



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

Civil Case 682 of 2009

KENYA PROGRAMMES FOR SUSTAINABLE DEVELOPMENT PLAINTIFF

VERSUS

CFC STANBIC BANK LIMITED DEFENDANT

RULING

1. The plaintiff's claim as stated in the plaint is that on or about February 2009, the plaintiff issued a cheque for US \$32,000 in favor of

one **Moundling Muigai James**. However on 18th February 2009 the plaintiff issued instructions to stop the cheque, the defendant received the letter and debited the plaintiff's account with \$27.83 being charges for stopping the payment but negligently paid the cheque which had been stopped. The plaintiff contends that the defendant, its employees, servants or agents were negligent for failing to honor the plaintiff's instructions. The plaintiff is now suing to recover a sum of **Ksh. 2.552,540.40** together with interest from 28th February 2009. The defendant filed a defence denying that the plaintiff has any cause of action. The defendant further denied there was any negligence on their part, or on the part of their servants or employees. It is particularly denied that there were valid instructions to stop the cheque.

2. On 24th November 2009, the plaintiff filed a notice of motion under **Order XXXV rule 1 and 2 of the Civil Procedure** seeking for summary judgment in the sum of **Ksh.2.552,540.40/-**. This application is supported by the affidavit of **James Muhia Njuguna** sworn on 24th November 2009. It was submitted by counsel for the plaintiff that the defence does not raise any triable issues. The plaintiff wrote a letter requesting for the stoppage of payment of the cheque. This letter was signed by **James Muhia Njuguna** who was one of the signatories to the account. There was no requirement that instructions to the defendant to stop a cheque should be signed by three signatories. Moreover the defendant is merely acrobat ting and reprobating in as much as they failed to stop the cheque, they went ahead to charge a commission of \$27.83 purportedly for stopping the cheque. All the correspondence to the defendant used to be signed by **James Muhia Njuguna** and there was no reason why the defendant failed to act on the instructions to stop the cheque.

3. This application was opposed by the defendant; reliance was placed on the replying affidavit by **M/s. Kainda Gitonga** sworn on 15th December 2009. It is contended that the plaintiff's organization resolved to open a bank account with the defendant and appointed three signatories, to wit; **James Muhia Njuguna, Susan Wanjiku Kabogo and Moundeling Muigai James** as signatories to the account. This appointment was supported by the resolution of the plaintiff and the minutes. On 28th February 2009, the plaintiff issued a cheque for a sum of US \$32,000 in favor of **Moundeling Muigai James** which cheque was signed by the three signatories mandated by the plaintiff. The defendant also received a letter signed by one person canceling the cheque but the defendant was unable to effect the instructions for reasons that it was not signed by the three signatories to the account.

4. The elements to determine in an application seeking for summary judgment, is first of all whether the defence raises triable issues. Although in this claim the plaintiff's claim is a liquidated one, the plaintiff's claim is founded on the tort of negligence. As the plaintiff contends the loss of \$32,000 was as a result of the defendants' negligence and a breach of duty of care. In the case of **Gurbaksh Singh & sons Ltd vs. Njiri Emporium Ltd (1985) KLR 695** Kneller JA, Platt & Gachuhi Ag. JJA held:-

*“2. Summary judgment should 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.

6. *A liquidated claim is one that needs no further inquiry as to how much ought to be claimed.*

7. *A sum does not become liquidated just because it is claimed but only if it is agreed or events on which it is based reveal it can be calculated independently of the sum claimed.”*

5. The plaintiff's suit although liquidated is clearly founded on the tort of negligence and breach of duty of care. Moreover, it is alleged that the cheque was properly executed by the three signatories to the account and in my humble view those allegations raised in the defence cannot be said to be frivolous. Also following the principles set out in the case of **DT Dobie & Company (Kenya) Ltd. V Muchina [1982] KLR**. The court of appeal explained what constitutes a reasonable cause of action in the following words:

“1. The words “reasonable cause of action”

In Order VI rule 13(1) means an action with some chance of success, when the allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer.

2. The words “cause of action” means an act on the part of the defendant which gives the plaintiffs his cause of complaint.

3. As the power to strike out pleadings is exercised without the court being fully informed on the merits of the case though discovery and oral evidence, it should be used sparingly and cautiously.”

6. The claim by the plaintiff speaks for itself, it can only be proved through the court room processes of examination and cross examination of witnesses for justice to be done in this matter and for the claimant to prove the extend of the instructions or the mandate given to the defendant and other matters that have been denied by the defendants.

Accordingly the application is dismissed with costs to the defendant.

RULING READ AND SIGNED ON 11TH JUNE 2010 AT NAIROBI.

M.K. KOOME

JUDGE