



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KISUMU**

**Civil Case 64 of 2000**

**AMALO CO. LIMITED ..... PLAINTIFF**

**VERSUS**

**TRUST BANK LIMITED..... DEFENDANT**

**RULING**

The application by the defendant is dated 26<sup>th</sup> August 2004 and is for summary judgment against the respondent for the sum of Kshs. 44,322,404/10cts plus interest thereon as prayed for in the counterclaim.

The grounds for the application are contained in the body of the Notice of Motion and are supported by the affidavit of the applicant's liquidation agent filed herein on the 28<sup>th</sup> September 2004.

There is opposition to the application on the basis of the facts contained in the respondent's replying affidavit.

Basically, the principles for the grant of summary judgment were settled in the case of **Giciem Construction Co Ltd =vs= Amalgamated Trade Services (1983) KLR 156** in which it was held inter – alia that:-

- (a) The object of Order 35 of the Civil Procedure Rules as to enable the plaintiff with a liquidated claim in which the defendant has no reasonable defence to a quick judgment without being subjected to a lengthy unnecessary trial**
- (b) The court should not grant an application for summary judgment where there is a reasonable ground of defence.**
- (c) In considering applications under Order 35 the Courts should grant leave to defend if there genuinely exists triable issues even if the court is skeptical about the success or merits of the proposed defence and where the court has doubt as to the bona-fides of the application it ought to impose an appropriate condition when granting leave to defend.**

**(d) The power to grant summary judgment under Order 35 should be exercised cautiously bearing in mind that it was intended to apply only to cases where there is no reasonable doubt that a plaintiff is entitled to judgment and where therefore it is inexpedient to allow the defendant to defend for mere purposes of delay. Conditional leave to defend should only be granted where there is evidence of bad faith on the part of the defendant or of suspicion of his conduct or the defence is a sham.....**

**(e) The general principles applicable to applications for summary judgment is that where the defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even fair probability that he has a bona – fide defence he ought to have leave to defend.**

**Leave to defend must be given unless it is clear that there is no real substantial question to be tried, that there is no dispute as to the facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment.....**

Herein, the applicant is seeking summary judgment on a liquidated counterclaim arising from facilities granted to the respondent by the applicant to borrow sums of money upto an aggregated of Kshs. 40,000,000/= upon the security of a legal charge over **LR NO. KISUMU / MUNICIPLAITY / BLOCK 7 / 158** amongst other securities. The charge instrument was said to have been lawfully executed but over time the respondent began defaulting in the repayment of the loan such that it received several demand letters from the applicant by which time the outstanding debt stood at Kshs. 38,169,368/10cts.

Consequently, the applicant put into effect the process of realizing the security by issuing the prerequisite statutory notice and thereafter advertising for the sale by public auction of the charged property by which time the outstanding debt stood at Kshs. 72,379,647/31.

To counter the imminent sale of the charged property, the respondent instituted this suit and obtained temporary injunction orders against the applicant on the 14<sup>th</sup> August 2006. The applicant was accordingly restrained from exercising its statutory power of sale or from appointing Receiver and managers following the respondent's alleged inability to meet its obligation.

The applicant filed a statement of defence and counterclaim and now contends that the respondent does not have a good defence to the counterclaim nor has it disputed its alleged indebtedness to the applicant.

The applicant urges this court to grant summary judgment against the respondent for the amount claimed in the counterclaim.

The applicant's counsel, **Mr. Nyolei**, contended that there is no good defence to the counterclaim since the defence fails to raise any issues that are triable. He further contended that since the dispute is over the interest payable and not the principal amount which is not disputed then judgment should be entered for the principle sum.

The learned counsel also contended that the respondent has always been reluctant to prosecute this suit thereby demonstrating its intention to have the payment of the outstanding debt delayed yet it continues to enjoy the interim orders much to the detriment of the applicant. Learned counsel informed the court that the outstanding debt currently stands at about Kshs. 80 Million.

The Learned counsel for the respondent **Mr. Gadhia**, contended that the amount claimed is not payable since the bank statements exhibited herein show a credit of far more than what is claimed by the applicant. He argued that it would be futile for the applicant to allege that the principle amount is not disputed when it has already been paid.

Learned Counsel contended that the dispute was over the interest charged by the applicant but indicated that the charge instrument is questionable since it provided for the sum of Kshs. 40 Million whereas the outstanding debt as at the 27<sup>th</sup> March 1998 stood at Kshs. 53,817,924/= thereby reflecting a shortfall of

approximately Ksh. 13 million.

If counsel is to be understood correctly, he was simply saying that considering the date of the charge instrument it was most unlikely that the outstanding debt could stand at over Kshs. 53 million as at the 27<sup>th</sup> March 1998 and if that was so, then the validity of the charge was in doubt as the actual amount borrowed by the respondent was uncertain.

It was also contended by the respondent's learned counsel that the rate of interest was not agreed upon and that normal commercial practices do not allow imposition of interest for advanced loans.

Counsel argued that on the basis of the calculations of interest, the applicant is actually indebted to the respondent in the sum of Kshs. 19,594,635/50cts.

As to the delay in having this suit prosecuted, learned counsel, informed the court that when the matter was fixed for hearing on 19<sup>th</sup> November 2008 the respondent was ready to proceed but the applicant intimated its intention to proceed with this application prior to the commencement of the suit. The matter was then stood over to 10<sup>th</sup> December 2008.

The respondent maintains that it has always been ready to proceed with the suit.

Upon this court's consideration of all the foregoing arguments and contention in the light of the guidelines provided for the grant of summary judgment in the aforementioned case of **Giciem Construction Co Ltd =vs= Amalgamated Trade Services**, it is apparent that the applicant has failed the test for the grant of summary judgment under Order 35 of the Civil Procedure Rules.

It cannot be said that this is a clear cut case for the grant of summary judgment in terms of the applicant's counterclaim.

The respondent's position appears to be that it has already discharged its obligations to the applicant and that, if anything, it is owed well over Kshs. 19 million by the applicant on account of unlawfully interest charges. The legality and validity of the charge instrument is also disputed.

All these are issues that are very much triable and when such issues arise a party ought not be driven from the seat of judgment without according him an opportunity to be heard on the merit.

Consequently, this application is devoid of merit and is dismissed with costs to the respondent.

However, taking into consideration the long period that the matter has taken in court and that the respondent continues to enjoy the interim orders made in its favour in the year 2006 it is only fair and just that the matter be fixed for hearing of the main suit on priority basis and in any event not later than three (3) months from this date hereof failure to which the court may call upon the respondent to show cause why the suit should not be dismissed for want of Prosecution.

**Dated, signed and delivered at Kisumu this 13<sup>th</sup> day of November 2009.**

**J. R. KARANJA**

**JUDGE**

*JRK/aao*