REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 128 of 2009

HARVEER INVESTMENTS COMPANY LIMITED…..…….. PLAINTIFF/APPLICANT

VERSUS

EQUATORIAL COMMERCIAL BANK LIMITED...1ST DEFENDANT/REESPONDENT

PRAHLAD SINGH BHANGRA……..……. 2ND DEFENDANT/RESPONDENT

COME-CONS AFRICA LIMITED ……..……3RD DEFENDANT/RESPONDENT

ADMATNX COMPANY LIMITED……..…4TH DEFENDANT/RESPONDENT

RULING

1. The chamber summons dated 30 September 2009 is brought by the plaintiff under the provisions of order VI Rule 13 (c) and 13 (d) of the civil procedure rules. The plaintiff is seeking for an order that the defence by the 1st Defendant be struck off. This application is based on the grounds that the 1st defendant's statement of defence is meant to embarrass and delay the fair trial of this suit. It is further contended that the 1st defendant admitted facts before the court of appeal which facts are being denied at the High Court by the defence. It will therefore save the courts time if this suit is struck out.

2. This application is supported by an affidavit sworn by Mrs. Harvindel Pal Kaur Bhangra on 30th September 2009 which has elaborated in greater details the grounds in support of the application. Briefly stated, the plaintiff filed this suit on 26th February 2009, simultaneously it filed a chamber summons under **Order XXXIX** of the **Civil Procedure Rules** seeking for an interim order of injunction. That application was dismissed by a ruling of the **Lesiit J** of 29th May 2009. The applicants successfully filed an appeal and also an application under **rule 5 (2) (b)** of the Court of Appeal rules. In that ruling the Court of Appeal made some observations to wit;

> ***"It was conceded that the charge and guarantee documents were executed on behalf of the applicant, and that on the face of those documents there would be no basis for the applicant to complain. However, a careful examination of the documents shows, and Miss Mate, for the bank conceded this, that the bank did not disburse any money to the applicant on the basis of those documents. They also show that no guarantee documents were executed for Kshs.7 million. That notwithstanding the bank has been demanding it. The alleged fraud has so far not been shown to have been executed for the benefit of the applicant. Besides, there is no evidence it paid any money to the applicant. Miss Mate informed us from the bar that the 1st respondent is not pursuing that claim of Kshs.7 million arguing that it is unsecured. It is arguable whether in view of what we have stated above the 1st respondent could properly exercise a power of sale. Besides, coercion to execute the charge having been alleged against the bank it is arguable whether the bank could in the circumstances, be entitled to enforce it. Those are matters to be canvassed either in the intended appeal or before the trial court when the suit will eventually come for a hearing, if at all. For purposes of the application before us it suffices to say that we are satisfied that the applicant's intended appeal is not frivolous."***

3. This is the gist of the application which was opposed by the 1st Defendant. Reliance was placed on the replying affidavit by **Joseph Kiilu** sworn on 28th October 2009 and a further affidavit sworn by M/s Mate on 15th March 2010. It is contended that the plaintiff applied for a loan of Ksh.20 million from the 1st Defendant which was supposed to be paid within a period of 24 months. The 1st defendant requested for a further facility of Kshs.7 million and executed certain letters of credit. It is alleged that the 1st defendant defaulted in repayment and the plaintiff demanded for the payment. According to the 1st defendant the defence raised is triable and the suit should proceed for trial. Both parties filed written submissions and quoted several authorities to support their respective positions.

4. The Plaintiff's main ground for seeking to strike the 1st defendant's defence is for reasons that there are variances in the matters presented before the Court of Appeal and in the High Court. However, the decision of the Court of Appeal as I understand it, points out that there are matters to be determined by the trial court when the suit will eventually come for hearing if at all. Also the principles to bring to bear on whether a court should strike out pleadings are well articulated in a long line of authorities especially the case of; **DT Dobbie & Co. Ltd. versus Muchina 1982 KLR** as per Madan JA:

> ***"The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out."***

5. The power to strike out pleadings is exercised without the court being fully informed of the merits of the case through discovery and oral evidence. That is why it is exercised sparingly and cautiously. Also in the case of **M/s Ramji Megji Gudka Limited vs. Alfred Morgat Omundi Michira & 2 others, CA No. 335 of 2001**, especially the holding by their Lordships that:

> ***"…****In dealing with the issue of triable issues, we must* ***point out that even one triable issue would be sufficient. A court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham. A defence on merit does not mean a defence which must succeed but it means a defence which raises a triable issue to warrant adjudication by the court…"*** *(Emphasis mine)*

6. Based on the above principles and the court of appeal's finding that there is an issue for trial, I need not say more of this application which should be disallowed. The suit should proceed for full hearing. Cost of this application shall be in the cause.

RULING READ AND SIGNED ON 17TH SEPTEMBER 2010 AT NAIROBI.

M. K. KOOME

JUDGE