



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 244 of 2007

SAHARA COMPUTERS LIMITED PLAINTIFF

VERSUS

NETWORK SOURCE LIMITED 1ST DEFENDANT

MBARANI ECHAMINYE 2ND DEFENDANT

K-REP BANK LIMITED 3RD DEFENDANT

RULING

1. The chamber summons dated 15th October 2009 is brought under the provisions of Order VI Rule 13(1) (b) and (d) of the Civil Procedure Rules by the 3rd defendant who is seeking for an order that it be struck off as a party to this suit. This application is premised on the grounds that there is no cause of action disclosed against the 3rd defendant. The plaintiff and the 1st defendant had a business relationship and the 3rd defendant was merely asked to provide a conditional offer to pay the plaintiff a sum of Ksh.4,466,870. Upon receipt of funds from Post Bank which were due to the 1st defendant. The letter expressly stated that the offer was not a bank guarantee and was not meant to constitute liability in case of failure to remit such cash. The 3rd defendant never received the cash and therefore had no obligation to remit the money to the plaintiff.
2. This application is supported by the affidavit of Josphine Siengo sworn on 15th October 2009. She has annexed a copy of a letter dated 4th May 2006 which did not constitute a contract between the plaintiff and the 3rd defendant. The funds were never released thus no liability would accrue as regards the 3rd defendant. All the pleadings clearly show that it is the 1st and the 2nd defendant who are indebted to the plaintiff.
3. This application was opposed by the plaintiff. Counsel relied on the replying affidavit sworn by **Anuj Jain** on 18th

December 2009 who contends that the 3rd defendant was a banker of the 1st defendant and the 1st defendant used the 3rd defendant to remit by swift telex transfer a sum of 2 million on 31st October 2006. On 4th May 2006 the 3rd defendant confirmed to the plaintiff that it would remit by way of bankers cheque Ksh.4,466,870.00/- on receipt of some money from a third party bank Messrs Post Bank. The plaintiff maintains that the 3rd defendant received the money but neglected to remit to the plaintiff. Counsel further argued that it is on the basis of that letter that the plaintiff supplied goods to the 1st defendant to its detriment.

4. The plaintiff maintains that the funds were received from Post Bank which matter has to go on trial to establish as a matter of fact whether the 3rd defendant received funds from Post Bank. The cause of action although based on goods delivered and not paid for, there is also a claim against the 3rd defendant who negligently gave an undertaking to remit funds and failed to honour the pledge. Counsel urged the court to find that it is only through viva voce evidence that this matter can be determined.
5. I have considered the rival submissions as summarized above. The reason why the 3rd defendant has been sued in this case is because of a letter dated 4th May 2006 addressed to the plaintiff in the following terms:-

“RE: ASSIGNMENT OF PAYMENT TO SAHARA COMPUTERS LTD.

On the request and instruction of our client, Network Source Limited, we hereby confirm to you that we shall remit by way of a Banker’s Cheque in your favour, Ksh.4,466,870/- on receipt of an Electronic Funds Transfer (EFT) payment from Post Bank.

Kindly note that this is not a bank guarantee and does not constitute a liability on the part of the Bank or any of its Officers.

However, we shall act responsible so as not to jeopardize your position.

Yours faithfully
For K-Rep Bank Limited

Antony Wambura
Advance Manager”

5. Under the provisions of **Order VI rule 13 (1) (b) and (d) of the Civil Procedure Rules** a suit which does not disclose a reasonable cause of action can be dismissed. It is determinable from the contents of that letter it was not a guarantee for the 3rd defendant to pay the debt for the 1st defendant it was conditional upon the 3rd defendant receiving certain monies from the 3rd party. The plaintiffs claim against the 1st defendant is in respect of goods supplied which were not paid for and the cheques issued for payment were dishonoured.

6. I find that the letter which constitutes the plaintiff's claim against the 3rd defendant was not a bank guarantee and did not constitute a liability that is actionable. I am persuaded that the suit against the 3rd defendant does not disclose any cause of action and can be struck off with costs to the 3rd defendants.

RULING READ AND SIGNED ON 26TH MARCH 2010 AT NAIROBI.

M.K. KOOME

JUDGE