



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 177 OF 2004
CO-OPERATIVE BANK OF (K)
LIMITED.....PLAINTIFF

VERSUS

JOSEPH WACHIRA
WAMURU.....DEFENDANT

RULING

By a Complaint dated 31st March, 2004, the Plaintiff/Applicant filed this suit against the Defendant/Respondent, claiming a sum of Kshs. 2,119,002.40 plus interest at the rate of 27% per annum unspecified bank charges, together with the costs and interest. It is alleged in the complaint that the said sum was loaned to the Respondent at his request and was to be repaid with interest at market rates by way of monthly instalments. It is alleged also that the Defendant/Respondent defaulted in remitting the requisite payments towards the loan, thereby becoming indebted to the applicant in the above sum as at 28th February, 2004.

In June, 2004 the Defendant filed a Defence dated 4th June, 2004 disputing the Plaintiff/Applicant's claim and denying ever having borrowed any money from the applicant, stating that he is a total stranger to averments made in the complaint, to which he put the applicant to strict proof.

On 3rd August, 2009, the Plaintiff/Applicant filed a Chamber Summons dated 27th July, 2009 praying that the Respondent's Defence be struck out under **Order V1 Rules 13 (b) and (c) 16** of the Civil Procedure Rules. Further, that judgment be entered for the applicant in the sum claimed together with interest and costs. It is in respect of this Chamber Summons that this Ruling is delivered.

The application is premised on the grounds that the Respondent's Defence is a mere denial, is frivolous, vexatious and only intended to prejudice and delay the fair trial of the action. That the same is totally without merit and amounts to an abuse of the process of this court. To support the application, the applicant filed an affidavit sworn by its legal officer, one Samuel Kibugi on 27th July, 2009 to which the following documents are annexed as exhibits.

- 1. A Copy of a handwritten letter dated 15th December, 1997 from the Respondent to the applicant applying for an overdraft of Kshs. 400,000/= ("SK1") for use in his supermarket business.**

2. The applicant's letter of 13th January, 1998 (SK2) addressed to the Respondent in response to 1 above approving an overdraft facility of Kshs. 300,000/= for a period of 12 months at a base rate of 27% "plus a mark up of 6%" and a penalty charge of 3% on any excesses.

3. Statements of account No. 01/91/368391/00 ("SK3") with the Defendant shown as the account holder.

As deponed in paragraph 6 of the supporting affidavit, additional conditions were also set out for the lending, including but not limited to the provision of security by way of a charge over some property, and the execution of a guarantee which however did not materialize. The applicant contends, therefore that the Respondent is truly and justly indebted to it in the sum claimed.

In reply to the chamber Summons, the Respondent filed Grounds of Objection dated 12th October, 2009, and also what is referred to as a supporting affidavit sworn and filed on 10th November, 2009. Common in these documents is the Respondent's contention that the defence filed raises triable issues which warrant a full hearing. The summary application is objected to as having been brought in bad faith and as being an abuse of the process of court. In his affidavit of 10th November, 2009 the Respondent states that the money claimed was never disbursed.

In response to the Respondent's above-stated affidavit, the applicant filed a further affidavit sworn by the same Samuel Kibugi on 23rd July, 2010, stating that, after the Respondent defaulted in repaying outstanding under the overdraft, he closed the business for which he had obtained the same and moved from Subukia to Nairobi, where he was traced by the applicants through a private investigator, whose report has been produced in evidence as annexure "SK4" of the applicant's further affidavit. With leave of the court, parties filed written submissions which, together with the pleadings and the affidavits filed by each of them, have been carefully considered. The Applicant's submissions were filed on 29th July, 2010 and those of the Respondent on 29th September, 2010.

The respondent admits that he is the person sued and that at the time of filing suit he was residing and working for gain in Subukia. He does not deny that he was a customer of the applicant, only disputing that he ever borrowed a loan from the Plaintiff bank. This denial is based only on the contention that the loan, if any, was intended to be secured by a charge, which was not done, a fact which, according to him creates a doubt as to whether any loan was ever disbursed. He has not however challenged the applicant bank's contention that the amounts claimed were loaned to him by way of an unsecured overdraft as per the statements exhibited in the supporting affidavit. He has said nothing about the request for the overdraft dated 15th December, 1997 ("SK1") and the approval of the same as communicated to him under cover of the letter dated 13th January, 1998 ("SK2").

The Respondent has also said nothing in regard to the Further Affidavit of 23rd July, 2010, despite its having been heavily relied upon in the applicant's submissions made in support of the Chamber Summons and by which his identity and personal status has been proved under the report of investigators who traced him from the time he sought financial accommodation from the applicants to the time the suit was filed.

Clearly, the defence filed herein is a mere denial and a sham. It raises no triable issues to warrant the suit proceeding to trial. Even at the summary stage the Defendant/Respondent has neither shown nor attempted to show that he should have leave to defend the suit. For all the above reasons I find this to be a clear and suitable case for striking out the defence which I hereby do.

Accordingly I allow the suit and enter judgment for the Plaintiff in the sum of Kshs. 2,119,002.40/= with interest at court rates from the time of filing suit until payment in full. The Plaintiff/Applicant shall have costs of both the suit and the application and interest thereon at court rates.

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 18TH day of NOVEMBER, 2010

M. G. MUGO

JUDGE

In the presence of:
No appearance

For the Applicant

Miss Bubi holding brief for Mr. Ndegwa

For the Respondent