



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. E222 OF 2020

BANK OF AFRICA KENYA LIMITED.....PLAINTIFF/ APPLICANT

VERSUS

MUGENGA HOLDINGS LIMITED.....1ST DEFENDANT/ RESPONDENT

TOM RUKUNDO MUGENGA.....2ND DEFENDANT/ RESPONDENT

MUGENGA HOLDINGS LIMITED.....3RD DEFENDANT/ RESPONDENT

RULING

Background

1. The application for determination before this Court is the Plaintiff's Notice of Motion application, dated 12th October, 2020, brought under **Order 51 Rule 1, Order 2 Rule 15 (1) of the Civil Procedure Rules 2010 and Section 1A, 1B and 3A of the Civil Procedure Act**. The Plaintiff seeks the following orders:-

- a) **This Honourable Court be pleased to strike out the Defendants' Statement of Defence dated 19th August 2020.**
- b) **This Honourable Court be pleased to enter Judgment in favour of the Plaintiff as prayed in the Plaint dated 2nd June 2020.**
- c) **The costs of this Application and the suit be borne by the Defendants.**

2. The backdrop to the matter is that the Plaintiff instituted this suit vide a Plaint dated 2nd June, 2020, seeking judgment against the Defendants for USD. 1,132,009.00 and Kshs. 543,630.00 plus interest at 12% p.a. In response, the Defendants filed the Statement of Defence dated 19th August, 2020.

3. The instant application is supported by the affidavit of **George Nyamai**, the Recoveries Officer of the Plaintiff, sworn on 12th October, 2020. He deposed that on various dates between 29th July, 2010 and 2nd July, 2013, the Defendants on their request accessed, secured and/or guaranteed various banking facilities from the Plaintiff: USD 1,215,000.00, USD 891,112.58 and Kshs. 90,500.00 on the on account of the 1st Defendant and Kshs. 5,578,933.00, Kshs. 900,209.66, 544,715.72 on account of **Pure Fuels Limited, Daniel Rukundo Mugenga and Prince Trevor Mugenga** respectively; the 2nd and 3rd Defendants, the directors of the 1st Defendant, executed directors guarantees and indemnity in favour of the Plaintiff guaranteeing to repay USD. 1,215,000.00 vide Deeds of Guarantee and Indemnity dated 22nd November, 2016; that Defendants failed, neglected and/ or blatantly refused to pay the outstanding arrears necessitating this suit.

4. It was also deposed that the Defendants' Statement of Defence dated 19th August, 2020 discloses no defence in law and it raises no issues for trial; the Defendants' Statement of Defence contains cluster of mere denials does not reply to and/or address the specific issues raised in the Plaint; the Statement of Defence is frivolous, a waste of court's time and is intended to delay the fair trial of the action; or it is otherwise an abuse of the process of the court; the Statement of Defence is vexatious, has no foundation, has no chance of succeeding and is filed as a mere procedural requirement; the Defendants have clearly admitted in paragraph 4 of the Statement of Defence existence of the loan facility; the Defendants are truly and clearly indebted to the Plaintiff for the amounts claimed; and the grant of the Orders sought will effectively

facilitate the just, efficient and expeditious disposal of this suit.

5. In opposition, the Defendants filed a Replying Affidavit sworn on 19th March, 2021 by **Tom R. Mugenga**, the 2nd Defendant and a director of the 1st Defendant. He deposed, among others, that the instant suit is premised on the same cause of action as that in **HC Misc. App. No. 634 of 2018** filed by the same Plaintiff against the 1st Defendant in which Consent Orders were recorded on 6th February, 2020 and are still in place.

6. Moreover, he deposed that the filing of the instant suit was therefore in bad faith and intended to mislead the Honourable Court to deal with a matter that is already pending before another court of competent jurisdiction. He further deposed that the Defence raises very serious pertinent issues of law touching on whether the Plaintiff has sold his properties and recovered all the monies due to them or at all which can only be determined after a full hearing of the evidence from the parties.

7. In addition, **Mr. Mugenga** deposed that it is an abuse of the process of the Court for the Plaintiff to recover money through the sale of securities and fail to account for it and then proceed to demand for unjustified and unexplained balances of the loan. He denied the averments contained in paragraphs 4, 5, 6, 7, 8, 9 and 10 of the supporting affidavit of **Mr. Nyamai** and challenged them to strict proof. He also deposed, in response to the averments at paragraph 10,11,12, 13, 14 and 15 of the said supporting affidavit that neither of the Defendants still owes money to the Plaintiff as claimed hence the need to proceed with the hearing of the Plaintiff's previous suit to await a matter touching on the subject matter at the Court of Appeal.

8. In reply, the Plaintiff filed a Supplementary Affidavit sworn by **Mr. Nyamai** on 26th April, 2021 in which he deposed, in response to paragraph 3 of the Replying Affidavit, that the suit in **HCCC Misc. Application No. 634 of 2018** is garnishee proceedings commenced by way of Originating Summons seeking to attach the 1st Defendant's decree/judgment entered in **HCCC 398 of 2009: Mugenga Holdings Limited & 15 others vs Commissioner of Police & Another**; that on 22nd February, 2019, a garnishee order was issued by **Hon. Msagha Mboghli J**; that, however, the Plaintiff has never executed the said orders after **HCCC Misc. Application No. 634 of 2018** was stood over generally pending the outcome of appeal in **HCCC 398 of 2009**.

Submissions

9. The application was canvassed by way of written submissions by consent of the parties. The firm of **Nyaanga & Mugisha Advocates** filed written submissions dated 26th April, 2021 on behalf of the Plaintiff while the firm of **J.A. Guserwa and Company Advocates** filed written submissions dated 5th May, 2021 on behalf of the Defendants.

10. The Plaintiff contends that the present suit is properly filed before this Court. It is the Plaintiff's contention that although it filed garnishee proceedings against the 1st Defendant in **HCCC Misc. Application No. 634 of 2018**, the same are separate proceedings between the judgment creditor and the garnishee and the said proceedings cannot be termed as a substantive suit between the parties. The Plaintiff relies on the Nigerian Court of Appeal case of **Fidelity Bank Pls vs Okwouwulu & Anor (2012) LPELR-8497 (CA)** which was cited with approval in **Mengich t/a Mengich & Co. Advocates & another vs Joseph Mabwai & 10 others [2018] eKLR**, where it was held that **"By its nature, Garnishee proceedings is "sui generis," and different from other Court proceedings, although it flows from the judgment that pronounced the debt."**

11. In addition, the Plaintiff submits that it has a cause of action against the Defendants and that it has a right to pursue recovery action against the principal debtor independently and/or alongside the guarantors where their principal debtor has defaulted in loan repayment. In this respect, the Plaintiff relies on the cases of **Monda Matundura vs National Bank of Kenya Limited (2018) eKLR** and **Solomon Mbili Ngomo vs Kenya Deposit Insurance Corporation Dalali Traders [2019] eKLR**.

12. The Plaintiff also relies the case of **Samuel Mureithi Murioki & another vs Kamahuha Limited [2018] eKLR** in which the Court of Appeal discussed the principles which should guide the court in determining whether to strike out a defence. The Plaintiff further relies on the case of **Job Kiloch vs Nation Media Group Ltd, Salaba Agencies & Michael Riorio [2015] eKLR** regarding what constitutes triable issues and contends that that the Defendants' defence does not disclose any triable issues.

13. On the other hand, the Defendants submit that their Statement of Defence dated 18th August, 2020 discloses reasonable cause of action and weighty triable issues; is not scandalous, frivolous or vexatious as the Defendants deny their indebtedness to the Plaintiff. The Defendants relied on the case of **Misort Africa Ltd vs Principal Secretary National Treasury and Planning & another, HCCC No. 182 of 2019** where the Court dismissed a similar application as the grounds relied upon were not valid grounds to strike out the defence.

14. Further, the Defendants cited the case of **Desbro (Kenya) Limited vs Polypipes Ltd & Another, HCCC No. 263 of 2017** for the proposition that the striking out of a suit or defence is a jurisdiction which a court should exercise sparingly and in a clear and obvious case that the defence raised by the defendant is a mere smoke screen meant to divert the Court's attention to the real question in issue and cannot amount to a prima facie defence warranting judicial examination.

15. Finally, the Defendants submitted that the evidence tendered by the applicant in support of its application is inadmissible pursuant to **Order 2 Rule 15 (2) of the Civil Procedure Rules**. In this regard, the Defendants' contention was that the Plaintiff has sought to rely on statements of account at paragraph 14 of the Supporting Affidavit and marked as **"GN-3"** of which the Defendants have not had an opportunity to challenge.

Analysis and determination

16. I have considered the application, the grounds in support thereof, the rival affidavits, the submissions and the law. In my evaluation, the issues for determination are whether the Plaintiff's suit is *res judicata*; whether the Defendants' defence is worthy of adjudication by the

Court.

17. On the preliminary issue as to whether Plaintiff's suit is *res judicata*, the principle of *res judicata* is provided for under **Section 7 of the Civil Procedure Act** as follows:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

18. The Court of Appeal in the case of the **Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others [2017] eKLR, Nairobi CA Civil No. 105 of 2017** outlined the elements of the doctrine of *res judicata*, as follows:-

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

19. The Defendant claims that the instant suit is premised on the same cause of action as that in **HC Misc. App. No. 634 of 2018** filed by the same Plaintiff against the 1st Defendant in which Consent Orders were recorded on 6th February, 2020 and are still in place.

20. I have looked at the ruling dated 21st February, 2019 in **HC Misc. App. No. 634 of 2018**, which the Defendants claim is premised on the same cause of action as the instant suit. It is clear that in **HC Misc. App. No. 634 of 2018**, the Plaintiff, the then Applicant commenced garnishee proceedings by way of Originating Summons against the 1st Defendant, the then 1st Respondent, and the Principal Secretary, State Department of Interior, the 2nd Respondents/ Garnishee and the Hon. Attorney General, the 3rd Respondent. The Plaintiff sought a substantive order that a sum of USD 951,509 and 14 cents, owed to it by the 1st Respondent be attached and released directly by the Garnishee to it through its advocates which was granted by **Hon. Mbogholi Msagha J.** However, I also note that the said orders have not been executed because the matter was stood over generally pending the outcome of appeal in **HCCC 398 of 2009** as per the Court Order issued on **13th March, 2020.**

21. I have looked at this Court's Judgment in respect of **HCCC 398 of 2009, Mugenga Holdings Limited & 15 others vs Commissioner of Police & Another.** The 1st Defendant, the then 16th Plaintiff, and 15 others filed suit against the Commissioner of Police and the Hon. Attorney General for compensation as a result of post-election violence in the country. It was claimed that as a result of the violence, the plaintiffs lost trucks and goods through theft and arson. In the result, the Court awarded **Mr. Mugenga** Kshs. 20,000,000/- for his house on subdivision No. 3918 Section 1 Mainland North Mombasa sold by **Bank of Africa Limited** and special damages of Kshs. 16,813,959.25 being special damages and his loss of business limited to 15% per annum for every truck lost for a period of 6 years based on the value of each vehicle.

22. In the circumstances, I find that the issues raised by the Plaintiff in this suit were not substantially or directly in issue in **HC Misc. App. No. 634 of 2018** and the suit is therefore not *res judicata*. The Defendants contention in this regard therefore fails.

23. I now turn to whether Defence should be struck out. The application is expressed to be brought under **Order 2 rule 15 of the Civil Procedure Rules, 2010** which provides as follows:

“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.”*

(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.”

24. The Court of Appeal in the case of **Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu [2009] eKLR** set out the principles that guide the Court in such an application as follows:-

“The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-

“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 506, where the Lord Justice said:-

“The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.”

We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.”

25. The Defendants, citing **Order 2 Rule 15 (2) of the Civil Procedure Rules**, took issue with the attachment of evidence by the Plaintiff to the instant application. This includes a statement of account which they claim not to have had an opportunity to challenge.

26. From a perusal of the pleadings and the submissions, it is evident that the instant application not only seeks dismissal of the Defendants’ defence in that it discloses no reasonable cause of action or defence in law but on grounds that it is frivolous, vexatious and it is otherwise an abuse of the process of the court. By Plaintiff exhibiting evidence to an affidavit is a testament that the Defence, which denies the Plaintiff’s averments, cannot be deemed as frivolous, vexatious or an abuse of the court process. The denials made by the Defendants are not groundless or fanciful or just made for the sake of it. They are not hopeless. A court requires to hear them and make a determination to what extent they controvert the Plaintiff’s case. To this extent therefore, the Plaintiff’s contention fails.

27. In this respect, I am guided by the Court of Appeal’s finding on a similar argument in the case of **Njeri Mbugua v Kirk Mweya Nyaga, NRB CA Civil Appeal No. 110 of 2012 [2016] eKLR** that:

“[31] From the above it is clear that an applicant can bring an application to strike out a pleading relying on any of the grounds listed in Order VI Rule 13 (1). The appellant brought his application in the court under ground (a) and (b) of Order VI Rule 13(1) of the Civil Procedure Rules. Under Order VI rule 13 (2) of the Civil Procedure Rules an application under ground (a) cannot be supported by evidence. However, the appellant also brought his application under ground (b) and under that ground he could adduce evidence. There is nothing to prevent an applicant from combining his application under grounds (a) and (b) as the appellant did. We would thus overrule the contention that the application was defective because it was supported by evidence.”

28. **Buller & Leake and Jacobs in Precedents of Pleading (12th Edition)** at page 145 explained the meaning of frivolous and vexatious pleadings as follows:

“A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action?”

29. In **Trust Bank Limited vs H.S.Amin & Company Ltd & another [2000] Eklr** the court went on to define a pleading that is an abuse of the process of the court as follows:-

“And a pleading which tends to embarrass or delay fair trial is described as a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses, trouble and delay and that which contains unnecessary or irrelevant allegations which will prejudice the fair trial of the action and lastly a pleading which is abuse of the process of the court really means in brief a pleading which is a misuse of the court machinery or process. [Emphasis added]

30. The Court of Appeal in the case of **Isaac Awuondo vs Surgipharm Limited & another [2011] eKLR**, cited with approval the case of **Moi University vs Vishva Builders Limited, Civil Appeal No. 296 of 2004 (unreported)** in which the same Court observed:-

“The law is now settled that if the defence raises even one bona fide triable issue, then the defendant must be given leave to defend. In this appeal we traced the history from the commencement of relationship between the parties herein. The dispute arises out of a building contract. In the initial plaint the sum claimed was well over 300 million but this was scaled down by various amendments until the final figure claimed was Shs.185,305,011.30/- We have looked at the pleadings and the history of the matter and it would appear to us that the appellant had serious issues raised in its defence. As we know even one triable issue would be sufficient – see H.D Hasmani v. Banque Du Congo Belge (1938) 5 E.A.C.A 89. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in Patel vs. E.A. Cargo Handling Services Ltd. [1974] E.A. 75 at P. 76 Duffus P. said:-

“In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as SHERIDAN, J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

31. Applying the above authorities to the matter at hand, I have looked at the defence and considered all averments. Without going into the merits, it is my considered view that the Defendants have raised triable issues that are worthy of adjudication by this Court.

Conclusion

32. In the result, the Plaintiff’s Notice of Motion application dated 12th October, 2020 is hereby dismissed with costs to the Defendants.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH JUNE, 2021.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Rotich for the Plaintiff/ Applicant.
2. Museve h/b for Ms.Guserwa for the Defendants/ Respondents