



**Rvist v Group Trd Development Kenya Ltd & 2 others (Commercial Miscellaneous Application 013 of 2023) [2024] KEHC 3635 (KLR) (Commercial and Tax) (15 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3635 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL MISCELLANEOUS APPLICATION 013 OF 2023**

**JWW MONG'ARE, J**

**APRIL 15, 2024**

**BETWEEN**

**KAJ ROLAND RVIST ..... APPLICANT**

**AND**

**GROUP TRD DEVELOPMENT KENYA LTD ..... 1<sup>ST</sup> RESPONDENT**

**JOHN KIMELY BIRECH ..... 2<sup>ND</sup> RESPONDENT**

**JIWOON HAN ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Applicant filed a Notice of Motion application dated 19<sup>th</sup> June 2023 pursuant to the provisions of Order 2 Rule 15(1), Order 36 Rules 1(a) & 2 and Order 51 of the Civil Procedure Rules 2012, Section 3A of the *Civil Procedure Act*, 2012, and all other enabling provisions of the Law, seeking the following orders –
  - i. That judgment be entered for the Plaintiff/Applicant as prayed in the plaint;
  - ii. That the Honourable Court be pleased to grant such further or other orders and directions as it may deem fit and just; and
  - iii. That the costs of this application and the suit be borne by the Defendants.
2. The application is premised on the grounds set on the face of the motion and is supported by affidavits sworn by KAJ ROLAND KVIST, the Plaintiff/Applicant herein on 19<sup>th</sup> June 2023 and 23<sup>rd</sup> August 2023. In opposition thereto, the Respondents filed replying affidavits sworn by JOHN KIMELY BIRECH the 2<sup>nd</sup> Respondents herein



on 10<sup>th</sup> August 2023 & 24<sup>th</sup> August 2023 respectively, and Grounds of Opposition dated 24<sup>th</sup> August 2023 raising the following grounds: -

- i. That the Plaintiff's application is incompetent, lacks merit, is ill conceived, is fatally defective, is an abuse of the due process of the law and cannot be ventilated for orders sought;
  - ii. That the Plaintiff's application is premature, although this Court issued an Order dated 19<sup>th</sup> May, 2022 for transfer of the Civil Suit N0. E1050 of 2021 from the lower Court to this Court for hearing and determination, that Order has not been effectuated and the application has been brought within a miscellaneous application that is already spent;
  - iii. That in any event, the application has not satisfied the mandatory strictures for summary judgment as provided for under Order 36 of the Civil Procedure Rules, 2010;
  - iv. That there exists no contractual and commercial relationship between the Defendants on one hand and the Plaintiff on the other hand, and therefore the Plaintiff cannot purport to lay claim against the Defendants for allegedly defaulting in satisfying its loan obligation;
  - v. That therefore, the application as filed against the Defendants is fatally incompetent, vexatious, devoid of any merit, an abuse of the Court process, does not meet the legal threshold for granting of the orders sought and is, therefore, only fit for dismissal; and
  - vi. That in the interests of justice and fairness the motion be dismissed with costs to the Defendants.
3. The Respondents also filed a Notice of Preliminary Objection dated 28<sup>th</sup> September 2023 raising the following grounds: -
- i. That the Plaintiff's suit and all consequential applications including the application dated 19<sup>th</sup> day of June, 2023 are incurably defective and should be struck out for being supported by an improper Verifying Affidavit dated 21<sup>st</sup> day of May, 2021, and the same cannot receive protection of admissibility of foreign Affidavits taken in England as under Part V Section 88 of the Evidence Act Cap 80 Laws of Kenya and for further reasons that;
    - I. The verifying affidavit was notarized in Stockholm, Sweden which is not a Commonwealth country and the same has not been supported with an Affidavit of the Notary Public or any other known authentication as was prescribed in the case of *Pastificio Lucio Garofalo SPA vs Security & Fire Equipment Co & Anor* [2001] eKLR. The Verifying Affidavit which was notarized by a "Mr. Gabriel Rudbeck" is not supported by an affidavit or any other document authenticating the stamp or signature appearing thereon;
    - II. The stamp impression and the words appearing in the impugned Verifying Affidavit are not in English language. It has been stated in a strange language bearing words such as "Advocat-Notarius Publicus" which is not accompanied by a certificate of translation; and therefore, irredeemably incompetent.
4. The Applicant's case is that by a Loan Agreement dated 30<sup>th</sup> September 2020 signed by the 1<sup>st</sup> Respondents together with a Guarantee and Indemnity dated 30<sup>th</sup> September 2020 signed by the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents, the Respondents applied for a short-term loan facility from the Applicant in the sum of Kshs.7,000,000/= to run their business operations. It was an express term of the loan agreement that the short-term loan facility will be will be repaid within 60 days from the date of disbursement which was 30<sup>th</sup> November 2020, together with interest at the rate of 43% p.a. in the liquidated sum of Kshs.10,000,000/=.



5. Further, any default in the repayment of the said amount after the due date would attract a further interest penalty at the rate of 5% per month. The Applicant averred that he disbursed the Kshs.7,000,000/= from his account held at NORDEA BANK ABP, SWEDEN, to the account provided and belonging to the 1<sup>st</sup> Respondents being Account No. 2042723714 held at Absa Bank Kenya PLC, Nairobi on 30<sup>th</sup> September 2020. He further averred that the Respondents have failed, refused and/or neglected to repay the said money despite being issued with various demands.
6. The Applicant contended that the Respondents have now filed a defence to his claim, which defence does not raise any triable issues that would merit a trial. He contended that by WhatsApp correspondence sent to his then advocates on record M/S KIMETO & ASSOCIATES ADVOCATES, Mr. JOHN BIRECH issued a proposal to settle the outstanding loan due in three instalments of Kshs.2,000,000/= on or before 30<sup>th</sup> March 2021, Kshs.3,000,000/= on or before 15<sup>th</sup> May 2021, and Kshs.5,000,000/= on or before 30<sup>th</sup> July 2021.
7. The Respondents in response thereto averred that before the Court can enter summary judgment against the Respondents', it has to satisfy itself that the respondents' defence does not raise any triable issues. Further, the power to strike out a pleading should be invoked sparingly and only in cases where the pleading is shown to be clearly untenable, since it ends with driving parties from the seat of judgment. They averred that their statement of defence raises triable issues, hence it deserves audience before this Court.
8. It was stated by the respondents' that there exists no contractual or commercial relationship between the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants and the Plaintiff therefore, the Applicant cannot purport to lay claim against them on account of the 1<sup>st</sup> respondents' alleged default in its loan repayment obligations. They further stated that the Applicant's suit does not disclose any reasonable cause of action against the Respondents, thus it is incompetent, bad in law and should be dismissed.
9. The Respondents contended that the Applicant has lumped a series of fraudulent and forged documents in support of the application herein so as to authenticate the alleged an agreement. In addition, the email and WhatsApp screenshot extract relied on by the Applicant constitutes forgery and fraud. They further contended that this Court does not have jurisdiction to entertain the Applicant's claim.
10. The instant application was canvassed by way of written submissions. I shall however not regurgitate the contents of the said submissions but I have considered them and will refer to them in my determination.

### **Analysis and Determination**

11. I have carefully considered and analyzed the pleadings filed by the parties herein in support and in opposition to the instant application, together with the written submissions by Counsel for parties, and in my view the issues for determination are: -
  - i. Whether the Respondents' notice of preliminary objection is merited; and
  - ii. Whether the defendants' defence should be struck out and summary judgment entered in favour of the Applicant as against the Respondents.
 (i) Whether the respondents' notice of preliminary objection is merited.
12. The Respondents referred to the provisions of Section 88 of the Evidence Act and submitted that for a verifying affidavit such as the one in this case to be admissible in a Kenyan Court, the Notary Public



who notarized and signed it ought to have availed an affidavit or an equivalent authentication, to show that the stamp and signature therein were in fact his. They further submitted that the Applicant's verifying affidavit which was notarized by a "Mr. Gabriel Rudbeck" is not supported by an affidavit or any other document authenticating the stamp or signature appearing thereon, thus the said affidavit is defective for want of compliance.

13. They referred to the provisions of Order 4 Rules 1(1)(f) & (2) of the Civil Procedure Rules and the case of *Pastificio Lucio Garofalo SPA v Security & Fire Equipment Co & Anor* [2001] eKLR and argued that in view of the fact that the Applicant's verifying affidavit is defective, the Applicant's plaint has not been accompanied by a verifying affidavit thus it cannot stand.
14. The Applicant on the other hand submitted that the Respondents' preliminary objection does not meet the threshold set out in the cases of *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors* [1969] EA 696 and *Nitin Properties Ltd. v Jagjit Singh Kalsi & Another* Civil Appeal Number 132 of 1989 [1989] LLR 4863 (CAK) [1995-1998] 2 EA 257, since the issues raised therein require probing of evidence, thus requiring this Court to look into matters of fact in order to determine them.
15. It is now settled law that a preliminary objection ought to raise a pure point of law, it should be argued on the assumption that all the facts pleaded by the other side are correct, and it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The Court in the case of *Mukisa Biscuit v West End Distributors Ltd* (supra) set out what constitutes a Preliminary Objection in the following words –

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

16. In the said case, Sir Charles Newbold P., stated that-

“..... the first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.” (emphasis added).

17. The Respondents' contention is that the Applicant's suit and all consequential applications including the instant application are incurably defective and should be struck out, for being supported by a verifying affidavit sworn on 21<sup>st</sup> May, 2021 and notarized in Stockholm, Sweden which is not a Commonwealth country, and the same has not been supported by an affidavit of the Notary Public or any other known authentication.
18. In this case, the Applicant disputes that his verifying affidavit sworn on 21<sup>st</sup> May 2021 is defective. I find that in order to determine whether this is the case, this Court will be required to probe evidence adduced by the parties herein by way of affidavits, so as to ascertain whether it complies with the provisions of Section 88 of the *Evidence Act* Cap 80 Laws of Kenya.



19. In view of the foregoing, I find that the Respondents' preliminary objection dated 28<sup>th</sup> September 2023 does not meet the threshold of what constitutes a preliminary objection as defined by the Court in the case of *Mukisa Biscuit v West End Distributors Ltd (supra)* and *Oraro v Mbaja* [2005] 1KLR 141.
20. In the premise, I find that the Respondents preliminary objection is not merited and I hereby dismiss it.
  - (i) Whether the defendant's defence should be struck out and summary judgment entered in favour of the Applicant as against the Respondents
21. The Applicant relied on the case of *Gupta v Continental Builders Ltd* [1978] KLR 83, and submitted that the Respondents defence does not raise any triable issues to warrant the dispute between the parties herein to be subjected to trial. Further, they are unable to see any issue raised in the said defence that would require more than depositions in the affidavits filed herein to be proved. The Applicant argued that the questions involved in this matter are questions of law and the relevant facts are so straight forward as not to require any proof by oral evidence.
22. The Respondents on the other hand submitted that they have raised various issues in their statement of defence such as the existence of any loan Agreement, and receipt of any sums of money from the Applicant, that require interrogation at a full trial. They referred to the case of *Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were* [2014] eKLR and further submitted that it is trite that where a party desires to be heard on an issue, the court should grant him that chance. They argued that their statement of defence raises triable issues that cannot be determined summarily.
23. Summary judgment is provided for under Order 36 Rules 1(a) & 2 of the Civil Procedure Rules 2010 which states as hereunder: -
  1. In all suits where a Plaintiff seeks judgment for –
    - a. a liquidated demand with or without interest; or
    - b. ...

where the defendant has appeared but not filed a defence the Plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.
  2. The application shall be supported by an affidavit either of the Plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.
24. From the above provision, it is evident that an application for summary judgment may be made where the sum claimed is a liquidated sum and the defendant has entered appearance but has not filed a defence. In instances where the defendant has filed a defence, the court has a duty to interrogate it and ascertain that it does not raise any triable issues before it can allow such an application. The Court of Appeal in the case of *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* [2015] eKLR held as hereunder with relation to summary judgment -
 

“An application for summary judgment under order XXXV rule 1 (now order 36 rule 1) may be made where the sum claimed is a liquidated sum, or where the defence raises no triable issues, and is a mere sham. In the authority of *Continental Butchery Limited v Nthiwa* [1978] KLR(Civil Appeal No. 35 of 1977) Madan JA set out the scope of the court's power to grant summary judgment as follows:



“With a view to eliminate delay in the administration of justice which would keep litigants out of their just dues or enjoyment of their property, the court is empowered in an appropriate suit to enter judgment for the claim from the Plaintiff under summary procedure provided by Order 35 subject to there being no triable issues which would entitle a defendant leave to defend.”

25. It is now well settled that when dealing with an application for summary judgment, if the defence filed by a defendant raises even one bona fide triable issue, then the suit must be allowed to go to trial. See *Postal Corporation of Kenya vs. Inamdar & 2 Others* [2004] 1 KLR 359. It is trite law that a triable issue need not be one that will succeed upon conclusion of the trial, but one that requires interrogation by the Court. A triable issue was defined by the Court in the case of *Patel v EA Cargo Handling Services Ltd* [1974] asan issue which raises a prima facie defence and which should go to trial for adjudication.
26. It is evident from the pleadings filed herein that the Applicant’s claim against the Respondents is for a liquidated sum. Further, it is founded on a Loan Agreement dated 30<sup>th</sup> September 2020 signed by the 1<sup>st</sup> Respondents and a Guarantee and Indemnity dated 30<sup>th</sup> September 2020 signed by the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents. The Respondents not only dispute the validity of the said documents but also aver that they are forgeries. The Respondents contend that there exists no contractual relationship between the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents and the Plaintiff, therefore the Applicant cannot sustain a suit against them on account of the 1<sup>st</sup> Respondent alleged default in its loan repayment obligations.
27. This in my view, amounts to a triable issue that requires this Court to interrogate the evidence that will be adduced by the parties herein at the hearing, and thereafter make a determination of whether there exists a loan agreement dated 30<sup>th</sup> September 2020 between the Applicant and the 1<sup>st</sup> Respondents, and a Guarantee and Indemnity dated 30 September 2020 between the Applicant and the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents.
28. The upshot of the above finding is that the application herein is not merited, thus it is hereby dismissed. The matter shall be heard and determined on merit upon taking of evidence from the parties by the court. Each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED VIRTUALLY at NAIROBI

this 15<sup>th</sup> DAY of APRIL, 2024.

.....

J.W.W. MONG'ARE

**JUDGE**

**In the Presence of:-**

PARA 1.

Mr. Muyavila holding brief for Okulo for the Plaintiff.

PARA 2.

Mr. Omenta holding brief Mr. Busiega for the Defendants.

PARA 3.

Amos - Court Assistant



