



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAKURU

STAT-PAPER SUPPLIES LTD.....PLAIANTIFF

VERSUS

MANHARPAR J. NARSHINGJI RAOL.....DEFENDANT

RULING

The applicant in the Chamber Summons dated 24th November, 2008 is the Plaintiff in this suit. Its suit is in respect of a liquidated claim of Kshs.3,000,000/= being monies advanced to the Defendant/Respondent towards the purchase of the Respondent's sisal twines by the Plaintiff/Applicant pursuant to a written agreement dated 26th August, 2005.

The Defendant having failed to fulfil her part of the bargain, the Plaintiff/Applicant filed this suit for the refund of the said sum, plus loss of profits.

In defence of the action, the Defendant/applicant filed a Defence dated 16th October, 2008 denying the both debt and the agreement and putting the plaintiff to strict proof thereof. Strangely though and by way of an alternative, the Defendant stated in paragraph 7 of the Defence that she had paid a substantial amount of the debt and of the Plaintiff/Applicant's claim and that she was paying the balance by instalments which the Plaintiff/Applicant had accepted.

For reasons of the above admission, the Plaintiff/applicant then filed the present application praying that the Defendant/Respondent's Defence be struck out and judgment be entered for the Plaintiff/Applicant as prayed in the plaint. Costs of the application and the entire suit are also sought. The Chamber Summons is supported by an affidavit sworn by one Hitesh Amrital Morjaria, a director of the plaintiff/applicant, to which is annexed a copy of the agreement executed between the parties and a copy of the Respondent's title deed to property agreed to be held as security for the loan herein against which a caution was registered in favour of the applicant in accordance with the agreement.

The Respondent has filed a Replying Affidavit challenging the Chamber Summons. In it she states that she has paid Kshs.100,000/= towards the alleged debt and annexes a copy of a cheque in that regard. She also challenges the suit on the ground that the same is premature in view of the arbitration clause appearing in paragraph 9 of the agreement. Further the Respondent claims that the agreement is not valid for reasons stated in paragraph 7 (a) (b) and (c) of the Replying affidavit.

Submitting in support of the Chamber Summons, counsel for the applicant Mr. Githui argued that the Defence filed herein is a mere denial and that the Replying Affidavit and the depositions therein are at variance with the Defence. He asked the court to find that the defence is an abuse of the process calculated to delay the early determination of the suit since the debt is clearly admitted.

Arguing for the Respondent, learned Counsel Mr. Mugambi submitted that the applicant is guilty of material non-disclosure by not stating that the debt is being paid by instalments and ought not to be awarded the sum claimed since part of it has been repaid. He also argued that the applicants are estopped from filing suit in view of the arbitration clause, which counsel argued should be given effect. In reply Mr. Githui submitted that the issued of part payment would be settled by way of a credit being given once judgment is entered and that the arbitral clause is of no effect since the Respondent has not applied for a stay of proceedings.

Under the provisions of Order VI Rule 13 (b) (c) and (d) under which this application is brought, a pleading may be struck out if it is either scandalous, frivolous or vexatious or may prejudice, embarrass or delay the fair trial of the action or if it is otherwise an abuse of the process of the court.

The power given to the court to strike out pleadings is quite vast. However as was held in the celebrated case of **D.T. DOBIE & COMPANY KENYA LIMITED VS. MUGYINA & ANOTHER** [1982] KLR 1, the power is to be exercised sparingly, the arm of the court being to sustain rather than to dismiss a claim. In **NITIN PROPERTIES LTD. VS. JAGJIT SINGH KALSI CIV. APPEAL NO.132 OF 1989**, where Defendant sought an order to strike out a plaint, the court held that a pleading, should only be struck out only if it is ***“incontestably or hopelessly bad.”***

The defence herein consisting on one hand of a mere denial and an admission of the claim on the other does not disclose a reasonable defence to the action. The fact that the Respondent having not only admitted being indebted to the applicant but having gone ahead to pay the same leaves the court with only one conclusion to make - that the defence is merely meant to delay the action.

The arbitration clause does not disclose a valid arbitration agreement in view of the fact that the Plaintiff as lender has the power to institute proceedings for the recovery of the debt, **“notwithstanding any arbitration proceedings which may have been referred from any dispute arising.....”** An assumption can only be made that the nature of dispute envisaged in the arbitration clause is one not touching on the debt per se.

In view of the above I find that the application before me has merit and the orders sought well deserved. I allow the same, strike out the defence and enter judgment for the applicant in the sum of Kshs.3,000,000/- (less amounts so far refunded) with interest thereon at court rates until payment in full.

The claim for profits being in the nature of special damages but not pleaded is not allowed.

The applicants shall have the costs of the suit with interest thereon at court rates.

DATED, SIGNED and DELIVERED at Nakuru this 3rd day of March, 2009.

M. G. MUGO

JUDGE