



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

HCC NO. 40 OF 2004

NATIONAL BANK OF KENYA PLAINTIFF

=VERSUS=

RUBBER COMPONENTS LTD 1ST DEFENDANT

IBRAHIM ODERO 2ND DEFENDANT

VISAY N. PATEL 3RD DEFENDANT

RULING

The plaintiff, National Bank of Kenya has sued the defendants for recovery of Kshs 8,414,855/= plus compound interest at the rate of 22%. It is alleged, in the plaint filed on 7/4/2004, that the 1st defendant, **Rubber Components**, was granted overdraft facilities and financial accommodation by the plaintiff but defaulted in the repayment thereof and that the 2nd defendant, **Ibrahim Odero**, and the 3rd defendant, **Vijay N. Patel**, guaranteed the repayment of the said overdraft and financial accommodation. It is further pleaded that the 2nd defendant executed a charge over parcel number **Siaya/Omio-Mwalo/2328** as security for the repayment of the said financial facility and accommodation. It is also averred that despite demand and notice of intention to sue, the defendants have failed, refused and /or neglected to repay the said sum hence the suit.

The 1st and 2nd defendants have filed a joint statement of defence denying liability to the plaintiff. They specifically pleaded that only Kshs 350,000/= was advanced to the 1st defendant, a substantial amount whereof has been paid. The 3rd defendant has filed a separate statement of defence in which liability is also denied. He has more specifically averred that if there was any guarantee he made on behalf of the 1st defendant, then the same was specific, clear and has been discharged.

In a reply lodged on 2/8/2007, the plaintiff joined issue with the defendants and reiterated the contents of its plaint.

The pleadings were in that state when the plaintiff filed its Notice of Motion dated 27/1/2005, pursuant to the provisions of Orders VI Rule 13(1)(b) (c) and (d) and XXXV Rule 1 of the Civil Procedure Rules. Section 3 (A) of the Civil Procedure Act has also been invoked. As there are specific provisions under which the Notice of Motion has been lodged, invoking section 3 (A) of the Civil Procedure Act is

improper.

The Plaintiff seeks two substantive orders namely, that the defendants' defences be struck out and that summary judgment be entered for it against the defendants jointly and severally as prayed in the plaint. The main grounds for the application as expressed on the face of the application are that the defendants are truly indebted to the plaintiff in the sum claimed; that the defendants' defences consist of mere denials and that the denials are scandalous, frivolous and an abuse of the process of the court.

The application is supported by an affidavit sworn by one **George O. Ojiambo**, the Plaintiff's Eldoret Branch Manager, who has deposed, among other things, that the defendants applied for and were granted a loan and or an overdraft facility by the plaintiff on the security of a charge over land parcel number **Siaya/Omia Mwalo/2328** and guarantees of the 2nd and 3rd defendants; that the 1st defendant admitted liability to the plaintiff and made proposals regarding settlement which were never fulfilled leading to the issuance of a Statutory Notice of Sale and advertisement of the charged property for sale by public auction; that the defendants made other proposals of settlement of their indebtedness to the plaintiff which proposals were not fulfilled and that the defendants have no defence to the plaintiff's claim.

The application is opposed. The 1st and 2nd defendants lodged a Notice of Preliminary Objection on various grounds including a challenge made to the competence of the suit and application. The 3rd defendant has filed a replying affidavit in which he has deposed, among other things, that he never guaranteed the entire loan advanced to the 1st defendant and that after the initial guarantee, the plaintiff advanced further sums to the 1st and 2nd defendants without his knowledge and that he has not been served with any notice at all prior to the institution of this suit. In the premises, the 3rd defendant contends that there are bonafide triable issues.

The application was canvassed before me on 24/11/2010 by **Mr. Songok**, learned counsel for the plaintiff, **Mr. Obudho**, learned counsel for the 1st and 2nd defendants and **Mr. Kathili**, learned counsel for the 3rd defendant. Counsel for the 1st and 2nd defendants addressed me on points of law only having filed no replying affidavit or grounds of opposition. Counsel for the 3rd defendant on the other hand substantiated his client's stand-points taken in his replying affidavit.

I have considered the application, the supporting affidavit and the annexures thereto. I have also considered the 3rd defendant's replying affidavit and the submissions of counsel. Having done so, I take the following view of the matter. The court has wide and ample powers under Order VI Rule 13 (1) of the Civil Procedure Rules to strike out pleadings and dismiss actions. The plaintiff herein has invoked sub-rule 1 (b) (c) and (d) of Rule 13 of the Civil Procedure Rules in seeking the striking out of the defences. So, are the defences scandalous, frivolous or vexatious. A scandalous pleading may contain matters which are indecent or offensive or matters made for the purpose of abusing the opposite party (see **Bullen & Leake and Jacob's Precedents of pleadings 12th Edition (page 144)**). Having perused the defences impugned, I see nothing scandalous in them. A frivolous pleading is trifling, fanciful and put forward merely to waste court's time (see **Bullen & Leake and Jacob's precedents – (Supra) page 145**). The defences delivered by the defendants particularly the 1st and 2nd defendants may be short on detail but I cannot describe them as trifling with the court. A vexatious pleading lacks bonafides and is hopeless or oppressive and tends to cause the opposite party unnecessary anxiety, trouble and expense. (see the same **Bullen & Leake & Jacob's precedents at page 145**). Again, I find no basis for holding that the defences put forward by the defendants lack bonafides or are hopeless and meant to cause anxiety, trouble and expense to the plaintiff.

Are the defences likely to prejudice, embarrass or delay the fair trial of the action? According to **Bullen & Leake and Jacob's precedent's** already cited, a pleading is embarrassing if it is ambiguous or unintelligible or states immaterial or irrelevant issues which may involve expense, trouble and delay and therefore prejudice the fair trial of the action. That description does not fit the defences delivered herein.

Are the defences otherwise an abuse of the process of the court? Having found that the defences are not

frivolous or vexatious, I find no basis to hold that they are an abuse of the process of the court. A pleading which is an abuse of the process of the court is frivolous, vexatious and absolutely without basis.

In the premises, I cannot strike out the defences filed under Order VI Rule 13 (1) (b) or (d) of the Civil Procedure Rules. As stated in **D.T. Dobie(K) & Co. Ltd –vrs- Muchina & Another** “As the power to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence, it should be used sparingly and cautiously” and that “the power should be exercised in plain and obvious cases”

The plaintiff has also invoked order XXXV Rule 1 of the Civil Procedure Rules. As stated in **Giciem Construction Company =vrs= Amalgamated Trades & Services (1983) KLR 156,**

“The object of order XXXV of the Civil Procedure Rules is to enable the Plaintiff with a liquidated claim in which the defendant has no reasonable defence to a quick judgment without being subjected to a lengthy unnecessary trial”

Is the plaintiff’s case the type the court in the above case envisaged. It has emerged herein that the plaintiff advanced sums to the 1st defendant on the security of a charge over parcel number **Siaya Omia Mwalo/2328**. That security is still held by the plaintiff. At one time, the plaintiff set in motion the process of realizing the said security but did not do so when the defendants made proposals regarding settlement of their indebtedness to the plaintiff. The defendants did not honour their proposal. The plaintiff has not explained why it did not realize its security when the proposals made by the defendants were not met.

The 3rd defendant has pleaded that if he guaranteed the repayment of any sums to the plaintiff on behalf of the 1st defendant, then the guarantee was for a specific sum and he has been discharged from the same. In his affidavit in reply to this Notice of Motion, the 3rd defendant has contended that after the guarantee, the plaintiff continued to offer further financial facilities and accommodation to the 1st and 2nd defendants without reference to him. In his view his guarantee did not extend to the subsequent financial facilities or accommodation. In my view that issue is bonafide. **In Giciem Construction Company =vrs= The Amalgamated Trades & Services (Supra)** the court held, *inter alia*, as follows:

“ 9. The general principle applicable to applications for summary judgment is that where the defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence, or even a fair probability that he has a bonafide defence, he ought to have leave to defend. Leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to the facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment. In this case the defendant showed that he had reasonable grounds for setting up a defence in stating the terms and details of work done. The discretion to give summary judgment was in this case improperly granted in the light of the disputed facts and unresolved issues which obviously raised triable issues”

The 1st and 2nd defendants herein have demonstrated that the plaintiff’s sums are secured by a charge over landed property which security has not been realized. The 3rd defendant has demonstrated that he was not a party to subsequent financial accommodation made by the plaintiff to the 1st and 2nd defendants. Those issues can only be resolved at the trial of the action. On the authority of several decisions of the Court of Appeal including **Giciem Construction Company –vrs Amalgamated Trades & Services (supra)**, I cannot enter summary judgment for the plaintiff as sought.

In the end, the plaintiff’s application dated 27/1/2005 and filed on 17/2/2005 is without merit and is dismissed. The plaintiff shall pay the costs of the 3rd defendant. The 1st and 2nd defendants shall however bear their own costs of the application.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 25TH DAY OF JANUARY 2011

F. AZANGALALA

JUDGE

Read in the presence of :-

Mr. Kiboi for the 3rd defendant applicant.

F. AZANGALALA

JUDGE

25/1/2011.