REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 709 OF 2009

(ELDORET HCCC NO. 18 OF 2019)

JOHN JOEL KANYALI.....PLAINTIFF

-VERSUS-

SBM BANK (KENYA) LIMITED.....DEFENDANT

RULING

[1] At the close of the Defence case on **4 February 2019**, directions were given for the filing of written submissions herein to enable the Court prepare its Judgment in the matter. The parties complied and filed their respective submissions. However, a disputation arose in connection with the Defendant's written submissions dated **28 March 2019. Mr. K'Opere** complained that the Defendant had unilaterally annexed additional evidence by way of 25 bank statements to its final submissions, which evidence the Plaintiff's side did not have the opportunity to test in the normal manner during the hearing. Accordingly, **Mr. K'Opere** took issue not only with the additional evidence, but also with what he termed **"extensive submissions on the new statements."**

[2] It was further the submission of **Mr. K'Opere** that the proper course would have been for Counsel for the Defendant, **Mr. Kanjama**, to apply for the re-opening of the case and to obtain leave of the Court to introduce the additional evidence; which was not done. He accordingly prayed that his objection be sustained and the additional evidence, as well as the submissions in respect thereof, be expunged from the record. In the alternative, he proposed that the Defendant's written submissions be taken back and replaced with fresh written submissions excluding the impugned schedules. Counsel underscored the fact that the additional statements have not been agreed upon by the parties; and that some of them are subject to a Court of Appeal decision; and therefore, can only be taken into account upon a joint reconciliation. Hence, his posturing was that the Plaintiff would be immensely prejudiced were the court to proceed in the manner proposed by Counsel for the Defendant.

[3] Mr. Kanjama, Counsel for the Defendant, narrated the challenges the Defendant encountered in defending this suit; one of which was that it was constrained to prepare several witness statements because some of its witnesses had left the Defendant's employ and could not be traced. He further pointed out that, in the course of time, the Defendant changed its name; and that in the middle of all these developments, there occurred an inadvertent failure on the part of the final Defence witness to present up-to-date Statements of Account before the Court. He explained that it was for that reason that the additional statements were filed along with the Defendant's written submissions. In **Mr. Kanjama's** view, it is curious that the Plaintiff should resist the additional statements, granted that one of the prayers he seeks is for accounts.

[4] Mr. Kanjama cited **Article 159(2)(a) and (d)** of the **Constitution,** and urged the Court to bear in mind the fact that this matter has been pending since **2009;** hence the need to administer justice herein without undue regard to procedural technicalities and without any further delay. He concluded his submissions by positing that no prejudice would be suffered by the Plaintiff should the statements be admitted in evidence, granted that the Plaintiff has already been extensively cross-examined on the bank statements. He thus made an oral application for the re-opening of the Defence case. To augment his submissions, **Mr. Kanjama** relied on the persuasive cases of **Joseph Ndungu Kamau vs. John Njihia [2017] eKLR** and **Pinnacle Projects Limited vs. Presbyterian Church of East Africa, Ngong Parish & Another [2019] eKLR** as well as **Sections 1A and 1B of the Civil Procedure Rules.**

[5] I have carefully considered **Mr. K'Opere's** objection and the response thereto by **Mr. Kanjama**. I have also perused the proceedings herein and the submissions filed by the parties in the light of Mr. **K'Opere's** objection. Indeed, the Defendant purported to file what it calls Updated Bank Statements to its written submissions, running from **2007** to **February 2019**. Those documents are by their very nature exhibits which the Defendant has purported to introduced long after the close of the Defence Case. I therefore have no hesitation in holding that that is irregular. The elaborate provisions of **Order 11 of the Civil Procedure Rules** are intended to ensure fair play in the adjudication

of disputes, and to eschew trial by ambush. As was pointed out by the Supreme Court of Kenya in **Raila Odinga & 5 Others vs. IEBC & 3 Others [2013] eKLR**:

> **"…There must be a fair and level playing field so that no party or the court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party or the court as a result of omissions or characteristics which were foreseeable or could have been avoided…"**

[6] In the same vein, it bears repeating the expressions of the Court of Appeal in **Daniel Toroitich Moi vs. Stephen Muriithi & Another [2014] eKLR** that:

> **"...Submissions cannot take the place of evidence. The 1st Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' *"marketing language"*, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all."**

[7] In the premises, I have no hesitation in holding that the introduction of additional evidence by the Defendant as attachments to its written submissions is plainly irregular and ought not to be countenanced. The Schedule and the Statements of Account in question are accordingly hereby expunged from the record.

[8] Counsel for the Defendant did make an oral application for the re-opening of the Defence Case; and in response thereto, **Mr. K'Opere** for the Plaintiff took the view that, whereas the Court has discretion to entertain and grant such an application, such discretion ought to be exercised judiciously. According to him, re-opening the case will occasion further delay; and that the Overriding Objective of the **Civil Procedure Act** is intended to ensure justice for both sides of a disputation. He accordingly urged for the dismissal of the oral application for the re-opening of the case.

[9] I have given consideration to the oral application for the re-opening of the Defence Case and the submissions made in that regard by learned counsel, including the two authorities relied on by **Mr. Kanjama**. I have no quarrel with the viewpoint taken by **Hon. Nyakundi, J**. in the **Pinnacle Projects Limited Case**, that:

> **"…it is important that in any judicial process adjudication parties involved be given an opportunity to present their case and have a fair hearing before the decision against them is made by the respective judge or magistrate. It is not lost that procedural fairness is deeply ingrained in our administration of justice system."**

[10] It is, however also imperative that an even-handed approach be adopted to ensure justice is done to both sides of the controversy. Hence, I share the view taken by **Hon. Kasango, J.** in **Samuel Kiti Lewa vs. Housing Finance Co. of Kenya Ltd & Another [2015] eKLR**, that:

> **"The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion, the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence."**

[11] Thus, in the Australian case of **Smith vs. New South Wales [1992] HCA 36** it was held that:

> **"If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered. In the latter situations the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised."**

[12] In this instance, the explanation by Mr. Kanjama was that, out of inadvertence, the last Defence witness omitted to produce the documents in issue. He pointed out that these are documents in respect of which the Plaintiff was extensively cross-examined and therefore that no prejudice would be suffered by him if the same are admitted in evidence. He further pointed out that since one of the Plaintiff's prayers is for accounts, it would be in his interest that up to date statements are placed before the Court for to enable it fully and finally determine the issues in controversy between the parties.

[13] A perusal of the pleadings and the proceedings in the court record does confirm that indeed, one of the Plaintiff's prayers is for:

> **"An order compelling the Defendant to furnish the Plaintiff with a full Statement of Accounts and a breakdown of all disbursements for the loans granted under the Charge dated 26/03/08, further charge dated 11/07/08 and second further charge dated 24/11/08."**

[14] The Plaintiff also prayed for an Order for Reconciliation of all the Plaintiff's Loan Accounts with the Defendant by an Independent Financial, Accounting or Audit Firm to be agreed between the parties and/or appointed by the Court on such terms as the Court may determine. In the premises, I would agree that no prejudice would be occasioned to the Plaintiff should the additional statements be admitted in evidence. I am convinced that the justice of the case would favour a re-opening of the Defence case with a view of having the additional statements admitted in evidence. As was aptly stated by Hon. Musinga, JA, in Equity Bank vs. West Link MBO Limited:

> ***"Courts of law exist to administer justice and in so doing they must balance between competing rights and interests of different parties but within the confines of law, to ensure the ends of justice are met."***

[15] The foregoing being my view of the matter, I would allow the Defendant's oral application to have the Defence Case re-opened as prayed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 22ND DAY OF JULY 2019

OLGA SEWE

JUDGE