



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**CIVIL SUIT NO. 1 OF 2019**

**EMIDAN ENTERPRISES CO. LTD.....PLAINTIFF/APPLICANT**

**VERSUS**

**KENNETH NYAGA GETAWERU.....DEFENDANT/RESPONDENT**

**R U L I N G**

**A. Introduction**

1. This ruling pertains to the application dated 3<sup>rd</sup> June 2019 in which the applicant seeks this court's for judgment as prayed in the plaint against the respondent on admission or in the alternative that the defence be struck out.
2. It is the applicant's case that the respondent has admitted owing him Kshs. 22,000,000/= the principal sum herein and that the defence filed raises no triable issues.
3. The application is brought under Sections 1A, 1B and 3A of the Civil Procedure Act as well as Order 13 Rule 2 of the Civil Procedure Rules 2010.
4. In response, the respondent averred that despite admitting owing the applicant, the applicant in his suit has not demonstrated the regime under which the loan contract was entered into or whether he was compliant with the necessary financial regulatory bodies' requirements prior to lending him the money.
5. The defendant further states that he has not acted in a manner to portray that he would default on the agreement and that the instant application by the applicant smacks off mischief and is an affront to the respondent's right to a fair trial enshrined under **Article 50 (2) of the Constitution** and the same ought to be dismissed.
6. In the alternative to the order's sought by the applicant in his application herein, it is the defendant's case that the court should order the parties herein to enter into a consent on the payment terms of the Kshs. 22,000,000/= owed or the matter be referred to mediation or alternative dispute resolution.
7. Parties agreed to dispose of the matter by way of written submissions.

**B. Plaintiff's Submissions**

8. It is submitted that the defendant has unequivocally admitted the claim against him specifically in paragraphs 8, 9, 11, 14, 16 and 17 and further in his replying affidavit herein where he moves the court to grant orders that the parties herein enter consent regarding the payment terms of the monies owed. It is the applicant's submission that this admission is plain and obvious and as the defence file raises no triable issues the instant application should be allowed. Reliance on this proposition is placed on the cases of **Margaret Njeri Mbugua v Kirk Mweya Nyaga (2016) eKLR** and that of **Polythene Industries Limited v Buzeki Dairy Limited (2015) eKLR**.

**C. Defendant/Respondent's Submissions**

9. It is submitted that the defence as is did not clearly bring out the issues that the respondent would have wanted this court to determine and this is a mistake which should not be visited on him and lead him away from the seat of justice. Reliance is placed on the cases of **Phillip Chemwolo & Another v Augustine Kubende [1986] eKLR**, **Elinda Muras & 6 Others v Amos Wainaina [1978] KLR** which was cited in the case of **Bank of Africa Kenya Limited** where the court in both instances held inter alia that *the door of justice is not closed because a mistake has been made..*
10. Reliance is also placed in the case of **WZO Konjit Tedla & Another v Osborne Ashiono Mutumira [2017] eKLR** where it was held

that “no suit ought to be summarily dismissed unless it appears ...so weak as to be beyond redemption and incurable by amendment.”

11. The applicant submitted that the defence filed in the suit herein raises a triable issue which is that of interest as prayed for by the applicant in prayer (c) of his plaint as the loan agreement had no term for interest whatsoever. Reliance is placed on the case of **D.T. Dobie & Company Kenya Ltd v Joseph Mbaria Muchina, CA No. 37 of 1978** where it was held that .. *if a suit has shown a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it..*

12. It is further submitted that justice should be administered without undue regard to procedural technicalities as enshrined in article 159 (2) (d) of the constitution and as was held in the case of **Republic v District Land Registrar, Uasin Gishu & Anor [2014] eKLR.**

13. It is submitted that the respondent is entitled to full costs of this suit as it was held in the case of **Supermarine Handling Service Limited v Kenya Revenue Authority [2010] eKLR.**

#### **D. Analysis & Determination**

14. I have carefully considered the application, the supporting affidavit and the replying affidavit filed herein by the parties. I have also considered the various submissions made and the authorities cited by learned counsels. The motion is brought under **Sections 1A, 1B, and 3A of the Civil Procedure Act, Order 13 Rule 2 of the Civil Procedure Rules**. The applicant seeks that judgement be entered as prayed in the plaint against the admission on admission and in the alternative the defence be struck out. **Order 2 Rule 15** deals with striking out of pleadings and provides 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.”*

15. It cannot be gainsaid that striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham. The Court of Appeal in **Blue Shield Insurance Company Ltd v Joseph Mboya Oguttu [2009] eKLR** restated these principle thus:

*“The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows: -*

*“The power to strike out should be exercised 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.”*

*We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 506, where the Lord Justice said: -*

*“The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.”*

*We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.”*

16. Whereas the power to strike out pleadings is a drastic step that should be used sparingly and only in the clearest of cases, a balance must be struck between this principle and the policy consideration that an applicant should not be kept away from his judgment by unscrupulous defendant who files a defence which is a sham simply for the purpose of delaying the finalization of the case. (See the case of **Kenya Commercial Bank v Suntra Investment Bank Ltd [2015] eKLR**). A careful consideration of the facts placed before the court reveals that the defendant’s statement of defence does indeed comprise of mere denials, whereas the applicant has shown that the respondent has made express admissions with regard to the applicant’s claim. As the notice of motion dated seeks orders of striking out as an alternative to judgment on admission, I propose to consider the application under **Order 13 Rule 2 of the Civil Procedure Rules 2010**, reads thus:

*“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.”***

17. The jurisprudence relating to applications made for judgment on admission is set out in the in the case of **Choitram v Nazari [1984] KLR 327** where the at Madan, JA stated as follows: -

***“For the purpose of Order XII Rule 6, admission can be expressed or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning.” (emphasis added)***

18. In the same judgment, as per **Chesoni Ag. JA**,

***“Admissions of fact under Order XII rule 6 need not be on the pleadings. They may be in correspondence or documents which are admitted or they may even be oral. The rules used words “otherwise” which are words of general application and are wide enough to include admission made through letter, affidavits and other admitted documents and proved oral admissions.....It is settled that a judgment on admission is in the discretion of the court and not a matter of right that discretion must be exercised judicially.”***

19. It is important to note that the current Order 13 is replica of Order XII in the now repealed Civil Procedure Rules before the 2010 version was enacted.

20. Thus, a court of law will act to strike out a defence and enter judgment on admission, if the admission relied on is clear and unambiguous. It is trite law that an admission need not only be in a pleading but can be discerned in any other way.

21. It is the applicant’s case that the respondent has admitted owing him Kshs. 22,000,000/=, the principal sum herein and that the defence filed raises no triable issues. In response, the respondent admits owing the applicant the sum of Kshs. 22,000,000/= but states that the applicant has not demonstrated the regime under which the loan contract was entered into or whether he was compliant with the necessary financial regulatory bodies’ requirements prior to lending him the money.

22. The respondent also states that he has not acted in a manner to portray that he would default on the agreement and that the instant application by the applicant smacks of mischief and is an affront to the respondent’s right to a fair trial enshrined under Article 50 (2) of the Constitution. In the alternative, it is the respondent’s case that the court should order the parties herein to enter into a consent on the payment terms of the Kshs. 22,000,000/= owed or the matter be referred to mediation or alternative dispute resolution. In his submissions, the respondent submits that the defence did not clearly bring out the issues that he would have wanted to be determined.

23. On the issue of mistake of the advocate as claimed by the respondent refer to the case of **Savings and Loans Limited v Susan Wanjiru Muritu Nairobi (Milimani) HCCS No.397 of 2002 Kimaru, J** expressed himself as follows: -

***“Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a Case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her Case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigant on account of such Advocate’s failure to attend Court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present Case, it is apparent that if the Defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff’s determination to execute the decree issued in its favour, is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the Court, it would be a travesty of justice for the Court to exercise its discretion in favour of such a litigant. (emphasis added)***

24. In my view, it is not enough for a party to simply blame the advocate but it must be shown that tangible steps have been taken by him in following up his case. The respondent herein has not shown what steps he took to rectify the alleged mistake for which he blames on his advocate. In fact, I find no mistake at all in the defence read as a whole leading me to a conclusion that the respondent was just being honest.

25. The respondent also submits that his defence raises a triable issue which in regard to the interest prayed for by the applicant in the plaint for the loan agreement had no term for interest whatsoever.

26. I do note that the applicant’s claim is based on the agreement for refund of money entered into between the parties herein on the 5<sup>th</sup> September 2018. Paragraph 5 therein provides;

***“That in default of any single instalment, the outstanding balance shall become due and owing and shall attract interest at the rate of 14% per annum until payment in full.”***

27. In paragraph 3, the defendant admits that he entered into an agreement with the applicant herein to refund Kshs. 22,000,000/= being consideration advanced for a transaction that was not successful and the parties agreed to revoke the same. Further in paragraph 5 of his statement of his defence the respondent herein does not deny that the cheque he issued to the applicant’s counsel were dishonored by his bank.

28. It is my considered view that the defence amount to an admission by the respondent of the claim. It is noteworthy that even in his replying affidavit to the instant application at paragraph 10, the respondent urges the court to order the parties herein to enter into a consent on the payment terms of the monies owed or the matter be referred to mediation or alternative dispute resolution. This is still a further admission of the claim and it is not a triable issue.

29. The representations by the respondent in his statement of defence as well as his replying affidavit to the instant application are, in my considered view, binding on the respondent. The respondent cannot therefore depart from this position as a party to an agreement. He agreed to refund Kshs. 22,000,000/= at an agreed interest rate on 5<sup>th</sup> September 2018. It is clear that the respondent not only admitted liability but also made a commitment to commence payments within given timelines. In effect, any assertion to the contrary in the respondent's statement of defence constitutes mere denials.

30. Having therefore carefully considered all the forgoing, it is my finding that the respondent made a clear and unambiguous admission that he was indebted to the applicant in the sum of **Kshs. 22,000,000/=** which debt has not been paid as agreed by the parties. There is equally sufficient evidence to demonstrate that the respondent has no reasonable defence to offer regarding the afore stated amount.

31. In the result, I find the application dated 3<sup>rd</sup> June 2019 meritorious and allow it in the following terms: -

- a) *That the defence filed on 11/03/2019 by the respondent is hereby struck out.*
- b) *That judgment be and is hereby entered for the applicant as prayed in the plaint.*
- c) *That costs payable by the respondent.*

32. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 10<sup>TH</sup> DAY OF DECEMBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Muriuki for Kathungu for Plaintiff/Applicant**

**Ms. Mbwiria for Ms. Wangoko for Defendant/Respondnet**