REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 231 of 2012

COMMERCIAL BANK OF AFRICA LTD. ……..…….…… PLAINTIFF

VERSUS

DAVID NJAU NDUATI …….. DEFENDANT

R U L I N G

1. The Plaintiff filed an Application by way of Notice of Motion dated 29 June, 2012 seeking that judgement be entered as against the Defendant as prayed in the Plaint. The grounds in support of the Application detailed that the Defence did not disclose any *bona fide* triable issues and that the Defendant was justly and truly indebted to the Plaintiff. The Application was supported by the affidavit of Ronald Mworia sworn on 29 June, 2012. The Defendant filed Grounds of Opposition dated 16 August, 2012. There were only 2 grounds, the first being that the Application was bad in law and misconceived. The second ground was that the Plaintiff's Application was fatally defective, an abuse of the due process of the Court and should be dismissed with costs.

2. Mr. Mworia detailed that he was the Head of the Remedial Management Unit of the Plaintiff bank. He detailed that the Defendant was indebted to the Plaintiff in the sum of Shs. 8,461,911.76 together with interest thereon at 26% per annum from 2 March, 2012. He stated that the Defendant had made an application, approved by the Plaintiff, for a loan of Shs. 2 million on 25 October, 2007. A loan account was opened for the Defendant and on that date, the said amount of Shs. 2 million was credited to the Defendant's current account with the Plaintiff. The deponent attached to his said Affidavit, a copy of the statements of the Defendant's current account no. 421104018 as well as statements for his loan account no. 3 421104 009. Thereafter the deponent recounted, the Defendant applied on 13 November, 2007, for a second loan facility in the amount of Shs. 3,100,000/-. Again that application was approved by the Plaintiff and the loan amount of Shs. 3,100,000/- debited to a second loan account opened for the Defendant being no. 3 421104 017 , with the said sum credited to his current account. The transactions were governed by the Plaintiff bank's General Terms and Conditions which the Defendant signed on 23 October, 2007. The interest rate detailed therein and agreed by the Defendant was 26% per annum. By way of security, the Defendant procured the joint registration with the Plaintiff of his motor vehicle registration number KAZ 108 Z, a Toyota station wagon.

3. Mr. Mworia then stated that the Defendant defaulted in his repayment obligations to the Plaintiff bank and by letter dated 17 September, 2010, the Plaintiff demanded the regularisation of the Defendant's loan accounts. The deponent stated that as a result of the Defendant's default the balance outstanding on both his loan accounts was transferred to his current account no. 421104 026 which was subsequently renumbered 421104 018. The reason given for the transfer was so as to reflect the interest which continued to accrue on the outstanding amount. The deponent went on to say that there was no response from the Defendant to the said letter dated 17 September, 2010 and consequently the matter was referred

to the Plaintiff's advocates. Notice of intention to sue was sent to the Defendant under cover letter from the advocates dated 29 November, 2010. Again there was no response from the Defendant to that letter. Finally, Mr. Mworia deponent to the fact that the Plaintiff bank did not hold a chattels mortgage in respect of the Defendant's said motor vehicle and as such the Plaintiff could not repossess the same and sell it. Further, he detailed that the amount which the Plaintiff bank was claiming being Shs. 8,461,911.76 could be seen at page 42 being the Defendant's said current account statement.

4. Miss. Babu for the Plaintiff and Miss. Nduati for the Defendant appeared before me to argue the Application on 19 September, 2012. Miss. Babu relied upon the contents of the Supporting Affidavit of Mr. Mworia and detailed that the application is brought under **Order 36 rule 6**, *Civil Procedure Rules*. She recounted to court the contents of the Supporting Affidavit and drew attention to the Plaintiff bank's General Terms and Conditions particularly clause 5 thereof, which gave the Plaintiff the wherewithal to charge interest on the loan accounts. The rate of interest applicable at the time the suit was filed was 26% per annum. From the Supporting Affidavit, counsel detailed that the Defendant was truly indebted to the Plaintiff as prayed in the Plaint. She requested for judgement be entered under the provisions of Order 36 rule 1 saying that the Application had been filed before the Defence was filed and as per **Order 36 rule 1**, this being a liquidated claim, the same was properly before court.

5. Counsel then referred the court to **Order 36 rule 2** which stated that the Defendant should show cause why he should not be given leave to defend by affidavit or otherwise. Counsel noted that the Grounds of Opposition filed by the Defendant contained 2 extremely vague grounds and ideally, the Defendant should have filed a Replying Affidavit as, presently before court, there was no challenge to the facts contained in the Supporting Affidavit of the Plaintiff. She maintained that the Defence that had been filed was a bare denial and contained no triable issues, even to the extent that the Defendant denied ever having been granted the loan facilities. Counsel maintained that the Defence was a sham and no purpose would be served by this court granting leave to defend the suit. Counsel stated that she had filed a list of authorities and specifically relied upon authorities nos. 2 and 4. Finally, Miss. Babu detailed that she relied upon sections 173 and 177 of the Evidence Act to the extent that a copy of an entry in a banker's statement is *prima facie* evidence. The statements which had been annexed to the Supporting Affidavit had not been challenged, were *prima facie* evidence.

6. In her turn, Miss Nduati submitted that the Plaintiff's said Application was misconceived and defective so as to be an abuse of the process of this court. She noted that the Application had been brought under Order 36 rule 1 which in her opinion, was clear – the application may be brought where the Defendant has entered an Appearance but not filed a Defence. No matter what counsel's opinion was as regards the Defence, it had been filed. In counsel's view that precluded the Plaintiff from seeking an order for summary judgement. Counsel noted that the Rules did provide an alternative for the Plaintiff for, where there is a Defence filed, it could apply to strike out that defence if in the opinion of the Plaintiff, it discloses no defence in law – see **Order 2 rule 15**. Miss. Nduati noted that the Application before court was filed on 29 June, 2012 while the Defendant had entered Appearance on 18 June, 2012. Under the provisions of **Order 6 rule 1**, after entering his Appearance, the Defendant had 14 days within which to file his Defence and thereafter he had another 14 days within which to serve that Defence. Counsel maintained that the Plaintiff's Application sought to interrupt that time period, in her opinion, unlawfully. She noted that the Application by the Plaintiff was filed barely 10 days after the Defendant's Appearance. On that ground alone, counsel's submission was that the Application should fail.

7. In her view, **Order 36 rule 1** presupposed that any application contemplated by the Plaintiff can only be filed in default of defence and that is why the rule allows the defendant to put forward by affidavit, details of his defence. However, in this case, there was a Defence filed by the Defendant. She maintained that the Plaintiff should not be allowed to move the court as to the Plaintiff's interpretation of the law but only as permitted by the law. Determination can only be done by the court if the law follows rules of procedure complied with and proper application made. Miss Nduati maintained that what the Plaintiff was trying to do was to invite the court to apply the provisions of **Order 36** to its advantage. It was asking the court to specifically ignore the provisions of **Orders 2 and 6**. Counsel requested the court to decline the invitation and dismiss the Application before it, with costs to the Defendant.

8. In a brief reply, Miss. Babu commented that she did not agree with the learned counsel's (for the Defendant) interpretation of **Order 36 rule 1**. She stated that even if the court took it that **Order 36** is only applicable where there is no Defence and since the Defence has been filed, **Order 36** does not apply, the last day for the filing of the Defence was 2 July 2012. That was 14 days from the 18 June, 2012. The Defence was filed on 3 July, 2012, out of time. Counsel maintained that as at the end of 2 July, the Plaintiff could have applied either in default of defence or for summary judgement. She maintained that the overriding objective was to do justice. There was both a Plaint and a Defence on record. The Defence was a mere denial. There was no reasonable defence to the action and, in counsel's opinion, there was no further point in protracting the litigation further.

9. Leaving aside the question as to whether the Defence filed herein on 3 July 2012 sets up triable issues, I consider it necessary that rules of procedure are properly followed so as to ensure that no prejudice is suffered by either or any party to an action. The Plaintiff's Notice of Motion dated 29 June, 2012 quite clearly is brought under the provisions of **Order 36** of the *Civil Procedure Rules* and nothing else. There is no mention of the general provisions of **section 3A**, *Civil Procedure Act*, for example, nor indeed that the Application is brought under **Orders 2 or 6. Order 36 rules 1 & 2** read as follows:-

"1. (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.

(2) The application shall be supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.

(3) Sufficient notice of the application shall be given to the defendant which notice shall in no case be less than seven days.

2. The defendant may show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit".

Looking at the timing in this matter, the Defendant entered his Memorandum of Appearance on 18 June 2012. According to **Order 7 rule 1** a defendant:

"shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service."

In this matter, a small arithmetical calculation would detail that he should have filed his Defence on or before 2 July, 2012. In fact, he did not file his Defence until 3 July, 2012, one day late, a fact observed by counsel for the Plaintiff.

10. However, unfortunately for the Plaintiff, it filed the current Application before court on 29 June 2012, three days before the Defence was due. For that reason alone, I feel that the Application before court was premature. Further and with regard to the strict wording of **rule 1 (1) of Order 36**, it has now been overtaken by events in that the Defendant has filed his Defence albeit one day late. It may have been possible for counsel for the Plaintiff to have relied upon the provisions of **Order 51 rule 10** which deals with technicalities. The said rules reads as follows:

“10. (1) Every order, rule or other statutory provisions under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.

As I read **rule 10 (1)**, where an applicant inadvertently fails to detail the order, rule or other statutory provision under or by virtue of which any application is made, this sub-rule allows for such failure. Similarly **subrule (2)** allows for the avoidance of a technicality where want of form does not affect the substance of the application. However in this matter, I am concerned that the Application was filed before the time for the filing of the Defence had expired and such does not amount to a mere technicality, it goes to the whole substance of the Plaintiff’s Application. To my mind, that prejudices the Defendant. Further, and as pointed out by the Defendant's counsel, a Defence has now been filed which, in my view, now takes the Application outside the purview of **Order 36 rule 1 (1)**. This is despite the fact that the Defence filed by the Defendant on 3 July, 2012 is in my opinion a mere denial and contains no triable issues.

11. Accordingly, I dismiss the Plaintiff's Notice of Motion dated 29 June, 2004 with costs to the Defendant.

DATED and delivered at Nairobi this 18th day of October 2012.

J. B. HAVELOCK
JUDGE