



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE 189 OF 2001

INDUSTRIAL AND COMMERCIAL DEVELOPMENT

CORPORATION (O.C.D.C.) PLAINTIFF

=VERSUS=

CHRISTOPHER KIKWONGOI CHEPKIYENG DEFENDANT

R U L I N G

The Plaintiff Industrial and Commercial Development Corporation is the Applicant herein. The Applicant so moves the Court under Section 3A of the Civil Procedure Act and Orders VI rule 13 (c) and XXXV Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law praying that the Defendant's defence be struck out and/or dismissed for failing to raise triable issues. The additional prayers are that judgment be entered against the Defendant for Kshs 943,024/95 with interest from the date of filing suit and for the costs of the Suit and Application be awarded to the Plaintiff/Applicant. The application is based on the grounds that the Defendant borrowed a sum of Kshs 150,000/= from the Plaintiff and entered into an agreement on the same on 11th May 1993. The Plaintiff reserved to itself the right to vary the interest rates and that the Defendant defaulted in payment of the loan and the principal together with interest stood at Kshs 943,024/95 as at 30th November, 2000. The further ground is that the Defendant admitted in his defence having borrowed the amount and the defence consists of mere denials raising no triable issues whatsoever and it is only fair that the Plaintiff's application be allowed. There is filed a supporting affidavit sworn by Isaac Buddy Mogaka described as the Corporation Secretary of the Plaintiff. In it he swears, inter alia, that the Defendant was to repay the loan of Kshs 150,000/= by sixty monthly instalments of Kshs 4,142/= each with effect from 15.02.1994. That in default of his obligations under the loan Agreement, The Defendant failed to make the agreed monthly instalments as and when they fell due and all demands to the Defendant by the Plaintiff have elicited no payment. The deponent then concludes that his perusal of the defence showed him that the defence has no triable issues. To his affidavit in support of the application is attached various annexures marked "YBM 1" through to "JBM 8".

The application is opposed and Grounds of opposition are filed. These are that the application is incompetent and without merit and not made in good faith. That the Loan agreement relied on is fatally defective in law and cannot sustain the application or the Suit and in any case the application does not meet the requirements of section 35 of the Advocates Act. The further grounds are that the application is frivolous and an abuse of Court process and the Defence raises triable issues. The applicant is blamed of

being guilty of laches and bringing the application as an afterthought and that the same should be dismissed with costs.

At the hearing of the application before me it was argued for the Applicant that the defence raises no triable issues at all and the loan is indeed admitted and the grounds of opposition as filed are totally irrelevant. It was further submitted that the Respondent never paid any instalment and also never showed that he paid any. The authorities relied on by the Respondent were described as being distinguishable in that in those cases, the Respondents had made some payments while in the present one, no payments were made.

For the Respondent it was submitted that the defence raises triable issues in that while the Defendant admits obtaining the loan, he denies the rate of interest or that he has not repaid the loan and there was no Reply to defence filed to contradict the Defence. It was the Respondent's case that no statements of account were annexed to the application to show how the sum being claimed was arrived at. The Loan Agreement was said to be defective in that it did not show who drew it. The Applicant was faulted for filing suit during 2001 and bringing the application in 2005 and so is guilty of laches. At the hearing the grounds that the application was incompetent and without merit and brought in bad faith were abandoned.

I have given due consideration to this application. In doing so, I have perused the Plaintiff as well as the Defence and the Loan Agreement and all other annexures and the relevant law. In the Plaintiff, the Applicant in paragraph 3 thereof states that the Defendant borrowed Kshs 150,000/= from the Plaintiff and executed a Loan Agreement on 11/05/1993 wherein he agreed to repay the principal Sum and interest thereon at 22% per annum by 60 monthly instalments and also to pay a Sum of Kshs 8,250/= being the interest for the moratorium period of three months due and payable on 01/01/1994. That is answered in paragraph 2 of the Defence where the amount of loan is admitted but the rate of the interest is denied. The defendant then proceeds to deny the contents of rest of the Plaintiff and particularly that the sum of Kshs 943,024/95 or any other sum at all are due.

The Annexure marked "IBM/1" is the Loan Agreement. A perusal of the document shows that the Defendant took a loan of shs 150,000/=, which he does not deny, and it also shows the interest rate applicable as 22%. That document is executed by, amongst others, Christopher Kikwongoi Chepkiyeng and a Photograph said to belong to the said Christopher Kikwongoi Chepkiyeng is attached on it.

When the Defendant admits taking the loan and denies the interest rate which interest rate is a clause in the Loan Agreement signed by the Defendant, is that a triable issue? I think not. The Defendant is not saying that the interest rate was inserted into the Loan Agreement after he had signed the same. The defence does not state that the loan, which is admitted, has been repaid but merely that "the alleged Sum of Kshs 150,000/= is not yet paid." To my mind this is a mere denial and I do not see what triable issue it raises. In the submissions by Counsel for the Respondent, it was stated that the Respondent never received the letters of demand. I notice that the address on annexures that are demand letters is P.O. Box 240, Iten. That also is shown as the address of the Respondent in the Loan Agreement he signed.

It cannot be lost to my mind what the Courts have held over the years that the power of the Court to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence and so the same should be used sparingly and cautiously. Likewise, it is the duty of the Defendant to show that he has bona fide triable issues in order to be allowed to defend the suit. The burden is on the Defendant to satisfy the Court that he is entitled to leave to defend the suit. That leave will not be granted if the Defendant merely states that he has a good defence on merit as he must go further and show that the defence is genuine or arguable or raises triable issues – see the case of Gohil –vrs- Wamai – Civil appeal No. 42 of 1982. In the present case, the burden has not been discharged in my view. I think that considering all facts as on the pleadings and annexures and without necessarily going into the merits of the case, this is a case where the defence is a mere denial raising no triable issues and is therefore a proper case where the same should be struck out and the issues be decided on the pleadings at this stage. Accordingly, I strike out the defence and enter judgment as prayed in the Plaintiff. The costs of the suit and of the application shall be borne by the Defendant.

Orders accordingly.

DATED AND DELIVERED AT ELDORET ON THIS 13TH DAY OF MAY, 2009.

P.M. MWILU,

JUDGE.

In the presence of:

Court Clerk - Paul Ekitela

Advocate for the Applicant - Mr. Manani H/B for Mulwa

Advocate for the Defendant - Mr. Kitur