



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL CASE NO.105 OF 2010

WATER PARTNERS
INTERNATIONAL.....PLAI
NTIFF

VERSUS

BENJAMIN K'OYOO T/A GROUP OF WOMEN IN AGRICULTURE – KOCHIENG (GWAKO)
MINISTRIES.....DEFENDANT

RULING

The Plaintiff claims against the Defendant a sum of Kshs.6, 520,000/= being the balance of Kshs. 7,170,000/= which it alleges to have loaned to the Defendant pursuant to partnership loan agreement entered between the parties sometime in 2005. The purpose of the loan, as stated in the Plaint filed on 23rd February 2010, was to finance the drilling of boreholes for various Women Groups falling under an association known as Group of Women in Agriculture-Kochieng (GWAKO).

On 18th August 2010 the Plaintiff filed an application by way of a Chamber Summons dated 10th August 2010, brought under **Sections A1 and B and 3A** of the **Civil Procedure Act** and **Order VI Rules 13 (1) (b) and (d) and 16** of the **Civil Procedure Rules** seeking orders of this court as follows:

- 1. That the Defence filed herein be struck out with costs.**

- 2. That judgment be entered for the Plaintiff herein as prayed in the Plaint.**

The application is premised on 5 grounds as follows

1. **That the Defence is a sham**
2. **That the Defence constitutes bare and mere denials.**
3. **That there are no issues to go to trial arising from the Defence.**
4. **That the Defence is frivolous and Vexatious**
5. **That the Defence is otherwise an abuse of the Court process.**

The plaintiff contends that the defendant has admitted the debt in a letter dated 5th January 2007, (exhibited at page 57 of annexure “**PA1**” to the Supporting Affidavit) and that he has paid a sum of Kshs. 560.000/= in part liquidation thereof. Copies of various cheques under which the part payment is alleged to have been made are also annexed to the supporting affidavit. To further prove the defendant’s indebtedness, the Plaintiff relies on a report by Deloitte & Touch submitted to the Plaintiff which the Plaintiff considers to constitute proof that the Defendant mismanaged the funds advanced to the project thereby committing fraud against the Plaintiff, the particulars of which are set out in paragraph 10 of the Plaintiff.

The application is opposed on the strength of the Replying Affidavit of Benjamin K’Oyoo sworn on 24th September 2010, and filed on 4th October 2010, in which he depones that the defence raises triable issues requiring the tendering of evidence at a full trial, the main ones being;

- (a) **Whether the Defendant is personally liable for the alleged loans;**
- (b) **Whether the loans were actually disbursed and the terms of the loan agreement,**
- (c) **Other issues traversed in the defence.**

He further depones that fraud having been cited then the onus to prove the same lies on the Plaintiff/Applicant and such proof can only be by way of evidence adduced at a full hearing. Further, the Respondent contends that the court lacks jurisdiction to try the suit in view of the fact that the agreement referred to as giving rise to the cause of action contains an arbitration clause. He holds the view, also, that the Chamber Summons, which he argues is supported by a fatally defective affidavit, not only lacks merit but is also an abuse of the process of the court.

The Respondent did not attend at the hearing of the Chamber Summons despite service. Counsel for the Applicant made oral submissions in support of the application and produced two authorities. Counsel submitted that the debt was undisputed and that the question of jurisdiction does not arise in view of the decision in **TREADSETTERS TYRES LTD** vs. **ELITE EARTH MOVERS LTD** [2007] e KLR in which the court, relying on the decision of the Court of Appeal in **CHARLES NJOGU LOFTY** vs. **BEDOUIN ENTERPRISES LTD** C.A. No. 253 of 2003 held that a party who has filed a defence in a matter arising out of an agreement containing an arbitration clause waives his right to arbitration. I accept this submission. It is trite law that summary procedure by way of striking out pleadings can only be exercised in clear and straight forward cases where no triable issues arise. I have perused the Plaintiff and the Defence filed herein in light of the Replying Affidavit and the law. I find the issues raised by the Respondent in paragraph 4 of the Replying Affidavit to be real issues and which are incapable of determination by way of summary procedure.

In paragraph 3 of the Defence the Respondent raises the issue of agency, which, is arguable in view paragraph 2 of the Plaintiff, which describes the Defendant as “**a registered faith based Community Organization**”. The question therefore whether the Respondent is personally liable in the circumstances, is one in respect of which the court must hear evidence, particularly since, the agreement relied upon is expressed to be between the Plaintiff and “**GWAKO MINISTRIES**”, as described in paragraph 2 of the Plaintiff. The letter alleged to have acknowledged the debt is signed by Benjamin K. K’Oyoo as the Program Director, G.W.A.K.O. Ministries. The cheques referred to as evidencing part payment are also drawn by the said G.W.A.K.O. Ministries and are signed by two signatories to the account. All this would appear to render credence to the Defendant’s averment that he acted as an agent and that the applicant should pursue the beneficiaries of the funds for reimbursement of the same, he says he made under paragraph 4 of the Defence.

The defence in paragraph 6 refutes all the allegations of fraud and puts the Plaintiff/applicant to the strict proof thereof. The allegations of fraud as particularized in paragraph 10 of the Plaintiff include allegations against the Defendant/Respondent as follows:-

- (i) Coercion of communities to sign agreement to the effect that they had received the funds**
- (ii) Compelling individuals to pay for boreholes already funded by the Plaintiff under the agreement**
- (iii) Using funds from another named source to drill the boreholes while purporting to use the funds advanced by the Plaintiff/Applicants for the purpose**
- (iv) Not drilling the boreholes in areas or locations identified by the Plaintiff/Applicant**

Clearly, the above are not matters which can be resolved in a summary application. Fraud must and can only be strictly proved by evidence at a full trial. I find that the agreement tendered herein as forming the basis of the contract between the parties not sufficient proof of the facts stated therein since, it is neither dated nor signed by the Respondent. From my perusal of the Report by M/S Deloitte & Touch I have formed the opinion that; for reasons stated therein, the probity value of the same can only be tested at a full hearing.

For all the above reasons I find that the Defence filed herein is neither a sham, nor is it frivolous, vexatious or an abuse of the process of the court. It does contain triable issues as stated in this ruling and I refuse to strike it out. In the circumstances summary judgment is refused. Accordingly, the application is dismissed with costs to the Defendant.

SIGNED and DELIVERED at NAIROBI this 16TH day of DECEMBER, 2010.

M. G. MUGO

JUDGE

In the presence of:

Mr. Ogunde holding brief for Mr. Karunga

For the Applicant

No appearance

For the Respondent