REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 403 OF 2014

B E T W E E N:

GULF AFRICA BANK LIMITED…….....……..…… PLAINTIFF

VERSUS

AIMA ENTERPRISES LIMITED……. DEFENDANT

JUDGMENT

1. The Application now before the Court is brought by the Plaintiff to the suit, Gulf African Bank Limited (hereinafter " the Applicant"). The Respondent is the Defendant to the suit, Aima Enterprises Limited (hereinafter "the Respondent")

2. Between April 2011 and around December 2012 the Parties had a Banker-Client relationship. The Applicant provided the Defendant with a Loan Facility pursuant to a Letter of Offer dated 1st April, 2011. The facility (known as a Murabaha Facitlity) was for the sum of KShs48,000,000/= secured on Third Party Charges. The Murabaha facility was to be charged at a rate of 15% per annum "rate of profit". On 26th April 2012, the Respondent through its Advocates Messrs Miller & Miller Company Advocates informed the Applicant that the Loan was to be taken over by African Banking Corporation (hereinafter "ABC Bank"). Following various formalities including the discharge of the securities and the provision of a Redemption Figure, on 6th December 2012, ABC Bank remitted the sum of Kshs51,163,834.50 to the Plaintiff Bank. The amount was said to have been paid by an RTGS Transaction. However neither the Application nor the Plaint has exhibited a copy of either the RTGS instruction or the receipt. The monies were paid into Account number 0930004 in the name of the Defendant. The effect was to put that account into significant credit (Kshs53,620.020.44). According to Ground (a) of the Application, the sums were "***wrongly credited"*** to the Defendant's current account. Those are the Advocate's words. That statement is not consistent with the Plaint which claims the sums were "***mistakenly***" credited to the current account rather than the redemption account. The Application also states that the Defendant has "***refused to repay the sums due***". The Witnesses explain the transaction using different terminology, but I will come to that later.

3. The Application is brought under "***Sections 1A & B and 3A of the Civil Procedure Act, Order 2 Rule 15 (1) (a-c) and Order 13 Rule 2 of the Civil Procedure Rules, Rule 15 (c) of the Practice Directions on Case Management, and all other Enabling Provisions of the Law***". The Applicant seeks Orders that:

(i) The Defence be dismissed with costs and judgment be entered as prayed in the

Plaint.

(ii) Costs of the application be awarded to the Plaintiff.

The Grounds relied upon in the Application are:

"*(a) The Defendant withdrew funds which had been wrongly credited into its current account and has refused to repay the same.*

(b) That the Defendant has admitted the debt prior to filing of the suit and the Defence consists of mere denials.

(c) There are no issues to go to trial arising from the Defence and the same is frivolous and vexatious.

(d) No useful purpose will be served if the matter goes to full trial as the defence is in essence a bare denial.

(e) It is in the interest of justice that this application be allowed as prayed."

4. The Application is supported by the Affidavit of a Lawi Sato, the Legal Officer of the Applicant Bank. From paragraph 7 onwards he relates that the funds were remitted to the Bank on 6th December 2012. The deponent says the amount remitted was KShs51,163,834.50. He says the Defendant was aware of the remittance. He does not explain how he knows of the Defendant's state of mind. At paragraph 8, he says; "*The funds were credited to the Defendant's current account and were to be utilised to offset the outstanding balances in the Defendant's loan account*.". It is noteworthy that he does not say that was not "by mistake". He then goes on to explain that the Defendant withdrew funds from his account prior to the transfer which was intended to settle the outstanding loan. When the transfer was finally done there was a shortfall of KShs.10,357,669.19 in the account. The Deponent says that, at a meeting on 11th February, 2013. "the *Defendant's director admitted the funds had been utilized*." The Deponent does not name the Director nor does he exhibit any minutes from the meetings he claims was held. Although the Supporting Affidavit does not refer to it, at Page16 of the Plaintiff's bundle is a letter dated 25th February, 2013. That letter sets out the Applicant's position of what transpired at that meeting. It states clearly that the shortfall was Kshs10,356,969.19. The letter records that the Defendant requested that it continue with the facility. In fact, that never happened. The request for continuation of the facility was put in a letter dated 25th February 2013 from the Respondent to the Applicant. The Bank did not formally demand repayment until 18th March 2013. The Demand is for repayment of Kshs10,356,969.19 within 14 days. It was also said that the profit was accruing at a rate of 20% and default damages at a rate of 20%.

5. By June 2013 the Bank was still offering the Defendant an alternative facility for the sum of Kshs10,357,000/=. The repayment term was 24 months and the facility profit was 20%. The Loan was to be secured. It seems the facility on offer was not accepted because by a letter dated 17th March 2014 (that is 12 months later) the Defendant said that it could not meet the repayment terms due to the high profit. The counter offer envisaged payment over a period of 68 months at a profit cost of 7.17% which is less than ½ of the previous facility. By a Letter from its Advocates the Bank made clear that was not acceptable.

6. Thereafter the Bank made an offer contained in a Letter of Offer dated 2nd October, 2013, The offer was accepted by the Defendant and its Guarantors on 14th November, 2013. The terms of the offer were inter alia that:

(i) The purpose of the facility was to be used to restructure the existing overdue Murabaha facility.

(ii) The facility was available for a period of 72 months initially.

(iii) The profit on the facility was to be charged at 20%.

(iv) As soon the facility was set up the Customer was to repay Kshs10,357,669.19.

(v) If the facility has not been drawn within 90 days the Bank reserves the right to vary the profit rate.

(vi) The facility was repayable on demand.

(vii) Under Clause 6.5 the customer undertook to pay " Default Damages" upon default of payment on the due date, at a rate of 20% per annum above the prevailing rate of the facility Default Damages were to be paid into a separate account specifically for charitable purposes.

(viii) Security was to be provided prior to draw down (The purpose of that clause is unclear as the drawdown had in fact, already taken place).

The Security was never put in place although the documents were drafted and sent to the Defendant's Directors under cover of a letter dated 29th November, 2013.

7. On 22nd April, 2015 the Defendant's Advocates on record filed an application to " withdraw from acting". The Court gave directions f or service and it seems they were not served on the Defendant itself. The Application to cease acting was not served before the date fixed for its hearing. It has not been heard or adjudicated upon.

8. The Defendant has not filed any response to the Application, nor has its Advocates attended Court after 30th April 2015. In the circumstances upon the Court file there is neither a Defence nor a Replying Affidavit.

9. As stated above the Application is premised on the fact that a Defence was filed. The date of filing is not stated. It is complained that it was a defence containing bare denials which should now be "dismissed". The Application also seeks an order that Judgment be ordered as prayed in the Plaint.

10. The Supporting Affidavit does set out the background facts to the institution of the various facilities. It also sets out the Plaintiff's attempts to settle the matter in correspondence however, it makes no mention of a Defence being filed or served at all. A search of the Registry has thus far revealed no Defence (as at the date of delivery). At the first mention on 19th March 2015, the Defendant's Advocate asked for 3 weeks to file a Replying Affidavit, that was granted. None was filed.

11. The Application is brought under ***Order 2 Rule 15 (1)(a)-(c)of the Civil Procedure Rules 2010***. ***Order 2 Rule 15(1) (a)-(c))*** provides for the striking out of a pleading (in this case a Defence). The Court is empowered to strike out a pleading or parts of it on the Grounds that:

(a) It discloses no reasonable defence in law, or

(b) It is scandalous, frivolous and vexatious, or

(c) It may prejudice, embarrass or delay the fair trial of the action.

12. As stated above, the Application asks for the Defence to be "dismissed". That is not a prayer that can be granted under ***CPR Order 2 rule 15***. Further, as there is, in fact, no Defence before the Court at the

time of drafting that assessment cannot be taken. Secondly, the Grounds of the Application do not record a filing date for the Defence. Nor or does the Affidavit refer to it. In the circumstances it is fair to assume that "a Defence" was never filed. There is no analysis, before the Court, of which of the paragraphs of the Defence fall in which category of the grounds of ***Order 2 Rule 15***.

13. The Applicant also filed Written Submissions on 23rd April 2015. In its Written Submissions the " ***relevant facts"*** are repeated from the Plaint and Supporting Affidavit. The date on which the Defence was supposed to have been filed and/or served is not recorded. Nor are there any references to specific paragraphs of the Defence. Therefore it is safe to assume there was none.

14. The Application is also brought under ***Order 13 Rule 2 of the CPR 2010***. That rule provides:

> *Order 13, rule 1 Notice of admission of case.*
>
> *1 …..*
>
> *Order 13, rule 2 Judgment on admissions*
>
> *2. 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 admissions 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.*

15. Immediately after paragraph 4 the Written Submissions (in an unnumbered paragraph) state; " *The Defendant has admitted the debt prior to filing of the suit the and Defence consists of mere denials."* Paragraph 5 states on; "*11th February, 2013, the Defendant's director admitted the funds had been utilized by the Defendant"*. Neither that admission nor its source is pleaded in the Plaint. However, at paragraph 11 of the Supporting Affidavit the Deponent says; "*The Bank held several meetings with the Defendant to discuss the outstanding amount. At the initial meeting held on 11th February 2013, the Defendant's director admitted that the funds had been utilized but argued that the Defendant could not repay the same immediately, instead proposing that the amount owing be restructured into a facility. This offer was formally reiterated in its letter dated 18th March 2013"*.

16. At paragraph 7 of the Written Submissions inform the Court that;

> " *The Defendant in its defence has failed to address specifically every claim made by the plaintiff but only made general denials without any effort to substantiate them.*"

17. The Plaintiff then moves onto a new heading namely, that "*There are no issues to go to trial arising from the Defence and the same is frivolous and vexatious"*. Followed by an extract from the authority of ***County Council of Nandi -vs- Ezekiel Kibet Rutto and 6 Others (2013) eKLR.*** Then follows a third heading which says, *" No useful purpose will be served if the matter goes full trial as the defence is in essence a bare denial."*

18. The Submission made there under is that: *"it would be a waste of Judicial time to allow a Defence to go to full trial which does not rebut any claim made in the Plaint."* The Submission relies on ***Bank of Baroda (K) Limited v Altec Systems Limited (2013) eKLR, 28.***

19. The Submissions conclude with a prayer for the Defence to be struck out and Judgment entered for the Plaintiff.

20. The Issues that arise for determination are:

(i) What is the Plaintiff's cause of Action/ Suit.

(ii) Has the Defendant filed a Defence.

(iii) If so, does it consist of bare denials?

(iv) If not, how should the court deal with it?

(v) Has the Defendant made any admissions?

(vi) If so do they deal with/ relate to the claims in the suit.

(vii) Should Judgment be entered?

(viii) Who should pay the costs ?

21. As stated above, the Plaintiff's Application seeks to strike out of the Defence first. There is no record of a Defence having been filed. That is particularly relevant because this Ruling has been delayed due to administrative reasons and otherwise. A search of the Registry has been instituted and no Defence has been located during that time. The Court does not act in vain. In the circumstances, the Application for "***the Defence to be dismissed with Costs"*** is dismissed for lack of subject matter. That brings us to the issue whether there are nonetheless any grounds for the Court to make a final decision upon the suit.

(a) Dealing next with the Plaintiff's pleaded Grounds. Ground (a) states that the funds from ABC Bank were "*wrongly credited*" to the Defendant's account. That statement is factually incorrect. The true picture emerges from the witness statements of Lawi Sato and Ms Elizabeth Mulwa which state clearly "*That the process was that funds were paid to the current account to then be transferred to offset the indebtedness in the facility account."* (Paragraphs 9 and 10). The real complaint therefore, is that the Defendant (a) knew the funds were received and (b) knew the purpose for which the funds were intended. Nevertheless, the Defendant withdrew sufficient funds to cause a shortfall in the repayment of KShs10,201,837.89. The state of knowledge of the Defendant through its Directors is particularly relevant to the Plaintiff's case because repayment of the facility was the condition precedent for the release of the Securities. The Securities were released upon condition of repayment. The creation of the shortfall means that arrangement was short-circuited.

22. The Plaintiff prays only for payment of the liquidated sum. Surprisingly, there is no claim for return and /or reinstatement of the Securities. Even more surprisingly, there is no claim for fraud and the possible consequent piercing of the corporate veil.

23. It is trite law that parties are bound by their pleadings, however opaque or ill thought out. How then should the court deal with the issues that clearly arise?

24. Firstly, the Court is bound by the overriding objective for efficient use of Court time and resources. The Plaintiff's Grounds as pleaded do not take the matter further. However the Written Submissions argue variously for judgment on admissions and striking out the Defence under ***Order 2 Rule 15(1) (a)-(c)*** at the same time as deciding that would be a waste of judicial time to allow the Defence to proceed.

25. The Plaintiff's Grounds as pleaded do not take the matter further. However, the Written Submissions argue variously for Judgment on admissions and striking out the Defence under ***Order 2 Rule 15(1)(a)-(c),*** at the same time as deciding that would be a waste of judicial time to allow the Defence to proceed. The Submissions are ill-logical. Should the Court strike out an admission?

26. The Plaintiff relies on the authorities listed in its Submissions. The relevant extracts are:O***rder XII***

rule 6 which reads:

"6, Any party may at any stage of a suit, where admission of fact had 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."

The Court of Appeal in ***Choitram v Nazari*** set guidance on interpretation of ***Rule 6*** thus:

"For the purpose of Order X11 rule 6 admissions 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. Much depends upon the language used. The admissions must leave no room for doubt that the parties passed out of the stage of negotiations on to a definite contract. It matters not if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by analysis. Indeed there is no other way, and analysis is unavoidable to determine whether admission of fact had been made wither on the pleadings or otherwise to give such judgment as upon such admissions any party may be entitled to without waiting for the determination of any other question between the parties. In considering the matter the judge must neither become disinclined nor lose himself in the jungle of words even when faced with a plaint such as the one in this case. To analyse pleadings, to read correspondence and to apply the relevant law is a normal function performed by judges which has become established routine in the courts. We must say firmly that if a judge does not do so, or refuses to do so, he fails to give effect to the provisions of the established law by which a legal right is enforced. If he allows or refuses an application after having done so that is another matter. In a case under Order X11 rule he had then exercised his discretion properly either way. If upon a purposive interpretation of either clearly written or clearly implied, or both, admissions of fact the case is plain and obvious there is no room for discretion to let the matter go to trial for then nothing is to be gained by having a trial. The court may not

exercise its discretion in a manner which renders nugatory an express provision of the law".

In ***Technistudy v Kelland(1976) 1WLR 1042 at 1046,*** Roskill LJ. Said;

"Pleadings should be precise, models of clarity and simplicity of expression. The Judge has to understand them in order to understand the case. Long repetitive argumentative averments most of which are suitable subjects for evidence, and argumentative grounds of appeal, only cause confusion.

In ***GILBERT -vs- SMITH (1976) 2ChD*** 686 at 688 -689 Melishih, L.J. *Referring to an equivalent English rule said:*

"I think that rule was framed for the express purpose, that if there was no dispute between the parties, and if there was on the pleadings such an admission as to make it plaint that the plaintiff was entitled to a particular order, he should be able to obtain that order at once upon motion. It must, however, be such an admission of facts as would show that the plaintiff is clearly entitled to the order asked for, whether it be in the nature of a decree, or a judgment, or anything else. The rule was not meant to apply when there is any serious question of law to be argued. But if there is an admission on the pleadings which clearly entitled the plaintiff to an

order, to wait but might at once obtain any order which could have been on an original hearing of the action."

In Kiprotich -Vs- Gathua & Others (1976) K.L.R. 87 at p. 92 the former Court of Appeal for Eastern Africa said that discretion must be exercised judicially.

27. In addition the Court has jurisdiction to order judgment in default of a defence as well as summary judgment. The procedure for summary judgment set out in the ***Civil Procedure Rules 2010*** presents the Court with an interesting conundrum. The pre -2010 procedure was contained in ***Order XXXV*** and provided:

"The application shall be made by motion supported by an affidavit either or the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed".

Under ***CPR 2010*** the procedure is set out in ***Order 36 rule 1(i)*** and provides; "*Sufficient notice of the motion shall be given to the defendant which notice shall in no case be less than seven days."*

28. The remainder of the Rule then goes on to deal with the circumstances of judgment in default of filing a defence, what then is the difference between " summary judgment and judgment in default ?"

29. It seems the current application is framed in a way that when the Defence is struck out the Court can decide on the application for judgment. That may be necessary because the ***CPR 2010*** does not provide for the situations where a Defence has been filed which does not "hold water" whether because it is weak or otherwise not falling within the grounds for striking out under ***Order 2 Rule 15***. Should it really be necessary for a plaintiff or indeed a defendant on a counterclaim to go through the rigmarole of first applying for the Defence to be struck out and then, in effect pursuing a second application for judgment to be entered. It is the view of this Court that approach does not comply with the overriding objective on efficient use of Court time and resources.

30. Article 165(3) (a) of the Constitution of Kenya 2010 gives the Court unlimited original jurisdiction in civil matters subject to the exclusion in ***sub-article (5). Article 159(2)(b)*** enjoins the Court to guard against delaying justice. ***Article 50*** places a responsibility on the Courts to provide access to Justice.

31. In addition, the Overriding Objective as set out in ***Sections 1A, 1B of the Civil Procedure Act (Cap 21 Laws of Kenya)***. provides: *"Section 1A:*

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A Party to civil proceedings or an advocate for such a Party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

Section 1B:

(1) For the purpose of furthering the overriding objective specified in Section 11A the Court shall handle all matters presented before it for the purpose of attaining the following aims –

(a) The just determination of the proceedings,

(b) The efficient disposal of the business of the Court,

(c) The efficient use of the available judicial and administrative resources;

(d) The timely disposal of the proceedings, and all other proceedings, in the Court, at a cost affordable by the respective parties; and

(e) The use of suitable technology".

32. In the circumstances, on the documents before the Court, the Application as pleaded cannot succeed. However, in accordance with the requirements set out above and the Plaintiff's argument in favour of judgment on admissions. It is clear from the evidence filed by the Plaintiff - and not controverted by the Defendant, despite ample opportunity, that this is an appropriate case for judgment on admissions.

33. It is equally clear from the Bank statements that there was a shortfall in the repayments promised upon the release of the securities. It is clear that the shortfall was caused, if not created, by the actions of the Defendant's officers making withdrawals against the RTGS payment from ABC Bank. There was an agreement to repay the loan. The securities were released. The Loan was not repaid. That obligation is still outstanding with or without any further admissions. The Court therefore orders Judgment on the principle sum of Kshs; 10,201,837.89.

34. However, the Director of the Defendant both in person and in correspondence between 11th February 2013 and 18th March, 2013 made several admissions. At the very least a request to reschedule indebtedness must be a clear and unequivocal admission that such indebtedness exists as a pre-requisite to restructuring.

35. We then come to the issue of interest. The Banking facility was provided pursuant to the precepts of Shariah Compliant Banking. In the circumstances, the Bank does not charge interest. What it does charge is profit costs at 20% per annum and default charges at 20% per annum chargeable in addition. That is set out in a letter of offer for a facility called " ***Tawaliq Finance Facility*** " dated 20th October 2013. The Directors of the Defendant signed and returned the Offer Letter to signify their consent to its terms. The securities set out were never provided. That may raise an issue on the enforceability of an incomplete agreement, in the absence of a defence. However, the Directors have clearly agreed to an interest rate of 20% following negotiations. That is what they signed on 14th November 2013.

36. Under ***Section 26*** of the ***Civil Procedure Act Laws of Kenya Cap 21*** the Court has wide discretion in relation to interest. It provides:

> ***26.*** *(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.*
>
> The Loan in this case was a commercial transaction. The "***cost***" of the loan whether in terms of " ***profit*** **cost**" or interest was fixed by the Parties at 20% per annum. In view of those circumstances, I order the Defendant to pay to the Plaintiff interest at a rate of 20% per annum compounded. Chargeable from the date of 14th November 2013 until payment. In addition, I order the Defendant to pay interest on the previous facility (Murahaba Facility) at the rate of 15% per annum from 11th February 2013 to 14th November 2013.

37. Each Party to pay its own costs.

It is so ordered,

FARAH S. M. AMIN

JUDGE

SIGNED AND DELIVERED THIS 5th day of December2016 At Nairobi

In the Presence of

Court Assistance: I. Otieno

Applicant: Mr Mweke Holding Brief for Mr Gachuhi

Respondent: No Appearance.