



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL SUIT 357 OF 2008

ORIENTAL COMMERCIAL BANK LIMITED.....PLAINTIFF

VERSUS

BUBACON AGENCIES LIMITED.....1ST DEFENDANT

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

R U L I N G

The application before me has been brought by the Plaintiff under Order XII rule 6 and Order VI rule 13(1) (a) and (d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It seeks judgment against the Defendants for the admitted sum of Kshs.3,609,137/70 and in the alternative that the Defendants' defences dated 31st July 2008 be struck out and judgment entered in favour of the Plaintiff as prayed for in the plaint. The application is based on five grounds namely:

- (a) THAT on 10th February, 2009 the defendants and the Plaintiff agreed on a settlement under which the defendants agreed to pay to the plaintiff a sum of Kshs.3,609,136.70 on or before 31st December, 2009 in full settlement of the debt.**
- (b) THAT pursuant to the agreement the defendants issued three (3) postdated cheques of Kshs.50,000 each to cover the agreed sum for the first three (3) months of January, February and March 2009 respectively.**
- (c) That the cheque for kshs.50,000 for the month of February, 2009 was dishonoured upon presentation.**
- (d) That the defendants have in any event disobeyed the court order issued by Honourable Justice Lesiit on 6th February, 2009 which required them to deposit a sum of Kshs.2,800,000 within 30 days from the date of the order.**
- (e) That it is in the interest of justice that judgment on admission be entered and/or in the alternative the defendants respective defences be struck out as the defendants are abusing court process.**

There is a supporting affidavit sworn by Mr. Machini, a Credit Officer of the Plaintiff.

The application is opposed. The Defendants filed grounds of opposition raising four grounds. Two of the

grounds can be discerned from the record of the proceedings and they are:

1. That the application is incompetent and an abuse of the court process.

4. That the application is res judicata

Grounds two and three on the Grounds of Opposition raised issues that needed to be substantiated. However those grounds were not substantiated because the Defendants' Advocates never came to court to oppose the application at the time set for hearing. Grounds one and four as listed hereinabove can be verified from the record of the proceedings.

The Plaintiff filed a Notice of Motion application dated 14th August, 2008 seeking summary judgment under Order XXXV rule 1(1) (a), (2) and (3) of Civil Procedure Rules, and judgment on admission under Order XII rule 6 of the Civil Procedure Rules. That application was heard and determined by this court. The court dismissed the application and gave the Defendants conditional leave to defend. The condition was that they deposit with the court Kshs.2,800,000/-. Each party was granted leave to apply.

The current application has been brought under Order XII rule 6 of Civil Procedure Rules, for judgment on admission, and order VI rule 13(1) (a) and (d) to strike out defence and enter summary judgment. Issue is whether the application is *res judicata* and an abuse of the court process as raised in the grounds of objection filed herein.

In the first application, the Plaintiff moved the court under order XXXV rule 1 and XII rule 6 of the Civil Procedure Rules. In the current application, the Plaintiff has invoked Order XII rule 6 again. The court had already made its decision on that prayer and the Plaintiff cannot invoke it again in an application. The notice of motion application is therefore *res judicata* and an abuse of the court process in so far as the prayer for judgment on admission based on Order XII rule 6 is concerned.

In regard to the application based on order VI rule 13 (1) (a) and (b). Rule 13(2) provides that where an Applicant moves the court under rule 13(1) (a) of Order VI, no affidavit should be filed in support of that application. I see that an affidavit has been sworn by the Plaintiff in support of this application. That renders the prayer for the striking out of the defence on the basis of order VI rule 13(1) (a) defective.

The Applicant has also invoked Order VI rule 13(1) (b) in which it seeks to strike out the Defendants' defence. From the grounds on the face of the application, only ground (b) is relevant to the prayer to strike out the defence. Under ground (b) the Plaintiff states that the Defendants have not honoured the order of the court made on 6th February, 2009 which gave the Defendants conditional leave to defend the suit, and required the Defendants to deposit within 30 days from the date of the order the sum of Kshs.2.8 million. The supporting affidavit, under paragraphs 2 and 3, the Plaintiff deposes that the Defendants failed to deposit the sum of Kshs.2.8 million within the time ordered by the court, and that the time has since long lapsed.

The Defendants have not filed any affidavit in response to this application. All they filed are grounds of opposition. The Defendants' averments that the sum ordered to be deposited by the Defendants as the condition upon which they could defend the suit has not been deposited is not controverted. The court can rightly deem the Defendants to have admitted that fact. This is sufficient ground for the court to grant the alternative prayer in the Plaintiff's Notice of Motion dated 7th April 2009, under order VI rule 13(1) (b), and strike out their defence for being an abuse of the court process.

The result of this application is that prayer 2 of the Notice of Motion is granted as follows:

1. The Defendants' Statements of Defence filed herein and both dated 1st August, 2008 be and are hereby struck out and judgment entered in favour of the Plaintiffs as prayed for in the plaint.

2. The Plaintiff will have costs of the application and of the suit.

Dated at Nairobi this 12th day of June, 2009.

LESIIT, J.

JUDGE

Read, delivered and signed in presence of:

Mr. Bundotich for the Plaintiff

N/A for Ms. Githua for the Defendants

LESIIT, J.

JUDGE