



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI COMMERCIAL & TAX DIVISION)
CIVIL CASE NO. 61 OF 2009

TOUCHSTONE DEVELOPERS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

HON. FRANKLIN MITHIKA LINTURIDEFENDANT/RESPONDENT

R U L I N G

On 2nd July 2009 the Applicant filed a notice of motion under Order XXXV Rule 1(1) (a), (2), (3), Order L Rule 1 of the Civil Procedure Rules. The said application seeks the following orders:

- 1. THAT Judgment be entered for the Plaintiff and against the Defendant in terms of the prayers set out in Plaintiff.**
- 2. THAT the costs of this application be borne by the Defendant.**

The said application is supported by the affidavit of Barnabas Mwangangi together with the annexures marked 'LM1' to 'LM3'. According to Mr. Bundotich, the applicant's counsel, the defendant's defence is a sham and does not disclose any triable issues. Further to the above, he also submitted that the defendant denied every averment by the plaintiff. In addition to the above, the defendant has even denied having signed the letter of offer and also using postdated cheques for the facility that was advanced to him. Apart from the above the learned counsel also submitted that at paragraph 3 of the supporting affidavit they have produced the letter of offer 'LM1' together with the voucher dated 29th November, 2007. It was his contention that the defendant acknowledged receipt of Kshs. 6 million through that voucher. Besides the above, he also submitted that the same letter of offer lists the terms of repayment of the facility as shown in the plaintiff. The learned counsel also submitted that paragraph 5 of the supporting affidavit refers to post dated cheques which have been tendered as exhibit 'LM2'. On the other hand he has also submitted that paragraph 9 of the supporting affidavit shows that the deponent has tendered the cheques that have been dishonoured. The learned counsel is of the considered opinion that there is no issue that should go for trial since the defence does not controvert the plaintiff's claim. He was of the view that it simply denies the plaintiff's claim. In addition to the above, the applicant's counsel also submitted that when faced with the application, the defendant filed a replying affidavit which completely departs from his defence. He further pointed out that in *paragraph 6 of the replying affidavit the respondent admits signing the letter of offer and also issuing post dated cheques that they have already tendered in*

evidence. The learned counsel observed that the defendant later tries to explain his version of events in this suit. He reminded the court that it is trite law that a party cannot depart from his pleadings and that the defence contradicts the replying affidavit. According to the learned counsel, the law is very clear that if a party wishes to depart from his pleadings then he should file an application to amend the same. Having failed to do so, the replying affidavit is of little help. In conclusion, the applicant's counsel has urged this court to enter summary judgment in terms of the prayers set out in the plaint.

On the other hand, the respondent's counsel, Mrs. Ligunya opposed the application for summary judgment. The learned counsel is of the opinion that the application is premature and lacks merit and hence the same ought to be dismissed. The respondent's counsel relied on the replying affidavit of her client together with the annexures. Mrs. Ligunya reminded the court that the application for summary judgment has been brought under order 35 rule 1, 2 and 3. According to the learned counsel, the above order envisages a situation where there is an admission of a liquidated sum. Further to the above, she submitted that at no point did the **respondent admit receiving the money in his defence or affidavit.** Besides the above, she also submitted that a denial by the defendant does not amount to an admission and that means that summary judgment ought not to be entered against the defendant. The learned counsel referred the court to Order 35 rule 2 and stated that the defendant has a right to defend the suit. It is for the above reason that the defendant has taken the position that the application is premature. According to the learned counsel, there are triable issues which have been highlighted in the replying affidavit and would have been brought at the trial if the suit would proceed. In addition to the above, the respondent's counsel has submitted that order VI rule 13 of the Civil Procedure Code, provides that if a party alleges that the other party's defence is a sham or does not disclose any triable issues, then they ought to move the court to strike out the defence. However, that is not the case in this particular matter. According to her, the gist of this suit is the letter of offer dated 29th November 2007 where the plaintiff was to advance some amount of money to the defendant. She further submitted that the said contract was rescinded by the action of the plaintiff and that the same has been highlighted in paragraphs 5 to 12 of the replying affidavit of the defendant. In those paragraphs, it has been deposed that whereas the plaintiff had offered to advance Kshs. 6 million to the defendant, he failed to advance the said sum as stipulated. Consequently, the respondent issued cheques 'FML1' and '2' of Kshs. 500,000 and Kshs. 780,000 on the 11th December 2007 and 20th of December 2007. However the said cheques were dishonoured and the same is highlighted in 'FML3' which is the defendant's bank statement showing that the above cheques had been dishonoured. As a result of the above the contractual obligation between the two parties came to an end. The respondent's counsel referred to petty cash voucher 'LM1' that was issued by a company called Global Villages. She further submitted that the defendant has been dealing with Touchstone and has never received any money from Global Village. To her the above are seemingly two different companies. She was of the view that the background of Touchstone and Global Villages should be canvassed during the hearing. In addition to the above, she also submitted that at the time of the offer to the defendant, one of the requirements was that he would deposit post dated cheques to the plaintiff. Upon the plaintiff failing to advance the sums, the defendant recalled the post dated cheques. However the same were never returned as shown by paragraph 14 to 21 of the replying affidavit. As far as the issue of Kshs. 200,000 which was purportedly paid by the defendant as indicated in paragraph 10 of the supporting affidavit, the learned counsel submitted that this is a wild allegation and that there is no proof of the same having been tendered in court. Similarly she also submitted that there is no proof of the advance of Kshs. 6 million. In conclusion, the learned counsel submitted that there are triable issues and that there is need for the matter to proceed to full trial to enable the parties adduce viva voce evidence. It is on that score that the learned counsel has urged this court to dismiss the plaintiff's application.

This court has carefully considered the detailed submissions by the two learned counsels. It is obvious that the parties entered into an agreement on 29th November, 2007 and consequently, the plaintiff prepared a letter of offer on the same date which was dully signed by the parties. According to the letter of offer the plaintiff agreed to advance a sum of Kshs. 6 million to the Defendant. It was a fundamental term of the agreement that the defendant was to repay the loan at the rate of Kshs.250,000 starting from 1st March, 2008. It was also agreed that in the event of a default or late payment of any installment, then the same would attract a penalty charge of 10% of the total loan outstanding with interest for that month. In addition to the above, it is crystal clear that on the same date the defendant signed a loan advancement form in which he undertook to make repayment for the loan through 21 post dated cheques. From the record, it is apparent that the plaintiff has produced all the 21 cheques as annexure

'LM2'. Those cheques were written through a company called Ark Choice Insurance Brokers Limited. After the loan had been disbursed to the defendant, he issued the following cheques that were dishonoured by the bank. These cheques are as follows: -

- (i) Cheque No. 428913 dated 1.3.08 for Kshs. 250,000
- (ii) Cheque No. 428914 dated 1.4.08 for Kshs. 250,000
- (iii) Cheque No. 428915 dated 1.5.08 for Kshs. 250,000
- (iv) Cheque No. 428616 dated 1.6.08 for Kshs. 250,000
- (v) Cheque No. 428917 dated 1.7.09 for Kshs. 250,000
- (vi) Cheque No. 428918 dated 1.8.09 for Kshs. 250,000
- (vii) Cheque No. 428919 dated 1.8.09 for Kshs. 250,000

According to the applicant, following the fact that the above cheques were dishonoured they did not see any need for banking the remainder of the cheques. In his replying affidavit the defendant has clearly shifted from the position that he had earlier taken in his defence. In fact the replying affidavit completely contradicts the defence which had been filed earlier. Whereas the defendant claimed in paragraph 5 of the defence that he has never issued a cheque in favour of the plaintiff, paragraph 5 of the replying affidavit concedes the fact that he was supposed to deposit several post dated cheques to the plaintiff in order for them to be used as security when the loan was being advanced. To reinforce the above, the plaintiff availed the cheques that confirmed compliance. Whereas the defendant has claimed in paragraph 7, 8 and 9 that the loan had not been disbursed the same seems to contradict the loan advancement form which clearly acknowledged receipt of Kshs. 6 million. It does not make any sense for the defendant to sign a loan advancement form which acknowledges receipt of the loan and then later turn around to claim that the money had not been advanced. From his own affidavit, it is crystal clear that the defendant is a politician and was involved in vigorous campaigns for a parliamentary seat during the last general election. In fact, in his replying affidavit he refers to himself as a Member of Parliament for Tigania West Constituency. That means that the defendant successfully campaigned and won a parliamentary seat as shown above. Having referred to himself as Honourable Member of Parliament, the court has no doubt that the defendant is an honourable citizen of this Republic. In the same breath, as an honourable citizen of this country, he is also expected and obliged to meet the obligations that he had earlier undertaken. The defendant must honour his promises and position in society. He must also be a role model. This court has no doubt that the money, Kshs. 6 million was advanced to the defendant and most probably was used to help the defendant during his campaign in the last General Elections. Having carefully gone through the defence this court finds that the same is a sham and does not disclose any trialbe issues at all. Having acknowledged receiving the loan and tendering post dated cheques, the defendant cannot turn around and claim that he was not advanced the money. Significantly, the defendant was granted a loan about four weeks to the general elections. That links the facility to his political activities.

Since the defendant has failed to pay the loan that was advanced to him, this court has no other alternative but to order that judgment be entered in favour of the plaintiff on the following terms:

- (a) Kshs. 12,646,400/-.
- (b) Cost of this application,
- (c) Interest on (a) and (b) at court rate from today till the date of payment.

MUGA APONDI
JUDGE

Ruling read signed and delivered in open court in the presence of:

Bundotich - Applicant's Counsel

Chigiti for Mrs. Ligunya - Respondent's/Defendant's Counsel

MUGA APONDI
JUDGE
9TH JUNE, 2010

Chigiti: I pray for leave to file an appeal

Bundotich: No objection

Court: The defendant is hereby granted 28 days leave to file an appeal.

MUGA APONDI
JUDGE
9TH JUNE, 2010