



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
MISC. APPLICATION CASE NO. 427 OF 2010

ALI MOHAMED SUNKAR.....PLAINTIFF
VERSUS
DIAMOND TRUST BANK (K) LTD.....DEFENDANT

RULING

This Ruling is delivered in the two parallel applications, namely;

- 1. The Defendant's Chamber Summons dated 5th August 2010, seeking orders of the court that the Plaintiff's suit be struck out under Order V1 Rules 13 (b)(d) and 16 of the Civil Procedure Rules (2009 Revised Edition) and**
- 2. The Plaintiff's Notice of Motion dated 28th September 2010 praying that summary judgment in the sum of KShs. 12,176,017/= be entered in favor of the Plaintiff.**

The Plaintiff's claim being that the Defendant bank made unauthorized debits in the Plaintiff's account at its Capital Centre branch, in breach of its legal mandate as a banker and the Defendant's defence being mainly, that the alleged debits were made on instructions issued by the Plaintiff by way of internal transfers and bank cheques issued to his former wife, her company and the Kenya Red Cross, the Defendant's position is that the Plaintiff's claim is scandalous, frivolous, vexatious and an abuse of the process of the court.

Relying on a Document Examiners' Report obtained by his advocates, which apparently found no match between the signatures in the bank transfer forms and cheques and specimen signatures obtained from the Plaintiff, the Plaintiff's contention is that the Respondent has no defence to the suit and that the one filed on 29th September 2010 is a sham, meant only to delay the expeditious disposal of the suit.

Written submissions were filed in the two applications followed by oral highlights. The said submissions and authorities cited have been duly considered. The Plaintiff's contention is that; there being no dispute that the Defendant did debit the Plaintiff's account with said monies, which were paid out to other parties, the court should find that it breached its mandate and should be ordered to pay the amounts so debited to the Plaintiff forthwith, on the strength of the Documents Examination Report dated 17th October 2010, commissioned by the Plaintiff and annexed to the Supporting Affidavit as annexure "AMS4."

The Defendant has submitted that the said report is not conclusive evidence that the debits were not authorized by the Plaintiff, particularly since he did not raise any query as regards the same yet the debits

were done over a period of eight months (1st August 2005 to 31st March 2007 as per the particulars shown in paragraph 5 of the Plaintiff), during which time the Plaintiff was furnished with his bank statements. The Document Examiner's Report reads, in part, as follows:-

“I can find no agreement between the disputed signatures and the specimens mentioned above on the documents marked B1-B7. The disputed signatures are formed in a style which does not conform to the style of formation shown on the statements.”

In his written submissions, the Plaintiff states that the only dispute to be resolved is whether the Plaintiff signed or authorized the payments to third parties, an issue he submits is neither frivolous, or scandalous and which cannot be said to be an abuse of the process of court. In this regard, he specifically submits as follows:-

“The court must investigate these allegations by the Plaintiff, that the monies were withdrawn from his account without authority.”

And further that:-

“The Defendant's attempts to resist the Plaintiff's application by challenging the hand writing experts report. The report can only be challenged by counter expert report. Elizabeth Hinga who is the Head of Debt Recovery Unit cannot simply discredit the handwriting expert's report without tabling another handwriting report. The Plaintiff has proved that he did not author the bank transfers by his own personal averment and also supported by expert evidence which the Defendant has failed to rebutt. There is therefore no issue to go to trial.”(underlining by court)

It seems to me that the Plaintiff's above submissions are contradictory of each other since the Plaintiff does appreciate the fact that his disclaimer of authority ought to be investigated. It is only at a full trial that the issue of authority, as per the averments in paragraph 3 of the Statement of Defence can be put to scrutiny with the evidence being tendered to prove that the debits were effected in the ordinary course of business, in particular as relates to the operation of the Plaintiff's account. The expert's report would also be put to the admissibility and “*conclusive evidence*” test as suggested by the Respondent in the submissions filed.

In view of the above, the case is not one where summary judgment can issue. Nor is it one where the Plaintiff's suit should be struck out under **Order V1 Rule 13 (1) (b) and (d)** of the **Civil Procedure Rules (2009 Revised Edition)**. This means that none of the orders sought by the parties can issue. I find that the suit and the Defence filed are arguable and deserving of a full trial. I have no option but to dismiss both applications and to order that the suit proceeds to trial. Each party shall bear its own costs in both applications.

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of OCTOBER, 2011

M. G. MUGO
JUDGE

In the presence of:

Mr. Odhiambo holding brief for Mr. Wandabwa For the Applicant
Mr. Matheka holding brief for Mr. Rinuni For the Respondent