



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Suit 836 of 2009**

**CONSOLIDATED BANK OF KENYA LTD.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**BARNABAS KARIUKI NG'ANG'A.....DEFENDANT/RESPONDENT**

**RULING**

The application before the Court is brought by a Notice of Motion dated 15<sup>th</sup> June 2010, and is made under **Order XXXV Rules 1 (1) (a) & (2)** and **Order VI Rule 13 (1)(d)** of the **Civil Procedure Rules; Sections 3 & 3A** of the **Civil Procedure Act**, and all enabling provisions of the Law. The Applicant thereby seeks from the Court the following orders that–

- 1. This Honourable Court be pleased to strike out the Defendant/Respondent's Statement of Defence dated 12<sup>th</sup> May 2010 for being otherwise an abuse of court process.**
- 2. This Honourable Court be pleased to enter summary judgment for the sum of Kshs. 7, 091,857/= together with interest at the monthly rate of 32% against the Defendant/Respondent as prayed for in the plaint.**
- 3. Costs of this application and the suit be borne by the Defendant.**

The application is supported by the annexed affidavit of JULIUS GIKONYO, the Plaintiff's Remedial Officer, and is based on the grounds that –

- (a) That the Plaintiff's claim is for a liquidated amount of Kshs. 7, 091, 857/= being outstanding balance in respect of an asset finance loan facility advanced to the Defendant by the Plaintiff but has defaulted in repayment.**
- (b) The Defendant/Respondent's Statement of Defence is a sham, consists of mere denials and raises no triable issues as the Defendant is truly indebted to the plaintiff.**
- (c) The Defendant/Respondent's Defence is scandalous, frivolous and /or vexatious.**
- (d) The Defendant/Respondent's defence if maintained may prejudice, embarrass or delay the fair trial of the action.**
- (e) The aforesaid pleading is otherwise an abuse an abuse of the process of the Court and should be struck out.**

**(f) It is in the interest of justice and fairness that this application is allowed.**

In opposition to the application, Barnabas Kariuki Ng'ang'a, the Respondent herein swore a replying affidavit on 29<sup>th</sup> June, 2010 and filed it on 5<sup>th</sup> July, 2010. In that affidavit, he deposes that in his statement of defence dated 12<sup>th</sup> June, 2010 he denied the existence of the said contract to purchase a tractor and the plaintiff in the reply to defence dated 14<sup>th</sup> May 2010 still insisted on the existence of a Renault Tractor. Paragraph 7 of the affidavit in support of the application generally states that the deponent only repaid a small portion of the loan without specifying how much exactly was paid, and how much was outstanding before and after the said payment, and that the affidavit in support does not bear a statement of account indicating the payments made by the Respondent although they are acknowledged by the Applicant. Without the said statement, the Applicant cannot summarily prove its claim and the amount claimed in the plaint is speculative and should be subjected to a full hearing so that it can be proved thereat. The Respondent further contends that the defence is not a sham as it raises serious triable issues including the identity of the asset financed and the amount claimed. He also states that no prejudice would be suffered by the Applicant if this matter goes to full viva-voce hearing, and that a full scale hearing would give the Applicant an opportunity to properly prove its case. On the other hand, if the application is allowed, the deponent would be seriously prejudiced because he would not have an opportunity to cross examine the plaintiff's witnesses on their claim and various payments in the plaint that are untrue and which the deponent has challenged in the defence.

At the oral canvassing of the application Mr. Magut appeared for the Applicant, while Mr. Wachira appeared for the Respondent.

Mr. Magut referred to the application dated 15<sup>th</sup> June, 2010 and urged that the defence be struck out and summary judgment entered. The application is supported by 3 affidavits. He argued that the Defendant made an application to the plaintiff seeking an asset finance facility. That plaintiff approved the application, issued a letter of offer and then money was released and plaintiff paid Kshs. 5.6 million, and vehicle finally released on 6<sup>th</sup> April 2006, signed by the Defendant himself. Counsel submitted that the Defendant never paid. Mr. Magut argued that the Defendant in his defence denies owing any money but does not explain whether he paid. That purpose of advance was to purchase a tractor. That the defence is a sham and there is nothing to be tried. The learned counsel argued that the defendant is challenging making any payments but he has not denied signing the documents which are annexed. He argued that to go to trial is just a mere delaying tactic, and that there is nothing for trial. He submitted that the defendant must demonstrate that he has triable issues. He prays that court dismisses defence and enter summary judgment.

On his part, Mr. Wachira argued that in application of this nature, it is the duty of the Respondent to demonstrate even one triable issue to be entitled to unconditional leave to defend. He submitted that the Defence raises issues of chattels, and that there is no such thing as a Renault Track. He argued that the issue is whether they offered a tractor or a truck and that this was a triable issue. He also submitted that both in the plaint and supporting affidavit, it is alleged the Respondent had paid a few instalments but they don't say how much was reduced by those instalments, or how the figure in this suit was arrived at. Counsel further submitted that statements of accounts are merely exhibited without explaining how the figures were arrived at. He argued that these were triable issues and thereupon urged the court to dismiss the application.

On his reply Mr. Magut argued that the Respondent was trying to shift the burden to the plaintiff when it was his duty to prove that he had paid. Since they were not denying they took the tractor, he asked the court to grant orders as prayed.

Having considered the pleadings and the respective submissions of counsel, I take the view that the main issue for determination is whether the statement of defence filed herein is a sham which ought to be struck out and summary judgment entered in favour of the Applicant.

It is worthy noting that **Order XXXV** of the **old Civil Procedure Rules** was intended to enable a

Plaintiff with a liquidated claim, to which there is clearly no defence, to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by the delaying tactics of the Defendant. Where the Judge to whom the application is made considers that there is any reasonable ground of defence to a claim, the Plaintiff will not be entitled to summary judgment. In **MOMANYI v HATIMY & ANOR (2003) E.A. 600**, Omolo, Lakha, and Ole Keiwuia, JJ.A said at page 604 –

**“There is no discretion to be exercised if triable issues have been disclosed in an application for summary judgment.”**

Similarly, in the case of **OSODO v. BARCLAYS BANK INTERNATIONAL LTD [1981] KLR 31** the court held that-

**“...if upon an application for summary judgment the Defendant is able to raise a prima facie triable issue as the Appellant did in this case, there is no room for discretion. There is only one course for the Court to follow, that is to grant unconditional leave to defend.”**

I find that in paragraph 5 of the Statement of Defence, the Respondent denies that he ever wanted to purchase a Renault Tractor or that he ever bought one and avers that no contract of the nature alleged by the plaintiff has ever been entered into between the parties. Further, in paragraph 9 of the said Statement of Defence, the Respondent avers that he is a stranger to the sum of Kshs. 7,091, 857/= claimed in paragraph 8 of the plaint and he doesn't know how it has been arrived at, or what formula has been used to calculate the said claim.

Without delving further into the issues raised in the Statement of Defence, the above issues without doubt constitute triable issues, as the claims therein would have to be tested by oral evidence in court. It is my humble view that the defendant has raised a prima facie triable issue and as such this court will not exercise its discretion because there is no room for such discretion. In sum, the only course for this court to follow is to grant unconditional leave to defend.

The application to strike out of defence and for summary judgment accordingly fails and is hereby dismissed. Costs in the cause.

It is so ordered.

**L. NJAGI  
JUDGE**

**DATED and DELIVERED at NAIROBI this 20<sup>th</sup> day of November, 2012.**

**MUTAVA  
JUDGE**