



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 104 OF 2015

NATIONAL BANK OF KENYA LIMITED.....PLAINTIFF

VERSUS

KHUNAIF TRADING COMPANY LIMITED.....1ST DEFENDANT

NURU ALI SALIM JEZAN.....2ND DEFENDANT

MUNIF ALI SALIM JEZAN.....3RD DEFENDANT

RULING

1. The application before me is dated 20th June, 2017. It is premised on the provisions of Section 3A of the Civil Procedure Act, Order 2 Rule 15(1)(a) (b) and (d), Order 13 rule 2 of the Civil Procedure Rules and other enabling provisions of the law. It seeks the following orders:-

- (i) That the defence struck out;
- (ii) That Judgment be entered for the plaintiff against the defendants as prayed in the plaint; and
- (iii) Costs of this application be provided for.

2. The application is supported by the affidavit of Fatuma Mohamed sworn on 20th June, 2017 and grounds upon which the application is anchored. The respondent neither filed a replying affidavit nor grounds of opposition. Mr. Mwawasi, Learned Counsel for the respondent however attended court to oppose the application.

3. Mr. Mwaniki, Learned Counsel for the applicant prayed for the defence to be struck out and for Judgment to be entered as prayed in the plaint, for the reasons that the defence is a mere denial of the plaintiff's claim, is frivolous and vexatious. He stated that the defence admits the plaintiff's claim. In his view, the defence is an abuse of the court process. He relied on the affidavit in support of the application and the authorities they had filed.

4. On his part, Mr. Mwawasi submitted that the defence raises triable issues that can only be determined after a full hearing. He stated that there is the issue of interest that has been charged which cannot be brushed aside. He prayed for the application to be dismissed.

ANALYSIS AND DETERMINATION

The issues for determination are:-

- (i) If the defence should be struck out for not raising triable issues; and
- (ii) If Judgment should be entered for the plaintiff against the defendants as prayed in the plaint.

5. The plaintiff filed a plaint on 3rd August, 2015 which it amended on 21st March, 2017. Its contents are both detailed and very elaborate. Paragraph 6 of the amended plaint outlines the facilities that were offered to the 1st defendant by the plaintiff. The plaintiff avers to have advanced the principal sum of Kshs. 13,003,020.00 to the 1st defendant for the purchase of a prime mover and Kshs. 2,880,000.00 was disbursed to the 1st defendant for the purchase of a new trailer. The plaintiff further avers that it was a term of offer that the facilities would

attract interest at variable rates of 18.75% per annum. The 1st defendant was liable to pay to the plaintiff all expenses and other charges for the maintenance and management of the facility. The facility would be repaid by way of 48 monthly installments with effect from 28th February, 2014 and thereafter at monthly intervals until payment in full.

6. As per paragraph 6(v) of the amended plaint, the asset finance facilities were to be secured by way of Hire Purchase agreements over the prime mover and the trailer, including joint registration of the prime mover and the trailer in the names of the plaintiff and the 1st defendant and personal guarantees by the 2nd and 3rd defendants as the Directors of the 1st defendant for the sum of Kshs. 15,883,020.00 each.

7. Paragraphs 11 and 12 of the amended plaint contain allegations of default on the part of the 1st defendant in repayment of the asset facilities. Paragraph 13 thereof states that the plaintiff filed an incidental suit being Nairobi Miscellaneous Application No. 829 of 2015 at the Chief Magistrate's Court for orders of repossession following which it was able to recover the prime mover and trailer which the plaintiff disposed of. The averment states that the prime mover and trailer were sold for the sum of Kshs. 7,228,000/-. A cost of Kshs. 2,841,279/- was thereby incurred which was debited to the 1st defendant's recoveries account No. 01099090326300.

8. Paragraph 14 of the amended plaint discloses that the plaintiff's claim as against the 1st defendant as the principal debtor and against the 2nd and 3rd defendants as guarantors is for the sum of Kshs. 14,341,512.35 from the 1st defendant's asset finance facility account No. 01105090326300 together with interest thereon at the variable rate standing at 23% per annum, with effect from 7th December, 2016 until payment in full.

9. A further claim is for the sum of Kshs. 4,142,505.60 due and owing from the 1st defendant's asset finance facility account number 01105090326301 together with interest thereon at the variable rate then standing at 23 % per annum with effect from 7th December, 2016 until payment in full. There is a claim for a further sum of Kshs. 2,841,279/= due and owing to the 1st defendant's recoveries current account No. 01099090326300 being the costs of recovery of the prime mover and trailer by the plaintiff as a consequence of the defendants' breach of the terms of lending and hire purchase agreement.

10. The defendants filed their statement of defence on 4th September, 2015. They did not file an amended defence to counteract the averments made in the amended plaint. In paragraph 6 of their statement of defence, the defendants aver that they do not owe the plaintiff the amounts claimed in the plaint and if they owe the plaintiff any amounts, which is denied, then the same is subject to verification as the plaintiff has been charging and/or purporting to charge undisclosed and irregular amounts or rates of interest. The defendants further aver that the 1st defendant has made substantial repayments to the plaintiff and deny owing the plaintiff the amount claimed.

11. In paragraph 8 of the statement of defence, the defendants aver that the plaintiff's suit is premature as negotiations are still ongoing on the restructuring and rescheduling of the repayments to be made by the defendants.

12. This court has considered the depositions in the supporting affidavit of the plaintiff's deponent, the documents availed by the plaintiff in its bundle of documents, the averments contained in the amended plaint and the statement of defence as well as the submissions made by the Counsel for the parties herein. This court at this stage is not expected to conduct a mini-trial but to satisfy itself that indeed the defence filed by the defendants raises no triable issues and is for striking out.

13. The Court of Appeal in the case of **Raghibir Singh Chatte vs. National Bank of Kenya Limited** [1996] eKLR cited with approval the words of Jessel M.R., in **Thorn vs. Holdsworth** [1876] 3 Ch. 637 at 640, as follows:-

“When a party in any pleading denied an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum, or any part thereof, or else set out how much he received. And so, when a matter of fact is alleged with diverse circumstances, it shall not be sufficient to deny it as alleged along those circumstances, but fair and substantial answer must be given.”

14. In **Magunga General Stores vs. Pepco Distributor Ltd** (1988-92) 2 KAR 89 Platt J.A., (as he then was) stated as follows:-

“First of all, a mere denial is not a sufficient defence in this type of case there must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore to deny liability without some reason given.”

15. In **DT Dobie and Company (Kenya) Ltd vs Muchina** [1982] eKLR, Madan J.A., stated as follows regarding the striking out of pleadings:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows 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 the case before it.”

16. The power to strike out pleadings confers discretion on the court and is exercised after paying due regard to the pleadings in issue. I am of the considered decision that the statement of defence filed herein is a sham as the defendants in their defence did not even attempt to give a substantive response to the issues raised in the plaint or the amended plaint. This is despite the comprehensive documentation that was availed to them through the bundle of documents filed by the plaintiff. It is my finding that the statement of defence consists of mere denials. In the said circumstances it would serve no purpose to sustain such a hopeless defence. I hereby strike it out.

17. Consequently, I enter Judgment in favour of the plaintiff as against the defendants jointly and severally as prayed in the amended plaint for:-

(i) The sum of Kshs. 14,341,512.35 due and owing from the 1st Defendant's Asset Finance facility account number 01105090326300;

(ii) The sum of Kshs. 4,142,505.60 due and owing from the 1st Defendant's Asset Finance Facility Account number 01105090326301;

(iii) Interest on (a) and (b) above at the rate of 23% per annum from 7th December, 2016 until payment in full;

(iv) The sum of Kshs. 2,841,279.00 due and owing on the 1st Defendant's recoveries account number 01099090326300; and

(v) Costs of the suit, plus interest thereon at court rates are awarded to the plaintiff from the date of Judgment until payment in full.

DELIVERED, DATED and SIGNED at MOMBASA on this 4th day of May, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. E. Nyongesa holding brief for Mr. Mutua for the plaintiff

No appearance for the 1st, 2nd and 3rd defendants

Mr. Oliver Musundi - Court Assistant