



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT ELDORET**

**Civil Suit 72 of 2008**

**OIKO CREDIT, ECUMENICAL DEVELOPMENT  
CO-OPERATIVE U.A.....PLAINTIFF**

**VERSUS**

**NANDI TEACHERS  
CO-OPERATIVE SAVINGS & CREDIT LTD:.....1<sup>ST</sup> DEFENDANT  
HENCRY K. BIRGEN:.....2<sup>ND</sup> DEFENDANT  
PAUL K. KORIR:.....3<sup>RD</sup> DEFENDANT  
BENJAMIN K. KOSGEI.....4<sup>TH</sup> DEFENDANT  
BEN K. RUGUT.....5<sup>TH</sup> DEFENANT  
SAMUEL KIRWA:.....6<sup>TH</sup> DEFENDANT**

**RULING**

The Plaintiff/Applicant has taken out a Notice of Motion under Order XXXV Rules 1 and 8 and Order VI Rule 13(1) (b)

(c) and (d) of the Civil Procedure Rules and section 3A of the Civil Procedure Act cap.21 of the Laws of Kenya and all other enabling provisions of the law and prays that the Defendants' defence be struck out and summary judgment be entered for the Plaintiff as prayed in the plaint against all the six Defendants. The application also prays for the costs of the application. That application is brought on the grounds that the Plaintiff's claim is for a liquidated sum and the defences are mere denials which do not raise any triable issues and do not constitute a reasonable defence against the Plaintiff's claim. Other grounds are that the defences may delay the fair trial of the suit and such defences are an abuse of the court process and they are frivolous and vexatious. One **Betty Kirai** the legal officer of the Plaintiff/Applicant swore the supporting Affidavit and stated that the Plaintiff granted a loan to the 1<sup>st</sup> Defendant which loan was secured by the personal guarantees of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendant's and a charge dated 11/02/2005 created over the 1<sup>st</sup> Defendant's property known as LR.NO.1181/370 Kabsabet as well as another charge dated 8/02/2005 created and registered on 28/04/2005 over all the assets of the 1<sup>st</sup> Defendant including share capital and loan portfolio. The deponent adds that the loan was disbursed through the 1<sup>st</sup> Defendant's Bank Account but that the 1<sup>st</sup> Defendant breached the loan agreement and defaulted in the payment of the loan despite indulgence and notices to pay. She swears that the counterclaim is baseless and prays as in the application.

**ALFRED NGATUNY** says that he is the chairman of the 1<sup>st</sup> Defendant/Respondent and he swears the Replying Affidavit to the application stating that if any loan was advanced to the 1<sup>st</sup> Defendant then that was due to the fraudulent acts of the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants whose further fraudulent acts led to the registration of the charges of the 1<sup>st</sup> Defendant's property LR.NO.1181/370 Kapsabet. He adds that the personal guarantees given by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants were executed in their own personal capacities for personal contracts and not as agents of the 1<sup>st</sup> Defendant and hence 1<sup>st</sup> Respondent could not honour the demand for repayment of the loan as the loan was fraudulently obtained by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants. And the deponent of the Replying Affidavit concludes that the 1<sup>st</sup> defendant has a defence that raises triable issues and its counterclaim cannot be ignored by the drastic remedy of summary judgment.

At the hearing of the application learned counsel for the Plaintiff/Applicant Mr. Songok submitted that indebtedness of the Defendant's to the Plaintiff was clearly proved by all the annexed documentary evidence and that the defences and counterclaim were all a sham not capable of resting the Plaintiff's claim and are meant to embarrass and delay the trial. He argued further that the counter claim cannot be divorced from the main suit and the one filed herein has no basis at all. He did not see in the defences a single triable issue.

Learned counsel Mr. Chebet arguing for the 1<sup>st</sup> Defendant/Respondent opposed the application stating that the amended defence and counter-claim stood as filed as they were not attacked by the Notice of Motion and said that Order 35 of the Civil Procedure Rules is a summary procedure, final in nature and must be used sparingly. His further view was that the 1<sup>st</sup> Defendant's contention that it never took a loan was a triable issue and the fact that the particulars of the fraud were not given in the defence cannot justify the entering of summary judgment. He concluded that the legality of the borrowing must be subjected to trial and the documents of charges and guarantees be subjected to inspection at trial. He said that even the liquidated claim sought was not established.

This now is an opportune time to consider the rival positions of the parties herein. For the Respondent to succeed in having this application dismissed it must prove that its defence and/or amended defence disclose the grounds upon which the Defendant relies because mere denials of the facts in the plaint cannot be sufficient. In this case where specific allegations are made and also documented the Defendant is of necessity required to specifically respond to those claims with evidence either by affidavit or otherwise to rebut those allegations. What has the 1<sup>st</sup> Defendant done? It merely alleges that it never took a loan and never intended to charge its property and further alleges fraud and collusion of the guarantors without giving particulars of those contrary to Order 6 Rule 8 of the Civil Procedure Rules. It may be said that those particulars may be sought and supplied any time before hearing but that would only be in a case which has a defence that raises triable issues and which then must proceed to trial. In this case the Respondent does not answer in its defence and amended defence the heavy and Replying affidavit or otherwise documentary evidence in the case relating to the loan said to have been taken by the Respondent. The 1<sup>st</sup> Respondent does not say what it was doing paying a whopping 22,876,062 to the Plaintiff if it claims that it was not repaying the loan advanced to it by the Plaintiff. I find that in this case the defences merely denied the contents of the plaint, without particularizing the grounds of such denials. That then cannot answer the claim set out in the plaint. The 1<sup>st</sup> Respondent appears to labour under the mistaken view that the counterclaim is the defence to the suit. What really does the counterclaim bring into the suit? All it does is call for the 1<sup>st</sup> Respondents title deed and a refund of part payment of the loan. That does not suffice to raise a triable issue. In any event merely to counterclaim does not entitle a Defendant to leave to defend. **Doge –vs- Kenya Cannery Limited Civil Appeal No. 11 of 1983.**

The 2<sup>nd</sup> to the 6<sup>th</sup> Respondents' defences are bare in my assessment and raise no triable issues. The personal guarantees they gave, and they do not deny having given them, were "as a continuing security and shall remain in full force and effect until all moneys now or hereafter payable by and all obligations and liabilities of the borrower under the Loan Agreement have been paid discharged, or satisfied in full..." are the words of such guarantees. The defence to any other effect save that payment in full has been affected and there has been discharge is in my view a mere denial raising no triable issues whatsoever. Nor the fact of the 2<sup>nd</sup> to the 6<sup>th</sup> Respondent's averments that they are no longer officials of the 1<sup>st</sup> Respondent and that it is the 1<sup>st</sup> Respondent that should pay, offer any defence capable of allowing the matter to go to full trial. These Respondents have never taken any action to remove themselves from the suit nor gave notice of acquiescence against the 1<sup>st</sup> Respondent as per the provisions of Order 1 Rule 21 of the Civil Procedure Rules. They are bound by the guarantees they executed and nothing stated in their defence raises a triable issue.

The purpose of order 35 of our Civil Procedure Rules is to enable plaintiff with a liquidated claim to which the Defendant clearly has no defence to obtain a quick and summary judgment without being unnecessarily kept from what is due to him. **Zola and Another –vs- Ralli Brothers Limited and Another Civil Appeal No.4 of 1969.**

My perusal of the defences herein does not show an answer to the claim in the plaint. These defences are not viable defences and they are not sustainable. It appears to me to be that this is one of those plain and obvious cases where there is truly no defence to the Plaintiff's claim. I am not persuaded by these defences that there is any real issue to go for trial and I am one with madam JA when in **Gupta –vs- Continental builders Ltd 1978) KLR 83 at page 89 he stated:-**

**“What happens is that the court merely does not accept the prima facie issues as genuine. This is exactly the task which the court is required to perform on an application for summary judgment.”**

That is what I have just done. My view of this matter is that it is patently clear that no useful purpose could be served by a trial on the merits of this case and the defences are for striking out and for judgment to be entered for the Plaintiff as prayed in the plaint. There really exists no defence and therefore there is no magic in going through a trial. **J.P. Machira t/a Machina & Company Advocates –vs- Wangethi Mwangi & Nation Newspapers Civil appeal No.179/1997.**

In this case I echo the words of Sir Charles Newbold P. when he said.

**“In these circumstances no matter what the defendant proved if she were given unconditional leave to defend, the judge at the end of the trial, would nevertheless have to enter judgment for the amount claimed in the plaint”**

see Elizabeth Edmea Camile –Vs- Merali (1966) E.A 411 at Pg 414.

I think I have said enough to show that the Respondents have failed to show that they have a defence which raises a triable issue and consequently they have not earned the unconditional leave to defend. I strike out the defences and the amended defence and enter judgment as prayed in the plaint. In the circumstances of this case I hereby stay execution until the trial of the counter claim.

It is so ordered.

**DATED AND SIGNED AND DELIVERED AT ELDORET THIS 28<sup>TH</sup> DAY OF APRIL 2010.**

**P.M.MWILU**

**JUDGE**

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IN THE PRESENCE OF:-

Miss. Mutai holding brief for Were Advocate for the Plaintiff/Applicant  
Chebet Advocate for the 1<sup>st</sup> Defendant/Respondent  
Absent – Arap Ngeno Advocate for the 2<sup>nd</sup> to 6<sup>th</sup> Defendant/Respondent  
Andrew Omwenga – Court clerk