



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 335 OF 2008

PRINTING INDUSTRIES LIMITED.....1ST
PLAINTIFF

MULTIPLE INDUSTRIES LIMITED.....2ND
PLAINITFF

VERSUS

BANK OF BARODDA KENYA
LIMITED.....DEFENDANT

RULING

This Ruling is delivered in the Plaintiff/Applicants Chamber Summons dated 13th August, 2010, seeking an order of this court to compel the Defendant/Respondent to produce, for inspection, the original statements in respect of the applicant’s account with the Plaintiff, No. 0007591507, for the period 17th January, 1992 to 28th February, 2001. The application is founded on the ground that, despite being served with a Notice to Produce Documents dated 18th January, 2010, the Respondent has refused to do so for no reasonable or excusable cause, yet the same are, in the opinion of the applicants, necessary for the process of discovery as they will aid in the fair determination of the suit.

The 1st Plaintiff/Applicant obtained financial assistance from the Defendant/Respondent by way of an overdraft on 30th January, 1992, which was secured by way of a legal charge over the 2nd Plaintiff/Applicants’ property known as L.R. No. 209/6857, debentures dated 22nd April, 1992, 9th November, 2004 and Supplementary debentures dated 6th July, 1993 and 24th February, 1999 over the 1st Plaintiff/Applicants assets. Besides the overdraft facilities other lendings were advanced to the Plaintiff/Applicant and secured in the same manner.

On or about 11th September, 2007 the Defendant/Respondent demanded the repayment of the sum loaned to the 1st Plaintiff, stating the same to be Kshs 49,929,151/= as at 1st May, 2007. On or about 8th May, 2008 the Defendant served the Applicants with a Statutory Notice in exercise of its power of sale under the charge over the 2nd Plaintiff/Respondents’ property. Later by a letter dated 19th June, 2008 the Defendant notified the applicant of the appointment of a Receiver under the Debentures. Being of the view that the attempts by the Defendants to realize the securities as above stated was illegal, the applicants filed this suit seeking orders against the defendant/Respondent as follows;-

- a. A Declaration that its overdraft and/or debt with the Defendant has been fully paid.

- b. A permanent injunction restraining the Defendant whether by itself its appointed agents, servants or employees from transferring leasing, disposing, alienating and/or otherwise howsoever interfering with all that property known as L.R. No. 209/6857 registered in the name of the 2nd Plaintiff.
- c. A permanent injunction restraining the Defendant whether by itself appointed agents, servants or employees from appointing a Receiver over the Plaintiffs' property and management of the Plaintiffs' assets.
- c(i). A Declaration by this Honourable Court that the Legal Charge dated 9th November, 2004 over the 2nd Plaintiff's property L.R. 209/6857 is ineffectual null and void.
- c(ii). A Declaration from this Honourable Court that the Debenture dated 9th November, 2004 over the 1st Plaintiff's assets is ineffectual null and void
- d. A mandatory injunction to compel the Defendant to release the securities held by it over the Plaintiff's assets.
- e. The sum of Kshs. 20,052,557.63 as prayed in paragraph 17 of the plaint.
- f. Interest on (d) above at the rate of 14% per annum
- g. Costs of this suit.

In opposing the Plaintiff's application the Defendants filed Grounds of Opposition stating that;

- 1. The application is an abuse of court process**
- 2. Rules of the court do not provide for orders such as are sought by the Plaintiffs.**
- 3. The Plaintiffs are at liberty to rely on the copies of the documents they have in their possession.**

Oral submissions were made at the hearing during which the learned counsel for the applicant cited, the case of OLUOCH –VS- CHARAGU [2003] E. A. 382, to prove that the applicant is entitled to the orders sought, since there is no dispute that the documents do exist; that they are in the custody and possession of the Respondents and that the same are relevant in that they relate directly to the issues in dispute.

In opposition, learned counsel for the Respondent submitted that the request by the applicant is for original statements, which are, in the ordinary and normal course of business given to the banks customers, which means that the applicants have the documents already. To buttress this argument learned counsel submitted that, since the applicants claim to have overpaid the debt due to the Respondent, it follows that they must have had the documents sought and used the same to compute the alleged overpayment, otherwise they must be deemed to be fishing for evidence to support an unfounded claim. Counsel denied that the Respondent has the said documents in its possession.

The pertinent issues forming the crux of this dispute is the Plaintiff/Applicants' contention that the sums borrowed from the Defendant both under the overdraft facility and other lending, as pleaded, has been repaid in full and that, in setting the same, the 1st applicant ended up making an overpayment of Kshs, 20,062,557.63 for which it seeks a refund under prayer (c) of the Plaint.

Both applicants contend that the interest rates charged on the loan facility were illegal, excessive and unconscionable, having been charged in a manner that flouted the loan agreement and in contravention of banking laws and regulations, and that illegal and unjustified penalty charges were also imposed and

levied against them in circumstances where the Defendant/Respondent is to blame for failing to credit loan repayments on time, and then debiting the applicants' accounts with illegal and unwarranted charges, penalties and fees, resulting in an undue escalation of the indebtedness.

In reply to the above allegations the Defendants' position is that the interest charged was in accordance with the rates agreed under the loan agreement and security documents and were therefore both legal and proper. It blames the 1st Applicant for exceeding the overdraft limit and being inconsistent in the loan repayments thereby falling into arrears which necessitated the imposition of penalty/additional interest. The Defendant contends that the sum of Kshs. 49,926,151/= intended to be recovered through the realization of the securities, in exercise of the statutory power of sale and the crystallization of the debentures, were properly computed and no overcharge can be imputed as alleged in the plaint.

I have seen the applicant's Notice to Produce Documents dated 18th January, 2010 and the Respondents reply thereto dated 11th February, 2010, in which the documents requested under item 2 and 3 of the Notice, were duly furnished to the applicant's advocates. As regards the documents in issue, which were listed as item 1, the Respondent's advocates remarked as follows;-

“We really do not see the relevance of the other accounts requested since the year 1992 and in the circumstances, our client is not obliged to produce these. In any event your client has copies of all these statements”.

Counsel for the Respondent did not submit as to why, in his considered opinion, the orders herein sought cannot issue. From my reading and understanding of **Order X Rules 11 and 23**, I am of the view that the application is properly before court, and that the court has an unfettered discretion to give directions as sought.

Considering the nature of the dispute, I am of the view that the documents sought are necessary for the fair determination of the same. I consider the refusal by the Respondent to produce the statements sought neither justified nor reasonable, since they are similar to the ones furnished in response to the notice to produce, albeit that, what the Respondents furnished counsel for the applicants with, were certified copies, which were, nonetheless, satisfactory. I believe the same ought to have been done in relation to item 1, since the loan, the subject matter of these proceedings was obtained on 30th January, 1992 and the financial accommodation extended from time to time thereafter. I am not satisfied that the same are not within the Respondents possession. If indeed that is the case then the Respondents advocates would have had no difficulty in stating so in their letter of 11th February, 2010.

Unless, which has not been stated herein, the Respondent accommodated the applicant as a customer without charging any operational or administrative charges, as is usually the case for all account holders, I think it would be most unreasonable and unethical to deny the applicants copies of documents such as are sought herein. Even if, as is claimed by the Respondents, original statements are normally issued to the customers, banks do retain what is normally referred to as original file copies, which are always available to a customer either free of charge or at a fee, depending on the relationship between the bank and the individual customer.

For the above reasons I find that the application has merit and do hereby allow the same. Accordingly I direct that certified copies of the documents sought under item 1 of the Notice to Produce dated 18th January, 2010 be furnished for inspection within 30 days from today.

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

M. G. MUGO

JUDGE

In the presence of :

Mr. Ochieng' holding for Kosgei

For the Applicant

Miss Bubi

For the Respondent