



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

Civil Suit 216 of 2008

BALUBHAI PURSHOTTAMDAS PATEL.....PLAINTIFF

VERSUS

DILIPKUMAR BABUBHAI PATEL.....1ST DEFENDANT

SANJAY CHIMANBHAI PATEL.....2ND DEFENDANT

RULING

This is an application by way of a Chamber Summons brought by the Plaintiff. It is expressed to be brought under Order VI rule 13(1) (b) (c) and (d) and 16 of the Civil Procedure Rules. It seeks to have the defence filed by the 1ST Defendant struck out with costs.

The grounds for the application are cited on the face of the Chamber Summons. They are that; the defence is scandalous, frivolous and vexatious; that it will prejudice and delay the fair trial of the suit and is otherwise an abuse of the court process. There are further grounds given in the affidavit in support of the application sworn by Balubhai Patel dated 11th March, 2009. I have considered the contents of that affidavit.

The principle applicable to an application under Order VI rule 13(1) are now well settled. No pleading should be struck out if it raises triable issues even if only one triable issue is raised. In an English case, **WENLOCK vs. MALONEY AND OTHERS [1965] WLR 1238** which is a persuasive authority, and which was cited with approval in the case of **D.T. Dobie & Co. Kenya Limited vs. Muchina [1984] KLR 1**, while dealing with the striking out of a plaint under provisions similar to order VI rule 13(1) of our Civil Procedure Rules, Sellers, L.J. stated as follows:

“This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge and to produce a trial of the case in chambers, on affidavits only without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power.”

In the supporting affidavit, the Plaintiff avers that the 1ST Defendant’s defence is not true. He annexes the letter of offer which was received by the 1ST Defendant from Giro Commercial Bank Limited and other correspondences reminding the 1ST Defendant of his indebtedness to the Bank. The Plaintiff also

annexes a letter of lien which he signed in favour of Giro Commercial Bank. At paragraph 6 of the affidavit the Plaintiff avers that he paid Kshs.12,841,071/83 to Giro Commercial Bank Limited, in terms of the lien in respect of monies borrowed from the Bank by the 1st Defendant. The Plaintiff also annexes a letter addressed to him by the 2nd Defendant in the case and uses it to state that the 1st Defendant was not extinguished from his liability to the Plaintiff. In that letter the 2nd Defendant towards three cheques for Kshs. 10 million and also declares that he will be liable for the loan given to the 1st Defendant.

The 1st Defendant was served with this application through his Advocate on record, but despite service, this application has not been opposed. The 1st Defendant has filed neither grounds of opposition nor a replying affidavit. That therefore means that the affidavit sworn in support of this application and the facts therein are uncontroverted, and it must be inferred that the 1st Defendant admitted that it is factually correct.

The 1st defendant filed a Statement of Defence dated 29th July 2008. It was filed by Lalji Raghwani, Advocate on his behalf. In paragraph 4 of the defence, the 1st Defendant denies that it renegotiated for any loan with Giro Commercial Bank and also denies that the Plaintiffs paid the sum of Kshs.12,841,071/83 as pleaded in the plaint. In paragraph 3 the Defendant denies all the allegations in paragraph 6 of the plaint and denies that he is liable to pay the loan in question. In paragraph 4 the 1st Defendant has pleaded in the alternative and without prejudice to the foregoing paragraphs of the defence, that if the Defendant negotiated a loan for and on his behalf, then the 1st Defendant's liability was extinguished as a result of direct arrangement between the Plaintiff and the 2nd Defendant, where the 2nd Defendant took over the 1st Defendant's liability over any outstanding loan.

In order to understand the 1st Defendant's defence it is necessary to understand the plaint. Gleaning from the plaint filed herein, there was an arrangement between the Plaintiff and the 1st Defendant in which the Plaintiff would negotiate for a loan on behalf of the 1st Defendant, with Giro Commercial Bank Limited. It is averred that the loan was granted by the bank, and that in consideration of the terms and conditions negotiated by the Plaintiff, the 1st and the 2nd Defendant jointly guaranteed payment to the Plaintiff in December 2005. The Plaintiff avers that as of 4th December 2007, when Giro Commercial Bank called upon the Plaintiff to pay the outstanding sum, the amount due was Kshs.12,841,071/83. The Plaintiff avers that it paid the outstanding sum on behalf of the 1st Defendant. The Plaintiff filed the suit in order to recover the said sum from the two Defendants, who gave a guarantee to him that they would pay any outstanding sum on the loan negotiated with the Bank.

The 2nd Defendant has an interlocutory judgment entered against him, but he is in the process of having the said judgment set aside. The court therefore does not have the benefit of a Statement of Defence from the 2nd Defendant.

Putting the case in proper perspective, what the 1st Defendant has pleaded is that any liability it had to the Plaintiff was taken over by the 2nd Defendant following direct arrangements between the Plaintiff and the 2nd Defendant. I note that from paragraph 6 of the plaint, some guarantee was given to the Plaintiff by the 2nd Defendant to the tune of Kshs.10 million to secure the loan to the Plaintiff, which is the subject matter of this suit. The Plaintiff has stated that it required guarantees from both Defendants as part of the terms and conditions negotiated between the Plaintiff and the bank, on behalf of the 1st Defendant. From the plaint it is not apparent that the 1st Defendant gave any guarantee or security to the Plaintiff regarding this loan. Considering the 1st Defendant's denial that it owes any money to the Plaintiff or that it has any liability to pay the amount demanded by the Plaintiff in this suit, it cannot be regarded as frivolous or vexatious the 1st Defendant averment that he had no liability to the Plaintiff. I think it is a triable issue. The Plaintiff has made reference to various documents in support of his case. Some of the documents are before the court, for instance a guarantee signed by the 2nd Defendant to the Plaintiff which is annexed to the affidavit in support of the application as "BPP3". That guarantee is also quoted verbatim at paragraph

6 of the plaint. I will quote the first paragraph where it states as follows:

“I refer to my letter dated 28th December 2005 whereby I had stated as follows: -

‘I SANJAY C. PATEL give my personal guarantee of Kshs.10,000,000/- (Kenya Shillings Ten Million Only) to Balubahi P. Patel against loan given to Dilip B. Patel of Steel Reinforcement Ltd through Giro Commercial Bank. For this I am giving my three personal cheques for the said amount. The amount if not cleared by 30th December 2006, I will be responsible for the amount and that you can cash the cheque given to you.’

From this paragraph, it does appear that the 2nd Defendant gave his personal guarantee to the tune of Kshs.10 million to the Plaintiff and clearly stated that that personal guarantee was given against the loan granted to the 1st Defendant through Giro Commercial Bank. That paragraph appears to be in tandem with paragraph 4 of the 1st Defendant’s defence. Whether or not the defence succeeds, it is a matter for the trial court to decide. The trial court will have to interpret the guarantee and also look at the totality of the case and all other documents to determine whether the guarantees given to the Plaintiff by the 2nd Defendant extinguished the 1st Defendant’s liability to pay the loan.

There are many other documents where are mentioned but are not before the court. They are necessary for the court to see in order to determine the issues in controversy in this case. For instance, the court will have to be satisfied that as stated at paragraph 4 of the plaint, the Plaintiff negotiated a loan with Giro Commercial Bank on behalf of the 1st Defendant. This is a matter the 1st Defendant has completely denied. In regard to paragraph 5 of the plaint, the court will need to see the Statement of Accounts showing that there was an outstanding amount on the loan, the subject matter of this case as of 4th December, 2007 as pleaded. See **WENLOCK v. MALONEY case**, supra.

I do find that this is not a plain and obvious case. I also do find that the 1st Defendant’s defence raises triable issues which ought to be ventilated at a full trial.

Having come to this conclusion, I do grant the 1st Defendant leave to defend the suit. The costs of the Plaintiff’s application dated 11th March, 2009 will be in the cause.

Dated at Nairobi this 5th day of June, 2009.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Were holding brief Mr. Hira for the Plaintiff

N/A for the 1st Defendant

N/A for the 2nd Defendant

LESIIT, J.

JUDGE