



First Community Bank Limited v Hanif Tours and Travel Agency Limited & 2 others (Commercial Case E210 of 2019) [2023] KEHC 2449 (KLR) (Commercial and Tax) (17 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2449 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E210 OF 2019
DAS MAJANJA, J
MARCH 17, 2023**

BETWEEN

FIRST COMMUNITY BANK LIMITED PLAINTIFF

AND

HANIF TOURS AND TRAVEL AGENCY LIMITED 1ST DEFENDANT

HASSAM MOHAMUD MOHAMED 2ND DEFENDANT

KASSIM MOHAMUD MOHAMED 3RD DEFENDANT

RULING

1. The plaintiff has filed the notice of motion dated January 7, 2020 made, *inter alia*, under order 2 rule 15(1) (b) and (d) of the Civil Procedure Rules (“the rules”) where it seeks to strike out the defendants’ statement of defence dated August 6, 2019 (“the defence”) and prays for judgment against the defendants as prayed for in the plaint together with costs of the application. The application is supported by the affidavit of the plaintiff’s Legal Officer, Claris Ogombo, sworn on January 7, 2020. The defendant has not opposed the application through either grounds of opposition or a replying affidavit. Moreover, their advocates on record did not attend court despite being served with process.
2. The plaintiff’s case is set out in the plaint dated June 26, 2019. The plaintiff advanced the defendants financial facilities amounting to Kshs 40,000,000.00 which attracted a profit at a rate of return of 14% per annum as evidenced by a letter of offer dated October 19, 2016. The facility was secured by a legal charge over two properties; Kwale/Ramisi/Kinondo Squatters S.S/143 and Kajiado/Loodriak/501 and personal joint and several guarantees by the 2nd and 3rd defendants as directors of the 1st defendant. The defendants defaulted in repayment of the facility despite demand being made. The plaintiff’s claim against the defendants jointly and severally is for Kshs 36,982,503.62 attracting a rate of return as 14% per annum.



3. In their defence, the defendants deny that they had defaulted on repayment of the facility and state that the securities were sufficient to clear the loan. They denied that they had refused to make payment and averred that they, "are willing to pay the loan and that they wish to be given time." They further state that they, "propose that they pay the balance in equal installments for a period of seven (7) years."
4. The plaintiff's case in the application is that the defendants' defence contains admissions of indebtedness hence the defence is a sham, scandalous, frivolous and vexatious. The plaintiff contends that by the requesting for the court to order the payment of the debt by installments, the defendants are attempting to introduce a variation of the agreement which the court should not permit.
5. Order 2 rule 15 of the Rules empowers the court to strike out or order amendment of a pleading on the ground that it discloses no reasonable cause of action or defence in law; or it is scandalous, frivolous or vexatious; or it may prejudice, embarrass or delay the fair trial of the action; or it is otherwise an abuse of the process of the court. The court may as a result stay the suit, dismiss it or enter judgment as the case may be. In addition, the principles guiding the courts exercise of discretion in striking out a pleading were distilled by the Court of Appeal in *DT Dobie & Company (Kenya) Ltd v Muchina* [1982] KLR 1 where Madan JA, stated as follows:

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."

6. In this case, the defendants have not opposed the application. Their defence amounts to a clear and unequivocal admission of the debt hence no purpose will be served by maintaining the defence and proceeding to trial. I would point out that once judgment has been entered, the defendants have a right to apply to liquidate the decretal amount by instalments under order 42 rule 6 of the Rules. As regards the secured properties, the plaintiff will give the defendant's credit for any sums recovered once they are sold. The plaintiff is entitled to file suit to recover the debt without recourse to the securities in the first instance.
7. I allow the plaintiff's application dated January 7, 2020 on the following terms:
 - a. The defendants' statement of defence dated August 6, 2019 be and is hereby struck out
 - b. Judgment be and is hereby entered for the plaintiff and against the defendants jointly and severally for Kshs 36,982,503.61 with a profit rate of return at 14% per annum from July 3, 2019 until payment in full.
 - c. The defendants shall bear the costs of the application and the suit.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Ms Agwata instructed by Issa and Company Advocates for the Plaintiff.

