



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 38 OF 2014

CFC STANBIC BANK LTD.....PLAINTIFF

VERSUS

1. JOHN NDIRANGU KAREGA.....1ST DEFENDANT

2. JANE WANJUGU IRERI.....2ND DEFENDANT

3. BEAUTY COLLECTION LIMITED.....3RD DEFENDANT

RULING

1. The application before me is dated 28th August, 2014. It has been brought under the provisions of Order 2 rule 15(1) (b), (c) and (d) of the Civil Procedure Rules, 2010 and Sections 1A, 1B and 3A of the Civil Procedure Act. It seeks the following orders:-

i. That the defendants' statements of defence be struck out and judgment be entered for the plaintiff against the defendants for Kshs. 6,651,089.05 plus interest at 10% above the bank's base rate currently at 13.5 % per annum to be calculated from 21st June, 2013 on daily balances and compounded with monthly rates until payment in full as prayed in the plaint; and

ii. That costs of the suit and of this application be to the plaintiff.

2. It is supported by the grounds on the face of it and the supporting affidavit of Boniface Machuki sworn on 28th April, 2014. The defendants (respondents) on 18th December, 2014 filed a replying affidavit sworn on 17th December, 2014 by John Ndirangu Karega, the 1st defendant (1st respondent) on his own behalf and on behalf of the two other respondents. The respondents also filed grounds of opposition on 18th December, 2014.

3. Mr. Adala, Counsel for the applicants sought for the striking out of the statements of defence dated 14th and 15th May, 2014 and for judgment to be entered as prayed in the plaint. He stated that under the provisions of Order 2 rule 15(1) (b), (c) and (d) of the Civil Procedure Rules, this court has powers to strike out pleadings that are scandalous, vexatious and frivolous or that may prejudice, embarrass or delay the court process.

4. He cited the case of **G.B.M. Kariuki vs Nation Media Group & 3 Others** [2012] eKLR which sets out the principles upon which courts act upon in considering such applications.

5. Counsel further submitted that the defence filed herein is a mere denial and a sham. In his view, it raises no triable issues. He indicated that the statements of defence do not in any way traverse or challenge the averments in the plaint. He made reference to the 1st and 2nd respondents' statement of defence filed on 14th May, 2014 where in paragraph 23 they deny owing the applicant money but in paragraph 28 they admit of the existence of a deed of guarantee. It was asserted that the defence is mixed up and does not challenge the existence of the claim.

6. Counsel also contended that the 3rd defendant's defence also raises no triable issue and that the filing of separate statements of defence is a ploy to try and evade provisions of the law. The court was informed that the 3rd defendant in its statement of defence denies that a guarantee was executed. He cited the case of **Five Forty Aviation Ltd. Vs Trade Winds Aviation** [2015] eKLR where the court stated that a triable issue does not mean one which will succeed but is a case raising prima facie defence so as to go for adjudication.

7. The applicant's Counsel concluded by stating that their application does not bring a separate cause of action. He did not agree with the respondents' grounds of opposition that the application should have been brought under Order 36 rule 2 of the Civil Procedure Rules.

8. Mr. Buti, Learned Counsel for the respondents informed the court that the 1st and 2nd respondents filed their defence as guarantors hence their defence is separate and distinct from that of the 3rd respondent who is the borrower. Counsel submitted that the applicant cannot combine 2 prayers for striking out and summary judgment in one application. He referred the court to paragraphs 17, 18 and 19 of the replying affidavit which addresses the issue of summary judgment.

9. He submitted that the statements of defence filed are not frivolous and that the applicant on 27th May, 2014 filed 2 replies to the same. In the reply to the defence of the 1st and 2nd respondents, the applicant, in paragraph 1 thereof joins issues with them. In paragraph 5 of the said reply to the defence, the applicant avers that the guarantee and indemnity were properly executed and that any variations were legally done. Counsel submitted that the foregoing was a triable issue. He further submitted that the applicant put the 1st and 2nd respondent to strict proof of paragraphs 10 to 17 of the defence. Mr. Buti submitted that a result of the foregoing, the suit has to go to full hearing.

10. Counsel informed the Court that with respect to the response to the 3rd respondent's defence, paragraph 5 puts the 3rd respondent to strict proof thereof. He referred to the provisions of Order 3 rule 5(1) of the Civil Procedure Rules which deals with joinder of issues, which can only be heard at a full hearing. He also referred to paragraph 23 of the 1st and 2nd defendant's defence where they deny that they owe the applicant Ksh. 6,651,089.05, whereof they state that they never signed any guarantee and that it was altered without their consent.

11. He referred to the case of **Kenya Commercial Bank vs Suntra Investment Bank Ltd.** [2015] eKLR in the applicant's list of authorities which states at page 6, "..... *Except, I can state comfortably that these principles now draw, not only from judicial precedent, but from the principles of justice enshrined in the Constitution especially in Articles 47, 50 and 159. The first guiding principle is that, every court of law should pay homage to its core duty of serving substantive justice in any judicial proceeding before it, which explains the reasoning of Madan J.A. in the famous D.T. Dobie case that the court should aim at sustaining rather than terminating a suit. That position applies mutatis mutandis to a statement of defence and counter-claim. Secondly, and directly related to the foregoing Constitutional principle and policy, courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party of a hearing, thus, driving such party away from the judgment seat; which is a draconian act comparable only to the proverbial drawing of the sword of damocles.*"

12. Mr. Buti submitted that the statements of defence as filed herein raise triable issues. He referred to the 3rd respondent's defence which states that its motor vehicle was auctioned in the year 2011, but looking at the accounts given by the applicant they have never credited the said money to its accounts. Counsel

submitted that the foregoing was not frivolous.

13. In response to the above, Mr. Adala submitted that the respondents were shifting goal posts by stating that a deed of guarantee was not signed and at the same time claiming that if it was signed, then it was altered without their consent. In his view, they are being evasive.

ANALYSIS AND DETERMINATION

The issues for determination are:-

- (i) If the statements of defence filed herein are incompetent to render them to be struck out;
- (ii) If Judgment should be entered for the plaintiff as against the defendants.

14. Order 2 rule 15 sub-rule 1 of the Civil Procedure Rules provides as follows:-

“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. In paragraphs 18 of the supporting affidavit, the applicant deposes that the respondents have no valid defence to the applicant’s claim as their defences are frivolous, vexatious and an abuse of the court process.

16. In paragraph 19 thereof the deponent states that the statements of defence raise no triable issue and they will delay, prejudice and or embarrass the fair trial of this suit.

17. Counsel for the applicant did not expound on the manner in which the statements of defence filed by the respondents will delay, prejudice or embarrass the fair trial of the suit. Although he submitted that the defence filed herein is a mere denial and sham, he failed to give a further exposition to the reasoning behind the said submission.

18. A perusal of paragraphs 3 of the 1st and 2nd respondents’ statement of defence is indicative of the fact that the respondents have denied having executed any guarantee/indemnity to secure the repayment of any ***“loan, financial accommodation, banking facilities, overdraft and/or advances granted to the 3rd defendant “as pleaded in an omnibus manner in paragraph 5 of the plaint.”*** My understanding from a further reading of paragraph 5 of the plaint is that the respondent takes issue with the manner in which the said paragraph is drafted in that the date of the said guarantee/indemnity is not specified as a result of which the 1st and 2nd respondents invite the applicant to prove its allegations.

19. In paragraph 5(e) of the 1st and 2nd respondent’s statement of defence, they aver that in the alternative and without prejudice to any paragraph therein contained, they state that they signed a document entitled deed of guarantee and indemnity dated 30th April, 2009, the applicant did not sign and seal the same as by law required and bound to do if at all the document was to be contractually binding between the said parties. It is my finding that paragraph 5(e) brings forth a triable issue of whether to not that the deed of guarantee and indemnity was properly executed so as to be deemed to be binding to the parties hereto.

20. In paragraphs 8 of the said defence, the 1st and 2nd respondents deny that the deed of guarantee made provision in respect to any loan or loans to be advanced to the 3rd respondent but makes mention of advances, financial accommodation, banking facilities and giving credit to the 3rd respondent.

21. In paragraph 10 (a) and (b) thereof, the 1st and 2nd respondents list down the items that were guaranteed as an overdraft facility of Kshs. 4,500,000/= , a term loan of Kshs. 601,226.12 and hire purchase facility of Kshs. 1,325,306.17 as per the facility letter dated 27th April, 2007 addressed by the applicant to the 3rd respondent. The 1st and 2nd respondents further aver that the hire purchase facility for financing motor vehicle registration No. KBD 157F has since been fully repaid and that no term loan was ever made to the 3rd respondent, hence the same is not outstanding.

22. Paragraphs 12 - 21 of the said statement of defence questions the variations that were made when the overdraft facility of Kshs. 4,500,000/= was varied to a term loan and the validity of the acknowledgment and undertaking as the 1st and 2nd respondents did not sign the authorization page permitting the applicant's Manager to debit then the 3rd respondent's account.

23. In paragraph 22 of the 1st and 2nd respondents' statement of defence, they aver that the applicant's claim against them is bad in law for uncertainty and ought to be dismissed. In paragraph 23 thereof, they deny owing the applicant the sum of Kshs. 6,651,089.05 which sum the applicant fails to state in what manner it arose, the dates or time when it became due, if at all.

24. In my considered view, the issues I have listed above are all triable issues that can only be well illuminated by giving the parties hereto an opportunity to adduce evidence at the main hearing.

25. I have also perused the statement of defence for the 3rd respondent who avers at paragraph 2 to having being advanced a loan in the month of April, 2009 pursuant to a charge that was not in existence during that month and denies that the charge dated 15th June, 2009 referred to in paragraph 4 of the plaint was to retroactively secure any such loan(s) and invites the applicant to prove the allegations.

26. In paragraph 3 of the said defence, the 3rd respondent states that there is non-disclosure of any loan advances made to the 3rd respondent prior to 17th October, 2009 as the statement of account contains the words "**balance taken over.**" and makes no reference at all to the loan advance for April 2009.

27. In paragraph 7, the 3rd respondent denies owing the applicant Kshs. 6,651,089.05 and puts the applicant to strict proof thereof. In respect to the hire purchase facility for motor vehicle registration No. KBD 157F, the 3rd respondent in paragraphs 8 and 9 of its statement of defence, avers that the said motor vehicle was repossessed and sold but the sale price was not credited to the 3rd respondent's statement of account.

28. The 3rd respondent in paragraphs 10 and 11 denies being indebted to the applicant in the sum of Kshs. 6,651,089.05 as claimed in the plaint and puts the applicant to strict proof thereof, and more particularly states that the statement of account at pages 74 to 102 of the applicant's documents does not reflect the said amount.

29. The Court of Appeal in **Joash M. Nyabicha vs Kenya Tea Development Authority KSM CA No. 302 of 2010 [2013] eKLR** held as follows:-

"A plain reading of Order VI rule 9 (1) shows that an allegation in a pleading may be traversed expressly by the opposing party or there may be a joinder of issue under rule 10 of the same Order which joinder operates as a denial of the issue or issues. (emphasis added).

Rules 10 (1) and (2) read as follows:-

(1) If there is no reply to a defence there is a joinder of issue on that defence

(2) Subject to sub-rule (3) -

(a) there is at the close of pleadings a joinder of issue on the pleading last filed, and

(b) a party may in his pleading expressly join issue on the immediately preceding pleading.

The Court went on to state that -

"Having failed to file a defence to the counterclaim, there was a joinder of issue and not an admission which served to deny those allegations. It is only if the appellant had filed a defence to the counterclaim and failed to traverse the claims contained therein that an admission could be derived."

30. On 27th May, 2014, the applicant herein filed two sets of replies to the statements of defence filed by the respondents. In paragraph 1 of the two responses, the applicant joins issue with the respondents in their defence save in so far as the same consists of admissions. In paragraph 5 of the reply to the 1st and 2nd respondents' defence, the applicant denies the allegations raised in paragraphs 10, 11, 12, 13, 14, 15, 16 and 17 and puts them to strict proof thereof. In the reply to the 3rd respondent's defence, the applicant puts the 3rd respondent to strict proof of the averments in paragraphs 8, 9 and 10 of its defence. Most of the other paragraphs in the said responses are in reiteration to what is contained in the applicant's pleadings. In line with the case of **Joash N. Nyabicha vs Kenya Tea Development Authority** (supra), it is clear that the applicant and the respondents do deny various allegations in the pleadings filed herein thereby raising triable issues.

31. On the issue of striking out of pleadings, in the case of **Yaya Towers Limited vs Trade Bank Limited** (In Liquidation) Civil Appeal No. 35 of 2000, the Court of Appeal had the following to state:-

"A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved... If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits... It is not the length of arguments in the case but the inherent difficulty of the issues, which they have to address that, is decisive... The issue has nothing to do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the Court or is unarguable...Where the plaintiff brings an action where the cause of action is based on a request made by the defendant he must allege and prove inter alia, both the act done and the request made for doing such an act. In the absence of any request shown to have been made by the defendant in the particulars delivered of such allegation, it would not be possible for the plaintiff to prove any request made by the defendant and without this the essential ingredient of the cause of action cannot be proved and the plaintiff is bound to fail.....No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment."

32. In my understanding of the above decision, the converse is also true in that the same rules apply in the striking out of statements of defence. As elucidated from the said case, the power to strike out pleadings is a discretionary one. Having perused the statements of defence filed herein, it is clear that the respondents have raised triable issues on whether the deed of guarantee and indemnity are enforceable

and whether the variation to the agreement between the applicant and the 3rd respondent was properly executed by the 1st and 2nd respondents. The amount that is being claimed by the applicant is also disputed by the respondents.

33. I therefore hold that the issues raised in the statements of defence by the respondents are not a sham, frivolous or an abuse of the court process. They need to be fully ventilated and this can only be done by giving the parties a chance to be heard. As earlier stated, the applicant did not expound on how they were likely to be embarrassed or prejudiced by the said defence statements.

34. In **Blue Sky Limited EPZ Limited vs Natalia Polyakova & another** [2007] eKLR, the Court stated thus:-

"the power to strike out pleadings is draconian and the court will exercise it only in clear cases where, upon looking at the pleading concerned there is no reasonable cause of action or defence disclosed. In the case of a defence, a mere denial or a general traverse will not amount to a defence. A defence must raise a triable issue."

35. Having declined to strike out the statements of defence herein, it follows that I decline to grant the second prayer to enter summary judgment in favour of the applicant. In **Provincial Insurance Company of East Africa Limited** now known as **UAP Provincial Insurance Limited vs Lenny M. Kivuti**, Civil Appeal No. 216 of 1996 (unreported) the Court of Appeal stated:-

"In an application for summary judgment even one triable issue, if bona fide, would entitle the defendant to have unconditional leave to defend."

36. I have considered the submissions made, the authorities cited in support of each party's arguments, and I am satisfied that the application herein lacks merit. It is herewith dismissed with costs to the respondents.

DELIVERED, DATED and SIGNED at MOMBASA on this 4th day of May, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Kinuthia holding brief for Mr. B.Otieno for the plaintiff/applicant

Mr. Buti for the defendants/respondents

Mr. Oliver Musundi - Court Assistant