



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 663 of 2008**

- Order XXXV rule 1, 2 and 8, Order XII rule 6 and Order L rule 1 of the Civil Procedure Rules and***
- sections 3A and 63(e) of the Civil Procedure Rules***
- Entry of summary judgment***
- Equitable estoppel***

***Principles applicable***

***BANK OF AFRICA KENYA LIMITED.....PLAINTIFF***

***VERSUS***

***MITS ELECTRICAL COMPANY LIMITED .....1<sup>ST</sup> DEFENDANT***

***SATYA GANDHI.....2<sup>ND</sup> DEFENDANT***

***PRIEYA GANDHI.....3<sup>RD</sup> DEFENDANT***

**R U L I N G**

This is the application dated 30<sup>th</sup> January, 2009. It has been brought under Order XXXV rule 1, 2 and 8, Order XII rule 6 and Order L rule 1 of the Civil Procedure Rules and sections 3A and 63(e) of the Civil Procedure Rules.

It seeks two prayers.

1. THAT summary judgment be entered against the defendants in favour of the plaintiff for Kshs.931,435.39 and Uganda Shillings 46,756.88 together with interest as prayed in the plaint.

2. THAT in the alternative, Judgment on admissions be entered in favour of the Plaintiff against the Defendants for Kshs.931,435.39 and Uganda Shillings 46,756.88 together with interest as prayed in the plaint.

Grounds upon which the application is based are cited on the face of the application as follows:-

a) The Defendant is well and truly indebted to the Plaintiff in the sum of Kshs.931,435.39 and Uganda Shillings 46,756.88 together thereon with costs and interest in the terms more particularly set out in the plaint filed herein.

b)The claim herein is in respect of a sum of Kshs.931,436.39 and Uganda Shillings 46,756.88 due from the 1<sup>st</sup> Defendants and owing to the Plaintiff under a temporary advance trade bill discounting facility advanced to the 1<sup>st</sup> Defendant and guaranteed by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

c)The defendants defence admits that a facility was advanced to the defendant by the Plaintiff but is evasive on its settlement.

d)The Defendants defence is a mere denial.

e) The Defendants defence raises no triable issues.

f) The 1<sup>st</sup> Defendant is truly indebted to Plaintiff in the sum of Kshs.931,435.39 and Uganda Shillings. 46,756.88 and the 1<sup>st</sup> Defendant's was so indebted at the commencement of this suit.

g) The 1<sup>st</sup> Defendants admitted the debt herein vide the 1<sup>st</sup> Defendant's letters of 22<sup>nd</sup> January 2008, 23<sup>rd</sup> May 2008 and 18<sup>th</sup> April 2008 addressed to the Plaintiff herein together with the statement of defence in paragraph six (6) and there are therefore no issues to warrant the trial of the matter.

The application is supported by an affidavit sworn by Anne Kahindi, the Legal Officer of the Plaintiff Bank of even date.

The application is opposed. The Defendants have filed Grounds of Opposition in which four grounds were raised namely:

1. The Plaintiff's application is fatally defective both in form and in substance.
2. The application is bad in law, incompetent, *misconceived and is an abuse of the process of the Court.*
3. *The Defence filed raises several triable issues.*
4. The Declaration sought by the Plaintiff cannot be granted on an application for summary judgment.

I have considered the application, supporting affidavit, grounds of opposition and submissions by Mr. Munge for the Applicant and Mr. Ongoto for the Respondent.

Mr. Munge placed reliance on the case of Kenindia Assurance Co. Limited vs. Commercial Bank of Africa Limited and others, CA No. 11 of 2000 (UR) for the proposition that once the Plaintiff proved that it made a demand for payment, unless fraud was pleaded in the defence, the demand must be met by payment. Mr. Munge submitted that the Plaintiff had demonstrated that it demanded for the payment of the facility from the Defendants and that none had been made. Regarding the issue of admissions, Mr. Munge submitted that the defence admitted the debt and also stated that it made proposals for payment. Mr. Munge contended that since the Defendant did not file a replying affidavit to show that it made payment as per the proposals, judgment should be entered on the said admission. Counsel relied on several cases on the issue of admissions, among them Kenya Gatsby Charitable Trust vs. Michael Kamau & Others Milimani HCCC No. 877 of 2002, where the court cited with approval the case of CHOITRAM vs. HERTA E. C. NAZARI [1982-88] 1 KAR 437 in which the Court of Appeal held as follows:

“A plain and obvious case even if established after substantial argument or analysis of documents, entitles a Plaintiff to judgment on admission.

For the purpose of Order 12, r. 6 admissions can be express or implied either on the pleadings or otherwise e.g. correspondences. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning....”

In response to the submissions by Mr. Munge, Mr. Ongoto for the Defendants contended that the defence raised triable issues. Counsel urged the court to find that there was no dispute regarding the amount advanced, but that excluded in the plaint was the fact the parties entered into an arrangement after the Defendants made proposals to the Plaintiff, and that as a result of the arrangement the Defendants have been making payment without default. Counsel has pointed out that under paragraph 10 of the Defence raised a triable issue. In that paragraph, the Defendant avers that the Defendants instructed the Plaintiff to close the 1<sup>st</sup> Defendant's Uganda account and gave a cheque to cover their indebtedness in the account as at the time of instructions. The Defendants avers that the Plaintiff did not act on the instructions and that, the sum it is now claiming in the plaint was accrued ledger fees and charges which it is estopped from claiming. Mr. Ongoto submitted that the issue whether the Plaintiff should claim the interest accumulated on that account as a result of its failure to act on the instructions given by the Defendant, was an issue for trial. The Defendant relies on Kenindia Assurance Co. Limited, supra, for the proposition that even if the Defendant raised only one trial issue, it should be granted leave to defend the suit.

I have considered the joint statement of defence filed on 19<sup>th</sup> December, 2008. The defence is clear that the debt is not denied. What the Defendants have pleaded is that the Plaintiff and the Defendants entered into repayment arrangements which replaced all other previous agreements; that the Defendants have kept to the agreed repayments. What the Defendants have pleaded is the doctrine of Equitable Estoppel that the Plaintiff cannot renege unilaterally on the Agreement after the Defendant had acted on it and made several payments in compliance to that Agreement. This averment is contained in paragraph 5 of the Statement of Defence. It is my view that paragraph 5 raises a triable issue which is whether the Defendant can rely on the doctrine of equitable estoppel in the circumstances of the case. In Kay Jay Rubber Products Ltd. vs. Development Finance Co. (K) Ltd. and another HCCC No. 55 of 1989 (UR), in the judgment of Hancox CJ., the Court of Appeal adopted with approval Lord Dennings definition of Equitable Estoppel in the case of Central London Property Trust vs. High Trees House [1947] KB 130 at page 215 and 217 thus:

“If you study the cases in which this doctrine has been applied, you will see that all that is required is that the one should have acted on the belief induced by the other party....”

When a man has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so.”

Going by the definition in the cited case, it is quite clear to me that the Defendants have pleaded that as a result of agreements entered into between the parties, the Defendants in compliance to the agreements made and continue to make payments to the Plaintiff. The Defendants have therefore invoked the doctrine of equitable estoppel. This is a triable issue, which has to be considered by the court at the trial of the case.

I have carefully considered the Statement of Defence filed herein and I am satisfied that the defence responds to each of the averments in the plaint and that it has sought to specifically traverse each and every issue raised in the plaint. There is no reply to defence and therefore the Plaintiff has not responded to the issue raised in paragraph 5 of the defence.

I have considered the affidavits sworn in support of the application. At paragraph 15 thereof, the deponent responds to the statement of defence filed herein by stating that the defence consists of mere denials of the Plaintiff's claim and that it is merely intended to delay the expeditious disposal of the suit. That averment does not carry any weight in light of the equitable estoppel pleaded by the Defendants in their defence.

It is trite as demonstrated in the cases relied upon by the Plaintiff and the Defendants that in an application for summary judgment, even one triable issue if bona fide would entitle the Defendant to have unconditional leave to defend. The issue is whether the defence as filed raises any triable issue. As I have already noted, paragraph 4 and 5 of the defence has raised a pertinent issue that the parties entered into some Agreement in which repayment arrangements were entered into pursuant to which the Defendants have been making repayments and which the Defendants claims it has not defaulted. At

paragraph 10 of the Defence the Defendants have raised another issue that as a result of the Plaintiff not acting on instructions given to close the 1<sup>st</sup> Defendant's Uganda account, that it was not claiming ledger fees and other accruing interest which it is not entitled to. I find that there are two triable issues raised in the Statement of Defence which are raised in paragraphs 4, 5, and 10. They are in my view bona fide.

In conclusion, the Plaintiff's notice of motion application dated 30<sup>th</sup> January, 2009 is dismissed in its entirety. The costs of the application will be in the cause.

I note that this is a matter which can conveniently be heard before the Chief Magistrate's court. I am therefore making an order that this case be transferred to that court for hearing and disposal.

Dated at Nairobi this 12<sup>th</sup> day of June, 2009.

LESIIT, J.

JUDGE

Read, delivered and signed in presence of:

Mrs. Karani holding brief Mr. Munge for the Applicant

**Mr. Ongoto for the Respondent**

LESIIT, J.

JUDGE