



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 400 OF 2018

AHMED ADAN T/A WETANGULA,

ADAN & COMPANY ADVOCATES.....PLAINTIFF

VERSUS-

DESTERIO ANDADI OYATSI, KENNETH HAMISH WOOLER KEITH AND

ELISABETH KLEM (sued jointly as executors of the

Will and Administrators of the estate of the late HON KIPYATOR NICHOLAS KIPRONO

BIWOTT).....DEFENDANTS

RULING

BACKGROUND

The Plaintiff (Ahmed Adan T/A Wetangula, Adan & Co. Advocates) by a Plaint filed on 9th November 2018, sued the Defendants (Desterio Andadi Oyatsi, Kenneth Hamish Wooler and Keith & Elisabeth Klem) jointly in their capacities as executors of the Will and Administrators of the estate of the late Hon. Kipyator Nicholas Kiprono Biwott.

The Plaintiff's claim is for Ksh 71,000,000.00, being money payable by the Defendants to the Plaintiff for money lent by the Plaintiff to the late Hon. Kipyator Nicholas Kiprono Biwott.

That between the 9th October 2014 and the 13th May 2015, the Plaintiff lent the late Hon. Kipyator Nicholas Kiprono Biwott a total of Ksh 71,000,000.00 remitted by transfer from the Plaintiff's account number [...] operated at Barclays Bank of Kenya Limited to the late Hon. Kipyator Nicholas Kiprono Biwott's account number [...] operated with the said/same bank.

That at the time of his death on 11th July 2017, the late Hon. Kipyator Nicholas Kiprono Biwott had not repaid the said sum of Ksh 71,000,000.00 or any part thereof.

That Desterio Andadi Oyatsi, Kenneth Hamish Wooler Keith and Elisabeth Klem as executors of the Will of the late Hon. Kipyator Nicholas Kiprono Biwott petitioned for the grant of probate of the deceased's Written Will on 18th December 2017, in **Succession Cause No. HC 1506 of 2016**, in the matter of the estate of Hon. Kipyator Nicholas Kiprono Biwott (deceased) and on the 20th December 2017, notified creditors of the estate of the deceased to send particulars of their claims.

On 16th March 2018, the Plaintiff submitted his claim to the Defendants.

STATEMENT OF DEFENCE

The Defendants filed a statement of defence dated 26th November 2018, in which they denied the Plaintiff's claim against the Estate in the sum of Ksh 71 million or any sum at all as pleaded in the Plaint or at all.

The Defendants stated that in terms of the said statute, and the Plaintiff's practice, the only lawful relationship that could exist and/or between the Plaintiff and the deceased was that of Advocate and client.

The Defendants deposed that all financial dealings between the Plaintiff and the [deceased/client] could only be transacted through the client's account maintained by the Plaintiff.

The Defendants further deposed that in relation to handling of financial matters or transactions in clients account, these are regulated by the provisions of **Advocates Act (Advocates(Accounts) Rules) and Rule 10 of Advocates Act (Advocates (Accounts) Rules)** prohibit the plaintiff as advocates from making withdrawals from the said client's account.

NOTICE OF MOTION OF 11TH FEBRUARY 2019

By a Notice of Motion dated 4th February 2019 and filed in court on 11th February 2019, the Plaintiff/Applicant sought orders :-

- a) The statement of Defence dated 26th November 2018 and filed on 27th November 2018 on behalf of the Defendants be and is hereby struck out.
- b) Judgment be and is hereby entered for the Plaintiff for the sum of Ksh 71,000,000.00 together with interest at commercial rates from 16th March 2018 until payment in full.
- c) The costs of this application and of the suit be awarded to the Plaintiff.

The Application is based on grounds that;

1. The Plaintiff's claim against the Defendants is for the sum of Ksh 71,000,000.00 being money payable by the Defendants to the Plaintiff, for money lent by the Plaintiff to the late Hon. Kipyator Nicholas Biwott.
2. In the circumstances, the estate of the late Hon. Kipyator Nicholas Biwott was/is truly indebted to the Plaintiff for the sum of Ksh 71,000,000.00.
3. The Defendants' Statement of Defence dated 26th November 2018 consists of mere denials, did not disclose any reasonable defence in law, was a sham and did not disclose any triable issues as between the Plaintiff and the Defendant.
4. As there were no real issues for trial, the Defence is bad in law, scandalous, frivolous, vexatious and ought to be struck out.
5. The Defendants are truly indebted to the Plaintiff and thus the Defence constitutes and amounts to an abuse of the process of this Honourable court.

REPLYING AFFIDAVIT

In response to Notice of Motion filed in court on 11th February 2019, Desterio Andadi Oyatsi one of the executors of the aforementioned estate swore an affidavit dated 27th February 2019, stating that the Plaintiff seeks orders to strike out the Statement of Defence on the grounds that it was bad in law, scandalous, frivolous and vexatious.

He averred that the said bank documents produced by the Plaintiff expressly stated the purpose or reason for the transfers of funds claimed in this suit by the Plaintiff.

That except for five (5) bank slips which were blank, the remaining fourteen(14) bank slips expressly stated that the said transfers of funds by the Plaintiff's firm to the deceased were either 'sale proceeds' or 'deposit of purchase price'.

That the attempt by the Plaintiff to change the nature of the transaction between him or his firm and the deceased from payment of money due to the deceased as "sale proceeds" or "deposit of purchase price" to a loan advanced by the Plaintiff to the Deceased is/was unlawful and an abuse of the Court process.

NOTICE OF MOTION DATED 27TH FEBRUARY 2019

The Defendants filed a Notice of Motion application dated 27th February 2019, pursuant to **Section 1A & 1B of the Civil Procedure Act, Order 13 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules**, 2010 the Courts inherent powers and all other enabling provisions of law seeking for orders;

- a) That a declaration that the Plaintiff admits in his documentary evidence that the money claimed herein was paid by the Plaintiff to the deceased as "sale proceeds" or "deposit on purchase price"
- b) That a declaration that this suit is a gross abuse of the Court process.

c) That judgment on admission be entered dismissing the Plaintiff's suit against the Defendants.

d) That the Defendants be awarded costs of the suit and of this application on the higher scale.

The application was based on grounds that;

a) The Plaintiff admits in his own documentary evidence that the money claimed was paid by the Plaintiff to the deceased as "sale proceeds" or "deposit on purchase price".

b) By reason of the above admissions, it is an abuse of the court process for the Plaintiff to bring this action alleging that he paid the said sums of money as a loan or loans advanced to the deceased.

c) The Plaintiff's said claim is false, unsustainable in law and an abuse of the court process.

REPLYING AFFIDAVIT

The Notice of Motion Application of 27th February 2019 was opposed vide a Replying Affidavit dated 23rd May 2019, sworn by Adan Sheik Ahmed, the Plaintiff herein. He stated that between 9th October 2014 and 13th May 2015 he lent the late Hon. Kipyator Nicholas Kiprono Biwott a total of Ksh 71,000,000.00 remitted by transfer from his account number [...] operated at Barclays Bank of Kenya Limited to the late Hon. Kipyator Nicholas Kiprono Biwott's account number [...] operated with the said bank.

That the Defendants have not produced any sale agreements or transfers allegedly entered into between Plaintiff or any other person and the late Hon. Kipyator Nicholas Biwott as there were no such sale agreements or transfers whatsoever.

That there were no properties sold to and transferred to Plaintiff or any other person by the late Hon. Kipyator Nicholas Biwott. The Defendants have not evidenced any such properties allegedly sold to him, as there were no such properties sold whatsoever.

That in the instant application, the Defendants have now taken the position that the Ksh 71,000,000.00 loaned by the Plaintiff to the late Hon. Kipyator Nicholas Biwott was "sale proceeds" or "deposit on purchase".

That the "sale proceeds" user narrative on some of the transfer slips is not and cannot be evidence of the Defendants' claim that the sum of Ksh 71,000,000.00 was the purchase price of properties from the late Honourable Kipyator Nicholas Kiprono Biwott.

DETERMINATION

After consideration of the applications pleadings and submissions the issues identified for determination are;

a) Should the Defence filed on 27th November 2018 be struck off and judgment entered in favour of the Plaintiff?

b) Should judgment on admission by the defendants be entered in favour of the Plaintiff?

ANALYSIS

With regard to the application dated 4th February 2019 filed on 11th February 2019, the Applicant submitted that the principle in law that a mere denial does not amount to a sufficient defence is well settled. In Magunga General Stores –vs- Pepco Distributor Ltd, EA (1986 – 89) 334 this principle was stated at page 4 of the Plaintiff's List and Bundle of Authorities thus:

"First of all, a mere denial is not a sufficient defence in this type of cases. There must be some reason why the Defendant does not owe the money. Either there was no contract or it was carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given."

The Applicant further submitted that a reasonable defence in law has been defined to mean a defence which raises a triable issue and a triable issue is one that is bona fide. It was so held in Equatorial Commercial Bank Ltd –vs- Jodam Engineering Works Limited & 2 others [2014]eKLR where the court stated as follows at page 11 of the Plaintiff's List and Bundle of Authorities:

"A statement of defence is said to raise reasonable defence if that defence raises a prima facie triable issue. In the case of Olympic Escort International CO. Ltd. & 2 Others –vs- Parminder Singh Sandhu & another [2009]eKLR, the Court of Appeal held that for an issue to be triable, it has to be bona fide. The court stated as follows: "it is trite that, a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona fide."

Margaret Njeri Mbugua –vs- Kirk Mweya Nyaga [2016] eKLR is a decision by the Court of Appeal in which the principle that in a claim for a liquidated sum or debt, a mere denial is not sufficient was reiterated. The relevant holding at page 23 of the Plaintiff's list and bundle of Authorities that:

"From the above case it is therefore clear that a mere denial or general traverse is not sufficient in an action for a debt or

liquidated amount and to that extent the Appellant's defence did not provide a reasonable defence. Applying all the principles stated in the above quoted cases to this appeal we are of the view that the trial court was right in striking out the defence. The Plaintiff contained details of the transaction that took place, however, the respondent rather than giving a fair and substantial answer gave a general denial of the facts. In the replying affidavit sworn by the respondent he more or less admitted having received the money yet demanded proof. In the circumstances there was no reasonable defence proffered, and the striking out of the defence was proper. In the absence of the defence the logical consequence was the entering of judgment in favour of the Appellant."

With regard to the application filed on 27th February 2019, the Plaintiff submitted *Cassam –vs- Sachania (1982)eKLR*, is a decision by the Court of Appeal in which the guiding principles in applications for judgment on admission were stated at page 56 of the Plaintiff's List and Bundle of Authorities thus:

"The Judge's discretion to grant judgment on admissions of fact under the order is to be exercised only in plain cases where the admissions of fact are so clear and unequivocal that they amount to an admission of liability entitling the Plaintiff to judgment. It is from being a plain case where one has to resort to the interpretation of documents."

The Defendants submitted with regard to application of 27th March 2019 that the reasons stated in the said documentary evidence for the transfer of funds from the Plaintiff's bank account to the Deceased's bank account as proved by the plaintiff's own documents was either "sale proceeds" or "deposit of purchase price."

It was the Defendant's submission that the said admitted facts entitle the Defendants to move this Honourable Court and seek a summary determination that:

- a) The Plaintiff's claim in this suit is a false claim and is not sustainable in law;
- b) The Plaintiff's have taken undue advantage of the death of the Deceased to make false claims against his estate by distorting the true facts and/or misrepresenting the true nature of the transactions between the Plaintiff and the deceased, for their commercial gain.
- c) The Plaintiff's have committed or practiced deceits against the Defendants and this Honourable Court by swearing false affidavits stating that their claims herein against the estate are genuine and valid when they know the truth that the said claims are false and fabricated.
- d) The present suit is a gross abuse of the court process.

Order 13 Rule 2 CPR 2010 on admissions provides;

"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."

As to what constitutes a triable issue, the Court in *Kenya Trade Combine Ltd versus Shah. Civil Appeal No. 193 of 1991*, had this to say:

"..... all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed. The defendant is at liberty to show, by whatever means he chooses whether by defence, oral evidence, affidavits or otherwise that his defence raises bonafide triable issues."

In the case of *Choitram vs Nazari [1984]KLR 237* that spelt the guiding principles of judgment on admission, it provides;

"For the purpose of order XII rule 6, admissions can be express or implied either on the pleadings or otherwise, eg 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. Much depends upon the language used. The admissions must leave no room for doubt that the parties passed out of the stage of negotiations onto a definite contract. It matters not if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by analysis. Indeed, there is no other way, and analysis is unavoidable to determine whether admission of fact has been made either on the pleadings or otherwise to give such judgment as upon such admissions any party may be entitled to without waiting for the determination of any other question between the parties....."

In the instant case, the Defendants deny the Plaintiff's claim against the estate of the deceased in the sum of Ksh 71 million or any sum at all as pleaded in the Plaintiff's claim or at all. The Defendants deposed that there was no evidence of any loan request or application to and from the Plaintiff by the deceased. The relationship was one of advocate and client and the funds remitted to the Deceased could only have been received or held by the plaintiff on the client's behalf.

The Defendants are Executors of the deceased's estate and are obligated to step in the shoes of the deceased in management of his estate. The Plaintiff's claim has to be established and proved to warrant payment/settlement of the same. The Executors act in a fiduciary capacity on behalf of the deceased in the interests of the deceased's estate's beneficiaries. It is therefore a *bona fide* triable issue whether the funds

remitted by the Plaintiff to the Defendant was/is a loan, purchase price funds or funds held and/or received on the deceased's behalf. It is imminent, especially in the absence of the deceased to verify / prove the claim of debt /loan by the Plaintiff to the deceased. This calls for production of relevant documents and/or tangible /cogent evidence on proof of the claim whose veracity and credibility shall be tested during hearing and determination of the claim.

The Defence raises real issues for trial and it is not scandalous, frivolous or vexatious and cannot be struck off at this stage as the proof of funds transfer by and of itself does not confirm a loan to the deceased from the Plaintiff. There could be other plausible and legitimate explanations of these funds transfer.

With regard to the application filed on 27th February 2019, the Defendants sought declaration that the Plaintiff admitted as shown in the annexed 14 bank slips that money claimed was paid by the Plaintiff to the deceased as 'sale proceeds' or 'deposit on the purchase price except for 5 of bank slips that are blank.

The Defendants sought judgment on admission that the funds transferred to the deceased by the Plaintiff were not a loan as claimed but sale proceeds and/or deposits of purchase price. Hence the Plaintiff's claim for payment and/or refund fails and suit is dismissed.

Similarly, this Court at this stage cannot confirm in the absence of trial, production of relevant documents and/or testimony of any witnesses to prove either loan as alleged by the Plaintiff or the sale proceeds and deposit of purchase price as defendants/Executors claim.

The upshot of the analysis on pleadings filed is that at this stage, this Court finds the Defence raises *bonafide* triable issues to be canvassed and ventilated during trial. Similarly, the application for declaration and judgment on admission, this Court finds the admission not clear and obvious, there is room for doubt as the deceased is not there to confirm or deny either the plaintiff's claim of the Defendant's Defence. The only and appropriate recourse is trial of the contested issues.

Both applications filed on 11th February 2019 by the Plaintiff and the one filed by Defendant on 27th February 2019 are dismissed with costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 13TH FEBRUARY 2020.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

N/A FOR THE PAINTIFF

MR. RABUT H/B MR. OYATSI FOR THE DEFENDANT

COURT ASSISTANT- MR. TUPET