



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL & TAX DIVISION**  
**CIVIL SUIT NO. 531 OF 2010**

**K-REP BANK LIMITED.....PLAINTIFF**

**VERSUS**

**POST & TELECOMMUNICATIONS EMPLOYEES HOUSING  
CO-OPERATIVE SOCIETY LIMITED..... DEFENDANT**

**RULING**

The Applicant in the Notice of Motion dated 17<sup>th</sup> February 2011, seeks orders of the court for the striking out of the Defence and Counterclaim, filed herein on 13<sup>th</sup> September 2010, and for judgment to be entered against the Defendant as prayed in the Complaint dated 29<sup>th</sup> July 2010.

The application, which is supported by an affidavit sworn by Betty Korir on 17<sup>th</sup> February 2010 is premised on the following 6 grounds:-

1. The Defendant is truly and justly indebted to the Plaintiff Bank in the sum of KShs. 45,872,104.10 with interest.
2. That the Defendant has variously admitted its indebtedness to the Plaintiff
3. That the Statement of Defence and counterclaim filed herein is a sham, does not disclose any reasonable defence and is scandalous, frivolous and vexatious.
4. That the Statement of Defence and counterclaim is otherwise an abuse of the court process and intended to delay the determination of this matter.
5. That the Statement of Defence and counterclaim filed herein is only meant to obfuscate and cloud the issues before this court and delay the determination of this suit.
6. That the Plaintiff's interests herein stand to suffer prejudice if this application is not granted.

The application is supported by an affidavit sworn by Betty Korir, the Head of the Plaintiff's Credit Risk Management Department on 17<sup>th</sup> February 2011, to which is annexed the letter of offer dated 23<sup>rd</sup> March 2006, together with letters written by the Respondent in acknowledgment of the loan and

outstandings thereon. Worthy of note are the letters dated 7<sup>th</sup> August 2007, indicating loan amount of KShs. 50,000,000/= as being due from the Respondent to the Applicant; another dated 8<sup>th</sup> May 2007, where the amount is stated as KShs. 43,000,000/=, and another letter dated 30<sup>th</sup> July 2008, for KShs. 33,663,282/= and yet another one dated 17<sup>th</sup> March 2009, where the Respondent refers to an outstanding loan of KShs. 32,000,000/= and which sought to have the interest thereon zero rated, and requesting that some threatened winding up process be withdrawn.

The application is opposed on the strength of a Replying Affidavit sworn by Charles O. Gichaba in which the loan facility is admitted, complaining only, that the sum of KShs. 41,870,634.30 claimed in the Plaintiff is not explained and that it differs from the sum of KShs. 45,872,104.10 (claimed under this application) and that amounts paid by the Respondent towards clearing the loan as well as the cash collateral held by the Applicant (to the Respondents credit) have not been accounted for in the calculations made available to the Respondent.

The Defence sought to be struck out is along the above lines but goes further to deny the entire loan and the advances made in the manner stated in paragraphs 3, 4 and 5 of the Plaintiff. It includes counterclaim for a sum of KShs. 35,986,000.68, which is said to have been recovered by the Applicant "on various occasions." Doesn't this leave one wondering in respect of what the Applicant would have been recovering such sums if there was no loan advanced in the first place?

Among the documentation tendered in opposition to the application is what the Applicant calls a statement of accounts ("COG 2") from M/S Worldrone Plus Ltd. From the face of it, the same was prepared at the request of and for the benefit of the Respondent in an attempt at putting into the correct perspective, the disbursements and loan outstandings as at 11<sup>th</sup> March 2011. It talks of a banking loan facility of KSh. 55,000,000/= disbursed by instalments of KShs. 10 million each on 18<sup>th</sup> November 2005, 19<sup>th</sup> January 2006, 31<sup>st</sup> March 2006 and 19<sup>th</sup> April 2006 and one of KShs. 15 million on 31<sup>st</sup> October 2006. The letter contains a summary analysis, which factors in the collateral and the interest paid, and gives a total net loan outstanding of KShs. 35,486,507.36. Taking into consideration all the facts of this case, the law as it relates to striking out and summary procedure generally, I am inclined to accept the Applicant's contention that the Defence filed can only be material, if at all, as regards the difference between the sum claimed and the sum presented herein as the net loan outstanding. That would be the only issue worthy of consideration at the trial.

Given the facts of the case, there is no basis laid for the counterclaim, given that a counterclaim in itself must raise a known cause of action. With due respect, it appears to me that, perhaps, what the Respondent wished to put forth was a set-off which, ordinarily, may be included in the defence whether or not it is added as a counterclaim. I find this to be a clear and obvious case where summary judgment can validly issue as regards the sum of KShs. 35,486,507.36 as provided for in the Defendant's exhibit ("COG 2"), even without striking the defence.

Accordingly, I enter judgment for the Plaintiff in the said sum and order that the suit be set down for hearing within the next 30 days as regards the balance and interest. Costs shall await the final judgment. In the event that the Respondent fails to set down the suit for hearing as herein ordered, the Defence (and counterclaim) shall stand struck out.

Orders accordingly.

**DATED, SIGNED and DELIVERED at NAIROBI this 11<sup>TH</sup> day of NOVEMBER, 2011**

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

In the presence of:

No Appearance

For the Applicant

Ms. Mwendu holding brief for

Mr. Getange

For the Respondent