



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO 595 OF 2015

BEATRICE MUTHONI KIRATU.....PLAINTIFF

VERSUS

RICHARD MUHERIA KURIA.....DEFENDANT

RULING

1. The Applicant/Plaintiff through a plaint dated 25th November 2015 sued the defendant claiming Kshs.7, 176,300 being refund of sum advanced to the defendant between 22nd September 2014 and 7th October 2014 with interest and costs.
2. The defendant filed defence dated 20th January 2016 praying the plaintiff's suit to be dismissed with costs.
3. Before me is a Notice of Motion dated 28th January 2016 seeking the following orders:-
 - a) THAT the Defendant's Statement of Defence dated 20th January 2016 and filed in court on 20th January 2016 be struck out.
 - b) THAT Summary Judgment be and is hereby entered for the Plaintiff against the Defendant for Kshs.7,176,300.00 as prayed in the Plaint dated 25th November 2015 together with interest and costs as prayed at prayer (b) and (c) of the Plaint.
 - c) THAT the Honourable court do give such further or other orders as it may deem fit in the interest of justice.
 - d) THAT the costs of this application together with those of the entire suit be borne by the Defendant.
4. The application is premised on grounds numbers (a) to (g) on the face of the application and supported by annexed affidavit of Beatrice Muthoni Kiratu, the Plaintiff/Applicant, sworn on 28th January 2016 and the annexures thereto "**BMK-1 to BMK-5.**"
5. The Respondent was duly served with a hearing notice as deponed in the affidavit of service dated 30th October 2018 sworn by Ismail Kamau Mwaura, a duly licensed approved and authorized process server of the High Court.
6. In the instant case, this court by its ruling of 15th June 2017 dismissed the defendant's application seeking extension of time within which the defendant should file further affidavits to the present application and amendment of the defence save for the written submissions. In view of the above the application is deemed unopposed.
7. The Applicant claim is basically for refund of Kshs.7, 176,300/- advanced to the defendant by the plaintiff as a loan between 22nd September 2014 and 7th October 2014 as tabulated under paragraph 4 of the plaint and for which sum the defendant issued to the plaintiff Nine (9) cheques for various amount as itemized under paragraph 9 of the plaint; that on presentation of all Nine (9) cheques, they were dishonoured by the defendant's bank. That after defendant failed to pay the amount due, the plaintiff reported at the Central Police Station in Nairobi on 19th August 2015 as per **OB No. 105/19/08/2015**. That a **Criminal Case No. 1888 of 2015** was instituted by the state against the defendant for issuing bouncing cheques to the plaintiff. The defendant has todate not paid the sum claimed.
8. The defendant in his defence dated 20th January 2016 denies all the contents of the plaintiff's plaint but even without admitting any part of the plaintiff's claim avers under paragraph 9 of the defence of having paid to the plaintiff Kshs.1,800,000/- and the remaining balance of Kshs.300,000/-. He also admits pending of the criminal case No.1888 of 2015.

9. I have considered the grounds in support of the application and the defendant's response as well as the submissions. The plaintiff's claim is specific with detailed particulars as to the claim and cheques issued to the plaintiff by the defendant; however the defendant's defence is a mere denial. It has not specifically addressed the issues stated in the plaint. It is devoid of material information, on specific averments in responding to the pleadings.

10. I have perused the court record and I have noted that the defendant's defence is not accompanied with the list of witnesses and witness statements. Order 7 Rule 5 of the Civil Procedure Rules makes it mandatory to have list of witnesses to be called at the trial, and copies of documents to be relied on at the trial accompanying the statement of defence. I find such failure can be taken as there being no reasonable defence and that the defendant has no evidence to support his denial, that he doesn't owe the plaintiff the sum of Kshs.7,176,300/-.

11. The defendant in his Replying affidavit avers that he did not borrow money from the Applicant nor did he issue her with postdated cheques. He does not, however, claim the aforesaid cheques were stolen and/or forged. He did not deny the cheques to be his. The plaintiff has incidentally attached documents demonstrating she had money in her bank account, withdrew the money and lent the amount thereto to the defendant (see **BMK-2**). She has attached cheques issued to her by the defendant (**BMK-3**); and (**BMK-4**) documents showing the cheques were all dishonoured. Having been satisfied that the defendant issued the cheques, which were dishonoured, to the plaintiff, I find that, he issued the same for a good cause, as people do not go about dishing out cheques for such substantial amount to strangers, without any reason unless one is of unsound mind. The defendant has not been described as person of unsound mind. The cheques issued by the defendant were all post-dated and for different amounts and I am satisfied the same were issued by the defendant in efforts to settle the amount he owed the plaintiff.

12. In the case of **Roma Trading Company Ltd Vs. Purshotam H. Pathak (1998) eKLR**, Hon. Justice P.N. Waki; as he then was; faced with similar circumstances to the present case of cheque being issued in attempted settlement of a due debt but bouncing on presentation for clearance held thus:-

"I am inclined to think that a defence is far from genuine.... cheques amounting to Kshs.2,593,383 could not have been issued by the deceased for nothing, I accept as submitted that they are evidence of part payment for the goods supplied in the two months before the deceased died. I would in the circumstances enter judgment for the sum."

13. I have considered the plaint and the defence in which the defendant admits there is a pending **criminal case No.1888 of 2015** arising out of the Nine (9) bouncing cheques as stated under paragraph 5 of the plaint. There is no defence of the same having been obtained from the defendant fraudulently or having issued the same through coercion. I take that the same were issued freely and voluntarily in exchange for the sum loaned. I find that it would be unconscionable to let the defendant get away with such substantial amount without paying the claim simply because there is no agreement in writing produced, notwithstanding that he committed himself to pay the amount loaned and did issue nine (9) cheques for payment. I find the defendant's defence, of mere denial to be no defence, to a specific and particularized claim, such as the present case. The defendant's allegation of having paid Kshs.1, 800,000/- and without disclosing the sum advance is vexatious and frivolous defence. I find that he is indebted to the plaintiff as pleaded in the plaint.

14. In the case of **Delex Motor Limited Vs Blue Shield Insurance Co. (2010) eKLR**, it was held, where a defence contains mere denial, it is only fair and just to strike the defence and enter judgment in favour of a plaintiff in claims for liquidated sum.

15. The defendant's defence is a mere denial, its is evasive to the plaintiff's specific and particularized pleading, it does not deny the defendant's own cheques which he issued in exchange for the loan advanced to him; the defence has not alluded to any reasons for denial of the plaintiff's claim. I find a defence of mere denial not sufficient denial of liability without some reasons having been set out. The defendant's defence is vexatious and frivolous and only intended to delay prompt determination of this matter. I find no basis of the same being maintained on record, as it would most likely prejudice the plaintiff's claim. I accept the plaintiff's submissions that the Nine (9) (nine) postdated cheques were issued as repayment for sum loaned to the defendant by the plaintiff.

16. The upshot is that the Plaintiff/Applicant's application dated 28th January 2016 is meritorious and is accordingly allowed. I proceed to make the following orders:-

a) The defendant's statement of defence dated 20th January 2016 be and is HEREBY struck out.

b) That summary of judgment be and is HEREBY entered for the plaintiff against the defendant for the sum of Kshs.7,176,300/- as prayed in the plaint dated 25th November 2015 together with interest at court rate from the date of filing the suit.

c) The plaintiff is awarded costs of the application and the suit.

Dated, signed and delivered at Nairobi this 13th day of December, 2018.

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J .A. MAKAU

JUDGE