REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E375 OF 2019

I & M BANK LIMITED.....PLAINTIFF/APLICANT

-VERSUS-

BUZEKI ENTERPRISES LIMITED...DEFENDANT/RESPONDENT

RULING

1. Through the plaint dated 18th October 2019, the plaintiff herein, I & M Bank Limited sought judgment against the defendant for Kshs 864,758,278/= and interest thereon together with costs of the suit.

2. The plaintiff's case was that by a Promissory Note dated 2nd August 2016 from the defendant to RT (East Africa) Limited, the defendant agreed to pay the said RT (East Africa) Ltd the principal sum of Kshs 864,758,278.00 which amount it did not pay thus precipitating the filing of this suit.

3. The defendant filed its statement of Defence on 22nd November, 2019 wherein it denied the plaintiff's claim and added that it was not a party to the alleged agreement between the plaintiff and RT (East Africa) Limited.

4. Through a Request for Judgment filed on 25th November 2019, the plaintiff sought and obtained interlocutory judgment against the defendant thus precipitating the filing of the application dated 27th November 2019 seeking, *inter alia*, orders to set aside the interlocutory judgment. The application was not opposed by the plaintiff and was on 18th December 2019, by consent, allowed as prayed.

5. The plaintiff however filed the application dated 16th December 2019 which is the subject of this ruling. In the said application, the plaintiff seeks orders to strike out the defence dated 21st November 2019 and the entry of judgment against the defendant as sought in the plaint.

6. The said application is supported by the affidavit of the plaintiff's Head of Business Development, **L.A. Sivaramakrishnan**, and is premised on the grounds that:

> **a. By a promissory note dated the 21st October 2016 from the defendant to the RT (East Africa) Limited and maturing on the 30th November 2016, the defendant agreed to pay to the RT (East Africa) Limited the principal sum of Kenya Shillings Eight Hundred and Sixty-Four Million Seven Hundred and Fifty-Eight Thousand Two Hundred and Seventy-Eight (KES 864,758,278/=) only.**
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> **b. The plaintiff discounted the said Promissory Notes to the benefit of the RT (East Africa) Limited who assigned the Promissory Notes in favour of the plaintiff who became holder for value.**
>
> **c. The agreement between the plaintiff and RT (East Africa) Limited was reduced into an assignment of a promissory note dated 24th October 2016 when the noted dated 21st October 2016 was assigned to the plaintiff.**
>
> **d. The defendant is justly and truly indebted to the plaintiff for the sum of KES 864,758,278/= and was so indebted at the commencement of this suit.**
>
> **e. The judgment sought by the plaintiff herein is for a straight forward liquidated sum arising out of promissory notes that**

have not been honored.

f. By their statement of defence dated 21st November 2019, the defendant does not have any reasonable defence to this suit.

g. The illusory defence is otherwise an attempt to delay and/or obstruct the plaintiff from recovering the claim set out against the defendant, as it constitutes bare denials and does not address the issue of whether the promissory note has been honored.

h. The defence should therefore be struck out because: -

1. It discloses no reasonable defence in law.

2. It is a sham as it contains mere denials.

3. It is scandalous, frivolous and vexatious and may delay or prejudice the fair trial of the suit.

4. It is otherwise an abuse of the court process.

7. The defendant opposed the application through the Grounds of Opposition dated 6th April 2020 wherein it stated inter alia that: -

1. The defendant's Statement of Defence in its entirety evinces triable issues of both fact and law; issues which the defendant submits ought to be ventilated at trial:

2. The plaintiff's plaint at paragraph 10 together with the defendant's Statement of Defence at paragraphs 9, 10 and 11 discloses the existence of prior proceedings (NAIROBI MILIMANI CIVIL SUIT NO. E134 of 2018 RANDON S.A. IMPLEMENTORS EPARTICIPACOES VS RT E.A. LIMITED) in which the defendant has been sued as 3rd Party by the alleged assignor herein on account of the suit Promissory Note. The Reply to Defence by the plaintiff does not deny the existence of these prior proceedings, neither does it rebut the fact that the suit claim therein is the very Promissory Note in issue in the instant proceedings, nor the fact that the proceedings are ongoing.

3. In light of the foregoing paragraph 2, provision of section 6 of the Civil Procedure Act has been offended, the defendant further submits the fate of the suit by the plaintiff is sealed in fact and law, and the defendant shall make the necessary application. The application by the plaintiff is in fact a red herring singularly meant to circumvent the law and defraud the court of the orders sought.

4. The alleged Assignment of the Promissory Note has been avoided by virtue of the alleged Assignor suing the defendant over the same Promissory Note; and the defendant further submits that the alleged assignment having been avoided, the plaintiff stands stopped from placing reliance on the same in the manner sought to be done in these proceedings.

5. The defendant is defending itself over the suit Promissory Note in the instant proceedings and in the aforementioned NAIROBI MILIMANI CIVIL SUIT NO. E134 of 2018 RANDON S. A. IMPLEMENTORS EPARTICIPACOES VS RT E. A. LIMITED. Such is the injustice, and waste of judicial resources that Section 6 seeks to denounce. The defendant submits that the plaintiff has no right in fact and in law to take out proceedings against the defendant as it has done and the plaintiff is well aware of this fact.

6. The defendant submits that the plaintiff has no rights under the alleged assignment and that in any event if it did, it is guilty of Laches, and cannot seek to redeem itself from such inordinate delay by punishing the defendant in the manner it has sought in the instant suit and application.

7. The defendant has a proper defence to the suit claim; the defence neither a red herring nor an illusion as has been termed in the application. The defendant has a constitutional right to defend itself and respond to the plaintiff's claim herein and such participation cannot amount to abuse of the court process and or employing delaying tactics or obstruction.

8. The instant application for summary judgment is not in the interest of expeditious determination of the issues herein, it is a premature avenue, a short cut sought to be used by the plaintiff to camouflage the fact that has no claim against the defendant.

9. The entire application is bad in law as it is neither anchored in the plaint nor in the Reply to Defence. More particularly Grounds f, g, h and i of the application ought to be struck out as they have no founding in either the plaint or the Reply to Defence.

8. The defendant also opposed the application through the Replying Affidavit of its Business Manager **Mr. Dennis Wanyonyi** who reiterates and expounds on the Grounds of Opposition.

9. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the plaintiff has made out a case for the granting of orders to strike out the defence and for entry of judgment for Kshs 864,758,278.

10. In ***Saudi Arabia Airlines Corporation v Premium Petroleum Company Limited*** that:

"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 of 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 bona fide 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 v 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."

11. As can be noted from the above cited case, the policy considerations in dealing with an application to strike out a defence are firstly; that on one hand, a Plaintiff should not be kept away from his judgment by unscrupulous defendant who has filed a defence which is a sham for the purpose only of stalling the case for as long as possible, secondly; that a defendant who has *bona fide* issue worth of trial should not be denied the opportunity to be heard on his defence on merit to enable the Court determine the real issues in controversy completely; and lastly that the ultimate aim of the court should be to serve substantive justice by considering all the facts of the case.

12. This court takes cognizance of the fact that there are numerous judicial precedents on the subject of striking out of pleadings and that it will not be necessary to reproduce them in this ruling. It is however necessary to point out that courts have taken the position that they will be cautious not to strike out pleadings due to the drastic nature of such an order as it has the effect of denying a party the opportunity to present its case. Judicial caution is also necessary in the sense that the court should not express any opinion on the matters in issue as that would hurt fair trial and restrict the freedom of the trial Judge in disposing the case should the suit be ultimately be heard on merit.

13. With the above considerations in mind, I will now turn to consider the defence filed by the defendant herein and determine if raises triable issues or is a sham as has been stated by the plaintiff. I note that the subject matter of this suit is the alleged promissory note dated 21st October 2016 from the defendant to one RT (East Africa) Limited which promissory note was allegedly assigned in favour of the plaintiff. The most notable aspect of the defence is the uncontested fact that there exist prior and ongoing proceedings over the same promissory note in ***Nairobi Milimani Civil Suit No. E134 of 2018 Randon S.A. Implementors Eparticipacoes Vs RT E.A. Limited*** in which the defendant herein has been sued as 3rd Party by the alleged assignor on account of the said Promissory Note. In other words, the defendant's case is that the instant suit offends the *sub judice* rule contained in section 6 of the Civil Procedure Act. Needless to say, the sub judice rule does not countenance the existence of parallel suits over the same subject matter.

14. My finding is that a perusal of the defendant's defence in its entirety indicates that it raises triable issues that can only be unpacked at the hearing of the case. In the circumstances of this case, I am not persuaded that the application to strike out the defence is merited and I therefore dismiss it with orders that costs shall abide the outcome of the main suit.

Dated, signed and delivered via Microsoft Teams at Nairobi this 8th day of October 2020 in view of the declaration of measures restricting court operations due to Coved -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

<u>In the presence of:</u>

Mr. Waigwa for plaintiff/applicant

No appearance for respondent

Court Assistant: Silvia