



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E145 OF 2019

ASL CREDIT LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

LIMURU HILLS LIMITED.....1ST DEFENDANT/RESPONDENT

HARISH KUMAR KANABAR.....2ND DEFENDANT/RESPONDENT

KIRIT BHAGWANDAS KANABAR.....3RD DEFENDANT/RESPONDENT

RULING

1. This ruling is in respect to the application dated 23rd September 2019 wherein the plaintiff/applicant seeks orders that: -

1. That the defendants Statement of Defence dated 26th August, 2019 and filed on 27th August, 2019 (hereinafter referred to as "the defence") be and is hereby struck out and judgement be entered for the plaintiff/applicant against the defendants/respondents for the sum of Kshs 212,276,573/- together with late payment charges and costs of the suit as prayed for in the plaint.

2. That the costs of this application and of the suit be borne by the defendants/respondents.

2. The application is supported by the affidavit of the applicant's advocate **Mr. Daniel Wandera** and is premised on the grounds that: -

i. The claim in the plaint against the defendants/respondents is a liquidated claim for the sum of Kshs 212,276,573/-, late payment charges of 5% per month from 1st April 2019, until payment in full and costs of the suit arising from executed Corporate and Personal guarantees by the defendants securing payment of Hire Purchase Facility advanced to Highgrove Holdings Limited (the "Hirer") by the plaintiff.

ii. The defendants/respondents filed a statement of defence wherein in paragraph 3 of the Statement of Defence, the defendants/respondents admitted the contents of paragraphs 5, 6, 7, 8, 9, 10 and 11 of the plaint therefore admitting that the Hirer defaulted in payment of the Hire Purchase Facility advanced to it by the plaintiff/applicant and the plaintiff/applicant upon the default served a notice of the principal debtor – the Hirer and a demand to pay the outstanding amounts to the defendants/respondents pursuant to the terms of the executed deeds of guarantee. The defendants/respondents upon service of the notice of default, failed, declined and or neglected to settle the amounts claimed.

iii. The defendants/respondents statement of defence merely alleges that the Hire Purchase Agreement No. 1797/AUG 2014 dated 19/9/2014 is invalid and unenforceable for want of registration which allegation is deceitful as the Hire Purchase Agreement was indeed registered and a certificate of registration issued dated 16th October 2014.

iv. Without prejudice to the above and notwithstanding the fact that the Hire Purchase Agreement No. 1797/AUG 2014 dated 19/9/2014 was duly registered and a certificate of registration issued, it is trite that Hire Purchase Agreement between the plaintiff and the Hirer were not subject to the Hire Purchase Act, Cap 507 as the hirer is a registered company, and the requirement as to registration under the Hire Purchase Act did not apply to it.

v. *The defendants/respondents are truly and justly indebted to the plaintiff as admitted in paragraph 3 of the filed statement of defence and that the Statement of Defence filed by the defendants/respondents herein discloses no reasonable defence in law against the plaintiff/applicant's claim herein.*

vi. *The defence filed herein is in plain eye- sight a mere sham, frivolous, baseless, vexatious and a waste of precious judicial time.*

vii. *The defendants/respondents defence will only serve to prejudice, embarrass and or delay the fair trial of this matter and consequently, prejudice the plaintiff's/applicant's rightful and just entitlement to its claim herein.*

viii. *The defence herein is rather an abuse of the process of this Honourable court.*

3. The respondents opposed the application through the replying affidavit of the 1st respondent's Managing Director **Mr. Kirit Bhangwandas Kanabar** who confirms that indeed, one High Grove Holdings Limited, applied for and obtained the said hire purchase facility for Kshs 192,421,850 but that the said agreement is invalid and defective for want of registration.

4. He states that owing to the said lack of registration, the striking out of the defence will be unjustified, premature and unfair as the validity of the agreement will require ventilation at the hearing of the main suit.

5. Parties canvassed the application by way of written submissions which I have considered.

6. Striking out of pleadings is governed by Order 2 Rule 15(1) (a) (b) (c) and (d) of the Civil Procedure Rules (CPR) stipulates 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.

7. In the present case, it is not disputed that the applicant entered into a Hire Purchase Agreement with Highgrove Holdings Limited (hereinafter "**the Borrower**") wherein the sum of Kshs 192,421, 850 was advanced to the Borrower at the respondent's request.

8. I note that the respondents did not deny that the borrower defaulted in servicing the loan facility and that they are truly indebted to the applicant. I further note that at paragraph 3 of the defence the respondents expressly admit several averments made in the plaint and especially paragraphs 10 and 11 thereof wherein the plaintiff/applicant states as follows: -

10. "The Borrower consistently defaulted in payment of the monthly instalments under the Hire Purchase Agreement and the plaintiff repossessed and sold the securities thereunder to recover the outstanding debt but the proceeds thereof did not offset the debt, leaving an outstanding debt of USD 388,661 equivalent to the sum of Kshs 40,809,378/= as at 31st March 2019, which sum continues to accrue Late Payment Charge at the rate of 5% per month from 1st April,2019 until payment in full.

11.As a result of the default by the Borrower in its repayment obligations under the Hire Purchase Agreement, the plaintiff served the 1st, 2nd and 3rd defendants with a notice of default of the principal debtor and demanded the defendants to pay the sum of USD 139,507 outstanding as at 13th July, 2017 and accruing late payment charges thereon of 5% p.m. as from 1st July, 2017 until payment in full pursuant to the Corporate and Personal Guarantees executed by the defendants, but the defendants defaulted to honour the terms of the executed guarantees by failing to pay the Principal Debtor's debt.

9. I note that the respondent's main line of defence is the claim that the subject Hire Purchase Agreement was not registered and is therefore defective and incapable of enforcement. Regarding the alleged lack of registration of the Hire Purchase Agreement, I note that the applicant demonstrated that the same was duly registered and a certificate of registration dated 16th October 214 issued as shown in annexure marked as "DW-5". **Be that as it may and even assuming that the Hire Purchase Agreement was not registered, courts have in interpreting Section 3 of the Hire Purchase Act taken the position that a Hire Purchase Agreement is not subject to the provisions of the Hire Purchase Act where the defendant is a body corporate.** In the present case, the hirer is a limited liability company and it therefore follows, that the Hire Purchase Agreement did not need to comply with the requirements for registration, as provided for by the Act.

10. I am guided by the decision *In The Matter Of First Lotto Limited* Winding-Up Cause No. 9 Of 2008 wherein the court observed that:

"Section 3 (1) of the Hire Purchase Act specifically excludes the application of the Hire Purchase Act on hire purchase agreements where the hirer is a body corporate".

11. My further finding is that this is a straight forward case of a debt that is not disputed and had not been settled. Case law is replete with judicial precedents on the subject of striking out of pleadings and I will not replicate them in this ruling. I will however take heed to the judicial caution that in an application such as the one before me, a court should not express any opinion on the matters in issue as that would

compromise fair trial by restricting the freedom of the trial Judge in determining the case should the suit be ultimately heard on merit. (See *Blue Shield Insurance Company Ltd v Joseph Mboya Oguttu* [2009] eKLR and *D.T. Dobie and Company (Kenya) Ltd v Muchina* (1982) KLR

12. In *Saudi Arabia Airlines Corporation v Premium Petroleum Company Limited* the court held 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.”

13. The policy considerations of the above approach are that while 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 temporizing on the case as long as possible; on the other hand, 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. In other words, the court should be concerned with dispensing substantive justice based on consideration of all facts of the case.

14. I have carefully considered all the averments made in the defence and I am persuaded that in plain eye-sight, it consists of an assembly of mere denials and admissions. Considering the defence in totality and the generalized denials I find that it is a mere sham and is a perfect candidate for striking out.

15. Accordingly, I strike out the defence and enter judgment for the Plaintiff and against the Defendant as prayed for in the plaint. It is so ordered.

Dated, signed and delivered via Microsoft Teams at Nairobi this 5th day of November 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Githui for Mwangi for plaintiff/applicant.

No appearance for defendants/respondents.

Court Assistant: Silvia