



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 357 of 2008

ORIENTAL COMMERCIAL BANK LIMITED.....PLAINTIFF

VERSUS

BUBACON AGENCIES LIMITED.....1ST DEFENDANT

ABDULLAHI M. ALI.....2ND DEFENDANT

RULING

The Plaintiff Bank, Oriental Commercial Bank Limited, has sued the 1st Defendant, Bubacon Agencies Limited, as principle borrower and the 2nd Defendant, Abdullahi M. Ali, as guarantor for a sum of Kshs.2,843,612.45. In the plaint the Plaintiff avers that the said debt arose out of an overdraft facility granted to the 1st Defendant at its request between October, 2006 and January, 2007. After the Defendants failed to pay the outstanding debt, the Plaintiff filed this suit against both Defendants.

The Plaintiff has now filed this notice of motion application dated 14th August, 2008 in which it seeks judgment against both Defendants as prayed for in the plaint with costs. The application is expressed to be brought under Order XXXV rule 1(1) (a), (2) and (3), Order L rule 1 and order XII rule 6 of the Civil Procedure Rules. The following five (5) grounds are the basis of the application.

- (a) THAT the defendants have since entered appearance in the suit and filed a defence.
- (b) THAT the Defendants have admitted their indebtedness to the Plaintiff prior to the commencement of these proceedings.
- (c) That the defendants are consequently incapable of maintaining a defence to the plaintiff's claim.
- (d) That it is in the interest of justice that judgment be entered summarily against the Defendants.
- (e) Such further facts and grounds of law to be adduced at the hearing hereof.

The application is also supported by an affidavit sworn by ATULKUMAR DAVE, the Deputy General Manager of the Plaintiff Bank of even date.

The application is opposed. The 2nd Defendant has filed a replying affidavit dated 2nd October, 2008 and grounds of objection dated 3rd September, 2008. The grounds of objection are as follows:

1. That the application is incompetent and an abuse of the court process.
2. That there are triable issues raised in the defences.
3. That the alleged admission is equivocal and does not relate to the amount claimed in the plaint.

4. That the Plaintiff claim consists of interest, commissions and other banking charges which must not only be pleaded but also proved.
5. That the entry in the statement of accounts contains illegal and un authorized debits/entry which are not recoverable or whose entry must be explained.
6. The 2nd Defendant's liability only arises/flows after a liability has been established against the 1st Defendant.
7. That the amount claimed constitutes unauthorized overdraft which were not subject of the guarantee.
8. The variation of the original term of the contract by the Plaintiff was a fundamental breach which discharged the parties from their liabilities.
9. That the supporting affidavit offends the provision of the oath and statutory declaration act cap 15 laws of Kenya and order XVIII rule 3(1) of the Civil Procedure Rules.

Mr. Bundotich appeared for the plaintiff and argued the application on its behalf counsel relied on demand notices sent to both Defendants, annexure 1 pages 1 to 4. Counsel also relied on the written proposals by the Defendants to the Plaintiffs to vary repayment terms, and the Plaintiff's written assent to the said request. There are annexure 2 and 3 respectively. Mr. Bundotich submitted that upon settling new terms of repayments, the Defendant gave to the Plaintiff 3 cheques for kshs.10,000. 30,000 and 60,000 which are annexed. Counsel submitted that only one of them was honoured while the rest were dishonoured. Mr. Bundotich submitted that the Defendant's defence was a sham as the Defendant had admitted that the facility was advanced. Counsel relied on the 1st Defendant's statement of account with the Plaintiff, exhibit 6, showing the sum outstanding.

Ms. Githua for the Defendants urged the court to find that there were triable issues raised in the 1st Defendant's defence in which the 1st Defendant, as principle debtor, has denied sum claimed and contested the interest charged.

I have considered the application, submissions by both counsels and the pleadings by both parties.

The Plaintiff invoked Order XXXV rule 1 and order XII rule 6 of the Civil Procedure Rules. However only an order for summary judgment has been sought. The court will consider only that. In any event there was no acknowledgment of the debt by the Defendants as pleaded in the plaint. At least none has been exhibited to the Court. The letter seeking to re-schedule payments only acknowledged that there was some money owed to the Plaintiff by the 1st Defendant but no specific amounts were mentioned.

The principles applicable to an application for summary judgment are now well settled. I am guided by the Court of Appeal decision of Gurbaksh Singh & Sons Limited vs Njiri Emporium Limited where Knelleter JA. Platt and Gachuhi Acting JJA held:

1. *Summary judgment for a plaintiff may be granted under order 35 rule 1(1)(a) for, inter alia a debt or liquidated demand with or without interest unless the Defendant shows he should have leave to defend the suit as per order 35 rule 2(1).*
2. *Summary judgment should only be entered where the amount claimed has been specified, is due and payable or has been ascertained or is capable of being ascertained as a mere matter of arithmetic.*
4. *An application for summary judgment cannot be allowed or applied cases where a detailed defence has been filed, as the court cannot ignore the defence filed and proceed with the case by way of summary procedure."*

I have considered pleadings filed herein together with the submissions by both Counsels. This was a highly contested application. The Plaintiff seeks to enforce an agreement between the parties and is claiming payment of outstanding overdraft facility advanced to the 1st Defendant and guaranteed by the 2nd Defendant. Both parties have put up very strong and elaborate defences raising very pertinent issues including the issue whether the sum claimed is due or has been paid in full and the agreed interest rates between the parties.

The 1st Defendant in paragraph 10 of its defence avers that the interest rate agreed upon was 12% and not 25% as has been applied in the statement of account. The same has been raised by the 2nd Defendant in his statement of defence at paragraph 7. The 2nd Defendant has also pleaded that the Plaintiff and the 1st Defendant changed the terms and conditions of their agreement without the authority or consent of the 2nd defendant and that therefore the 2nd Defendant

was discharged from the guarantee.

The agreement between the parties has not been annexed to this application. I am also satisfied that the issue of interest is a matter that should go to trial in order for the court to examine the agreement between the parties and to determine whether the Plaintiff had the right or option under that contract to vary the interest terms, if at all and whether if they were valid, the same was done in breach of the agreement.

An application for summary judgment can only be granted where the amount claimed has been specified. The Defendants both deny that any sums were due. I have looked at the Applicant's plaint and various sums of money are specified at various paragraphs of the plaint as the sums due. In paragraph 8 of the plaint, the Plaintiff claims Kshs.2,843,612,45 as the sum due from the 1st Defendant as of 31st January, 2008.

In paragraph 9 the Plaintiff's claim is Kshs.32,903,612.45 as the outstanding monies due from both Defendants as at 31st May, 2008. In prayer (a) of the plaint it seeks to recover Kshs.2,843,612.45. Even though the sums claimed by the Plaintiff have been specified in the plaint, due to the different figures that have been given, without substantiation of these amounts, it is difficult to know whether the sum prayed for in the plaint is the sum actually due from the Defendants.

In view of the elaborate defence that has been advanced by the Defendants in this case, in exercise of my discretion, I will give each of the Defendants a conditional leave to defend the suit on condition that they deposit with this court the sum of Kshs.2.8 million.

Accordingly, I order as follows:

1. The Notice of Motion application dated 14th August, 2008 be and is hereby dismissed.
2. The Defendants are granted conditional leave to defend the suit.
3. Both Defendants to deposit in this court Kshs.2,800,000.00 within 30 days from the date herein with either party having leave to apply.
4. Each party to bear its own costs.

Dated at Nairobi, this 6th day of February, 2009.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

N/A for Mr. Bundotich for the Applicant

N/A for Ms. Githua for the Defendants

LESIIT, J.

JUDGE