REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 25 of 2013

BANK OF BARODA (K) LIMITED……..….PLAINTIFF

- VERSUS –

ALTEC SYSTEMS LIMITED…….... DEFENDANT

RULING

1. This suit is for recovery of Kshs 4,034,637.50. The facts are fairly straightforward. It is common ground that on the 22nd September 2010, the defendant applied for an overdraft of Kshs 15,000,000 from the plaintiff. It was to be secured by a legal charge over a property known as Kisumu Municipality/Block 8/452. That property was in the names of Kamniklal Lakhani, a director of the defendant. In the meantime and on 30th September 2010, the defendant applied for and was granted a temporary overdraft facility of Kshs 1,000,000 pending approval and perfection of the earlier application for overdraft.

2. The plaintiff has now presented two notices of motion to court: the first is dated 8th January 2012 and seeks to restrain the defendant from utilizing proceeds from sale of the above property and to furnish security for satisfaction of any decree in this suit. The second application is dated 12th November 2012 and prays that the statement of defence dated 21st August 2012 be struck out with costs.

3. I will deal with the latter application first. The applicant contends that the defendant has made an unequivocal admission of the debt at paragraph 4 of the defence. The amount has not been repaid. The only contentious matter is whether interest is payable on the overdraft of Kshs 1,000,000 or such other amount drawn down under the facility. I have studied the replying affidavit of Ashish Lakhani sworn on 20th March 2013. At paragraph 6 and 7, he depones that it is true that the defendant was advanced Kshs 1,000,000 by way of overdraft. He however disputes that there was an agreement on interest payable. In his view, the interest demanded in the plaint is exorbitant. The defendant's case is that this is a triable issue that should go to trial.

4. I am of the following considered opinion. There are clear legal benchmarks for striking out pleadings. At any stage of the proceedings, the court may strike out a pleading if it discloses no reasonable cause of action; is scandalous, frivolous or vexatious; or it is otherwise an abuse of court process. Striking out a pleading is a draconian measure to be employed sparingly. See *Wambua Vs Wathome* [1968] E.A 40 and *Coast Projects Ltd Vs M.R. Shah Construction* [2004] KLR 119. See also *Sankale Ole Kantai t/a Kantai & Company Advocates Vs Housing Finance Company of Kenya Limited* Nairobi, High Court case 471 of 2012 (unreported). See also *Francis Ngira Batware Vs Ashimosi Shatanbasi & Associates Advocates and 2 others* Nairobi, High Court, case 476 of 2009 [2013] e KLR.

5. The reason is that at this stage, the court is not fully seized of tested evidence or facts to form a complete opinion of the merits of the case. That is why the power should be exercised sparingly. This

principle of restraint was restated recently by the Court of Appeal in *Kisii Farmers Co-operative Union Limited Vs Sanjay Natwarlal Chauhan* Kisumu, Civil Appeal 32 of 2003 (unreported). See also the *The Cooperative Bank Limited Vs George Wekesa* Civil Appeal 54 of 1999 (Court of Appeal, Nairobi, unreported). In addition, regard must now be had to article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act. The court is now enjoined to do substantial justice to the parties. The overriding objective of the court is clearly laid out in those statutory provisions.

6. Ideally, cases should be determined on tested evidence at a full hearing. Striking out a pleading should thus be an exception and not the norm. The bottom line cannot be better set than in the words of Fletcher Moulton L.J. in *Dyson Vs. Attorney General* [1911] 1 KB 410 at 418 when he delivered himself thus;

"*To my mind, it is evident that our judicial system would never permit a plaintiff to be driven from the judgment seat in this way without any court having considered his right to be heard except in cases where the cause of action was obviously and almost incontestably bad"*

See also *Musa Misango Vs Eria Musigire* [1966] E.A. 390 at 395 where Sir Udo Udoma C.J. cited with approval the above passage.

7. When I juxtapose those principles of law against the facts here, I find further as follows. At paragraph 4 of the defence and paragraphs 6 and 7 of the replying affidavit, there is an unequivocal admission of the debt arising from the overdraft. I am satisfied from the supporting affidavit of David Ogega sworn on 12th November 2012 and his supplementary affidavit sworn on 24th January 2013 that the defendant issued cheques to third parties or drew cash from the account thereby overdrawing it by Kshs 3,854,217.50. The details of those cheques and cash withdrawals are pleaded at paragraph 6 of the supporting deposition. I hear a very loud silence from the defendant on repayment. Accordingly, to investigate the element of the defence relating to the sum of Kshs 3,854,217.50 would be a *fait acompli.* It would be futile and bogus: That is an amount the defendant drew down. There is no special traverse by the defendant. The next logical question is on any interest claimed on it. The pleadings and depositions do not reflect an express or written contract for payment of interest. To that extent, I agree with the defendant. The case cited by the defendant of *Packfuels Limited Vs Earth Movers Limited* Nairobi High Court case 595 of 2007 [2008] e KLR is relevant. See also *Mohammad Hassim Pondor and another Vs Summit Travel Services and 4 others* Nairobi, High Court case 511 of 2008 [2011] e KLR. In a synopsis, the question of interest payable is moot and is not a frivolous issue. But if that be the only issue, it is catered for by section 26 (1) of the Civil Procedure Act. That section provides as follows;

"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".

8. In short the only document the plaintiff cites on interest is the defendant's board resolution of 20th September 2010. It stated:

"Altec Systems Ltd also agrees to any interest charges to be paid for this facility to Bank of Baroda (Kenya Limited for the period of this facility as per their rates".

That to me cannot be the contractual basis for the rate of interest claimed in the plaint. If the plaintiff were to insist on it, the matter would have to proceed to trial. But from the documents and submissions by the plaintiff, nothing will change the fact that no contractual rate of interest was agreed upon by the parties on the temporary facility. It follows as a corollary that if I strike out the defence, I cannot award the plaintiff the interest at the rate of 20 % pleaded at paragraph 9 of the plaint.

9. Facts can be very stubborn. Even if the matter proceeds to trial, the only viable option will be an

award of interest at court rates. This was an overdraft. It was a commercial lending: not a friendly loan. I would take judicial notice that banks lend money at interest. I will thus award interest under section 26 of the Civil Procedure Act. And since there was no written or express contractual basis, I will only award interest at court rates from the date of filing suit (23rd May 2012) till full payment. Being faithful then to the overriding objective of the Court at article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act, I will strike out the statement of defence. Valuable judicial time should never be wasted investigating a bogus defence. See *Churanjilal & Company Vs Adam* [1950] 17 EACA 92. There is absolutely no rebuttal put forth on the overdrawn principal sum of Kshs 3,854,217.50. I will thus enter judgment in favour of the plaintiff for Kshs 3,854,217.50 together with interest at Court rates from 23rd May 2012 till full payment.

10. I then turn to the application dated 8th January 2012. It seeks to restrain the defendant from *"utilizing the sale proceeds of the property Kisumu Municipality/Block 8/452 held by its advocates pending the hearing of the application".* That prayer is on a legal quicksand. Although the defendant had intended to create a legal charge over the property to secure the Kshs 15,000,000 overdraft, it did not come to pass. The defendant only accessed the temporary overdraft facility for which I have entered judgment against it. Secondly, the property does not belong to the defendant but to its director Ramniklal Lakhani. He is distinct from the defendant company. *Salomon Vs Salomon* [1897] AC 22. He is not a party to this suit. It would be to turn logic onto its head to attach his property merely because *"he had previously offered the same property to the plaintiff to secure bank facilities applied for by the defendant".*

11. The remainder of the motion is to compel the defendant to furnish security to satisfy the decree. The Court is imbued with such power. It is discretionary. See *Procon Limited Vs Provincial Building Company* [1984] 2 ALL ER 368, *Shah Vs Shah* [1982] KLR 95, *Kuria Kanyoko t/a Amigos Bar & Restaurant Vs Francis Kinuthia Nderu and 2 others* [1988] 2 KAR 126. However, I have already struck out the defence and granted the plaintiff judgment on the principal sum and interest at Court rates from 23rd May 2012 till full payment. The prayer to furnish security may have been merited but is in the circumstances futile and spent. I thus need not go into the merits of that prayer.

12. For all the above reasons, the orders that commend themselves to me to make are as follows;

a) THAT the plaintiff's notice of motion dated 12th November 2012 succeeds to the following extent: The defendant's statement of defence dated 21st August 2012 be and is hereby struck out;

b)THAT judgment be and is hereby entered in favour of the plaintiff against the defendant for the principal sum of Kshs 3,854,217.50. Interest is awarded at Court rates from 23rd May 2012, the date of the suit, until full payment;

c) THAT the plaintiff is awarded costs of the suit in any event.

d)THAT the plaintiff's other notice of motion dated 8th January 2012 is dismissed with no order as to costs.

It is so ordered.
DATED and **DELIVERED** at **NAIROBI** this 7th day of May 2013.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of

Mr. P. Kiranga for Njeri Oyatta for the Plaintiff.

Mr. E.O. Mongeli for Ms Shaw for the Defendant.

Mr. Collins Odhiambo Court Clerk.