



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI MILIMANI COMMERCIAL COURTS**

**Civil Case 1316 of 2006**

**GICHOCHO BUILDING CONTRACTORS**

**AND GENERAL MERCHANTS CO. LTD.**

**.....PLAINTIFFS**

**V E R S U S**

**EQUITY BANK LIMITED .....DEFENDANT**

**R U L I N G**

This suit involves a customer-bank dispute. The Plaintiff is the customer while the Defendant is the bank. The Plaintiff has pleaded in its plaint dated 13<sup>th</sup> December, 2006 that on 2<sup>nd</sup> March, 2006 the Defendant drew from the Plaintiff's account at the Defendant's **Four Way Tours Branch, Nairobi**, the sum of KShs. 5 million and remitted the same to a third party, without the Plaintiff's authority or consent. The Plaintiff further pleads that its said account, which had a credit balance of only KShs. 114,730/55, was as a result of that withdrawal thrown into a debit balance of KShs. 4,885,569/40. Further, the Plaintiff was unable to access his KShs. 114,730/55. It seeks a declaration that the aforesaid transfer from its account was without its authority or consent and of no effect. It also seeks an order to compel the Defendant to reverse or cancel the transfer unconditionally. Finally, the Plaintiff seeks general damages, costs of the suit and interest.

The Defendant entered appearance and filed defence and counter-claim. Its defence is that the Plaintiff made a request for transfer of KShs. 5 million from its corporate account to its account at the **Standard Chartered Bank**. However, the transfer was erroneously done twice through electronic fund transfer (EFT) as well as the Defendant's real time gross system (RTGS). The Defendant then asked the Plaintiff to refund one of the two credits of KShs. 5 million, but the Plaintiff refused. The Defendant therefore pleads that the Plaintiff's claim is baseless and fraudulent and that the present suit was filed in furtherance of that fraud. The Defendant counter-claims for the sum of KShs. 5 million together with bank charges and interest. The Plaintiff filed a reply to defence and a defence to the counter-claim.

By chamber summons dated 18<sup>th</sup> June, 2007 the Plaintiff has sought an order to strike out the Defendant's defence and counter-claim with costs, and judgment to be entered for the Plaintiff as prayed in the plaint. The application is said to be brought under **Order 6 rule 13(1) (b) & (d)** of the **Civil Procedure Rules** (the Rules). The grounds for the application appearing on the face thereof are that the defence is a mere denial and frivolous; that the counter-claim has no relevance to the matters in question

and was filed merely to vex the Plaintiff; and that the defence and counter-claim have no grain of truth in them and are a gross abuse of the court process. The application is supported by the affidavit of one **MARY WANGARE KANAI**, a director of the Plaintiff.

The Defendant has opposed the application as set out in the grounds of opposition dated 26<sup>th</sup> June, 2007. Those grounds include:-

1. That the statement of defence and counter-claim has joined issue with the Plaintiff, which issues can only be effectually and finally determined at full hearing.
2. That striking out a pleading is a draconian measure, and this is not a proper case for such measure.

No replying affidavit was filed.

I have considered the submissions of the learned counsels appearing, including the cases cited. I have also perused the pleadings. It is the Plaintiff's case, as set out in the plaint, that KShs. 5 million was transferred from its account without its consent or authority and credited into someone else's account in another bank. The Plaintiff states that it did not have that kind of money in its account to be transferred. It had only KShs. 114,730/55 in credit. This modest sum of course disappeared in the transfer, and the Plaintiff's account was thrown into the huge debit of KShs. 4,885,569/40.

On its part, the Defendant says that the Plaintiff had made a request for transfer of KShs. 5 million from its account to another account it held with the Standard Chartered Bank, and that this was done. The Defendant further pleads that due to a mistake on its part another transfer of KShs. 5 million was similarly made, notwithstanding that the Plaintiff did not have the money to be transferred, which means that it was Defendant's own money that was used in the second transfer. The Defendant has therefore counter-claimed for a refund of this money in the second transfer.

I note that none of the parties has placed before the court any bank statements showing these transfers. So it has been left to evidence to be adduced at the trial to show the transfers pleaded by the Plaintiff and by the Defendant. According to the Plaintiff there was only one transfer of KShs. 5 million, and the same was without its authority or consent. On the other hand, the Defendant says there were two transfers of KShs. 5 million each, one with the Plaintiff's consent and the other one by mistake of the Defendant. All these are issues of fact which ought to be ventilated at the trial of the action.

I therefore do not find that the defence filed by the Defendant amounts to a mere denial and thus frivolous. The defence raises triable issues. I also do not find the counter-claim to be irrelevant to the issues raised in the Plaintiff's suit. The counter-claim is part and parcel, according to the Defendant, of the transactions giving rise to the Plaintiff's cause of action. It is thus not vexatious. Finally, I also do not find the defence and counter-claim to be an abuse of the process of the court.

The power to strike out pleadings is drastic because it shuts out a litigant from a hearing of the action. It is a jurisdiction which ought to be very sparingly exercised, and then only in clear cases. It must be remembered that the power to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. See the case of **DT Dobie & Company (Kenya) Ltd -vs- Muchina [1982] KLR 1**.

Having considered all matters placed before the court, I do not find any merit in the application by chamber summons dated 18<sup>th</sup> June, 2007. This is not a clear case for striking out. The application is hereby dismissed with costs to the Defendant. It is so ordered.

**DATED AT NAIROBI THIS 6<sup>TH</sup> DAY OF APRIL, 2009**

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED THIS 9<sup>TH</sup> DAY OF APRIL, 2009**