REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANICOMMERCIAL COURTS)

Civil Case 620 of 2005

STANBIC BANK KENYA LIMITED.....PLAINTIFF

VERSUS

KENYA AKIBA MICRO-FINANCE LIMITED.....DEFENDANT

R U L I N G

The application before the court is brought by a Notice of Motion dated 17th January, 2007, and is made under **Order XXXV Rules 1 (1) (a), (2), (3)** and **8; Order XII Rule 6; Order L Rule 1** of the **Civil Procedure Rules;** and **Section 3A** of the **Civil Procedure Act.** The Applicant seeks an order that judgment be entered for the Plaintiff as prayed in the plaint, and that costs of this application and of the suit be awarded to the Plaintiff.

The application is supported by the annexed affidavit of Eunice Lumallas, the Legal Officer of the Plaintiff Bank, and is premised on the grounds that the defendant is justly and truly indebted to the Applicants in the sum of Kshs.3,731,429.22 as at 15th October, 2005 and was so indebted at the commencement of this suit; that the judgment sought herein is for a straightforward liquidated amount; that the Defendant has in any event admitted the debt herein; and that the Defendant does not have any or any reasonable defence to the suit.

On 8th March, 2007, the Defendant filed Grounds of "Objection" which I presume were meant and intended to be grounds of "Opposition". Those grounds are that-

1. ***The application is frivolous, vexatious and an abuse of the court process.***
2. ***The defence on record raises bona fide triable issues worthy a trial.***
3. ***The defendant does not technically exist having been closed down by the Central Bank of Kenya on 2nd November, 2005.***
4. ***The application has been prematurely made.***
5. ***The Honourable Court may not issue orders in vain.***

During the oral canvassing of the application, Ms. Thuo appeared for the Applicant while Mr. Murugara held brief for Mr. Njengo for the Respondent. Mr. Murugara applied for an adjournment on the ground that Mr. Njengo had no further instructions in this matter, the Defendant having been placed under receivership by the Central Bank of Kenya. He therefore applied for an adjournment as Mr. Njengo would soon be filing an application for leave to withdraw from acting for the Defendant/Respondent.

Opposing the application for adjournment, Ms. Thuo argued that the application was dated 17th January, 2007 which was more than three years ago. The Applicants had severally attempted to fix the application but the Defendant kept coming up with the same

excuse. Noting that the Respondent had been placed under receivership in 2005, and that the application had been filed in court on 18th January, 2007, the court declined to grant the adjournment as the Respondent's Counsel had had sufficient time to file his application to cease acting but did not do so. Mr. Murugara's instructions had been limited to making the application for adjournment, and therefore could not argue the application. The hearing of the application therefore proceeded *ex parte.*

Ms. Thuo for the Applicant narrated the banker-customer relations between the parties, which led to the opening by the Respondent of Account No.0140078328501 with the Applicants. In the course of its operations, the Respondent overdrew the account by the sum claimed in the plaint, which sum the applicant now claims together with the contracted interest at 23% per annum until payment in full. Counsel referred to the bank statements copies of which are attached to the application, and to copies of correspondence exchanged between the parties. She submitted that the Respondents acknowledged their indebtedness to the Applicants and even made proposals for repayment but did not honour those proposals. She referred to **GOHIL v. WAMAE [1983] KLE 489** and submitted that this case rests squarely on **Order XXXV Rule 2** and that judgment should be entered for the sums due with interest. She finally submitted that the Defendant's defence is made up of mere denials and urged the court to allow the application as prayed.

The defence on record is very interesting. In a nutshell, the Defendant denies that there was any agreement for extending banking facilities to the defendant, and that if there was any such agreement, the defendant did not utilize the facility; secondly, that if the Defendant utilized the facility, the Defendant paid back to the Plaintiff any moneys owed as a result of utilizing the said facilities; and thirdly, that if the defendant entered into an agreement with the plaintiff for financial facilities as alleged, the plaintiff was in breach of the terms and conditions of the said financial facility thereby entitling the Defendant to rescind the said agreement and the Defendant was therefore no longer bound by the terms and conditions of the said agreement.

Attached to the Plaintiff's supporting affidavit is a bundle of documents. These include, *inter alia,* an application for the opening of accounts by Limited Liability Companies; the plaintiff's General Terms and Conditions duly signed and dated 14th May, 2004 by the duly authorized officers of the Defendant; a resolution of the Defendant's Board of Directors passed on 14th May, 2004 mandating the opening of the subject account with the Plaintiff; and the Defendant's P.I.N. together with certified copies of the national identification cards of the authorized signatories of the said account. From these documents and the Defendant's bank statements, copies of which are attached to the application, it is self evident that the defendant indeed opened an account with the Plaintiffs, and the said account was run by the Defendants in the manner alleged by the plaintiffs. It is therefore futile for the Defendants to deny the agreement for the opening of the subject account and the indebtedness arising from overdrawing the account.

Secondly, copies of the correspondence between the parties show that by a demand notice dated 2nd June, 2005 and addressed by the Applicants/Plaintiffs to the Respondents/Defendants, the Applicants made reference to the Respondent's indebtedness to the Applicants in the sum of Kshs.3,682,652.54 as at the date of the notice on which interest continued to accrue at the rate of 23.75% per annum. In their response by a letter dated June 8, 2005, the Respondents, *inter alia*, rendered themselves thus-

> ***"The account Relationship Manager***
> ***Stanbic Bank Ltd.***
> ***NAIROBI***
> ***Dear Sir***
> ***RE: OVERDRAWN POSITION – KSHS.3.8 MILLION***
>
> ***We refer to your letter dated the 2nd June 2005 regarding the overdrawn position of our account, the contents of which we have noted with much surprise, given that we have at no time disputed that position, neither have we declined to adjust it …"***

This statement amounts to a clear admission that the Respondents indeed owe theApplicants the amount of money claimed by the Applicants.

Following the Respondent's aforesaid letter dated 8th June, 2005, the Applicants wrote to the Respondents another letter dated 16th June, 2005, enclosing a proposal agreement for repayment of the sum of Kshs.3,697,302.55 owed by the Respondents as of that date. In their response dated June 20, 2005, the Respondents wrote to the Applicants as follows-

> ***"Dear Sir,***
>
> ***RE: EXCESS OF KSHS.3,697,302.55***
> ***We acknowledge receipt of your letter dated 16th of June 2005 forwarding a proposal agreement between yourselves and Kenya Akiba Micro-Finance Ltd. While we are generally in agreement with the terms we have the following comments on the specific clauses …***
> ***Clause 5: We request that instead of Kshs.750,000 per week as demanded by the Bank, a weekly standing order of Kshs.500,000 be accepted.***
> ***Clause 6: If excess were formalized by our signing of the agreement then we plead that a rate other than the punitive 23.75% be considered."***

In their response to these requests, the Applicant's letter dated 21st June, 2005 said in no uncertain terms that the Respondent's proposal to repay Kshs.500,000 per week was not accepted. As for the rate of interest, the Applicants explained that when pricing excesses, they took into account such issues as unarranged excess; additional unanticipated utilization of liquidity; usage of credit lines; unsecured or inferior lending position; internal communication, meetings, submission of credit motivations, particularly when deadlines are missed; and heightened level of seniority in account Relationship Management all of which are expressed as an interest rate, which the Respondents could reduce by banking all their receipts in the account, and maintaining a credit balance, all of which were entirely within the Respondent's control.

This response was followed by some meetings between the parties which did not yield any fruit, thereby precipitating this suit.

Order XXXV Rule 2 (1) of the **Civil Procedure Rules** requires a Defendant to show either by affidavit or by oral evidence that he should have leave to defend. The burden lies entirely on him to satisfy the court that he is entitled to defend the suit by demonstrating that the defence is genuine or arguable or raises triable issues. In the instant matter, the defendant did not file any replying affidavit, but only filed grounds of "Objection". These do not satisfy the requirements of **Order XXXV Rule 2 (1)** as to showing by affidavit or oral evidence that the Defendant is entitled to defend the suit. It is not enough to state in the grounds of "Objection" that the defence raises *bona fide* triable issues.

Secondly, the Defendant admitted in its correspondence with the Plaintiff that it owed the Plaintiff the money which is the subject matter of this suit. The defence filed herein is therefore an afterthought, and consists only of generalized denials. It is also not enough to state in the grounds of "Objection" that the defendant "does not technically exist" as it exists in law.

For the above reasons, I find that the application succeeds and prayers 1 and 2 of the application by Notice of Motion dated 17th January, 2007 are hereby granted as prayed.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 15th day of April, 2010.

L. NJAGI
JUDGE