



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 662 of 2005**

**THE CO-OPERATIVE BANK OF KENYA LTD.....APPELLANT**

**VERSUS**

**KENNETH ONDIEKI OBAE.....RESPONDENT**

**(An appeal from the Ruling, Order, Interlocutory Judgment and Decree of Honourable**

**A. Elkindiy, Acting Senior Principal Magistrate, dated and delivered at Nairobi on the 24<sup>th</sup> day of August, 2005)**

**J U D G M E N T**

1. The appellant herein, The Co-Operative Bank Of Kenya Ltd, being dissatisfied with the Ruling, Order, Judgment and Decree of Honourable Mr. A. El Kindiy, the Acting Senior Principal Magistrate, delivered at Nairobi on 24<sup>th</sup> August, 2005 appeals to the High Court against the entire ruling on the following grounds:

- (i) The learned Magistrate erred in law in entering summary judgment in favour of the respondent and against the appellant without having due regard to the pleadings and the evidence before the Court.
- (ii) The learned Magistrate erred in law and in fact by holding that the appellant's defence raised no triable issues when in actual fact, the defence raised serious triable issues which ought to have been canvassed at the full hearing of the suit; consequently, the learned Magistrate's refusal to grant the appellant unconditional leave to defend the suit was erroneous.
- (iii) The learned Magistrate erred in law by entering summary judgment on a claim founded on negligence in the absence of proof thereof.
- (iv) The learned Magistrate erred in law by failing to appreciate that affidavit evidence alone was not sufficient to establish the alleged negligence on the part of the appellant.
- (v) The learned Magistrate erred in law by failing to appreciate that part of the respondent's claim was unliquidated and was not therefore a claim contemplated under Order XXXV Rule(1) of the Civil Procedure Rules.
- (vi) The learned Magistrate erred in law by entering summary judgment for general damages as prayed in the respondent's plaint on the basis only of affidavit evidence.

- (vii) The learned Magistrate erred in law and fact by finding that the respondent had proved the claim for special damages, which finding was contrary to the evidence before the Court.
- (viii) That the learned Magistrate erred in law and fact by finding that there was a contract between the respondent and British American Insurance Company despite the failure on the part of the respondent to produce a written contract as evidence thereof.
- (ix) That the learned Magistrate erred in law by relying on documents which were inadmissible in evidence in finding for the respondent.
- (x) The learned Magistrate erred in law and fact by finding that the respondent's policy was cancelled on 26<sup>th</sup> October 1999 despite there being no evidence before the Court to support such a finding.
- (xi) The learned Magistrate erred in law and fact by finding that the respondent's account was opened without his authority despite evidence to the contrary.
- (xii) The learned Magistrate's finding went against the principles of indemnity and amounted to unjust enrichment.
- (xiii) The learned Magistrate was wrong to disregard the appellant's oral submissions and authorities in so far as concerned the issue of admissibility of the documents produced by the respondent and part of the respondent's claim which was premised on unliquidated damages.
- (xiv) Consequently the learned Magistrate's decision occasioned a miscarriage of justice."

2. The appeal arose from a ruling delivered in a suit which was filed by Kenneth Ondieki Obae hereinafter referred to as respondent. The respondent's claim against the appellant, as is evident from the plaint dated 10<sup>th</sup> March 2005, arose from a customer-banker relationship pursuant to which the respondent was the holder of an account with the appellant's Ukulima House Branch. The respondent contended that he took out an educational policy cover on 1<sup>st</sup> April, 1997 for his daughter and duly instructed the appellant to remit to British American Insurance Co. Ltd monthly premiums of Kshs.3,880/= through a standing order. On or about 26<sup>th</sup> October, 1999 the appellant without notice or any justification stopped remitting the premiums to the insurance company resulting in the insurance company canceling the insurance policy. The respondent claimed that as a result of the appellant's negligence and breach of contract in failing to remit the insurance premium, the respondent suffered special damage of Kshs.1,123,380/= and general damages. The respondent therefore prayed for judgment against the appellant.

3. In the statement of defence filed by the appellant to the respondent's suit, the appellant denied that the respondent had suffered any loss or damage due to the appellant's negligence or breach of contract. In the alternative the appellant maintained that the respondent's account was closed and another account opened on the respondent's instructions. The appellant further maintained that the respondent failed to instruct the appellant to issue a standing order in favour of British American Company Limited when the second account was opened. The appellant further contended that the respondent was not entitled to the amount claimed as the policy in question had not matured.

4. By a Chamber Summons dated 6<sup>th</sup> June, 2005 the respondent moved the Court under Order VI Rule 13(1)(b)(c) seeking to have the defence filed by the appellant struck out and judgment entered in the respondent's favour. The application was supported by an affidavit sworn by the respondent in which he reiterated the facts set out in his plaint.

5. The respondent exhibited a copy of the bank statement for his account number 0110040073200 and a copy of the policy with British Insurance Co. Limited. The respondent maintained that defence filed by the appellant was calculated to prejudice, embarrass or delay the fair trial of his suit. He therefore urged

the Court to strike out the defence.

6. In a replying affidavit sworn by Mercy Mbuku Senior Legal Officer of the appellant, the appellant maintained that the defence filed raised triable issues which were identified as follows:

- (a) whether or not the defendant was negligent as alleged in the plaint;
- (b) whether or not the defendant breached the terms of the alleged contract;
- (c) whether or not the account number 011004007321 was opened with the consent of the plaintiff;
- (d) whether or not it was necessary for the plaintiff to specifically instruct the defendant to issue a standing order in favour of British American Insurance Company Limited in relation to the new account number 011004007321;
- (e) has the plaintiff suffered any loss?

7. Mbuku deponed among other things, that the respondent's old account was closed and a new one opened with the respondent's knowledge and consent. She explained that in accordance with Banking Practice and Procedures, a standing order could not be transferred from one account to another as the instructions are specific to the particular account. Mbuku swore that the respondent failed to instruct the appellant to issue a standing order in favour of British American Insurance Co. Ltd. when the new account was opened. She urged the Court to dismiss the respondent's application as the same was an abuse of the Court.

8. The hearing of the application proceeded on 12<sup>th</sup> of August, 2008 before the Acting Senior Principal Magistrate. Mr. Ombati who appeared for the respondent submitted that the appellant closed and opened another account for the respondent without the respondent's instructions. He maintained that the appellant was negligent and in breach of contract in failing to transfer the respondent's instructions on the standing order to the new account. He explained that the respondent suffered loss and submitted that the defence did not raise any triable issues and was just a delaying tactic.

9. Mrs. Kamau who appeared for the appellant submitted that there was no proof of any contract of insurance, and that according to the policy it could only mature after certain stated events which had not been established. Mrs. Kamau argued that the appellant's claim was not a liquidated claim and therefore there was a need for an inquiry in order to establish the claim. Mrs. Kamau maintained that there were triable issues that needed to be established by way of evidence. She urged the Court to dismiss the application and grant the appellant unconditional leave to defend the suit. Counsel for the appellant relied on a list of authorities which was availed to the Court.

10. The ruling of the Trial Magistrate which was extremely brief was as follows:

*"I have considered it arguments advanced by both parties very carefully. Applicant had standing orders with the bank. Standing orders were cancelled on 26/10/1999. No mention was given to the applicant. Applicant had informed him that he has bank. Bank on it over matatu opened another account without instructions. They only transferred to names that not the standing orders. They acted on their own and a result to policy was cancelled.*

*Applicant therefore has suffered loss as indicated in paragraph 8. Even a commissioners were charged commission at 100/=.*

*Defence has no triable issues. I am therefore opinioned that summary judgment should be entered against respondent.*

*I allow the application and make the orders as prayed by the applicant."*

11. The ruling as above reproduced does not appear to make much sense but the conclusion is clear that the defence raised no triable issues and therefore summary judgment should be entered. The respondent's application was for striking out the defence under Order VI Rule 13(1)(b)(c) of the Civil Procedure Rules which states as follows:

"13(1) at any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that –

- (a) .....
- (b) it is scandalous, frivolous or vexatious; or
- (c) it may prejudice, embarrass or delay the fair trial of the action; or"

12. The ruling of the trial Magistrates does not however address these grounds upon which pleading could be struck out. There is no finding that the defence filed by the appellant is scandalous or frivolous or vexatious or that it may prejudice, embarrass or delay the fair trial of the action. Nor has the trial Magistrate considered whether the defence should be struck out.

Further under order VI rule 13(1)(a) a defence may be struck out where it does not provide a reasonable defence. However, such an application cannot be supported by an affidavit but must state concisely the grounds upon which it is made. In this case the respondent's application was not brought under Order VI Rule 13(1)(a) of the Civil Procedure Rules. Moreover it was supported by an affidavit, such that Rule 13(1)(a) could not therefore apply.

13. The trial Magistrate appears to have formed the opinion that there are no triable issues and that summary judgment should therefore be entered. Those are matters which are relevant to Order XXXV Rule 1(1)(a) and (2) of the Civil Procedure Rules under which summary judgment may be entered in respect of a liquidated demand where the Court is satisfied that a defendant does not have a defence to the plaintiff's claim or that the defence filed does not raise any triable issues. In this case the defence filed by the appellant raised issues which were well articulated in the replying affidavit sworn by Mercy Mbuku. Needless to state that the trial Magistrate erred in finding that there are no triable issues.

14. For the above reasons I find that this appeal must succeed. Accordingly, I set aside the order of the trial Magistrate dated 24<sup>th</sup> August, 2005 and substitute thereof an order dismissing the respondent's application dated 3<sup>rd</sup> June 2005. I award costs of the application and costs of this appeal to the appellant. The original file shall be remitted back to the lower Court for the suit to be determined after a full trial.

Those shall be the orders of this Court.

Dated and delivered this 15<sup>th</sup> day of July, 2009

**H.M. OKWENGU**

**JUDGE**

In the presence of:-

Werimo for the appellant

Ombati for the respondent