



Victoria Commercial Bank Ltd v Ken Match (E.A) Limited & 2 others (Commercial Case E449 of 2020) [2024] KEHC 3460 (KLR) (Commercial and Tax) (18 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3460 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E449 OF 2020
DO CHEPKWONY, J
MARCH 18, 2024**

BETWEEN

VICTORIA COMMERCIAL BANK LTD PLAINTIFF

AND

KEN MATCH (E.A) LIMITED 1ST DEFENDANT

MAYURKUMAR PRAVIN CHANDRA MODHA 2ND DEFENDANT

MAGAJAN BHIMA MODHWADIA 3RD DEFENDANT

RULING

1. This ruling determines the Plaintiff's Notice of Motion application dated 5th May, 2021, brought under Sections 1A, 1B and 3A, all of the *Civil Procedure Act* and Order 2 Rule 15 (1) (a), (b), (c) and (d) both of the *Civil Procedure Rules*, 2010 seeking inter – alia the following orders: -
 - a. That this Honourable Court be pleased to strike out the Defendants/Respondents Statement of Defence dated 21st December, 2020 as the same offends the mandatory procedures of law by failure of the Defendants to serve the filed defence on the Plaintiff/Applicant within fourteen (14) days from the date of filing the defence and file an affidavit of service.
 - b. That in the alternative to prayer (a) above, the Defendants/ Respondents statement of defence dated 21st December, 2020, (herein referred to as the Defence) be and is hereby struck out as it does not disclose any reasonable ground of Defence in law and it is an abuse of the Court process and judgment be entered against the Defendants/Respondents for the sum of Kshs.21,192,983.55/= interests at 13% per annum from 25th October 2020 till payment in full and costs of the suit as prayed for in the Plaintiff.
 - c. That the costs of this application and of this suit be borne by the Defendants/Respondents.



2. The grounds in support of the application are as set out on its face and in the affidavit of Ruth Muasya, the Plaintiff's Legal Manager, wherein it has been averred that the Plaintiff advanced the 1st Defendant an overdraft facility of Kshs.10,000,000/= and a guarantee facility of Kshs.10,000,000/= (herein referred to as "the facilities") which were secured by among other things, a debenture over the 1st Defendant's assets for Kshs.14,000,000/=, a pledge of Kshs.6,000,000/=, a lien deposit in the 1st Defendant's name and personal guarantees executed by the 2nd and 3rd Defendants. However, the Defendant/Respondents defaulted in the repayment of the facilities in the terms herein agreed and the outstanding amount as at 24th September, 2019 was Kshs.24,695,799.65. That the Plaintiff/Applicant commenced realization of the securities and more particularly, transferred the sum of Kshs.6,388,742.60 from the lien deposit leaving a loan balance of Kshs.19,049,102.40 which as at the date of filing this suit had accrued interest to the tune of the tune of Kshs.21,192,983.55 and which interest continues to accrue interest at the rate of 13% per annum until it is paid in full.
3. It is also averred that the Defendants filed a statement of defence but failed to serve the same in accordance with Order 7 Rule 1 of the *Civil Procedure Rules*. In any event, the statement of defence filed contains mere denials and unsubstantiated allegations of fraudulent accounting practices said to have been done by the Plaintiff/Applicant. In the alternative to that, the Defendants have alleged that the whole transaction became void and voidable as a result of the Plaintiff/Applicant's breach of the agreement. According to the Plaintiff, the Defendants are approbating and reprobating, in other words, they are blowing hot and cold without putting forth any reasonable defense.
4. The Plaintiff/Applicant further avers that the Defendants cannot deny the existence of executed contracts based on the facilities which were advanced to them hence their mere denial is not sufficient to establish a defense in this case.
5. The court has been referred to the case of *Peeraj General Trading and Construction Company Ltd (K) and Another v Mumias Sugar Company Limited* [2016] eKLR, wherein the court cited with approval that mere denial for loan facilities are not enough to establish a defense or denial of liability and that there is need to lead forth some reasons for the denial, for example that the contract failed or that some or payments have been made and the same can be proved.
6. On the other hand, in their grounds of opposition dated 21st June, 2021, the Defendants aver that the application is premature and that the statement of defence raises triable issues that cannot be wished away at the instance of an application. The Defendants crave for the application to be dismissed and the matter be allowed to proceed for full hearing.
7. Directions were issued that parties canvass the application by way of written submissions and in that respect, the submissions filed by parties will be considered in the determination of this application, hence their contents will not be reproduced herein.

Analysis and Determination

8. Having considered the pleadings filed by parties herein, the issue crystalizing for determination is whether the Defendants' statement of defence should be struck out either for not having been served upon the Plaintiff within the prescribed timelines or for not raising or disclosing any reasonable defence.
9. In seeking to have the statement of defence dismissed for not having been served within the timelines prescribed under Order 7 Rule 1 of the *Civil Procedure Rules*, 2010, the Plaintiff/Applicant submitted that it has never been served with the statement of defence but upon realization that a defense had been filed upon perusing the court file in a bid to make an application for summary Judgment.



10. Order 7 Rule 1 of the *Civil Procedures Rules*, 2010 states that a Defendant ought to file a defence within fourteen days of being served with summons and serve it within fourteen days from the days from the date of filing the defence. Order 10 Rule 3 of the Civil Procedure Rules further provides that where a Defendant fails to serve either the memorandum of defence within the prescribed time, the court may on its own motion or on application by the Plaintiff, strike out the memorandum of appearance or the defence as the case may be and make such orders as it deems fit in the circumstances.
11. In its submissions, the Plaintiff/Applicant seeks to invoke Order 10 Rule 3 and have the defence dismissed for lack of service. However, in this court's humble opinion, under Article 159(d) of *the Constitution*, courts are required to administer justice without undue regard to procedural technicalities. But this does not mean the courts
 - should ignore the rules of procedure which are meant to guide in the orderly presentation and adjudication of cases such as the requirement on service of defense on time failing to which the defence may be dismissed.
12. That notwithstanding, this court subscribes to the view by Ringera, J (as he then was) that lapses in procedure and form which do not necessarily affect the jurisdiction of the court, or the dispute at hand should not make a case fatal to the extent of it being struck out at a preliminary stage.
13. Thus, the question to ask in this case is whether by not striking out the defense for not having been served would occasion a miscarriage of justice or prejudice to the Plaintiff/Applicant. In the case of *Priscilla Jeruto Kisoso & Kiporot Ole Totona Alias Singo Arap Totona and 3 Others* [2016] eKLR, Munyao, J stated that the Civil Procedure Rules prescribe when pleadings and documents may be served, but it does not say that it is "illegal" or "forbidden" to serve such documents thereafter. A party is at liberty to apply for service out of time and such application must be considered on reasons given. It is not a case of "illegality", but a case where the court has to exercise discretion.
14. Consequently, this court also aligns with the view that the court has discretion to allow a statement of defence to be served at a later date and for that reason, sees no prejudice that cannot be beyond pecuniary compensation. In the circumstances, this court declines the prayer to strike out the statement of defense on account of non-service.
15. On the second limb as to whether the defense can be struck out for not having raised triable issues, and judgment be entered against the Defendants, this court has taken into consideration Order 2 Rule 15 (1) of the *Civil Procedure Rules* as the relevant provision in these circumstances of this case. It provides that:-
 - (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
 - a. it discloses no reasonable cause of action or defence in law; or
 - b. it is scandalous, frivolous or vexatious; or (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.
16. The above provision sets out the grounds guiding in determining whether to strike out pleading and narrows them to three, namely, where the pleading raises no reasonable cause of action or defence, where the pleading is likely to prejudice a fair trial and where the pleading is an abuse of the court process.



17. In the present case, the Plaintiff seeks the defense to be dismissed for failing to disclose a reasonable defense in law and as the Plaintiff puts it, it contains mere denials without any substantiative reasoning. The Plaintiff avers that the Defendants were advanced the loan facilities after having freely signed the offer letter and ascribed to the terms therein. That, the Defendants also freely executed the debenture facilities and all other securities in favour of the Plaintiff and thus, having benefited from the loans, they cannot turn around and allege either fraud or accounting malpractices.
18. On the other hand, the Defendants have merely averred that they were not advanced the loans and if at all they were advanced, then the same was due to fraud and accounting malpractices on the part of the Plaintiff. They maintained that the Plaintiff had breached the contract hence it became void and or voidable and not enforceable against them.
19. This court has carefully considered the documents filed by both sides as well as those attached to the application at hand, this court finds that the Defendants have not denied entering into the lending agreement with the Plaintiff especially the offer letter dated 1st October, 2018 and the debenture made on 29th October, 2018. It is also noted that the Defendants have not advanced the particulars of fraud or accounting malpractices committed by the Plaintiff which could have impugned the lending agreements. Further, the Defendants have not controverted the statements of accounts filed by the Plaintiff/Applicant showing that the facilities were indeed deposited in the 1st Defendant's account which is currently in arrears. It then follows that the statement of defence contains mere denials in a plain and obvious case of a loan advanced but not repaid.
20. In the same breadth, whereas the court recognizes that striking out of a defence would divest the Defendants of a hearing, and drive them off the Judgment seat, it is also aware to the equally important constitutional imperative of having justice dispensed with without unreasonable delay. In view of this, it is imperative that the Plaintiff should not be kept away from enjoying fruits of its Judgment by unscrupulous Defendants who, in this court's view have merely filed a defence for purposes of temporizing on the case for as long as possible. Considering the generalized denials contained in the statement of defence, this court finds that the same to be a mere sham and proceeds to strike it out.
21. Accordingly, the Plaintiff's application dated 5th May, 2021 be and is hereby allowed in the following terms: -
 - a. That Judgment be and is hereby entered against the Defendant/Respondents jointly and severally for a sum of Kshs.21,192,983.55 with interests at the rate of 13% per annum from 25th October, 2020 until payment in full.
 - b. The Costs of both the application and the suit to be borne by the Defendants.

It is so ordered.

RULING DATED AND SIGNED AT KIAMBU THIS 13TH DAY OF MARCH, 2024

D. O. CHEPKWONY

JUDGE

RULING DELIVERED, DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF MARCH, 2024.

ALFRED MABEYA

JUDGE

