



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 222 OF 2012

EQUITY BANK LIMITED APPLICANT

VERSUS

PENNELLY CONSTRUCTION &

ENGINEERING LIMITED RESPONDENT

RULING

1. The **Notice of Motion** before the court is dated **15th August 2012**. It seeks the following orders:-
 1. *That this Honourable Court be pleased to strike out the Defendant's Statement of Defence dated 26th July 2012.*
 2. *That consequence to prayer 1 above, this Honourable Court be pleased to enter judgement against the Defendant as prayed for in the Pliant dated 3rd April 2012.*
 3. *That the costs of this application and generally for this suit be awarded to the Plaintiff.*
2. The Application is premised on several grounds set out therein and is supported by the affidavit of **PURITY KINYANJUI** dated **15th August 2012** and its annexures.
3. The application is opposed through a replying affidavit of **SIMON KIPRONO CHELUGUI** dated **19th October 2012**.
4. Briefly, the Plaintiff filed this suit on **3rd April 2012** seeking the recovery of Kshs.4,539,604/20 with interest at 24% per annum on the basis of a loan which was granted to the Defendant who is alleged to have failed to pay the loan. The said loan, which was **Kshs.3,550,000/=** was secured by a motor vehicle registration number KAR 931K jointly registered in the names of the Plaintiff and the Defendant. Upon the Defendant's failure to repay the said loan, it is also alleged by the Plaintiff that the Defendant has hidden the said motor vehicle making it difficult for the Plaintiff to repossess the same and hence this suit.
5. The Defendant filed a Defence on **26th July 2012** and denied everything including the existence of the loan contract, and stating that if any loan was indeed given to the Defendant, the Defendant has since fully repaid the loan together with any interests which would be thereon. The Defendant then adds that the Plaintiff is claiming false, unconscionable, illegal and oppressive interest, and urges the court to deny the application. The same denials are reiterated in the replying affidavit of Mr. Simon Kiprono Chelugui.
6. I have considered both the Plaintiff and the Defence. There are only two issues for this court to determine:

- i. **Whether loan of Kshs.3,550,000/= was advanced to the Defendant.**
- ii. **If yes, what was the applicable interest rate?**

The claim in the Plaintiff is based on the Letter of Offer dated **16th June 2008** for the sum of Kshs.3,550,000/=. That letter is attached to the affidavit of Purity Kinyanjui as “**PK 2**”. The letter contains the loan amount of Kshs.3,550,000/=. Monthly repayment amount of Kshs.124,796/=. interest rate at 1.25 % per annum and a default rate of 6% per annum, the security motor vehicle registration number KAR 931K, and other relevant terms. That Letter of Offer was accepted by the Defendant on 16th June 2008.

7. Before the Letter of Offer, the Defendant had executed Business Loan Application Form applying for Kshs.3,550,000/= on the same date. The said form is attached to the affidavit of Purity Kinyanjui as “**PK 1**”. In the statement of account attached as “**PK 3**” it is shown that on 19th June 2008 there was a disbursement debit in favour of the Defendant’s account confirming that there was a drawdown of the said loan facility.
8. Clearly, the Defendant applied for a loan of Kshs.3,550,000/= which loan was disbursed on the terms and conditions contained in the Letter of Offer. This means that the denial in the Defence and in the replying affidavit to the application simply amount to mere denials meant to delay the early and just finalisation of this matter.
9. Besides, by a letter dated **24th May 2010** the Defendant had written to the Plaintiff acknowledging the loan, and its default to repay the same and promised to regularise the account. This letter is attached to affidavit of Purity Kinyanjui as “**PK 5**”. Earlier, on **15th March 2010**, vide a letter of demand attached as “**PK 4**” the Plaintiff had demanded Kshs.3,735,436.80 from the Defendant, which amount was not paid. It is therefore, very clear in my mind that the loan amount of Kshs.3,550,000/= which was advanced to the Defendant, remains outstanding with applicable interests.
10. The second issue depended on the answering affirmatively to the first issue. Since I have found that the loan of Kshs.3,550,000/= was advanced to the Plaintiff, what then was the applicable rate of interest. Clause 3 of the Letter of Offer dated **16th June 2008** stated that interest would be charged at 1.25% per month, and that the Plaintiff reserved the right to amend the applicable rate of interest without notice to the Defendant. Clause 4 provided for additional interest or default interest at 6% per annum above the rates specified in Clause 3. Such interest was payable on demand. It is therefore clear that the Plaintiff’s demand for interest at 24% per annum is purely contractual and is not subject to debate.
11. Having established that there was a loan granted to the Defendant by the Plaintiff, and having established that the said loan was at agreed interest of 1.25% per month and a default rate of 6% per annum, it is then plain that the Plaintiff’s claim against the Defendant is established. Going back to the Defence, it is also clear that the denials in the defence amount to mere denials, a sham intended to mislead the court and to delay the sooner and just determination of this suit.
12. In the case of **CHOITRAM – VS – NAZARI [1982 – 99] 1 KAR 437**, Madan, J.A. (as he then was) said at pages 441 to 442:-

“For the purposes of Order XII Rule 6 admissions have to be plain and obvious, as plain as spikestaff and clearly readable because they may result in Judgement being entered.”

I am cognisant of the above caution given by the Judge. In the matter before the court, the loan is clearly admitted by the Defendant’s letter dated **24th May 2010**. Even if that was not admission, I have shown herein above the Business Loan Application Form filled by the Defendant, the letter of offer executed by the Defendant, the drawdown of Kshs.3,550,000/= in favour of the Defendant. The only issue which the Defendant may carry over is that the interest rate being applied by the Plaintiff is oppressive and unjust. However, the applicable interest rate, as I have also demonstrated above, was purely contractual and this court cannot purport to write contracts for the parties by disregarding the same.

13. The upshot of the foregoing is that I find this application a clear and merited circumstance to exercise my discretion to strike out the Defendant's Defence dated 26th July 2012. To that end I make the following orders:-

- a. *The Defendant's defence herein dated 26th July 2012 is herewith struck out.*
- b. *I herewith enter judgement in favour of the Plaintiff against the Defendant as prayed in the Plaint dated 3rd April 2012.*
- c. *The costs of this application, and of the suit, are given to the Plaintiff.*

DATED, READ AND DELIVERED AT NAIROBI

THIS 2ND DAY OF MAY 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Mutua for Applicant

Odawa holding brief for M/s Sawe for Respondent

Teresia – Court Clerk