



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 56 OF 2020

GULF AFRICAN BANK LIMITED.....PLAINTIFF/APPLICANT

VERSUS

1. AFRICAN WATER DRILLING COMPANY LIMITED
2. ABDULLE ABDULAZIZ HASSAN
3. AHMED HASSAN ABDULLE
4. COAST WATER WORKS DEVELOPMENT AGENCY.....DEFENDANTS/RESPONDENT

RULING

1. Before me is a **Notice of Motion** Application dated **13th October, 2020** by the Plaintiff/Applicant brought pursuant to **Sections 1A, 1B, 3, 3A & 63(e)** all of the **Civil Procedure Act Cap 21** and **Order 2 rule 15(1) (a), (b), (c) & (d)** and **Order 13 rule 2**, all of the **Civil Procedure Rules (2010)**. In this application, the Applicant is seeking the following orders:

1. **The 2nd & 3rd Defendant's Statement of Defence dated 5th September 2020 be struck out for disclosing no reasonable cause of action, for being frivolous, vexatious and otherwise an abuse of the court process.**
2. **Upon grant of (1) above, judgment be entered against the 2nd & 3rd Defendant's jointly and severally for Kshs. 19,400,000.00 together with profits as per the Guarantee dated 23rd July 2020.**
3. **Without prejudice to (1) & (2) above, judgment on admission be entered against the 1st Defendant for Kshs. 18,899,375.93 and Kshs.1,275,139.00.**
4. **The Costs of this application be awarded to the Plaintiff against the 1st, 2nd & 3rd Defendants.**

2. The application is premised on twelve (12) grounds on its face which grounds are explicated in the **Supporting Affidavit of LAWI SATO**, the Plaintiff/Applicant's Senior Legal Officer sworn on **13th October, 2020**.

3. The application is opposed vide a **Replying Affidavit** sworn on the **19th November, 2020** by the 3rd Defendant, who is also a Director of the 1st Defendant Company. In the said affidavit, the 3rd Defendant faulted the instant application, describing it as a nonstarter and totally defective. In his view, the application is geared towards protracting the court from addressing the issues raised on the Defendants' Statement of Defence and the Counter-claim therein.

4. It is also deponed that the Plaintiff was well aware of the fact that the loan facility advanced to the 1st Defendant was being used to finance projects and contracts with the Ministry of Agriculture, Livestock and Fisheries and at some point, the Plaintiff restructured the loan facility on the mutual understanding that no payments had been made by the said Ministry. As such **Mr. Ahmed**, the 3rd Defendant herein describes the Plaintiff's suit as premature and incompetent.

5. It is averred further that the Plaintiff changed the agreement unilaterally to the detriment of 1st Defendant and ended up charging unlawful interest and profit contrary to the **Islamic Banking Law** as well as the **Islamic Sharia Laws**.

6. The deponent went on to depone that the amount of **Kshs.24,644,884.67** claimed by the Plaintiff was arrived at through wrongful calculation of interest in breach of **Section 44** of the **Banking Act** as well as the terms in the Contract between the parties. Those uncontractual interest, as described by **Mr. Ahmed**, were in breach of the 1st Defendant's consumer rights guaranteed under **Article 46(1)(b)** and **(c)** of the **Constitution** and this Court should not overlook such illegalities.

7. In view of the foregoing, **Mr. Ahmed** invited the court to find that the Defence and the Counter-claim have raised triable issues and should not be struck out as sought. He added that a defence or any suit can only be struck out or preliminarily determined if it raises no triable issues. Thus, this Court finds that the application lacks merit and does not in the least meet the standards of granting the orders sought.

8. The 4th Defendant/Respondent did not file any pleadings in response to the **Motion** dated **13th October, 2020**.

9. Directions were taken that the application be canvassed by way of written submissions and both parties complied with the Applicant filing its submissions on **20th November, 2020** while the 1st - 3rd Defendant/ Respondent filed theirs on **11th December, 2020**.

THE PLAINTIFF/APPLICANT'S CASE

10. The Applicant's case is that it advanced a **Tawarruq** and **Qard Facility** to the 1st Defendant vide Letters of Offer dated **4th June, 2018**, **23rd July, 2018**, **28th February, 2019** and **13th November, 2019** respectively.

11. The Applicant states that the 2nd and 3rd Defendants guaranteed the repayment of the **Tawarruq** and **Qard Facility** by executing a Guarantee dated **23rd July, 2018** for the sum of **Kshs.19,400,000.00** together with profit, commission and costs. The loan has been admitted by the 1st Defendant/Respondent but has not been paid to date, the same having become due as at **13th May, 2020** and the outstanding amount payable is **Kshs.24,664,884.67**.

12. It is the Plaintiff/Applicant's averment that through a Letter dated **29th July, 2020** and written by the 1st Defendant/Respondent's advocates admitted to owing the principle sum of **Ksh.18,899,375.93** and profits of **Kshs.1,275,139.00**. The Applicant contends that the Letter dated **29th July, 2020** amounts to unequivocal admission and that Judgment should be entered in its favour for the amount of **Ksh.18,899,375.93** together with profits of **Kshs.1,275, 139**.

13. According to the Plaintiff/Applicant, the 1st Defendant/Respondent only contests the interest as charged on the agreed profits but does not contest the **Kshs.18,899,375.93** and profits of **Kshs.1,275,139.00** as evidenced in the Letter dated **29th July, 2020** and the Statement of Defence dated **4th September, 2020**.

14. The Plaintiff/Applicant thus states that the Letter dated **29th July, 2020** was clear, unambiguous and unconditional in that it amounts to an admission, and judgment should be entered on that basis. Reliance was also placed on the cases of **Choitram -vs- Nazari [1984]eKLR** and **Agricultural Finance Corportion –vs- Kenya National Assurance Company Limited (In Receivership) [1997] eKLR**.

15. Further, it is the Applicant's case that the 2nd and 3rd Defendants'/ Respondents' Statement of Defence dated **5th September, 2020** be struck out as it raises no reasonable cause of action. And if this prayer is granted, Judgment be entered against the 2nd & 3rd Defendants jointly and severally for **Kshs.19,400,000.00** together with profits as per the signed guarantee dated **23rd July, 2018**.

16. According to the Plaintiff/Applicant, the 2nd & 3rd Defendants' Statement of Defence does not raise a reasonable cause of action as it only raises the issue with regard to the Contract between the Plaintiff and the 1st Defendant. The 2nd & 3rd Defendants claims are centered on the illegality of the Plaintiff's and the 1st Defendant's Contract.

17. The Applicant contends that 2nd & 3rd Defendants/Respondents are guarantors of the 1st Defendant and cannot contest the contract between the Plaintiff and the 1st Defendant as they were not party to the same.

18. The Applicant avers that as a guarantor, once the 1st Defendant defaults, which is the case herein, then the 2nd & 3rd Defendants should fulfill their obligations under the guarantee as signed on **23rd July, 2018**. The Plaintiff has since informed the 2nd & 3rd Defendants via a Letter dated **1st July, 2020** that the 1st Defendant has since defaulted and has since demanded that the 2nd & 3rd Defendants should honor their obligations under the Guarantee.

19. The Applicant states that the 2nd & 3rd Defendants' Statement of Defence is a waste of judicial time as they are treating themselves as though they were sued as principal debtors, yet they have been sued as guarantors and cannot make the 1st Defendant's claims as theirs. They have relied on the case of **Trapos Limited & 2 Others –vs- I & M Bank & Another [2018] eKLR**.

20. That it is the 2nd & 3rd Defendants' obligation to pay the debt once the principal debtor defaults as is the case herein. The Plaintiff claims there is nothing to take to trial as far as their liability as guarantors is concerned and has relied on the case of **Kenindia Assurance Company Limited – vs- First National Finance Bank Limited [2008]eKLR**.

THE 2ND & 3RD DEFENDANTS'/RESPONDENTS' CASE

21. The 2nd & 3rd Defendants did not deny being guarantors of the 1st Defendant but contested that the Plaintiff changed the contract between it and the 1st Defendant.

22. According to the 2nd & 3rd Defendants the Plaintiff is well aware that the money advanced to the 1st Defendant was to facilitate a project from the Ministry of Agriculture, Livestock, Fisheries and Co-operatives State Department for Livestock. The 2nd & 3rd Defendants claim that they have not been paid, a fact that the Plaintiff is well aware of.

23. The 2nd & 3rd Defendants contend that the amount of **Kshs.24,664,884.67/=** as claimed by the Plaintiff is in violation of the provisions of **Article 46(1)(b) and (c) of the Constitution** and **Section 44 of the Banking Act** and has calculated and added interest that was never agreed upon by the parties.

24. On whether their Statement of Defence should be struck out, the 2nd & 3rd Defendants stated that their Defence raises issues on breach of Contract and unlawful interest as charged by the Plaintiffs, which issues they state can only be interrogated by court in a full trial.

25. The 2nd & 3rd Defendants in their submissions stated that their defence raises triable issues which can only be resolved through trial and have placed reliance on the cases of **Moi University –vs- Vishva Bulders Limited [2010]eKLR** and **Kisii Farmers Co-operative Union Limited –vs- Sanjay Natwarlal Chaunhan T/A Oriental Motors [2006]eKLR**.

ANALYSIS AND DETERMINATION

26. I have very carefully considered the application, the Replying Affidavit and rival submissions by the parties. I have also considered the written and oral submissions by the Counsel for the parties together with cited statutory and case law. In my view, there are only two issues that arise for determination:-

i. Whether the 2nd & 3rd Defendant’s Statement of Defence can be struck out; and

ii. Whether judgment can be entered on admission against the 1st Defendant.

i) Whether the 2nd & 3rd Defendants’ Statement of Defence can be struck out.

27. It is now settled that striking out of pleadings is discretionary, one done with caution as the court will not have had the benefit of being fully informed on the merits of the case through the discovery and oral evidence. See cases of **D.T. Dobie & Company (Kenya) Ltd –vs- Muchina (1982)KLR 1 at p.9** and **Delphis Bank Limited –vs- Caneland Limited [2014]eKLR**.

28. In the case of **Co-operative Merchant Bank Ltd –vs- George Fredrick Wekesa, Civil Appeal No.54 of 1999**, the Court of Appeal stated as follows:

“...Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant’s defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent’s action or which is otherwise an abuse of the process of the court. The defence raises a fundamental issue, namely, whether there was any misrepresentation as alleged by the respondent, a question which, cannot possibly be answered at the stage of an application for striking out; nor will it be competent for the court of appeal to try to answer it as its jurisdiction only extends to identifying whether, if any, there are issues which are fit to go for trial. The court has no doubt whatsoever, that the above is a fundamental triable issue...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment. The appellant’s defence cannot be said to fall into that category and had the trial Judge considered fully all the matters alluded to, he would not have come to the same conclusion as he did...”

29. The 2nd & 3rd Defendants in the instant case herein have been sued in their capacity as the guarantors of the 1st Defendant. A reading of the Defendants pleadings has revealed that the 2nd & 3rd Defendants are the directors of the 1st Defendant which is a Company and a separate legal entity.

30. The Plaintiff claims that the 1st Defendant is in default of a **Tawarruq** and **Qard Facility** principle sum of **Ksh.18,899,375.93** and profits of **Kshs.1,275, 139.00** respectively and that the same has been due since **30th June, 2020** as shown in the letter dated **1st July, 2020**.

31. It is the Plaintiff’s averment that the 2nd & 3rd Defendants as guarantors, are only liable to the extent of their guarantee as signed on the **23rd July, 2018** of **Ksh.19,400,000.00**.

32. In the Application herein, the Plaintiff has asked this court to strike out the 2nd & 3rd Defendants’ Statement of Defence for it raises no reasonable cause of action in relation to the guarantee as signed by the parties on the **23rd July, 2018**.

33. I have looked at the 2nd & 3rd Defendants’ Statement of Defence dated the **5th September, 2020**, and note that it does not contest the existence of a Guarantee. The said Statement of Defence is strikingly similar to that of the 1st Defendant, that only contests the charge on interest on the **Tawarruq** and **Qard Facility** principle as between the Plaintiff and the 1st Defendant.

34. It is now settled law that a guarantee limits the guarantor's liability to the fixed sum as agreed. The 2nd & 3rd Defendants are only liable to the Plaintiff in terms of the guarantee as signed on the **23rd July, 2018** for the fixed sum of **Kshs.19,400,000.00**. See the case of **Rajnikantkhetshi Shah –vs- Habib Bank A.G. Zurich [2016] eKLR**, where it was held as follows:-

“...the law is that, unless otherwise provided, where a guarantee limits the guarantor's liability to a fixed sum, the guarantors will be liable to the extent of the guarantee only and not to the entire debt of the principal debtor...”

35. The Statement of Defence by the 2nd & 3rd Defendants has not been limited to the guarantee but it is centered around the loan facility between the Plaintiff and the 1st Defendant, and thus does not raise any separate defence from that of the 1st Defendant.

36. In my view, it is therefore evident that the 2nd & 3rd Defendants have not raised any reasonable cause of action and/or any triable issues in its Statement of Defence in terms of the guarantee as signed between them and the Plaintiff. Even though the 2nd & 3rd Defendants are Directors of the 1st Defendant, the guarantee and the loan facility have been signed in different capacities and they cannot be said to overlap each other.

ii) Whether Judgment can be entered on admission against the 1st Defendant

37. The Plaintiff has sought Judgment on admission to be entered in terms of **Ksh.18,899,375.93** and profits of **Kshs.1,275, 139.00**. The Applicant's claim is that a Letter dated **29th July, 2020** amounts to unequivocal admission that the 1st Defendant owes money to Plaintiff/Applicant.

38. The Applicant submitted that the principal debt has been substantially admitted by the Respondent. The suit seeks for recovery of a sum of **Kshs.24,664,884.67** plus interest thereon which arose out of a **Tawarruq** and **Qard facility** given by the Plaintiff to the 1st Defendant.

39. The **Tawarruq facility** advanced was **Kshs.7,500,000.00** on **4th June, 2018**, **Kshs.5,300,000.00** and **Kshs.6,100,000.00** on **23rd July, 2018**. The **Qard facility** was to be paid as profits of **Kshs.1,275,139.00**. The amount claimed in the Plaintiff is inclusive of interest, and the Defendant has admitted the principal sum of **Kshs.18,899,375.93** and profits of **Kshs.1,275, 139.00** but has denied the interest that accrued and continues to accrue on the said **Tawarruq** and **Qard facility**. By letters dated **29th July, 2020**, the 1st Defendant admits that the **Tawarruq** and **Qard facility** of **Ksh.18,899,375.93** and profits of **Kshs.1,275, 139.00** is owing to the Plaintiff. The letter reads as follow and I quote *verbatim* was written by the 1st Defendant's appointed Counsel that :-

RE: GULF AFRICAN BANK LIMITED VS AFRICAN

DRILLING COMPANY LIMITED

“.....

Our Client's instruction is that on or about 23rd July, 2018 pursuant to the Letters of Offer dated 23rd July, 2018 and 13th

November, 2019, our client was granted banking facility Tawarruq facility number 8539 and duly executed Master Tawarruq & Qard Facility Agreements based on Islamic Financing. Our client was consequently disbursed the sum of Kenya Shillings Eighteen Million Eight Hundred and Ninety Nine Thousand Three Hundred and Seventy Five and Ninety Three Cents (Kshs.18,899,375.93/=) and the profits on the said amount being the sum of Kenya Shillings One Million Two Hundred and Seventy Five Thousand One Hundred and Thirty Nine (Kshs.1,275,139/=)....”

Yours faithfully,

Hassan N. Lakicha & Co.

40. The 1st Defendant filed a Statement of Defence on **7th September, 2020** and one of the documents relied on as evidence at page 53-54 is the Letter dated **29th July, 2020**, where the 1st Defendant accepts owing a sum of **Kshs.18,899,375.93** and profits of **Kshs.1,275, 139.00**.

41. The Plaintiff/Applicant is convinced the Letter dated **29th July, 2020** is a clear admission of the debt of the **Tawarruq** and **Qard facilities** and that Judgment on the admission should be entered for the Plaintiff.

42. Under **Order 13 rule 2** of the **Civil Procedure Rules**, any party may at any stage of the suit, where an admission of facts has been made, either on the pleadings or otherwise, apply to the Court for such Judgment or order as upon those admissions he may be entitled to, and the court may upon such application make such order or Judgment as the court may deem fit.

43. The 1st Defendant has not contested issuing or the contents of the letter dated **29th July, 2020** but in response have maintained a dispute of the interest as charged on the **Tawarruq** and **Qard Facilities**.

44. In the case of **Guardian Bank Limited –vs- Jambo Biscuits Kenya Limited [2014]eKLR**, the Court stated that the following on Judgments on admission: -

“...the principle applicable in judgment on admission is that the admission must be very clear and unequivocal on a plain perusal of the admission. The admission in the sense of Order 13 Rule 2 of the Civil Procedure Rules is not one which requires copious interpretations or material to discern. It must be plainly and readily discernible. In such clear admission, like J.B. Havelock J stated in the case of 747 Freighter Conversion LLC v One Jet One Airways Kenya Ltd & 3 Others HCCC No. 445 of 2012, there is no point in letting a matter go for a trial for there is nothing to be gained in a trial...”

45. The 1st Defendant in its pleadings has made it clear that the issue in existence for determination before the court is on interest as charged by the Plaintiffs. The issue raised on interest cannot prevent this court from entering a Judgment on an admission which is clear and unequivocal.

46. For the reasons stated above, the application dated **13th October, 2020** is allowed in terms of Prayers no.(1) and (2). Subsequently the 2nd & 3rd Defendants' Statement of Defence dated **5th September, 2020** be and is hereby struck out for disclosing no reasonable cause of action and Judgment entered as per the guarantee for **Kshs.19,400,000.00**.

47. I further allow the application dated **13th October, 2020** in terms of **Prayer No.(3)** and enter Judgment on admission for the Plaintiff against the 1st Defendant for **Kshs.18,899,375.93** and **Kshs.1,275,139.00**.

48. The hearing of the suit will thus restricted to the issue on interest as contested by the 1st Defendants.

49. Costs shall be in the cause

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 10TH DAY OF MARCH, 2021

D. O. CHEPKWONY

JUDGE

10/3/2021