintiffs were:

"in terms of the instruments respecting the facilities advanced to the Principal, (the company, bracketing mine), uplifted and utilized to partly satisfy the then liabilities due from the Principal to the Defendant".

As I understand this paragraph of the Defence, the Defendant while admitting the Deposit receipt is saying that the monies in respect thereof are no longer there having been uplifted by the Defendant to satisfy the debt owed to the Defendant by the company.

25. To my way of thinking, this is no form of Defence. The Defendant admits the monies were deposited by the Plaintiff and is now saying sorry, I have used those funds so deposited and off-set them against the account of the company. Accordingly, I allow the Plaintiffs' Application by way of Chamber Summons dated 23 December 2009.

The Defendant's Defence, set-off and Counterclaim herein dated 23 November 2009 and filed herein on 26 November 2009 are struck out with costs to the Plaintiffs. For reasons that I have detailed above, I am not prepared to grant prayer No. 2 of the Application to strike out the Defendant's Memorandum of Appearance herein dated 10 November 2009 and filed herein on 11 November 2009. Judgment will be entered herein for the Plaintiffs as prayed in the Plaint.

DATED and DELIVERED at NAIROBI this 17th day of November, 2011.

J. B. HAVELOCK
JUDGE