



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL CASE NO. MISC. 325 OF 2010

EQUITY BANK LIMITED.....PLAINTIFF

VERSUS

MARTHA KARWIRWA ANTHONY.....DEFENDANT

RULING

The Plaintiff/Applicant, Equity Bank Limited, has moved the court by way of a Notice of Motion dated 6th October 2010, brought under **Order XXXV Rules 1(a)** and **2 Order V1 Rules 13(1) (b) and (d)** of the **Civil Procedure Rules** seeking orders as follows:-

- 1. That summary judgment be entered for the Plaintiff as against the Defendant in the sum of KShs. 2,601,833.19 plus interest at 24% p.a. from 31st December 2009.**
- 2. THAT in the alternative to prayer (1) above, the Respondent's defence herein be struck out and judgment be entered for the Applicant as prayed in the Plaint.**
- 3. THAT the costs of this application and of the entire suit be borne by the Respondent in any event.**

The application, which is supported by an affidavit sworn on 6th October 2010, by the Applicant's Debt Recovery Manager, Purity Kinyanjui, is premised on three grounds as follows:-

- 1. That the Plaintiff's claim against the Defendant is in respect of loan facility granted to the Defendant on 29th November 2006 and at her own request.**
- 2. That the defence herein is a mere denial of the Plaintiff's claim and raises no triable issues.**
- 3. That the defence as filed is a sham, meant only to prejudice and/or delay the realization of the Plaintiff's claim and that it is fair and in the interests of justice for this litigation to come to an end.**

To oppose the application the Respondent filed a Replying Affidavit sworn on 2nd November 2010 which, although alluded to in the submissions filed on behalf of the Respondent, acknowledged and responded to in the Applicant's written submissions, the file copy thereof appears not to be in the court file. Its existence and correctness as to the facts is therefore presumed since there is no dispute in respect thereto.

The Applicant's written submissions are dated 18th March 2001 and filed on 22nd March 2011, while the Respondent's written submissions are dated 1st April 2011 and filed on 4th April 2011.

The applicant cited seven authorities as follows:

1. **BALOZI HOUSING CO-OPERATIVE SOCIETY LIMITED vs SAMUEL WAIGANJO THUO T/A WAIGANJO & ASSOCIATES H.C.C.C. No. 161 of 2001 CA 291 of 2002 [2009] eKLR**
2. **ORIENTAL COMMERCIAL BANK LIMITED vs BUBACON AGENCIES LIMITED & ANOTHER, CIVIL CASE NO. 357 OF 2008 [2009] eKLR**
3. **KEPHAH MAINA WANGAI T/A KEPHAH CONSULTANCY vs DONWOODS CO. LTD CIVIL SUIT NO. 457 OF 2005**
4. **KENYA COMMERCIAL BANK vs ALFRED ONYANGO OKOKO [2005] eKLR**
5. **KENYA NATIONAL CAPITAL CORPORATION LIMITED vs INTEGRATED WOOD COMPLEX LTD & ANOTHER [2004] eKLR**
6. **NATIONAL INDUSTRIAL CREDIT BANK LIMITED vs GATHUKU [2002] KLR 295**
7. **NICHOLAS MAHIHU MURIITHI v BARCLAYS BANK OF KENYA LIMITED [2007] eKLR**

The Respondent cited the authority of PROLINE SUPAQUICK LIMITED vs KENYA OIL COMPANY LIMITED 2006 eKLR and relied heavily on the decision in NAIROBI GOLF HOTEL (K) LTD vs LALJI BHIMJI SANGHANI BUILDERS & CONTRACTORS, Civil Appeal NO. 5 of 1997 cited therein, where the Court of Appeal held, inter alia that:-

“It is trite law that in an application for summary judgment under Order XXXV Rule 1 of the Civil Procedure Rules, the duty is to cast on the Defendant to demonstrate that he should have leave to defend the suit. His duty in the main is limited to showing; prima facie, existence of bona fide triable issues or that he has an arguable case. On the other hand it follows, a Plaintiff who is able to show that a defence raised by a Defendant in an action falling within the purview of Order XXXV is shoddy or a sham is entitled to summary judgment.”

The Plaintiff/Applicant's claim against the Defendant/Respondent is in respect of a liquidated sum of KShs. 2,601,833.19 which, according to the averments in the Plaint dated 13th May 2010, the Notice of Motion and Supporting Affidavit, represents the balance of a loan of KShs. 4,950,000/= which the Applicant claims to have advanced to the Respondent on or about 29th November 2006. It is said to have been so advanced under a loan agreement signed by the Respondent in acceptance of the terms thereof, on 12th October 2006, which stipulated that the loan was repayable by 36 Monthly instalments of KShs. 170,000/= until payment in full. The Applicant contends that the Respondent defaulted in the repayment of the instalments causing the account to run into arrears amounting to the sum claimed.

The Applicant claims interest on the said sum at the rate of 18% per annum as the prevailing rate at the time of default i.e. 31st December 2009, plus 6% penalty interest. Whereas the Plaintiff simply states that the details of the loan facility are known to the Respondent, it is deposed in Supporting Affidavit that the loan was given to Rwatha Enterprises, a business owned by the Respondent, and whose bank account was operated by the Respondent. Copies of the Letter of Offer and Defendant's Statement of Account are annexed to the Supporting Affidavit.

In the Defence sought to be struck out, the Defendant/Respondent denies having taken a loan from the Applicant in the manner stated in the Plaintiff and dissociates herself from the indebtedness of M/S Rwatha Enterprises while admitting that the latter did acquire the stated loan from the Applicant. She denies any agreement that the loan attracted an interest of 24% and avers that the interest rates at the material times was 8% per annum, which, in her view, the Applicant had no right to arbitrarily and unilaterally vary or fix. She alludes to a Chattels Mortgage which the parties intended to have in place to secure the lending but which was never executed, a fact she says rendered the loan agreement null and void.

The Letter of Offer under which the subject loan was advanced by the Applicant is (annexture PK1) is dated 11th October 2006 and is addressed to Martha Karwirwa Anthony T/A Rwatha Enterprises and is executed by Martha Karwirwa, accepting the terms thereof and undertaking to be bound by them. It says that the loan was to be utilized for the purposes of a motor vehicle and it would be repaid in 36 months by quarterly instalments of KShs. 170,500/= payable by direct debit from the borrower's accounts.

As regards the interest, the Letter of Offer provided under clause 5.1 and 5.2 as follows:-

“5.1. The facility shall attract interest from the date of drawdown (as well after as before any demand of judgment or the liquidation of Borrower) at a flat rate of 8% or such other rate as determined by the Lender from time to time. The Borrower hereby acknowledges that the Lender has the right to amend interest charges without prior notice to the Borrower.

5.2. If the Borrower fails to pay any sum payable under the facility on its due date of payment, the borrower shall pay interest on such sums from the date of such failure to the date of actual payment (as well after as before any demand, judgment or the liquidation of the Borrower) at the rate of six percent (6%) per annum above the rate specified in clause 5.1 of this letter. The Borrower hereby acknowledges that such interest represents a reasonable pre-estimate of the loss to be suffered by the Lender in case of default of the Borrower.”

It is trite that where summary judgment is sought a Defendant may show by affidavit, oral evidence or otherwise that he has leave the suit. The defence itself challenges, among other things, the sum claimed and the interest of 24% p. a. sought. Although in the submissions filed, the Respondent appears to admit the loan, she states that the same was realized by the repossession and auctioning of the motor vehicle purchased with the same, and submitting that the sums so realized adequately satisfied the arrears of the loan.

It is submitted for the Respondent that no account of the proceeds of sale was rendered to confirm if indeed the same fell short of satisfying the outstanding debt. Also that no proper accounts were rendered to show how the interest of 24% came about. In my view these are triable issues which can only be resolved by way of evidence. The documentation filed in support of the application is not specific on the said issues, which have been cited to support the defence filed.

It is not enough for the Applicant to state that the Respondent signed an acknowledgment of the letter stating out terms of the lending. The Applicant still had the obligation, as a lender, to ensure that the

borrower as its customer had a clear picture of how the monies debited from her account were applied to the loan account in order to ascertain what balances remained due. That the motor vehicle bought with the loan money was repossessed and disposed of by the Applicant, and the proceeds thereof applied towards the loan is not disputed.

The agreement having specifically stated that the loan given in November 2006, was repayable in 36 months by way of quarterly instalments, it is not enough for the Applicant to say that the “*entire debt*” was called up in December 2009 “*upon default by the Defendant*” and that as at 31st December 2009 the entire outstanding debt was KShs. 2,601,833.19, without stating how the said figure was arrived at, noting that the 36 months had lapsed when the loan was “*called up.*” The Applicant did not even disclose either in the Plaint or the Supporting Affidavit that it had repossessed and sold the Respondent’s motor vehicle, the proceeds of which it was duty bound to account for.

I am persuaded that this is not a clear case where summary judgment can issue. I find that important triable issues do exist as have been disclosed in the submissions filed that the matter should proceed to a full trial. Accordingly, the application is hereby dismissed with an order that costs be in the cause.

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

M.G. MUGO
JUDGE

In the presence of:

No Appearance

For the Applicant

Mr. Odhiambo holding brief for Mrs. Makori For the Respondent