



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

HCCC NO. E 340 OF 2019

PRIME BANK LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

KALUWORKS LIMITED.....DEFENDANT/APPLICANT

RULING

1. The real question raised by the Defendant's application of 18th February 2020 is whether the Defence proposed by Kaluworks Limited (Kaluworks) raises triable issues. The Notice of Motion seeks to set aside a regular default Judgment entered in favour of Prime Bank (the Plaintiff or Bank) against Kaluworks and for leave to defend the matter.

2. The default Judgment is regular because there is an admission that summons to enter appearance and Plaintiff were duly served but Kaluworks did not enter appearance or file Defence on time. Kaluworks attributes this inaction to negotiations it initiated with the Bank after being served with the pleadings and summons but which did not bear fruit.

3. Kaluworks, a customer of Bank, is said to have been issued with short term promissory notes and which it promised to pay to the Plaintiff. The three notes are said to be in the sum of Kshs.50,000,000/=. The case of the Bank is that after the customer had defaulted in making the payment, the debt was converted into a term loan whose terms were reduced into a duly accepted letter of offer dated 27th December 2008.

4. Ranjedra Tewary, the Managing Director of Kaluworks, swore an affidavit on 18th February 2020 in support of the application. Annexed to his affidavit is a draft defence in which the following line of defence is raised:-

a) The respondent's suit is premised on the allegation that the Applicant issued the Respondent with promissory notes, an allegation which the applicant totally refutes.

b) The Respondent has not produced a single copy of the alleged promissory notes in its bundle of documents. The documents marked as promissory notes thus Annexure 1 and 2 are actually correspondences between the parties and not promissory notes.

c) The alleged promissory notes issued to the Plaintiff were issued by third parties and not the Defendant and thus the defendant cannot be compelled to bear the burden of other parties' obligations.

d) The Respondent has deliberately concealed crucial information to the honorable Court and proceeded to obtain judgment in relation to this suit.

e) The non-existence and/or concealment of the alleged promissory notes renders the Plaintiff/Respondent's suit a non-starter as they cannot prove their main allegation or claim.

f) Any subsequent actions done, or documents made pursuant to the said void promissory notes are thus rendered obsolete, including the purported conversation of the terms of the promissory notes made on 27th December 2018."

5. The Bank thinks this to be a wishy-washy defence. Let me interrogate the strength of the resistance offered by the customer.

6. From the customer's own confession (affidavit of Ranjedra Tewary), Summons and Plaintiff were served on Kaluworks on 18th October 2019. On 22nd October 2019, Kaluworks takes pen and paper and makes a proposal for settlement of the debt. A relevant part of that letter

is the admission of the debt in the following terms:-

“As per discussion with you, we have agreed to repay your outstanding short term note of Kshs.50 Million + Interest in 73 monthly installments of Kshs.1 Million which has started from 1st Jan 2019. During the period, Jan to April 2019, we have paid Kshs.4 Million. You will appreciate that during this period, company was not operating. This amount was paid to you by Investment House from their own cash flow. However, of late they also ran into cash flow issues and could not honour other installments as promised from May 19 onwards. In addition, Kshs.1 Million was debited to our accounts in Sept 2019.”

7. One line of Defence is that Kaluworks did not execute or issue the promissory notes and there is no evidence of the notes. Yet even if that was true, the letter of offer executed by Kaluworks on 5th February 2019 acknowledging the restructure of the dues on account of the promissory notes into a term loan of Kshs.50,000,000/= destroys the argument. The formal letter of offer cured whatever shortcomings there could have been in the issuance of the notes

8. The letter of offer also defeats the argument by Kaluworks that the promissory notes were issued by third parties and not the Defendant. In the letter of offer, Kaluworks owns up to the debt. It takes full ownership of the restructured facility. That does it for Paragraphs 6 and 7 of the proposed Defence.

9. In Paragraph 8, Kaluworks sets up the following defence:-

“8. In response to Paragraph 6 of the Plaintiff, the Defendant asserts that the attempt by the Plaintiff to restructure the alleged financial obligations by the letter of offer dated 27th December 2018 is unlawful as the said letter of offer was based on void promissory notes issued by third parties and not the Defendant.”

10. This may very well be a vain attempt to tarnish the letter of offer because there is a subsequent express admission of debt, the letter of Kaluworks dated 22nd October 2019 which is adverted to earlier in this decision.

11. On interest rate charged, the Defendant makes what, at first blush, seems to be an attractive argument. Kaluworks argued that the rate of interest of 22% is illegal because the letter of offer sets the interest rate at 4% p.a above the Central Bank rate being 9% p.a totaling 13% p.a. Further that the default rate is 0.75% and not 9% as alleged by the Bank.

12. First, there is express acknowledgement by Kaluworks, in its proposal of 22nd October 2019, that it was in default. In the letter of offer, Kaluworks covenants to pay default interest in the event of failure to keep up with repayment. Clause 10 provides that default rate to be 0.75% per month over and above the normal rate. If that rate is annualized, it becomes 9% per annum. That added to the 13% normal rate makes a rate of 22% per annum. That is the amount of interest sought by the Bank in its pleadings, that is 22% per annum. In a word, the interest charged by the Bank cannot be faulted.

13. There is no viable defence to the Bank's claim and this should be the end of this matter. The Notice of Motion dated 18th February 2020 is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 2nd Day of November 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17TH April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Mutua for Plaintiff.

No appearance for Defendant.