



Gulf African Bank Limited v Kodaji Building & Construction Works Limited & 2 others (Civil Case E246 of 2020) [2024] KEHC 63 (KLR) (Commercial and Tax) (11 January 2024) (Ruling)

Neutral citation: [2024] KEHC 63 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E246 OF 2020
JWW MONG'ARE, J
JANUARY 11, 2024**

BETWEEN

GULF AFRICAN BANK LIMITED PLAINTIFF

AND

KODAJI BUILDING & CONSTRUCTION WORKS LIMITED 1ST DEFENDANT

WILLIAM OMBURO ODAJE 2ND DEFENDANT

VIBIAN CHEMTAI 3RD DEFENDANT

RULING

1. The Plaintiff/Applicant has by a Notice of Motion application dated 10th August 2021 moved this Honourable Court, filed under Section 3A of the [Civil Procedure Act](#); Order 2 Rule 15 and Order 36 Rule 1 of the Civil Procedure Rules, seeking the following Orders:-
 1. That this Honourable Court be pleased to strike out the Defence dated 28th October 2020.
 2. That this Honourable Court be pleased to enter summary judgement as against the Defendants jointly and severally for the sum of Ksh25,341,103.22/- as well as default damages thereon at 20% per annum from 12th June 2020, as sought in the Plaint dated 9th July 2020.
 3. That the costs of this application and suit be awarded to the Plaintiff/Applicant.
2. The application is supported by the grounds on its face and the supporting affidavit sworn by legal officer, Lawi Sato, on 27th April 2022 and written submissions dated 24th June 2022.



3. Briefly, the background to this matter is That on the 1st defendant's request, the Plaintiff extended a Tawarruq Local Purchase Order finance facility to a maximum principal of Kshs.20,000,000/- through a letter of offer dated 27th April 2018; That following negotiations between the 1st Respondent and the Applicant, the Applicant restructured the outstanding debt twice, through facility restructure letters That were accepted and executed by the 1st Respondent; That however, the 1st Respondent dishonoured and breached the terms of the said loan facility by failing and/or defaulting in payment of the instalments which has since fallen into arrears to the tune of Kshs.25,341,103.22/- as at 12th June 2020 which amount continues to accrue default damages at the rate of 20% per annum prompting the Applicant to file this suit and That although it holds a duly executed and registered charge of Kshs.525,000/- over Title No. North/Nyokal/Kowili/1932, the value is insufficient to settle the debt.
4. On 28th October 2020 the Respondents filed their joint statement of defence and served upon the Applicant on 13th November 2020. However, the Applicant submits That That the defence is illusory, a sham and aimed at delaying the course of justice and making a mockery of the judicial process as the same consists merely of blanket denials and affords no legitimate answers to the claim. Accordingly, the Applicant urges this Court to strike out the defence and enter summary judgment as prayed as its claim against the 1st defendant is for a clear, ascertainable and specified liquidated sum of Kshs. 25,341,103.22/-.
5. To support their application for striking out the defence, the Applicant urged the court to be guided by the decision of the Court of Appeal in the case of Mugunga General Stores vs. Pepco Distributors; C.A. No. KSM 24 of 1986, [1987] eKLR where the Court of Appeal upheld a Trial Judge's ruling striking out a defence containing bare denials where the cause of action was based on a breach of contract for non-payment.
6. The Respondents opposed the Application and in doing so they filed a replying affidavit sworn by the 2nd defendant on 10th December 2021 in addition to their written submissions dated 25th October 2022. The Respondents argue That the application is frivolous, vexatious and an abuse of the court process and That it seeks to take away the defendant's right to be heard and opportunity to cross examine and interrogate the Applicant on the actual amount of the principal sum disbursed.
7. The Respondents contended That their defence raises triable issues including That an issue as to the actual amount of loan disbursed and the rate of interest/profit applicable are contested. They argue That the Applicant had adjusted the interest rates on the principal sum over time without their notice or consent; That the Applicant has not availed the loan account statement despite their requests and That the Applicant has declined their request for an audit inclusive of their accountants.
8. The Respondents further asserted That the Applicant shall not suffer any prejudice if the matter goes to trial; That the matter ought to proceed to trial in That the Applicant has not sought to enforce its statutory power of sale on Title No. North Nyokal/Kowili/1932 That the Applicant's suit being a claim for special damages ought to be specifically proved and That the money was borrowed by the 1st Defendant and this raises the question whether the 2nd and 3rd Defendants who were the guarantors are to be treated the same as the borrower when there is a default.
9. In support of their grounds of opposition the Respondents urged the court to be guided by the Court of Appeal decision in DT Dobie & Company v Joseph Mbaria Muchina & Anor (Nairobi CA No. 37 of 1978) and as cited in the case of Madison Insurance Company Limited v Augustine Kamanda Gitau & Anor (High Court CA No. 123 of 2018) on the principles for consideration by a court in determining an application for striking out of pleadings. The Respondents prayed for the dismissal of the application with costs.



Analysis and Determination

10. I have carefully considered the application, rival affidavits and submissions together with the authorities cited by the parties herein in support and opposition to the application. I note That the only issue for determination is whether the application has met the threshold set by Order 2 Rule 15 of the Civil Procedure Rules on striking out of pleadings. Order 2 Rule 15 of the Civil Procedure Code provides as follows: -

“Rule 15. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground That—

- (a) It discloses no reasonable cause of action or defence in law; or
- (b) It is scandalous, frivolous or vexatious; or
- (c) It may prejudice, embarrass or delay the fair trial of the action; or
- (d) It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

11. At the outset, the Court notes That the striking out of a defence is a matter of discretion which must be exercised judiciously and not on a whim. It is also well founded That the striking out of a defence is a drastic measure which requires the careful consideration of the Court so as to prevent miscarriage of justice by denying a party to a suit the constitutional right to be heard.

12. The principles for consideration before the grant of summary judgment or striking out a defence were aptly captured by the Court of Appeal in *Ramji Megji Gudka Ltd v Alfred Morfat Omundi Michira & 2 others* [2005] eKLR, as follows: -

“In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in *Dt Dobie & Company (Kenya) Ltd. v. Muchina* [1982] KLR 1 in which Madan J.A. at page 9 said: -

“The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for That is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.”



13. Further, the Court of Appeal in *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* (2015) eKLR highlighted, as follows:-

“Before the grant of summary judgment, the court must satisfy itself That there are no triable issues raised by the defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner.

What then is a defence That raises no bona fide triable issue? A bona fide triable issue is any matter raised by the defendant That would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term “triable” as, “subject or liable to judicial examination and trial”. It therefore does not need to be an issue That would succeed, but just one That warrants further intervention by the Court.”

14. With the above in mind, I have looked at the plaint and the defence. The Applicant’s claim is That the 1st Respondent defaulted in loan repayment in accordance with the terms of the loan agreement and That the 2nd and 3rd Respondents failed to repay the outstanding amount in their capacities as directors and personal guarantors. In their defence, the Respondents deny knowledge of the loan. They deny That they requested the Applicant for the facility; That they executed the letter of offer, the facility restructuring letters of 19th September 2018 and 29th March 2019 and the guarantee and indemnity. However, at para. 17 they aver That:-

“Without prejudice to the foregoing, the Defendants state and aver That the loan was secured by a charge on the Title Number North Nyokal/Kowili/1932 and That the value of the property is sufficient to settle the alleged sums of money That is outstanding but which is in any event denied by the Defendants”

15. The Applicant strongly asserted That this averment was an admission of liability and contended That the charged property was not sufficient to settle the outstanding loan. On the other hand, the Respondents took the position That since the Applicant did not seek to enforce its statutory power of sale with respect to the charged property, its cause is premature as its right to recall or require full payment of the loan has not crystallized.

16. I have considered in depth the arguments put forward by the defence both in their defence and in opposition to this application. The Respondents, in my view, raise pertinent issues as to why the Applicant has not first and foremost sought to realize the charged property which was offered as part security to the loan. No material in terms of a valuation report or otherwise has been placed before the court to support the argument put forward by the Applicants That the same is insufficient to repay the loan or is incapable of being sold for one reason or another. I am therefore persuaded That the respondents have put forward a defence which raises triable issues and to strike out their defence at this stage will be to deny them an opportunity to be heard on their defence.

17. I find and hold That the defence filed by the Defendants in the matter before this court raises triable issues which should be canvassed by way of calling evidence in a full trial. Subsequently, the upshot of the above finding is That the application by the Plaintiff is without merit and is hereby dismissed in its entirety with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 11TH DAY OF JANUARY, 2024.

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J.W.W. MONG'ARE



JUDGE

