

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION

HCCOMM NO. 284 OF 2018

DIAMOND TRUST BANK KENYA LIMITED.....PLAINTIFF/RESPONDENT

-VERSUS-

TAMANA TRAVELS & TOURS LIMITED... 1ST DEFENDANT/APPLICANT

KIRAN RAMJI MULJI JETHA KORZDIA ...2ND DEFENDANT/APPLICANT

RULING

1. Vide a Notice of Motion dated 8th April, 2024 brought under the provisions of Section 3A of the Civil Procedure Act, and Order 36 of the Civil Procedure Rules, 2010, the defendants/applicants seek the following orders;-

(i) That Summary Judgment be and is hereby entered in favour of the defendants/applicants as prayed in the defendants' amended statement of defence and counterclaim dated at Nairobi on 29th August 2018 as amended at Nairobi on the 13th April 2023;

(ii) That in particular, the respondent be ordered to refund the applicants Kshs.14,197,686.30 illegally recovered from the applicants; and that the costs of this application be borne by the respondent.

2. The application is anchored on the grounds in support of it, and the affidavit of Mr. Kiran Ramji Mulji Jetha Kutedia, the 2nd defendant herein. He averred that the suit herein was instituted by a plaint to which the defendants responded to, by filing a contended defence. He stated that upon the plaintiff realizing that it had made claims in its plaint that were helpful to the defendants' case, the plaintiff filed an application dated 1st March 2023 for leave to amend its plaint.

3. Mr. Ramji deposed that leave was granted to the plaintiff to amend its plaint on 9th March 2023 which was 1696 days (4 years, 7 months and 20 days) after filing its plaint. That through their Advocates, the defendants opposed the application for leave to amend the plaint based on the fact that the amendments were being introduced to defeat the defence and also based on the length of time that had elapsed since the close of pleadings.
4. Mr. Ramji averred that the plaintiff proceeded to file its amended plaint dated 13th March 2023 on 14th March 2023, and the defendants filed their amended statement of defence and counterclaim dated 13th April 2023 on 14th April 2023, which was followed by a pre-trial conference on 17th April 2023, after which pleadings were closed.
5. Mr. Ramji stated that on 10th July 2023, the case was set down for hearing in the presence of both parties, for 5th February 2024.
6. He further stated that on the hearing date, the Advocates for both parties were present and the Court allocated the time for hearing as 1400 hrs on the same day in open Court.
7. He deposed that at the time allocated for hearing, the plaintiffs' Advocate sought to be granted leave to file a response to the defendant's amended statement of defence and counterclaim, and the plaintiff was granted leave to do so within 21 days subject to the plaintiff paying costs and Court adjournment fees within 7 days.
8. Mr. Ramji stated that the 21 days given to the plaintiff to file its response to the defendants' amended statement of defence and counterclaim expired on 26th February 2024 and that the 7 days given to the plaintiff to pay costs and Court adjournment fees expired on 12th February 2024.

9. He further stated that the plaintiff was yet to file a response to the counterclaim despite the extension of time granted by the Court.
10. Mr. Ramji averred that he has repaid the plaintiff Kshs.20,197,686.30 towards the overdraft facilities, and the plaintiff has collected proceeds of Kshs.15,000,000/= from the sale of his apartment (staff and servant quarter A6 erected on Land Reference No. 870/111/574, Nairobi).
11. Mr. Ramji claimed that the above payments constitute over payments as he has indicated in the amended statement of defence and counterclaim dated 13th April 2023. He contended that the total liquidated demand that is undefended is as stated in prayer (b) of defence and counterclaim dated 13th April 2023 and interest on the same.
12. The plaintiff filed a replying affidavit sworn on 15th October 2024 by Ms Jennifer Thiga, a Legal Officer working for the plaintiff. She contended that the plaintiff is not automatically entitled to Summary Judgment only on the basis that there is no defence to the counterclaim. She averred that Summary Judgment under Order 36 Rule 1 of the Civil Procedure Rules, 2010, is only available to a plaintiff who seeks Judgment for a liquidated sum, and where the Court is not only satisfied that there is no defence but that there is also no fairly arguable point to be urged by the defendant, or if the defence raises a point of law that is clearly misconceived or where there is no dispute as to any factual aspects of the case or when the defendant has admitted all or part of the claim.
13. Ms Thiga contended that the defendant's counterclaim is not for payment of an unpaid debt or ascertainable amount due under a contract of sale and/or supply of goods and services, but instead, it is a claim for refund of Kshs.14,197,686.30 which is neither a debt nor an ascertainable amount due to the defendants' under obligations under a contract.

14. She deposed that the issue of whether or not the defendants are entitled to the sum of Kshs.14,197,686.30 will be subject to the Court's investigation as to whether the defendants obtained a financial facility from the Bank, the amount lent, whether the amount was illegally recovered from the applicants as claimed, which requires the defendants to adduce evidence during a full hearing.
15. Ms Thiga contended that although the plaintiff has not filed a defence to the counterclaim, its claim as presented vide its amended plaint dated 13th March 2023 is that the defendants owed Kshs.9,968,396.65 and USD172,362.63 as at 30th April 2018, which is due and owing to date.
16. She stated that if the instant application is allowed, the plaintiff's claim as pleaded in its amended plaint dated 13th March 2023 will be rendered nugatory before the Court determines whether the defendants are indebted to the plaintiff as claimed. She averred that the defendants' counterclaim dated 13th April 2023 can therefore not be allowed summarily but ought to await a full hearing, where the plaintiff will have an opportunity to cross-examine the defendants on the evidence adduced and when the defendants will be required to discharge their burden of proof on a balance of probability.
17. She claimed that as per the draft reply to the amended defence and defence to the counterclaim annexed to the plaintiff's replying affidavit, the plaintiff has an arguable defence in denying the allegation that the defendants paid the sum of Kshs.35,197,686.30 and in stating that they are to date still indebted to the plaintiff.
18. She reiterated that the defendants' counterclaim dated 13th April 2023 does not meet the threshold to be summarily allowed under Order 36 Rule 1 of the Civil Procedure Rules, 2010.

ANALYSIS AND DETERMINATION

- 19. I have considered the application dated 8th April, 2024, the affidavit in support thereof and the replying affidavit filed by the plaintiff in opposition to the said application.
- 20. I note that there was non-compliance on the part of the plaintiff which when granted leave to file a reply to the defence and defence to the counterclaim did not. The draft reply to the defence and defence to the counterclaim attached to the plaintiff's replying affidavit is of no probative value and cannot be considered, since it does not form part of the pleadings that are properly on record for the plaintiff.
- 21. On its part, the defendants/applicants despite being directed to file and serve their written submissions on 23rd September 2024 and 9th December 2024 failed to do so. The application herein will therefore be determined on affidavit evidence and the applicable law.
- 22. The defendants seek an order for entry of Summary Judgment as per their amended statement of defence and counterclaim dated 13th April, 2023. The defendants also pray for a refund of Kshs.14,197,686.30, allegedly illegally recovered from them.
- 23. Order 36 Rule 1 of the Civil Procedure Rules, 2010, provides for Summary Judgment in the following terms;-

(1) In all suits where a plaintiff seeks Judgment for a

(a) Liquidated demand with or without interest; or

(b)

Where the defendant has appealed 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.

24. In **Nairobi Golf Hotels (K) Ltd v Bhimji Sanghani Builders Contractors** [1997] eKLR, the Court of Appeal stated thus on Summary Judgment-

In an application for summary Judgment the duty is cast on the defendant to prove that he should be given leave to defend but his duty is limited to showing prima facie the existence of triable issues or an arguable case.

25. The plaintiff's claim against the defendants herein is for payment of an overdraft facility for Kshs.10,500,000/= that was granted to 1st defendant and secured by the 2nd defendant's personal guarantee as per a letter of offer dated 1st October 2012. The plaintiff contends that subsequently, the 1st defendant approached the plaintiff seeking an overdraft facility for their account No.0600346002 which the plaintiff accepted and granted the 1st defendant an overdraft facility for USD 50,000.00 that was secured by a lien on fixed deposits aggregating Kshs.4,400,000/=, already held with the plaintiff and in the 1st defendant's name at the plaintiff's Westgate branch, and which was to be discharged by appropriate execution.
26. The plaintiff alleges that the 1st defendant overdrew on the said facilities over and above the stipulated respective limits causing the same to be in arrears with an aggregate outstanding amount of Kshs.18,478,509.63 as at 24th October 2014 for both the Kshs. Account No. 060034001 and USD account No.0600346002.

27. The plaintiff stated that it issued Statutory Notices and sold Flat No. 16 and staff quarters No. A6 erected on LR. No. 1810/111/574 which was registered as security and the said property was sold for Kshs.15 Million through private treaty and the money was remitted to the plaintiff and credited to the 1st defendant's overdraft account No.0600346001 leaving an outstanding balance of Kshs.8,690,395.00, which has continued to accrue interest.
28. It was contended by the plaintiff that the USD account No. 0600346002 was still accruing interest on the outstanding amount. The plaintiff claims Kshs.9,963,396.65 and USD 171,362.63 with interest at Court rates from the date of filing (sic) until payment in full, costs and any further reliefs as the Court may deem just and fit.
29. In their amended statement of defence and counterclaim, the defendants denied having sought an overdraft facility in January 2014 for their account No. 0600346002 and put the plaintiff to strict proof thereof.
30. They also denied having been granted an overdraft facility for USD 50,000.00 as per the letter dated 15th January 2014 and contend that what was granted was a bank guarantee facility of USD 50,000.00 secured by a lien on fixed deposits aggregating Kshs.4,400,000/= already held by the plaintiff. They asserted that the plaintiff would be able to liquidate the lien to discharge the said facility if need arose, without requiring additional sums from the defendants.
31. The defendants denied having renewed the overdraft facility for Kshs.10,500,000/=. They averred that the facilities were capped to a maximum amount and the authority to disburse funds was vested with the plaintiff and over disbursing of funds (if any), was at the plaintiff's leisure and pleasure, at their risk as to costs and losses (if any).

32. The defendants stated that they take issue with the allegation that they overdrew account No.0600346002 having not received any overdraft facilities on the said account and put the plaintiff to strict proof thereof.
33. The defendants averred that at 29th October 2014 they had made repayments to the tune of Kshs.20,197,686.30 and could therefore not have been in arrears amounting to Ksh.18,478,509.63 as alleged. They claimed that the plaintiff failed to properly administer the accounts and levied incorrect interest, unconscionable and unscrupulous bank charges, penalties and commissions which led to an increase of the aggregate outstanding amount.
34. The defendants contended that having repaid Kshs.20,197,686.30 as at 31st October 2015 and with the plaintiff having sold the security at Kshs.15,000,000/= the plaintiffs have thus far collected over Kshs.35,197,683.30 against a Kshs.10,500,000/= facility. They also challenge the cost at which the security was sold which they claim was at an undervalue and claim that the plaintiff's statutory power of sale had not accrued due to failure by the plaintiff to give Notices in that regard.
35. In their counterclaim, the defendants contend that the plaintiff is in breach of the *in duplum* rule having recovered more than double the principal amount, in that it has recovered over Kshs.35,197,686.30 in excess of the maximum limit of Kshs.21,000,000/=.
36. In the counterclaim, the defendants pray for the dismissal or striking out of the plaintiff's suit with costs to the defendant, a declaration that the defendant completed paying the loan facility extended to it by the plaintiff, an order for the plaintiff to refund the 1st defendant the Kshs.14,197,986.30 illegally recovered from the 1st defendant, costs of the suit and such other reliefs as the Court may deem just and fit.

37. The **Blacks Law Dictionary 9th Edition** defines a “*liquidated amount*”

“as a figure readily computed based on an Agreement’s terms.”

38. Further **Jowitt’s Dictionary on English Law 2nd Edition** (London 1977) at P. 949 on “*Liquidated demand*” states as follows –

“Where an action is brought for the debt or liquidated demand only, the writ must be endorsed with a statement of the amount claimed and also with a statement that further proceedings will be stayed if, within the time limited for appearing, the defendant pays the amount claimed to the plaintiffs, his solicitor or agent or into account...”

39. In this case it is the defendants who are seeking Summary Judgment as per their statement of defence and counterclaim dated 29th August 2018 and as amended on 13th April 2023, and that the plaintiff be ordered to refund the defendants the sum of Kshs.14,197,686.30, allegedly illegally recovered from them.

40. Although the plaintiff did not file a reply to the defence and a defence to the counterclaim, having analyzed the pleadings filed so far by the parties herein, I am not persuaded that the defendants’ claim in the counterclaim is a liquidated demand as there are many contentious triable issues raised by the plaintiff in its amended plaint, which were denied by the defendants herein. It is the said contentious issues and mostly, as to whether the defendants have overpaid the facilities advanced to them or whether they are in arrears in payment of the said facilities, that must be heard on merits by each party calling a witness or witnesses in support of its case.

41. Issues of overcharging of interest, bank charges and commissions and whether the *in duplum* rule applies to the suit herein will also need to go to trial.

42. In the end, having found that there are triable issues in the main suit as well as in the counterclaim, the application herein is found to be without merits.
43. It is hereby dismissed with costs to the plaintiff/respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 17th day of December 2025. Ruling delivered through Microsoft Teams Online Platform.

**NJOKI MWANGI
JUDGE**

In the presence of:-

Mr. Janjo David for the plaintiff/respondent

Mr. Onguti for the defendants/applicants

Ms B. Wokabi – Court Assistant.