



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 241 OF 2009
**THE REGISTERED TRUSTEES OF MICRO
ENTERPRISES SUPPORT
PROGRAMME TRUST (MESPT)..... PLAINTIFF**
VERSUS
**BUNGOMA FAMILY DEVELOPMENT
PROGRAMME LTD & 8 OTHERS DEFENDANT**
RULING

The Applicant in the Notice of Motion dated 30th March 2010, is the Plaintiff in the suit. It has moved the court under **Orders X11 Rule 6** and **XXXV Rules 1(1) and (2)** of the **Civil Procedure Rules (2009 Revised Edition)**, praying that judgment on admission be entered against the Defendant/Respondents, jointly and severally, in the sum of Kshs. 7,405,744.20 as prayed in the Plaint dated 24th February 2009 and filed on 8th April 2009.

The application is premised on the grounds that the Respondents are truly and justly indebted to the Applicant and that the Defences filed on their behalf are mere denials and do not raise any triable issues. The application is supported by the affidavit of John Masha, the Credit Manager of the Applicant, to which is annexed several documents and correspondences as proof. Opposing the application the 1st and 2nd Defendant/Respondent's have filed a Replying Affidavit sworn by the 1st Defendant/Respondent on 7th July 2010 on their joint behalf. Grounds of Opposition dated 3rd June 2010, have been filed on behalf of the 4th Defendant/Respondent while a joint Replying Affidavit has been filed on behalf of the 5th, 6th, 7th, 8th and 9th Defendant/Respondents. The 3rd Defendant/Respondent has since died and the claim against him dropped.

Oral submissions were made before me in which learned counsel for the Applicant Mr. Kimondo stated that; the 1st Defendant/Respondent, having admitted in paragraph 5 of its Defence, that it has paid Kshs. 2,067,505 out of Kshs. 8,000,000 of the amounts loaned to it by the Plaintiff/Applicant (which loan was secured by guarantees executed by the 2nd to 9th Defendant/Respondents) the said representation amounts to an admission of indebtedness to the Applicant binding all the Defendants, and in respect of which the Plaintiff/Applicant is entitled a judgment on admission under **Order X11 Rule 6**. Following the above, learned counsel submitted that the respective defences filed by the Respondents are mere denials which should be struck out and summary judgment entered in accordance with the provisions of

Order XXXV Rules 1(1) and (2) above cited.

Copies of the respective Letters of Guarantee and Indemnity executed by the 2nd to 9th Defendant/Respondents have been exhibited as proof of their indebtedness, as well as a copy of a charge over the 2nd Respondent's property known as **L. R. NO.**

E. BUKUSU/N. KANDUYI 2039, charged by the 2nd Respondent to secure the Plaintiff/Applicant's loan to the 1st Respondent. It has been submitted that attempts to realize the amount due by selling off the said immovable property have been unfruitful. Correspondence evidencing the futile attempts by auctioneers to do so has also been exhibited.

Submitting in opposition to the application Mr Khakula for the 5th to 9th Defendant/Respondents told the court that no clear admission can be inferred from the facts of the case and that summary judgment cannot issue, arguing that, even if the loan is not disputed the amount due to the Applicant has not been ascertained and that the amounts stated in the exhibited correspondences are at variance with the sum claimed under the Plaint. Citing the authorities of **UNITED INSURANCE CO. LTD & TWO OTHERS –VS- WARUNGE & TWO OTHERS [2003] KLR** and **DEPOSIT PROTECTION BOARD –VS- SUNBEAM SUPERMARKET & TWO OTHERS [2004] KLR**, Mr. Khakula submitted that the Respondents should be given leave to defend the suit.

Although no one attended at the hearing to present the 4th Respondent's objection where only Grounds of Opposition have been filed to the effect that the suit is not suitable for summary dismissal and that the 4th Defendant's defence does raise triable issues, including points of law; and further that, given the amount claimed the suit ought to be heard on merits in order that the several documents filed by the Applicant be tested by way of oral evidence, the court has considered the 4th Defendant's defence filed herein on 26th June 2009.

It is trite that summary judgment for a liquidated sum can only be entered where the amount claimed has been specified, is due and payable or has been ascertained or is capable of being ascertained as a mere matter of arithmetic. It was so held in the leading Court of Appeal decision in **GURBAKSH SINGH & SONS LIMITED –VS- NJIRI EMPORIUM [1985] KLR 695**, whereby it was further held (inter alia) that:-

“An Application for summary judgment cannot be allowed or applied in cases where a detailed defence has been filed, as the court cannot ignore the defence filed and proceed with the case by way of summary judgment.”

Where the application for summary judgment is based on an admission, the law requires that such admission of fact, whether arising from the pleadings or otherwise must be clear and unequivocal. [See **SINGH –VS- QURBANLITE LTD [1985] KLR 920**].

The Applicant has cited two authorities to support this application as follows:-

- 1. NATIONAL BANK OF KENYA LTD –VS- ELIZABETH W. KIMEMIA [2006 e KLR**
- 2. VITAFOAM PRODUCTS LTD –VS- PARKSONS FURNISHINGS LTD H.C.C.C. (MILIMANI) NO. 680 OF 2002**

The two authorities are, infact, judgments delivered after a full trial and not in interlocutory proceedings, with the first one being relevant in support of the contention that the guarantees executed by the 2nd to 9th Defendant/Applicants were valid and enforceable and to what extent the guarantors would be liable to satisfy the principal debt, while the second authority is, I think, intended to demonstrate that the suit herein was validly filed in Nairobi. I do not therefore consider the two directly relevant to the main question to be determined herein, which is, whether a joint and several judgment should be entered

against the Defendants without going to trial. It is clear from the pleadings that the loan advanced to the 1st Defendant/Respondent by the Applicant cannot be denied and any denial as appearing in the defences filed ought to be deemed to be a mere denial, in view of the admission of the loan and the securities executed by the various parties in favour of the Applicant.

The alleged admission in the 1st Defendant's Defence reads as follows:-

“5. Having already paid Kshs. 2,067,505/= out of Kshs. 8,000,000/= the 1st Defendant does not admit the figure of 7,405,744.50/= as the outstanding debt as alleged in paragraph 20 and 21 of the Plaint and will call for accounts.”

The defence was filed on 25th June 2009, and cannot be said to be supported by the letter dated 16th December 2005, (annexture JM13 to the Supporting Affidavit) which the Applicant correctly says was written in answer to the demand of 1st November 2005, wherein a sum of Kshs. 3,957,802.20/= plus interest and legal charges was demanded, or to have been answered by the Applicant's letter of 12th February 2009, pursuant to which the suit was filed.

In paragraph 14 of the 4th Defendant's Defence it is stated that the Applicant, having been incorporated and registered under the Trustee (Perpetual Succession) Act, (Cap 164 of the Laws of Kenya), it lacks locus standi to claim any profit and benefits from the contract it seeks to enforce. In view of the fact that the loan advanced provides for interest, penalties and other charges, I am of the view that the issue of locus standi is a triable issue.

I am of the view that there is exists no clear and unequivocal admission of the sum claimed herein in the absence of agreement as to how the sum of Kshs. 7,405,744.20/- has been arrived at. I do not consider the particulars as tabulated in paragraph 21 of the Plaint sufficient enough to satisfy the court on the same in view of the several discrepancies appearing in the sums stated in the various statements/schedules included in the exhibited correspondence. A case in point is the loan repayment schedule appearing in annexture JM 14 furnished to the advocates of the Applicant and which substantially differs from the particulars as presented in paragraph 21 of the Plaint.

In view of the above I find that triable issues do exist to warrant this suit going to trial for a just and fair determination on merits.

Accordingly, the application is hereby dismissed with costs in the cause.

DELIVERED and SIGNED at NAIROBI this 29TH day of JULY 2011.

M. G. MUGO
JUDGE

In the presence of:

Mr. Kariuki holding brief for Mr. Kimondo **For the Applicant**

No Appearance

For the Respondents