



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 424 OF 2012

LUCY MWERU NJOROGE.....PLAINTIFF

VERSUS

IYEGO RWATHIA COMPANY LIMITED.....DEFENDANT

R U L I N G

1. The application before the Court is the Plaintiff's Notice of Motion dated **16th July 2012** and filed in Court on **27th July 2012**. It is expressed to be brought under **Order 36 rule 1** of the **Civil Procedure Rules**. The said application is for summary Judgment for the sums stated in the Plaint of **Kshs. 6,040,349.99**.
2. The application is based on the the grounds stated on the face thereof and is supported by the affidavit of the Plaintiff sworn on **26th July 2012**. The said affidavit essentially reiterated the grounds of the application.
3. The brief facts are that on or about the year 1999, the Defendant was in a dire financial stress and its buildings were on the verge of being sold when it sought and obtained a friendly loan from the Plaintiff's husband (now deceased) repayable in instalments. The Defendant was only able to repay part of the loan and thus on **11th August 2009** it renegotiated the terms of the loan with the Plaintiff and an agreement was entered into where the Defendant acknowledged owing **Kshs. 7,040,349.99** repayable on or before 16th day of every subsequent month at monthly instalments of **Kshs. 100,000/=**.
4. The Plaintiff avers that the Defendant repaid only **Kshs. 1,000,000/=** and failed and or refused to repay the balance thus it owed **Kshs. 6,040,349.99** as at **16th July 2010**. According to the Plaintiff this was the date of breach of the agreement.
5. The application is opposed. The Defendant filed a Replying affidavit on **9th October 2012** sworn by **JULIUS GIKONYO MUCONGA** described as the Chairman of the Board of Directors of the Defendant Company.
6. It is averred by the deponent that the Plaintiff's application is premature since the Company has filed a Defence that raises triable issues. He lists the triable issues, among them that the Plaintiff has not stated the exact date when the Defendant borrowed money from her husband and how much money was borrowed.
7. He further avers that the Plaintiff has not demonstrated to the Court the regime of law under which the alleged loan contract was entered into and that she has not exhibited necessary approvals and licences from the concerned financial regulatory bodies authorising the Plaintiff to lend money and charge interest.
8. It is also the deponent's averment that the advocates on record for the Defendant have raised a

- Defence of limitation of actions and that they will raise a preliminary objection at the opportune time which point may determine the suit in its entirety.
9. In reply, the Plaintiff filed a further affidavit sworn on **10th November 2012**. She averred that the Defence had been filed after the current application was filed and served and therefore the same was misplaced and untenable and ought not to be considered. The Plaintiff reiterated that she was seeking to enforce the agreement dated **11th August 2009** for payment of the sum of **Kshs. 7,040,349.99** duly entered between the Defendant and herself.
 10. The application was prosecuted by way of written submissions. Counsel for the Plaintiff filed written submissions on **27th November 2012**. The said submissions essentially reflected the facts in the application as well as the Plaintiff's supporting affidavit. It was submitted for the Plaintiff that the Defendant had not traversed or addressed the issue of the Agreement dated **11th August 2009** and therefore it was an established fact that the Defendant had breached the said agreement. Counsel relied on the case of **Kenya Planters Co-operative Union Ltd vs Machrose Flora Ltd**, where the Court granted an application for summary judgment, *inter alia*, because the Defendant had not traversed a material disposition.
 11. In response, Counsel for the Defendant filed submissions on behalf of the Defendant on **22nd April 2013**. In the said submissions Counsel for the Defendant reviewed the Statement of Defence filed in Court on **6th August 2012**. It was Counsel's submission that the said Defence raised triable issues and that in such a case summary Judgment could not be entered. Counsel relied on the case of **Nilam Doshi Vs Credit Agricole Indosouez Ltd & 2 others, Civil Case No 802 of 2002**.

ANALYSIS

12. I have considered the application herein, the affidavits on record as well as submissions by Counsel. Having done so, I take the following view of the matter.
13. To begin with I would like to state that I have noted that the case of **Nilam Doshi Vs Credit Agricole Indosouez Ltd & 2 others, Civil Case No 802 of 2002** referred to by Counsel for the Defendant and attached to the submission therein is totally unrelated to this case. The ruling in the said case is in relation to dismissal of a suit for want of prosecution while the current application is for summary Judgment. Those are two different issues and with distinct principles. With respect, the said case does not help the Defendant's case herein.
14. Now to the application at hand, the procedure and conditions for seeking summary judgment are set out in **Order 36 rule 1(1)** of the **Civil Procedure Rules**. It was held in the case of **COMMERCIAL ADVERTISING & GENERAL AGENCIES LTD VS. QUREISHI [1985] 458**, that -
 1. *The court has power under Order XXXV (now Order 36) of the Civil Procedure Rules to enter summary judgment for the claim of a Plaintiff with a view to eliminating delays in the administration of justice.*
 2. *Summary judgment is granted subject to there being no bona fide triable issue entitling a defendant to leave to defend. If a bona fide triable issue is raised, the Defendant must be given unconditional leave to defend, but not so in a case in which the court feels justified in thinking that the defences raised are a sham.*
 3. *On an application for summary judgment the Plaintiff, the Defence, the counter-claims and reply to defence, if any, and affidavits in support of and in reply as well as all relevant issues and circumstances are all proper material for consideration. Nothing is immaterial which helps justice to be done.*
15. I have noted that the Defendant herein filed its Defence after the current application was made. However, there is nothing to stop the Court from considering the same once it is on record. In any case the Plaintiff has not demonstrated that it will suffer any prejudice that cannot be compensated for by way of costs.

16. Moving forward, in its Defence, the defendant has denied having knowledge of the agreement dated **11th August 2009**, and averred that if there was any borrowing and lending then the same was not sanctioned by the owners of the Company in an AGM as required under the Company's MOA and AOA.
17. To my mind, the decisions made by a Company whether financial or otherwise are normally by way of a resolution by the Company. There is no such resolution on record either to show that the Defendant borrowed a certain amount of money or that they were to repay the same as indicated in the agreement of **11th August 2009**. The said agreement has been signed by some directors. There are no documents on Court record to confirm that they are indeed officials of the Defendant Company and that the said agreement was sanctioned by the Company.
18. The Plaintiff has stated that the loan offered to the Company was a friendly loan and that apparently the late husband was a shareholder therein. These facts are not conclusive and need to be ascertained. For the aforesaid reasons this Court is minded that it should tread carefully in exercising its powers in giving summary Judgment where there are issues of law to be answered. See **SUNDERJI VS. CLYDE HOUSE COMPANY LTD [1984] KLR 499**, where the Court held -

“...where an issue is raised which requires reference to case law in order to reach a decision such an issue should be tried with full argument on the law and should not be dealt with summarily..”

19. The parties herein need to be cross examined to establish the circumstances under which this loan came to being. This can only be attained if the Defendant is given leave to defend.
20. The other line of defence raised by the Defendant was that the Plaintiff had not demonstrated to the Court the regime of law under which the alleged loan contract was entered into and that she had not exhibited necessary approvals and licences from the concerned financial regulatory bodies authorising the Plaintiff to lend money and charge interest. The Plaintiff attached a Loan amortization Schedule for the Defendant in its List of Documents which shows that the Plaintiff was charging the Defendant interest. There is need to establish under what circumstances and authority the Plaintiff was doing so.
21. To sum it up and in view of the foregoing, it is evident that the Defendant's Defence raises triable issues that need to go for trial. Therefore the Plaintiff's Notice of Motion dated **16th July 2012** and filed in Court on **27th July 2012** is hereby dismissed. However for filing its statement of Defence after the current application, the Defendant shall bear the Plaintiff's costs of this application.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 7TH DAY OF APRIL 2014

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Kavindu holding brief for Muchoki for the Plaintiff/Applicant

Ohenga holding brief for Okindo for the Defendant/Respondent

Teresia – Court Clerk