



NCBA Bank Kenya PLC v Color Creations Limited & 2 others (Commercial Case E317 of 2022) [2024] KEHC 13976 (KLR) (Commercial and Tax) (8 November 2024) (Ruling)

Neutral citation: [2024] KEHC 13976 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E317 OF 2022**

**MN MWANGI, J
NOVEMBER 8, 2024**

BETWEEN

NCBA BANK KENYA PLC APPLICANT

AND

COLOR CREATIONS LIMITED 1ST RESPONDENT

EVA WANJIKU MURAYA 2ND RESPONDENT

MOHAMED ARSHAN KHAN 3RD RESPONDENT

RULING

1. Before me is a Notice of Motion application dated 29th February 2024, filed pursuant to the provisions of Sections 1A & 3A of the *Civil Procedure Act*, Cap 21 of the laws of Kenya, Order 2 Rule 15, Order 13 Rule 2 & Order 36 Rule 1 (a) of the Civil Procedure Rules, 2010, and all other enabling provisions of the law. The plaintiff is seeking orders for inter alia, striking out of the defendants/ respondents' defence & counter-claim dated 9th September 2022 for offering no defence in law, and for being scandalous, frivolous, and an abuse of the Court process. The plaintiff also seeks an order for summary judgment to be entered in favour of the plaintiff for Kshs.38,587,305.21 as prayed in the amended plaint, or in the alternative, an order for judgment on admission be entered against the defendants for Kshs.38,587,305.21 and USD 334.21.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Ms Christine Wahome, the plaintiff's Senior Legal Counsel. She averred that following an agreement dated 28th March 2007, the plaintiff extended a credit facility of Kshs.20,000,000/= to the 1st defendant, repayable in 60 equal monthly instalments of Kshs.486,361.14. She stated that the said loan was secured by a debenture dated 11th June 2007, registered in the plaintiff's favour as the first-ranking debenture over the 1st defendant's assets, along



- with personal guarantees and indemnity from the 2nd and 3rd defendants, as Directors of the 1st defendant for Kshs.20,000,000/= each.
3. She deposed that vide a credit facility letter dated 20th September 2007, the plaintiff increased the credit facilities for the 1st defendant to a total of Kshs.26,350,000/=. That the said amount included an overdraft of Kshs.6,350,000/= repayable from business cash flow, term loan 1 of Kshs.12,000,000/= repayable in 60 monthly instalments of Kshs.291,816.69, and term loan 2 of Kshs.6,350,000/= repayable in 60 monthly instalments of Kshs.194,544.46. She averred that the said facility was secured by an all-asset debenture over the 1st defendant's assets for Kshs.20,000,000/= and a personal guarantee from the 2nd and 3rd defendants for Kshs.26,350,000/= each.
 4. Ms Wahome deposed that the facility advanced to the 1st defendant by the plaintiff was again increased vide a credit facility letter dated 8th August 2008 to Kshs.27,956,000/=: comprising an overdraft of Kshs.11,350,000/= and term loan 1 of Kshs.16,606,000/=: which was to be repaid in 48 equal monthly instalments of Kshs.483,474.00. She stated that the said facility was secured by an all-asset debenture over the 1st defendant's assets for Kshs.28,000,000/= and a personal guarantee from the 2nd and 3rd defendants for Kshs.28,000,000/= each.
 5. She further stated that on 15th September 2008, the plaintiff restructured these credit facilities without altering the securities. She asserted that the defendants were always aware of these arrangements, hence upon default and filing of the suit, the defendants' defence failed to contest the credit facilities or confirm any repayments. Additionally, emails from the 3rd defendant, a Director of the 1st defendant, acknowledged the debt and requested additional time to make payments.
 6. In opposition to the application herein, the defendants filed a replying affidavit sworn on 30th April 2024, by Mohamed Arshad Khan, the 3rd defendant herein. Mr. Khan acknowledged that the plaintiff advanced various credit facilities to the 1st defendant, which was initially secured by a bank guarantee from the African Development Bank under the GOWE program for Kshs.6,350,000/=. While confirming awareness of the credit facilities and personal guarantees, he argued that despite providing all required security documents, the plaintiff did not furnish copies of the said documents to the defendants upon disbursement. He contested the plaintiff's claim of Kshs.38,587,305.32 and USD 334.21, asserting that a significant portion has already been repaid. The defendants also disputed the interest and penalties charged by the plaintiff for being excessive and detrimental to their rights.
 7. He averred that the defendants' defence and counter-claim raise triable issues, including the issue of whether the loan has been repaid, whether it was guaranteed by GOWE, and whether the interest charges were excessive. He emphasized that resolving these issues requires examination of evidence by the Court. He also averred that there was no admission of indebtedness to the plaintiff. He contended that the emails cited by the plaintiff were on a "without prejudice" basis, thus protected under Section 23 of the *Evidence Act*. Mr. Khan maintained that the defendants' statement of defence and counter-claim dated 9th September 2022, present issues worthy of a fair hearing in Court.
 8. The application herein was canvassed by way of written submissions. The plaintiff's written submissions were filed by the law firm of Kiragu Wathuta & Company Advocates on 18th July 2024, whereas the defendants' submissions were filed on 17th July 2024, by the law firm of Farrah Munoko & Company Advocates.
 9. Mr. Wathuta, learned Counsel for the plaintiff cited the provisions of Order 2 Rule 15 of the Civil Procedure Rules, 2010 which provides for striking out of pleadings and the case of Giciem Construction Company v Amalgamated Trade & Services LLR No.103 CAK, cited by the Court in Job Kilach v Nation Media Group [2015] eKLR, and submitted that the defendants' statement



- of defence and counter-claim dated 9th September 2022, raise no triable issues and should be struck out. He further cited the decisions in *Raghibir Singh Chatte v National Bank of Kenya Limited* [1996] eKLR, and *Rockster Investment Limited & 4 others v Bofa Investment Limited* [2017] eKLR, asserting that the defence raised by the defendants herein, consists only of denials and evasive responses. Counsel contended that while the defendants claim to have repaid a substantial amount of the loan, they neither disclose the exact amount allegedly paid, nor do they provide supporting evidence.
10. Counsel for the plaintiff argued that the defendants' counter-claim dated 9th September 2022, is frivolous, scandalous, and an abuse of the Court process. He averred that although the defendants allege that the loan agreements violate Section 13 of the *Consumer Protection Act* due to excessive interest rates, they fail to specify which Agreements or Clauses are unconscionable. Counsel noted that the interest rates were mutually agreed upon and signed by both parties at the time of the Loan Agreements, rendering any later objections to their fairness baseless and an abuse of the process.
 11. Mr. Farrah, learned Counsel for the defendants referred to the provisions of Order 2 Rule 15 Civil Procedure Rules, 2010 and cited legal precedents to argue against striking out of the defendants' statement of defence. He referred to the case of *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* Civil Appeal No. 35 of 2000, as cited in *Besta Court Limited v Alice Njeri Kamau T/A Alibra Enterprises* [2015] eKLR, to support the view that every litigant deserves his day in Court and that suits or pleadings should not be dismissed without allowing for fair hearing. Additionally, he cited the case of *Kimere & another t/a Gichuki Kimere & Co. Advocates v Kihato* [2023] KEHC 19986 (KLR), asserting that the defendant's statement of defence does not contravene Order 2 Rule 15, and therefore, it should not be struck out.
 12. The defendants' Counsel cited the decisions in *Industrial & Commercial Development Corporation v Daber Enterprises Limited* [2000] 1 EA 75, and *Nathans Browne Jp v Murang'a County Government* [2022] eKLR, and argued that the defendants denied the plaintiff's claim in their statement of defence, except for acknowledging financial facilities extended to the 1st defendant, which they claim have been fully repaid. He submitted that was a triable issue worthy of this Court's consideration. He stated that the defendants filed a counter-claim dated 9th September 2022, challenging the interest and penalties imposed by the plaintiff, alleging that they violate Article 46 of *the Constitution* of Kenya, 2010 and Section 13 of the *Consumer Protection Act*, No. 46 of 2022, thus rendering the said interest and penalties unconscionable, an issue that ought to be determined the Court. Counsel referred to the Court's holding in the case of *Jamii Bora Bank Limited v Daniel Macua Ndonga* [2018] eKLR.
 13. Mr. Farrah cited the Court of Appeal case of the *Co-operative Merchant Bank Ltd. v George Fredrick Wekesa* Civil Appeal No. 54 of 1999, and argued that the plaintiff has not established grounds for summary judgment against the defendants. In citing Order 13 Rule 2 of the Civil Procedure Rules, 2010 and the case of *Lagoon Development Limited v Prime Aluminium Casements Limited* [2021] eKLR, Mr. Farrah contended that the defendants' acknowledgment of the loan facility does not equate to admitting default or the amounts claimed in the plaint. He argued that the defendants have neither admitted the sums claimed nor has the plaintiff provided clear, unambiguous evidence of such admission. He stated that for the said this reason, the plaintiff is not entitled to an order for judgment on admission as against the defendants.

ANALYSIS AND DETERMINATION.

14. I have considered the instant application, and the affidavit filed in support thereof. I have also considered the replying affidavit by the defendants, as well as the written submissions by Counsel for the parties. The issues that arise for determination are -



- i. Whether the defendants' statement of defence and counter-claim dated 9th September 2022 ought to be struck out, and summary judgment entered against the defendants in favour of the plaintiff; and
- ii. Whether the plaintiff has made out a case to warrant this Court to enter judgment on admission against the defendants.

Whether the defendants' statement of defence and counter-claim dated 9th September 2022 ought to be struck out, and summary judgment entered against the defendants in favour of the plaintiff.

15. Striking out of pleadings is provided for under the provisions of Order 2 Rule 15 of the Civil Procedure Rules, 2010 which states as hereunder –
 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.
 2. No evidence shall be admissible on an application under sub rule (1)(a) but the application shall state concisely the grounds on which it is made.
 3. So far as applicable this rule shall apply to an originating summons and a petition.
16. It is common ground that Courts have the discretion to strike out a pleading, but in so doing, they are reminded to bear in mind that striking out of a suit and/or pleading is a draconian and drastic measure which should be resorted to not only with caution but also sparingly, and in the clearest of cases. It is only where a pleading cannot be salvaged by an amendment that a Court should strike it out. This was the position taken by the Court in *Geminia Insurance Co Limited v Kennedy Otieno Onyango* [2005] eKLR, where Musinga J., (as he then was) held that -

It is trite law that striking out pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that the suit is beyond redemption.

17. The Court of Appeal in *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* (supra), addressed the issue of striking out of pleadings and stated thus -

A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.



18. Further, the Court of Appeal in *Crescent Construction Limited vs Kenya Commercial Bank Limited* [2019] eKLR, stated as follows:

However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honored legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.

19. In this case, the plaintiff's prayer is for this Court to strike out the defendants' statement of defence & counter-claim dated 9th September 2022 on the ground that the defence raises no defence known in law, and the counter-claim is frivolous, scandalous, and an abuse of the Court process. The plaintiff contends that the defendants admit having received various financial facilities from the plaintiff, hence their defence and counter-claim should be struck out, and summary judgment be entered against them in favour of the plaintiff. In order to determine whether or not the plaintiff has made out a case to warrant the striking out of the defendants' statement of defence and counter-claim dated 9th September 2022, and for entry of summary judgment against the defendants, this Court has to establish whether the said statement of defence and counter-claim raise any triable issues that ought to be determined by this Court on merits.

20. In an application for summary judgment, a Court has to 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 as is in this case, in the defendants' counter-claim. In the case of *Osodo v Barclays Bank International Limited* [1981] KLR 30, the Court when dealing with an application seeking an order for summary judgment held as follows –

Where there are triable issues raised in an application for summary judgment, there is no room for discretion and the court must grant leave to defend unconditionally.

21. Further, the Court of Appeal in the case of *Nairobi Golf Hotels (Kenya) Limited Civil Appeal No. 5 of 1997 (UR)*, cited in *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] KECA 208 (KLR) held that -

...it is now trite that in applications for summary judgment under order XXXV rule 1 of the Civil Procedure Rules, the duty is cast on the defendant to demonstrate that he should have leave to defend the suit. His duty is however limited to showing prima facie the existence of bonafide triable issue or that he has an arguable case. On the other hand it follows that a plaintiff who is able to show that a defence raised by a defendant in an action falling within the provisions of order XXXV is shallow or a sham is entitled to summary judgment.

22. The dispute between the parties herein revolves around financial facilities advanced to the 1st defendant by the plaintiff, and secured by inter alia, a debenture over the 1st defendant's assets, and personal guarantees and indemnity from the 2nd and 3rd defendants. The defendants contend that in addition to the aforesaid securities, the said financial facilities were also secured by a bank guarantee from the African Development Bank under the GOWE program for the sum of Kshs.6,350,000/=.
23. It is evident from the pleadings filed by the plaintiff that it contends that the 1st defendant defaulted in its loan repayment obligations, thus the 2nd & 3rd defendants' liability to the plaintiff under the personal guarantees and indemnity to pay the outstanding loan balance owed by the 1st defendant to the plaintiff has crystalized. The defendants on the other hand averred that the 1st defendant has since fully repaid



the financial facilities advanced to it by the plaintiff, hence they are not liable to the plaintiff for the sums sought in this suit. The defendants have also filed a counter-claim dated 9th September 2022 challenging the legality of the interest and penalties charged by the plaintiff as being excessive and detrimental to their rights.

24. In *Kimere & another (Both t/a Gichuki Kimere & Co. Advocates) v Kihato (Sued in his capacity as the Administrator of the Estate of Jane Mukuhi Matu - Deceased) (supra)* the Court held the following-

The law is settled that striking out pleadings is a draconian act of last resort that must only be employed in very rare and clear cases. The jurisdiction to strike out pleadings being discretionary, must also be exercised judiciously and sparingly. “If a party’s pleadings raise even one bona fide triable issue, then the party should be given leave to defend (*Postal Corporation of Kenya v I.T.Inamdar & 2 others* [2004] eKLR).

It must always be borne in mind that a triable issue is not necessarily one that would ultimately succeed. It need only be a bona fide issue. (*Olympic Escort International Co. Ltd. & 2 Others v Parminder Singh Sandhu & Another* [2009] eKLR).

25. This Court finds that the defendants’ statement of defence and counter-claim dated 9th September 2022 raise triable issues such as whether or not the defendants have fully repaid the financial facilities advanced to the 1st defendant by the plaintiff, whether the interest and penalty charges levied against the plaintiff were legal, and whether or not the financial facilities were also secured by a bank guarantee from the African Development Bank under the GOWE program for Kshs.6,350,000/=.

26. As to whether the defendants’ counter-claim dated 9th September 2022 is scandalous, this Court is not persuaded that this is the case. This is because the issue of legality of the interest and penalty charges levied by the plaintiff against the 1st defendant ought to be determined in order for the Court to determine the extent of indebtedness or otherwise of the defendants to the plaintiff. In the case of *Madison Insurance Company Limited v Augustine Kamanda Gitau* [2020] eKLR, the Court explained what entails a scandalous, frivolous and vexatious pleading as hereunder -

A pleading is scandalous if it states (i) matters which are indecent; or matters that are offensive; or (iii) matters made for the mere purpose of abusing or prejudicing the opposite party; or (iv) matters that are immaterial or unnecessary which contain imputation on the opposite party; or (v) matters that charge the opposite party with bad faith or misconduct against him or anyone else; or (vi) matters that contain degrading charges; or (vii) matters that are necessary but otherwise accompanied by unnecessary details. See *Blake vs. Albion Life Ass. Society* (1876) LJQB 663; *Marham vs. Werner, Beit & Company* (1902) 18 TLR 763; *Christie vs. Christie* (1973) LR 8 Ch 499.

However, the word “scandalous” for the purposes of striking out a pleading under Order 2 rule 15 of the Civil Procedure Rules is not limited to the indecent, the offensive and the improper and that denial of a well-known fact can also be rightly described as scandalous. See *J P Machira vs. [Wangechi Mwangi and Nation Newspapers Civil Appeal No. 179 of 1997](#)*.

But they may not be scandalous if the matter however scandalising is relevant and admissible in evidence in proof of the truth of the allegation in the plaint or defence so that when considering whether the matter is scandalous regard must be had to the nature of the action.

27. This Court finds that the defendants’ counter-claim is not scandalous, frivolous and an abuse of the Court process. Further, having found that the defendants’ statement of defence & counter-claim dated 9th September 2022 raise triable issues, this Court finds that an order for striking out of the said



statement of defence & counter-claim and/or for entry of summary judgment in favour of the plaintiff as against the defendants cannot issue.

Whether the plaintiff has made out a case to warrant this Court to enter judgment on admission against the defendants.

28. Judgment on admission is provided for under the provisions of Order 13 Rule 2 of the Civil Procedure Rules, 2010 which states that -

Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.”

29. The jurisprudence relating to applications for judgment on admission is set out in the case of *Choitram v Nazari* [1984] KLR 327, where Madan, JA., stated that -

“For the purpose of Order XII Rule 6, admission can be expressed or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning.” (emphasis added)

30. In the same judgment, Chesoni Ag. JA made the following observation -

“Admissions of fact under Order XII rule 6 need not be on the pleadings. They may be in correspondence or documents which are admitted or they may even be oral. The rules used words “otherwise” which are words of general application and are wide enough to include admission made through letter, affidavits and other admitted documents and proved oral admissions..... It is settled that a judgment on admission is in the discretion of the court and not a matter of right that discretion must be exercised judicially.”

31. Before a Court can grant a judgment on admission, the admission has to be unequivocal. Upon perusal of the defendants’ statement of defence and counter-claim dated 9th September 2022, it is clear that the defendants confirm that the plaintiff advanced various financial facilities to the 1st defendant which were secured by inter alia, personal guarantees and indemnity by the 2nd & 3rd defendants. However, they do not unequivocally admit to being indebted to the plaintiff. To the contrary, the defendants aver that they have since paid a substantial part of the said loan amount. This in my view does not amount to a clear, obvious, and unequivocal admission to warrant this Court to enter judgment on admission in favour of the plaintiff as against the defendants.

32. The upshot is that the instant application is devoid of merits. It is hereby dismissed with costs to the defendants.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF NOVEMBER 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE



In the presence of:

Mr. Kabuchu for the plaintiff/applicant

Ms Kiombe h/b for Mr. Farrah for the defendants/respondents

Ms B. Wokabi - Court Assistant.

