



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 28 OF 2009**

**EQUITY BANK LIMITED.....PLAINTIFF**  
**VERSUS**  
**TRADE HOUSE (K) LIMITED.....1<sup>ST</sup> DEFENDANT**  
**RICHARD KAMUTU KARIUKI.....2<sup>ND</sup> DEFENDANT**  
**JUDITY SUSAN MULWA.....3<sup>RD</sup> DEFENDANT**

**RULING**

The applicant in the Notice of Motion dated 6<sup>th</sup> May 2010, being the plaintiff in this suit, seeks Orders under **Order XXXV Rule 1** of the **Civil Procedure Rules** as follows:

- 1. That judgment be entered for the plaintiff as prayed in the pleadings.**
- 2. That costs of the application be borne by the defendant/respondents.**

The application is premised on the grounds that the defendants are truly and justly indebted to the plaintiff's applicant at the sum of Shs. 17,249,884.20 and that there is no real defence to the plaintiff's claim since, according to the applicants, the defence filed by the respondents is a mere denial.

The application is supported by an affidavit sworn by Purity Kinyanjui on 5<sup>th</sup> May 2010, in which she deposes that the sum claimed arose out of an overdraft facility given to the 1<sup>st</sup> defendant/respondent by the applicant to the tune of KShs.13 million, which was secured by a third party's property, as well as guarantee and indemnity documents executed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants/respondents. The said guarantees and indemnity which have been exhibited as annexures PK2a and PK2b in the supporting affidavit are dated 29<sup>th</sup> May 2006 and 1<sup>st</sup> August 2006 respectively. It is deposed further in the said supporting affidavit that the overdraft facility was granted upon the consolidation of the 1<sup>st</sup> defendant's subsisting loans at its request. That despite accommodation thus accorded to the 1<sup>st</sup> defendant, it failed to honour the arrangements for repayments, instead accumulating a debt in the aggregate sum of KShs.17,279,884.20 in its two accounts with the plaintiff namely, A/c Nos. 01250590863725 and 0120290070082 as at 29<sup>th</sup> October 2008. The applicant therefore, holds the 2<sup>nd</sup> and 3<sup>rd</sup> defendant/applicant jointly and severally liable for the repayment of the above stated sum under the guarantees and indemnity executed by them.

The notice of motion is opposed on the grounds of opposition filed on 18<sup>th</sup> June 2010 in which the respondents state that:

1. The defence raises trouble issues which cannot be adjudicated purely on affidavit evidence.
2. The grounds on which the application is based do not support an application for orders under **Order XXXV Rule 1**.
3. The application is incompetent and does not warrant the discretionary orders sought.
4. The supporting affidavit is misleading, does not disclose material facts and/or contains facts which are not accurate.
5. There is an arguable defence based on the facts.

6. The facts as presented in the application contradict the prayers sought in the plaint.
7. The entire application is otherwise frivolous, incurably and fatally defective and an abuse of the court process.

Submitting in support of the application, learned counsel for the applicant, Mr. Kimanga drew the court's attention to certain negotiations mentioned in paragraph 6 of the Supporting Affidavit as represented by the 1<sup>st</sup> respondent's letters to the applicant dated 10<sup>th</sup> March 2008 and 13<sup>th</sup> March 2008 (annextures "PK 4a" and "PK4(b)" under cover of which the 1<sup>st</sup> respondent requested that the loan be restructured to accommodate the 1<sup>st</sup> respondent's repayment proposals. Counsel submitted that these two letters are proof that indeed the sum of KShs.17,279,844.20 is due and owing from the respondents, in which case there would be no reason to proceed to trial.

Counsel submitted that, on the strength of the decision of the Court of Appeal in **Gohil vs. Wamae** [1983] KLR 489, the applicant is entitled to summary judgment because in his opinion, the defendants have not shown either by affidavit or oral evidence that they have a right to defend the suit. He submitted further that the grounds for opposition on their own are inadequate to prove that the respondents either have an arguable defence or that the same raises triable issues. In the absence of a replying affidavit to counter the facts stated in the supporting affidavit, counsel submitted that the defence must be deemed to be a mere denial.

Responding to the submission made by counsel for the applicant, Mr. Kimamo for the defendants submitted that the grounds of opposition sufficiently demonstrate that the defendants ought to be given an opportunity to defend the suit on merits. He stated that the applicant's authority of **Gohil vs. Wamae** supports the respondents' position in that the law, as stated therein requires only, that a party opposing an application for summary judgment demonstrates either by affidavit or oral evidence that he has a right to do so. He urged the court to look at the plaint, the defence filed and the supporting affidavit all of which clearly show that the amount of debt is not clearly provided for. He argued also that the application seeks to enforce guarantees whereas the prayers in the plaint merely request for a judgment in respect of a debt. Further, counsel submitted that the defence states that a sum of KShs.12,267,640/= has been paid to the plaintiff/applicant in full settlement of the loan as a result of which the third party's security was discharged. For this reason, counsel has submitted that the sum demanded from the respondents is therefore suspect, since the plaintiff/applicant has not stated in the plaint how the same came about. Another issue raised in the defence is that there was no actual drawdown and also that no accounts were rendered to confirm the indebtedness as stated in the plaint. It is the applicant's position that in the absence of any reply to defence, the matters raised in the plaint remain triable.

To support the respondents' submission counsel relies, in addition to **Gohil vs. Wamae** (supra) on the decision in **Osondo vs. Barclays Bank International Limited**, Civil Appeal No. 11 of 1990 in which the Court of Appeal held that:

**"Where there are triable issues raised in an application or summary judgment, there is no room for discretion and the court must grant leave to defend unconditionally."**

Other authorities cited in support of respondents' submissions are **Lacote Limited vs. Henry Owulo Ndele** [2005] eKLR (Civil Appeal No. 127 of 2002 (1)) and **Gurbaksh Singh & Sons Limited vs. Njiri Emporium Ltd** [1985] KLR at page 695.

The submissions made and authorities cited in support of the contesting parties' positions by their respective counsel, have been carefully considered. The guiding principles in proceedings for summary judgment have been restated severally in our courts. In the case of **Lacote Limited vs. Henry Owulo Ndele** (supra), the Honourable Mr. Justice Visram, held *inter alia*, that:

**"...summary procedure is drastic; it removes a litigant from the sit of justice without a hearing based on evidence that can be tested in cross examination; and must be used sparingly in clear and straightforward cases where there are indeed no triable issues."**

The learned judge held similarly in the case of **Imanyara vs. National Bank of Kenya** [2004] in KLR where the Court of Appeal decision in **Lalji t/a Vakkep Building contractors vs. Carausal Limited** [1989] KLR 386 was followed. I accept the above findings.

Following the decision in the celebrated case of **Zola vs. Ralli Bros** [1969] EA 681, the Court of Appeal in **Giciem Construction Company vs. Amalgamated Trade & Services Limited** [1983] KLR 186, the Court of Appeal held *inter alia* that:

**"The object of Order XXXV of the Civil Procedure Rules is to enable the plaintiff in a liquidated claim in which the defendant has no reasonable defence to a quick judgment without being subjected to a lengthy unnecessary trial."**

and that:

**“The power to grant summary judgment under Order XXXV should be exercised cautiously bearing in mind that, it was intended to apply only in cases where there is no reasonable doubt that the plaintiff is entitled to judgment and therefore it is inexpedient to allow the defendant to defend for mere purposes of delay ...”**

and further that:

**“... leave to defend should be given unless it is clear there is no real substantial question to be tried; that there is no dispute as to the facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment.”**

Undoubtedly, this court has been asked to allow a suit summarily without according the defendants the opportunity to ventilate their case at a full trial. I have no doubt in my mind that based on the Court of Appeal decisions in **Gohil vs. Wamae** and **Osondo vs. Barclays Bank Limited**, the existence of triable issues can be demonstrated orally at the hearing of the application as provided for under **Order XXXV Rule 2(1)** which states that:

**“The defendant may show either by affidavit or by oral evidence or otherwise that he should have leave to defend the suit.”**

In my considered view, for the court to determine whether or not the defence raises any triable issues, it must consider not only the defence but also other pleadings as filed. The main point of the defence herein is that the defendants do not owe the plaintiff the sum of KShs.17,249,844.20 as claimed in the plaint.

Although the defence admits the existence of the overdraft facility of KShs.13 million granted to the 1<sup>st</sup> defendant by the plaintiff/applicant and secured by a charge of a third party's property, the defendants aver, in paragraph 2 of the defence that they never at any one time exceeded the guaranteed sum and that a sum of KSh.12,267,640/= was paid to the applicants in full settlement of the sums due under the overdraft facility.

The defendants' state in paragraph 3 of the defence that the sum of KShs.22 million, stated in paragraph 4 of the plaint as having been advanced to the 1<sup>st</sup> defendant on 31<sup>st</sup> March 2007, was never advanced since no actual draw down in respect of the same was ever executed. The applicant has been put to strict proof of the said facts and claim. Further, the defendants state in their defence that payments made to the applicant were never credited into the 1<sup>st</sup> defendants/respondent's account. Neither did the applicant render proper accounts to explain the actual draw downs and interest rates applicable on the overdraft facility.

The debt claimed in prayer (a) of the plaint is said to have arisen as the consequences of default in the repayment of the 1<sup>st</sup> defendant's loan. In regard thereto paragraph 7 of the plaint states that:

**“The 1<sup>st</sup> defendant has defaulted in repayment of the said loan and the outstanding amount as at 31<sup>st</sup> September 2008 was KShs.17,249,884.20/=.”**

Despite the plaintiff having stated that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants bound themselves to liability over specific sums under the guarantee and indemnity, it is not clear from the plaint how the joint and several liability in the said sum of KShs.17,249,884.20 comes about. The applicant has submitted that the defendants have not provided anything to prove that the facts stated in the defence are true. I am of the view that the defendants need not prove the facts pleaded at this stage. It is trite law that pleadings must be limited to facts and not evidence. The defendants' position at this point rests only on being able to prove “*by affidavit, oral evidence or otherwise*” that it is entitled to defend the suit within the principles set out hereinabove. I am persuaded to hold as did the Hon. Mr. Justice Ringera in the case of **Orbit Chemical Industries Limited vs. Mytrade Limited and R.Y.K. Vohora** High Court Civil Case No. 631 of 1998 as follows:

**“Whether the defendants or plaintiffs are likely to succeed or not is not a pertinent in an application for summary judgment. It is for the trial of court.”**

In view of the above, I find that the respondents have demonstrated on the basis of the grounds of opposition and submissions made in support thereof that they are entitled to defend the suit in view of the several triable issues arising from the defence as filed. I am therefore not inclined to exercise my discretion in favour of the applicant and find that the application for summary judgment fails.

Accordingly the same is hereby dismissed with costs to the respondents.

**DELIVERED and SIGNED at NAIROBI this 5<sup>TH</sup> day of NOVEMBER 2010.**

**M. G. MUGO**  
**JUDGE**

In the presence of:

Miss Gulenywa holding brief for Mr. Kimamo      For the Defendant

Mr. Nyaenya holding brief for Mr. Kibanya      For the Plaintiff/Applicant