

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 023 OF 2022

JEHOSHAPHAT MUTUNGA KIMANTHI.....
PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....
DEFENDANT

RULING

1. The Plaintiff/Applicant’s Notice of Motion dated 4th November 2024 seeks, principally, an order that summary judgment be entered against the Defendant as prayed in the Amended Plaint dated 4th November 2024, and that costs of the application be provided for
2. The application is premised on the grounds that the Defence filed is weak, does not raise any bona fide triable issues, and fails to specifically deny the Plaintiff’s key averments. The Applicant contends that the Defendant does not dispute that the Plaintiff has been servicing interest on a mortgage facility that was never advanced, which amounts to a breach of contract. The Plaintiff therefore urges that the Defence is frivolous and an unnecessary attempt to delay the fair determination of the matter.

3. The Defendant opposes the application through Grounds of Opposition dated 3rd March 2025, contending that:
- i. The application is substantively defective as the prayer for summary judgment does not avail to the plaintiff as contemplated under Order 36 Rule 1 of the Civil Procedure Rules 2010.*
 - ii. There is no application seeking leave to amend the plaint and hence there is no proper amended plaint on record hence the present application is a non-starter.*
 - iii. The application is defective in limine as it seeks for orders based on a non-existence amended plaint.*
 - iv. The application is an abuse of the court process and urged the court to dismiss the same.*
4. Both parties filed written submissions which the Court has carefully considered.

Analysis and determination

5. From the pleadings and submissions, the issue that arises for determination is whether the application is merited.
6. The Defendant argues that the Amended Plaint relied upon is not properly on record since leave to amend was neither sought nor granted, contrary to Order 8 Rules 3 and 5 of the Civil Procedure Rules. The Applicant, however, maintains that the amendment was procedural as it was accepted by the court.
7. It is trite law that pleadings which are not properly amended with leave where required, are irregular and incapable of grounding substantive orders. In **Elijah Kipngeno Arap Bii**

v Kenya Commercial Bank Ltd [2013] eKLR, the Court of Appeal held that while amendments should generally be freely allowed, they must comply with the procedural requirements of the Civil Procedure Rules.

8. In the present case, the record shows no order granting leave to amend the plaint. The purported “Amended Plaint” dated 4th November 2024 is therefore not properly before the Court. The application, being founded on that pleading, is procedurally defective.
9. **Order 36 Rule 1(1)** of the **Civil Procedure Rules** on which the Respondent’s prayer for summary judgment was anchored empowers a plaintiff to apply for a summary judgment for a liquidated amount in instances where the Defendant has entered appearance but not filed a defence. It provides thus:

“(1) In all suits where a plaintiff seeks judgment for;

(a) A liquidated demand with or without interest;
or

(b) The recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser;

Where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for

the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.”

10. The principles governing the grant of summary judgment are settled. The Court of Appeal in **Continental Butchery Limited v Samson Musila Nthiwa [1978] eKLR** held that summary judgment should only be entered where there is no bona fide triable issue. Similarly, in **Postal Corporation of Kenya v I.T. Inamdar & 2 Others [2004] 1 KLR 359**, the court emphasized that:

“Summary judgment is a draconian measure which should be granted only in the clearest of cases where there is no reasonable doubt that the defendant has no defence.”

11. This was the same position in **Swiss Deli Trade (Panama) Inc v Privamnuts EPZ Kenya Ltd (2021) eKLR** where Njuguna J stated:

“...it is clear that an application for summary judgment may be made where the sum claimed is a liquidated sum and where the defendant has entered appearance but has not filed a defence. Where the defendant has filed a defence, the court has the duty to interrogate the said defence and satisfy itself that there are no triable issues raised by the defendant either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other

manner, before it can allow such an application... All a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial and a defence which raises triable issues does not mean a defence that must succeed.”

12. The Defendant’s defence, while brief, raises issues touching on the validity of the alleged mortgage facility and the contractual obligations of the parties. Whether the facility was advanced or not, and whether interest payments were wrongfully imposed, are factual and evidentiary matters that can only be properly tested at trial.
13. The Court is guided by the principle that if a defence raises even one bona fide triable issue, however weak, the defendant must be given an opportunity to be heard.
14. Accordingly, the Court is not persuaded that this is one of those “clearest of cases” in which judgment should be summarily entered. The defence cannot be said to be a mere sham or frivolous on its face. The Defendant’s defence discloses triable issues warranting a full hearing.
15. For the foregoing reasons, the Court finds that the Notice of Motion dated 4th November 2024 is procedurally defective. Consequently, the application is dismissed with costs to the Defendant.

RULING delivered virtually, dated and signed at **NAIROBI**

This **16th** day of **October** 2025.

P.M. MULWA
JUDGE

In the presence of:

Mr. Mutunga for Plaintiff

Court Assistant: *Carlos*