REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION AT MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO. 380 OF 2013

KENYA COMMERCIAL BANK…….....……PLAINTIFF

Versus

SUNTRA INVESTMENT BANK LTD.……...….DEFENDANT

RULING

Strike out defence: Court told

[1] I am being asked by the Plaintiff through a Motion dated 12th June 2014 to strike out the defence herein and enter judgment for the Plaintiff as prayed for in the plaint. The Motion is supported by the Affidavit of Bonnie Okumu. The Plaintiff submitted that its claim is made up of clear and very specific liquidated claims. The Motion is expressed to be brought under Order 2 rule 15 of the Civil Procedure Rules which 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—***
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> ***(a) it discloses no reasonable cause of action or defence in law; or***
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> ***(b it is scandalous, frivolous or vexatious; or***
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> ***(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.***

The Applicant's gravamen

[2] The Applicant stated that on or about March 2008 the Government of Kenya offered for sale to the public 10 billion shares in Safaricom Limited by way of an Initial Public Offer. A number of Authorised Selling Agents (ASA) was appointed to facilitate the sale of the shares on commission basis, and the Respondent was one of the agents. The Plaintiff bank was responsible for receiving and forwarding to the

Defendant applications for the Safaricom Limited shares together with all the attendant remittances/payments.

[3] The Respondent in its capacity as an ASA Agent received a total sum of Kshs. 10,000,030.00 from the Applicant to facilitate the purchase of shares for Magic Movers Kenya Limited, a customer of the Applicant. It was later discovered that the Respondent submitted only the banker's cheque to the receiving Bank for the Safaricom Limited IPO, Citibank N.A. Kenya Branch, and failed to submit the supporting application form for the shares drawn by Magic Movers Kenya Limited. Despite the failure to submit the Application Forms, the funds drawn on the cheque duly cleared from its account into Citibank's Nairobi Branch on 6th May 2008.

[4] The Applicant enumerated the consequences of the omission, negligence and breach of contractual responsibility by the Respondent in the Plaint and reiterated in the Affidavit in support of the Notice of Motion dated 12th June 2014 sworn by Bonnie Okumu. The Applicant submitted that its pleadings are concise and provided the specific events and documents in support of its cause of action. The Applicant urged that, it provided a list of documents, witnesses and witness statements in accordance with Order 7 rule 5 of the Civil Procedure Rules. The Defendant was not as forthcoming in the Statement of Defence and resorted to a blanket denial of all issues in the Plaint. The statement of defence filed is a sham; mere denial without sufficient reasons for the denial; it does not raise any bona fide triable issues; and therefore, it does not raise a reasonable defence in law. See paragraph 4 to 9 of the Defence. It is trite law that triable issue is not one which must necessarily succeed but one that raises bona fide triable issues which should go to trial for adjudication. They cited the case of **Ecobank Kenya Limited vs. Bobbin Limited and 2 others [2014] eKLR**, where the court relied on the **Sheridan J Test** in **Patel vs. E.A. Cargo Handling Services Limited [1974] E.A**. on what amounts to a triable issue was established.

[5] According to the Applicant, the Respondent did not also comply with Order 7 rule 5 of the Civil Procedure Rules and is yet to file and serve upon the Plaintiff the list of witnesses and statements. The defence should, therefore, be struck out under Order 2 rule 15 of the Civil Procedure Rules as it has no merit. This affords a quick and fair remedy to a Plaintiff who would have otherwise been delayed in realising his claim against the Defendant. They cited that case of **The Kenya Power and Lighting Company Limited vs. Alliance Media Kenya Limited [2014] eKLR.**

[6] The Applicant further contended that, the Respondent has not even filed an Affidavit in opposition to the application in spite of the leave granted to them on the 8th of October 2014 to file replies within 14 days thereof. See the case of **George P.B. Ogendo vs. James Nandasa & 4 others [2006] eKLR**, the court stated *inter alia*, that:-

> ***"…an evasive and vague defence from which the Plaintiff cannot know what defence is being pleaded will normally be struck out on the grounds that it is wanting in seriousness and tends to annoy."***

The court went further to state that:-

> ***"The term "abuse of the process of the court" connotes that the process of the court must be carried out properly and honestly and in good faith, and it means that the court will not allow its functions as a court of law to be misused."***

[7] The Applicant mounted further attacks; the defence filed is also frivolous and baseless and has no legs to stand on. The Respondent in paragraph 10 of the Statement of Defence claims that there *have been efforts to try and amicably resolve the issue*. They did not even respond to the letters sent to them before filing of this suit. How can, therefore, be any amicable settlement? The averment that this court has no jurisdiction because there is an arbitration clause governing this dispute is a red herring because the moment the Respondent filed appearance and defence it submitted itself to the jurisdiction of the court. Moreover, the arbitration clause mentioned by the Respondent binds only the Plaintiff and the Defendant and not third parties like Magic Movers Kenya Limited. Further, under Clause 4 of the agreement provided that the agreement was only valid for the duration of the Initial Public Offer by Safaricom

Limited and was to stand terminated once the whole process was concluded. It did not envisage such fraudulent actions of the Respondent on the Applicant and third parties, i.e. Magic Movers Kenya Limited. The provision on ADR under Clause 9 was based on good faith and the Defendant has clearly not been acting in good faith taking into consideration that the party failed to respond to numerous letters from the Applicant prior to filing of the suit in 2013. The Clause also provided that any issues arising was to be resolved by the parties within 14 days on being brought to the attention of either party or within an agreed on period. The Defendant received a letter articulating the issues dated 3rd May 2013 on 13th May 2013 and failed to respond to the letter therefore the Defendant cannot claim not to have been given an opportunity to resolve the matter out of court and their failure to take on the opportunity cannot be held as against the Plaintiff and lengthen the process leading to compensation in this matter.

[8] Although Courts have been loath to enter summary judgment as it is seen to be a draconian measure, but it should be entered in the clearest of case where:

a. The amount claimed has been specified
b. The amount claimed has been ascertained or is capable of being ascertained
c. The amount claimed is due and payable.

See the decision in **The Kenya Power and Lighting Company Limited vs. Alliance Media Kenya Limited [2014] eKLR** and the Ecobank. The Plaintiff's case is clear as it seeks to compel the Defendant to refund the sum of Kshs. 10,000,030.00 being the consideration paid for the non-allocated shares, general damages all accruing interest at bank lending rates of Kshs. 18% per annum from the date of remittance, 6th May 2008 until payment in full and costs of the suit. The claim is therefore of a liquidated nature with the amount claimed being Kshs. 10,000,030.00 at an interest rate of 18%.

[9] Contrary to the submissions by the Respondent, the Applicant was categorical that its application is not fatally defective on the basis that the Plaintiff did not file a further Authority to Swear Affidavit, by Bonnie Okumu. Paragraph 2 of the Affidavit sworn by the said Bonnie Okumu, deposes clearly that he is authorized to swear the Affidavit in his capacity as the Head of Legal Services. Order 4, rule 1 (4) of the Civil Procedure Rules, 2010 provides that:

> ***Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.***

Order 4, rule 1 (4) provides for the Verifying Affidavit accompanying the Plaint and does not in any way imply that the same bars any other authorized person to swear an Affidavit in support of an Application in the case. The Supporting Affidavit is proper. The Oxygen Principle in sections3A and 3B in the Civil Procedure Act, provide that.

> ***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.***

The objection is a technicality and should be refused under the Constitution of Kenya, 2010. See the case of **Kamani vs. Kenya Anti-Corruption Commission (2010) e KLR**, where the Court of Appeal departed from its earlier obstinate stance on technicalities and applied the Oxygen principle.

[10] Again, contrary to the submission by the Respondent, failure to file a Reply to the Defence does not amount admission of the allegations by the Respondent. At any rate, there was nothing for the Plaintiff to respond to the Defence which consisted only of blanket denials and raised no issues. Such failure amounts to a joinder of issues. See Order 2, rule 12 of the Civil Procedure Rules 2010.

[11] The court in Jubilee Insurance Company Limited vs Margaret Mukuhi Njuguna agreed with the decision of the trial Magistrate that stated that a reply is only necessary to confess and avoid and further that it was only mandatory where there is a counterclaim. In this case, your Honour, there was no counterclaim. The court should, on those reasons strike out the defence and enter judgment.

Respondent: Defence raises triable issue

[12] The Respondent started by saying that the Applicant did not file a reply to defence and so there is a joinder of issue as stated in **Order 2 Rule 12** of the Civil Procedure Rules. They asserted that the failure is an admission of the allegations in the Defence. According to the Defendant the Defence has specifically pleaded that the claims sought against them was occasioned by the Plaintiff. See Paragraph 7. In addition, the Defendant in Paragraphs 10, 11 and 12 of the Plaint has accused the Plaintiff of failure to adhere to the agency agreement with regards to reconciliation, amount claimed and interest and finally the clause on arbitration that is provided under Clause 9 of the Agreement between the Plaintiff and the Defendant dated 2nd April 2008 (**Annexture BO 2).** They also argued that the agreement subject of the suit is subject to arbitration agreement. The dispute ought to be referred for arbitration and the court is only the last resort where the arbitration is not successful. The Applicant is circumventing this procedure. They relied on the decision by Honourable Lady Justice Gacheche in ***Unga Millers v James Muenen Kamau [2005] eKLR*** on the effect of failure to file a Reply to Defence:

> ***"But that was not all, for as aforementioned, there was no reply to the appellant's claim that the respondent acted negligently and he was thus to blame. It is trite law that he who does not file a reply to such a defence is deemed to have admitted the said allegations."***

[13] Secondly, the Application is fatally defective as it is supported by a stranger to these proceedings. The authority filed with the plaint clearly stated **Mary Oganga** is the authorized person to sign pleadings on its behalf. There has been no other authority given to **Bonnie Okumu** to swear pleadings on behalf of the Applicant. In light the foregoing, the Supporting Affidavit is defective and should be struck out, the effect of which would the Application is also fatally defective for lack of supporting affidavit.

[14] They submitted that striking out of pleadings is a drastic remedy that should only be resorted to only where a pleading is a complete sham. With the admission arising out of the failure to file a Reply to Defence, the Defence cannot be struck out. Court of Appeal Judges in **Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu [2009] eKLR** stated:

> ***"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:-***
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> ***"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."***
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> ***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:-***
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> ***"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. "

[15] The Respondent is of the view that the Defence raises triable issues on the terms of the Agreement between the Plaintiff and the Defendant. Secondly it should be noted that the there is a 3rd Party **Citi Bank NA Kenya** that has been named in the pleadings of whom its officers confirmed receiving money. It is bad faith for the Plaintiff not to state that the Defendant pays the sums owed yet the whole time **Citi Bank NA Kenya** have confirmed that they received the money. The application does not meet the threshold on striking out of pleadings and the same should be dismissed with costs. The court should direct the parties to prepare their documents in line with the new pre-trial directions and thereafter the matter be set down for hearing. See the following **List of Authorities;**

1. **Civil Procedure Act and Rules Cap 21 Laws of Kenya.**
2. **Unga Maize Millers v James Munene Kamau [2005] eKLR**
3. **Blue Shield Insurance Company Ltd V Joseph Mboya Oguttu [2009] eKLR**

THE DETERMINATION

Legal threshold on Striking out of defence

[16] There is no dearth of judicial precedents on the subject of striking out of pleadings. I am not prepared to multiply them, except I take heed to the judicial caution that in application such as the one before me, a court should not express any opinion on the matters in issue as that would hurt fair trial and restrict the freedom of the trial Judge in disposing the case should the suit be ultimately be heard on merit. See the case **Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu [2009] eKLR** and **D.T. Dobie and Company (Kenya) Ltd vs Muchina** ***(1982) KLR 1,*** But for the sake of setting out the test I will apply in this application, I am content to quote a work of the Court in **Saudi Arabia Airlines Corporation V Premium Petroleum Company Limited** that:

I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the Court in determining whether to strike out a pleading. 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 Article 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 by Madan JA in the famous DT 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 the Damocles''. Therefore, the power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is 'demurer or something worse than a demurer' beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the SHERIDAN J Test in PATEL v E.A. CARGO HANDLING SERVICES LTD. [1974] E.A. 75 at P. 76 (Duffus P.) that"…a triable issue …is an issue which raises a prima facie defence and which should go to trial for adjudication." Therefore, on applying the test, a defence which is a sham should be struck out straight away.

[17] I have stated in past decisions, and I will state again, that the policy considerations of the above

approach are that; 1) on one hand, a Plaintiff should not be kept away from his judgment by unscrupulous Defendant who has filed a defence which is a sham for the purpose only of temporizing on the case as long as possible; and 2) on the other hand, a defendant who has *bona fide* issue worth of trial should not be denied the opportunity to be heard on his defence on merit to enable the Court determine the real issues in controversy completely; that is serving substantive justice on consideration of all facts of the case.

[18] There are three issues of preliminary significance that have emerged from the arguments by parties and which I note much emphasis has been laid upon by parties. I will dispose of them quickly given that they are of a legal nature and do not involve making of expressions of opinions which will hurt a trial. The first one is on joinder of issues, the second on authority to swear affidavit and the third on arbitration agreement. On joinder of issues and admission of allegations in a pleading, I have this to say. According to Order 2, rule 12 of the Civil Procedure Rules 2010, a joinder of issue operates as a denial of every material allegation of fact made in the pleading on which there is a joinder of issue. Where a plaintiff does not file a reply to defence, there is a joinder of issues on the defence. The way I understand the law is that where an express joinder of issues is filed in the form of a reply to defence, there is joinder of issue on it as the last pleading filed, but any allegation which is excepted from the joinder and is stated to be admitted upon the reply will not benefit from rule 12(1) of Order 2 of the Civil Procedure Rules. Therefore, a reply will operate as joinder of issues on those allegations so expressly stated in the reply, and perhaps, unless I am wrong, those allegations in the defence which are not expressly denied on the reply may be deemed to be admitted. See Order 2, rule 12 of the Civil Procedure Rules 2010 which provides as follows:

> ***Denial by joinder of issue***
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> 1. ***If there is no reply to a defence, there is a joinder of issue on that defence.***
> 2. ***Subject to subrule (3)—***
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> a. ***there is at the close of pleadings a joinder of issue on the pleading last filed; and***
> b. ***a party may in his pleadings expressly join issue on the immediately preceding pleading.***
>
> 3. ***There can be no joinder of issue on a plaint or counterclaim.***
> 4. ***A joinder of issue operates as a denial of every material allegation of fact made in the pleading on which there is a joinder of issue unless, in the case of an express joinder of issue, any such allegation is excepted from the joinder and is stated to be admitted, in which case the express joinder of issue operates as a denial of every other such allegation.***

[19] And my take on the objection to the supporting affidavit is this. Under the rules, an affidavit will not be defeated merely because an authority under the seal of a corporation has not been filed contemporaneously with the application. The requirement of the law is that such authority should be filed before the hearing. Therefore, it is sufficient, in an interlocutory application, for the deponent to depose in the affidavit that he has the authority to swear the affidavit on behalf of the corporation. Another concern; even if the supporting affidavit is declared invalid, a Notice of Motion will not be defeated, for it can stand on the grounds set out in the body thereof. In addition, an application for striking out a defence on the ground that it discloses no reasonable defence do not require affidavit evidence. See Oder 2 rule 15(2) of the Civil Procedure Rules. The restriction thereof is a provision of law and serves a useful constitutional purpose; the court is allowed to just look at the pleadings without probing for evidence to see if the pleading is a real demurer which cannot even be resurrected by amendment. On that basis, only clear cases will be terminated summarily; this is a procedure intended to avoid miscarriage of justice by sending away a person from the judgment seat without being heard on merit. The objection fails. I will look at the pleadings and see whether it raises any triable issues.

[20] Copious submissions were made on some alleged arbitration agreement between the parties. The defence also alluded to existence of arbitration agreement between the parties. The Defendant sees this as a triable issue. The arguments by the Defendant on the arbitration agreement are only profitable in an application under section 6(1) of the Arbitration Act. I am not dealing with such application under section

6(1) of the Arbitration Act and indeed none has been filed. Of great significance here, the Defendant filed appearance and defence on 1st October 2013, and in light of the strict limitation in section 6(1) of the Arbitration Act, the allegation of existence of an arbitration agreement between the parties does not divest this court of jurisdiction over this matter. For better understanding of this position of the law fathom what the Court of Appeal stated on section 6(1) of the Arbitration Act in the case of **Lofty vs. Bedouin Enterprises Ltd – EALR (2005) 2 EA 122** that:

> ***"We respectfully agree with these views, so that even if the conditions set out in paragraphs (a) and (b) of Section 6 (1) are satisfied the Court would still be entitled to reject an application for stay of proceedings and referral thereof to Arbitration, if the application to do so is not made at the time of entering an appearance or if no appearance is entered, at the time of filing any pleadings or at the time of taking any step in the proceedings. [Underlining mine]***

[21] And the Court of Appeal quoted with approval the rationale behind section 6(1) of the Arbitration Act as it had been expressed by Githinji J. (as he then was) in HCCC 1756 of 2000, that;

> ***"In my view, section 6(1) of the Arbitration Act of 1995 which the court is construing means that any application for stay of proceedings cannot be made after the applicant has entered appearance or after the applicant has filed pleadings or after the applicant has taken any other step in the proceedings, so the latest permissible time for making an application for stay of proceedings is the time of that the applicant enters appearance. It seems that the object of Section 6(1) of the Arbitration Act of 1995, was inter alia, to ensure that applications for stay of proceedings are made at the earliest state of the proceedings. Section 6(1) of the Arbitration Act, Chapter 49 (now repealed) allowed applications for stay of proceedings to be made at any time after the applicant has entered appearance. Section 6(1) of the Arbitration Act of 1995, has changed the law as it does not permit an application for stay of proceedings to be made after entering an appearance."***

In the premises, this court has jurisdiction over this matter, and, the allegation of arbitration clause is not a *bona fide* triable issue worth reserving for trial. Nonetheless, the less I say about it at this stage the better.

[22] I am left with the last hurdle. I have looked at the Defence and I have carefully considered all the averments therein. It is in plain eye-sight that it is an assembly of mere denials. The Defendant has attempted to explain some of the averments through its submissions; not even an affidavit. Even with the explanations offered in the submissions, the defence remains a complete demurer; I do not see any hope of injecting life to it even through amendment. The major points presented in the submissions rotate around two matters; 1) the existence of arbitration agreement; and 2) the mention of a third party, CITIBANK, NA KENYA BRANCH, in the body of the plaint. I have dealt with the former issue and it cannot, in the circumstances of the case amount to a *bona fide* triable issue. About the latter issue; the fact that a third party is mentioned in the body of the plaint does not amount to *bona fide* triable issue in the Defence worthy a trial. The defence does not even allude to the said third party; the issue has just propped up in the submissions by the Defendant. In any case, the said third party is not a party in the suit and no claim has been laid against it by the Plaintiff or the Defendant. In law, a third party is enjoined in a suit at the instance of the Defendant and through the set procedure under Order 1 rule 15 – 22 of the Civil Procedure Rules. And, liability between the Defendant and the third party is determined between the Defendant and the third party, but of course, after the court is satisfied that there is a proper question to be tried as to liability of the third party and the Defendant, and has given directions under Order 1 rule 22 of the Civil Procedure Rules. The way I understand the law on third parties, such issues of third parties are issues and triable only between the third party and the Defendant, and cannot be a bona fide issue triable between the Defendant and the Plaintiff. On the basis of those legal reasons, even if the third party had been joined, which he has not, it is not a triable issue at all for purposes of liability between the Plaintiff and the Defendant. Looking at the defence and the generalized denials, it is a mere sham. It is a perfect candidate for striking out. Accordingly, I strike out the defence and enter judgment for the Plaintiff and against the Defendant as prayed for in the plaint. It is so ordered.

Dated, signed and delivered in court at Nairobi this 12th Day of March, 2015

F. GIKONYO

JUDGE