REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. E086 OF 2019

GULF AFRICAN BANK LIMITED……………………….PLAINTIFF

VERSUS

ATTICON LIMITED……………………………………..1ST DEFENDANT

DOUGLAS KAILANYA…………………………………2ND DEFENDANT

DOROTHY CHEPKURUI………………………………3RD DEFENDANT

BILLY ODERO ONYANGO……………………………4TH DEFENDANT

EXPORT PROCESSING ZONES AUTHORITY…….5TH DEFENDANT

RULING

(1) Before this Court is the Notice of Motion dated **13th August 2019** by which **GULF AFRICAN BANK LIMITED** the Plaintiff/Applicant seeks for orders that:-

> **1) The 5th Defendants statement of defence dated 11th June 2019 be struck out for disclosing no reasonable defence in law for being an abuse of the court process and meant to delay the fair trial of the suit.**
>
> **2) Upon grant of prayer (1) above, judgment be entered against the 5th Defendant for Kshs.21,991,649.53 plus default damages at 14% per annum from the date of filing suit till payment in full.**
>
> **3) The costs be awarded to the Plaintiff against the 5th Defendant.**

(2) The application was premised upon **Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Cap 21 and Order 2 Rule 15(1), (a), (c) & (d)** of the **Civil Procedure Rules 2010** and was supported by the Affidavit of even date sworn by **LAWI SATO**, the Senior Legal Officer of the Bank.

(3) The 5th Defendant **EXPORT PROCESSING ZONES AUTHORITY** opposed the application through the Replying Affidavit dated **25th March 2019**, sworn by **WINNIE SANG**, the Ag Head of Legal Services of the 5th Defendant. The application was canvassed by way of written submissions. The Plaintiff/Applicant filed its written submission on **27th November 2019** whilst the 5th Defendant filed its submissions on **24th January 2020**.

BACKGROUND

(4) The Plaintiff by way of a letter of Offer dated **11th April 2018** advanced to the 1st Defendant **ATTICON LIMITED** a facility of **Kshs.20,000,000.** The facility was to be used to finance contract Number **03-2016/2017** (hereinafter "**the contract**") which the 5th Defendant had awarded to the 1st Defendant.

(5) However the Plaintiff avers that the 5th Defendant failed to honour its undertaking and instead of paying the proceeds of the contract into the account held at the Plaintiff Bank as agreed, the 5th Defendant paid the sum of **Kshs.28,813,554.00**, being the proceeds of the contract into a different account held at **Family Bank Limited**.

(6) The 5th Defendant explained this change by stating that they received a letter dated **2nd November 2018** from the 1st Defendant directing that the proceeds of the Contract be paid into the account held at **Family Bank** and **not** to the Plaintiff Bank. The Plaintiff/Applicant submits that by its admission that it acted contrary to its own irrevocable undertaking, the 5th Defendants have no reasonable defence in law to the Plaintiffs claim. That their defence is a sham, is an abuse of court process and is meant only to delay the Plaintiffs pursuit of justice.

(7) The 5th Defendant however submits that their defence raises triable issues which ought to be canvassed during a trial of the suit. That a summary dismissal of their Defence would amount to driving the 5th Defendant from the seat of justice.

ANALYSIS AND DETERMINATION

(8) I have carefully considered the submissions of both parties as well as the relevant law. **Order 2 Rule 15** of the **Civil Procedure Rules 2010** provides for dismissal of any pleading in the following terms:-

> **(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.**

(9) Further **Order 13 Rule 2** of the **Civil Procedure Rules 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."**

(10) It is common ground that the 5th Defendant issued an irrevocable undertaking dated **3rd April 2018** committing to channel the proceeds of the contract into Account Number **0900166102** at the Plaintiff Bank. The said letter read as follows:-

> **"This is to acknowledge receipt of your irrevocable instructions that all your payment be made to the following account.**
>
> **We would like to confirm that payment certificates in relation to ongoing works under the following contract between the Export Processing Zones Authority and Atticon Limited will be processed as soon as we are in receipt of Development Funds from the National Treasury.**

(11) The 5th Defendant concedes that contrary to its own undertaking it instead deposited the amount of **Kshs.28,813,554.00** being proceeds of the said contract into an account held at **Family Bank.** The 5th Defendant explains that this was done upon instructions from the 1st Defendant who were the beneficiaries of the loan facility.

(12) The Plaintiff/Applicant submit that the actions of the 5th Defendant cannot be excused as the undertaking ought to have been honoured notwithstanding directions from any other person/party. That the 5th Defendant could not resile from the undertaking dated **3rd April 2018** simply on the say so of the 1st Defendant. In support of this position the 5th Defendant relies on the case of **SHEMARINE KENYA LIMITED –VS- KRK IMPEX PUT LIMITED & ANOTHER [2015] eKLR**, in which the Court of Appeal held as follows:-

> **The Appellant's argument that the undertaking was revoked by the 2nd Respondent is illogical. A contract of this nature created certain guarantees which the 1st Respondent acted upon. If one party to a contract intends, for whatever reason, to opt out, the prudent and reasonable expectation of the law is that the affected party must be in the know. <u>It is only after the consent and the knowledge of the affected party is sought and obtained that the other party can release himself from the obligation or liability under the guarantee</u>.**[own emphasis]

(13) As a general rule courts ought to be reluctant to summarily dismiss any pleading as the net effect of doing so would be to deny a party a hearing on merits. In the case of **DT DOBIE and COMPANY (KENYA) LTD –VS- MUCHINA (1982) KLR,** it was held

> **"The Court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out."**

"The power to strike out should be exercised only 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…..

(14) The above decision was made in respect of an application seeking to strike out a suit. However, I venture to state that the same sentiments would apply mutatis mutandis to an application seeking to strike out a Defence.

(15) In **KENYA COMMERCIAL BANK –VS SUNTRA INVESTMENT BANK LTD [2015] eKLR**, the Court cited the case of **SAUDI ARABIA AIRLINES CORPORATION –VS- PREMIUM PETROLEUM COMPANY LIMITED** in which it was stated:-

"I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the court in determining whether to strike out a pleading. Except, I can state comfortably that these principles now draw, not only from judicial precedent, but from the principles of justice enshrined in the constitution especially in article 47, 50 and 159. The first guiding principle is that, every Court of law should pay homage to its core duty of serving substantive justice in any judicial proceeding before it, which explains the reasoning by Madan JA in the famous DT DOBIE case that the Court should aim at sustaining rather than terminating a suit. That position applies mutatis mutandis to a statement of defence and counter-claim. Secondly, and directly related to the foregoing constitutional principle and policy, courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party of a hearing, thus, driving such party away from the judgment seat; which is a draconian act comparable only to the proverbial drawing of the "Sword of the Damocles." Therefore, the power to strike out a suit or defence should be used sparingly and only on the clearest cases where the impugned pleading is "demurer or something worse than a demurer" beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no bonafide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the SHERIDAN J Test in PATEL VS E.A CARGO HANDLING SERVICES LTD [1974] E.A 75 at P.76(Duffus P.) that"…a triable issue..is an issue which raises a prima facie defence and which should go to trial for adjudication." Therefore, on applying the test, a defence which is a sham should be struck out straight away." [own emphasis]

(16) From the above authorities it is manifest that the power to strike out pleadings should be exercised very sparingly by the Courts. The Court is required to consider whether the defence raises a triable issue and have it must be pointed out that a triable issue is not defined as an issue that would succeed at trial. In the case of **JOB KWACH –VS- NATION MEDIA GROUP LTD** the Court of Appeal observed:-

"Before the grant of summary judgment, the court must 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 in any other manner. What then is a defence that raises by the Defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term "triable" as, "subject or liable to judicial examination and trial. "It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court." [own emphasis]

(17) Similarly in **GICIEM CONSTRUCTION COMPANY –VS- AMALGAMATED TRADE & SERVICES LLR NO.103 CAK** it was held:-

"As a general principle, where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence, he ought to have leave to defend. Leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to the facts or law which raises a reasonable doubt that the Plaintiff is entitled to judgment."

(18) I have perused the 5th Defendants Statement of Defence dated **11th June 2019**. In my view it raises pertinent triable issues not least of which is the question of whether the 5th Defendant was right to act upon the instructions of the 1st Defendant as it did.

(19) In the premises I find that the said Defence is not for striking out. The Plaintiff have not demonstrated what if any prejudice they are likely to suffer if the matter proceeds to full trial.

(20) Finally, I find no merit in the present application. The same is hereby dismissed in its entirety and costs are awarded to the 5th Defendant. It is so ordered.

Dated in **Nairobi** this **2nd** day of **October**, **2020**

Justice Maureen A. Odero