



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

Civil Case 559 of 2009

EQUITY BANK LIMITED PLAINTIFF

VERSUS

KARIM BADRUDIN JAMAI.....DEFENDANT

RULING

This application has been brought by way of notice of motion under order 35 rules 1 (a), 2, and 8(1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The said application seeks the following orders:

- 1. THAT summary judgment be entered for the plaintiff against the defendant for the sum of Kshs.194,702,385.68 as prayed for in the plaint.**

- 2. THAT the costs of this application be provided for.**

The application is premised on the following grounds:

- (a) The Plaintiff's prayer is for a liquidated demand.
- (b) The defendant is indeed indebted to the plaintiff
- (c) The defendant's defence raises no triable issues.
- (d) The defence may prejudice, embarrass or delay the fair trial of this suit.

During the hearing of the application, Mr. Ondieki for the applicant, submitted that the application is supported by the affidavit of Joseph Kamau dated 2nd October 2009. Specifically, he referred to paragraph No. 3 in which he deponed that the respondent admitted his indebtedness by giving payment proposal pursuant to the breach of his obligations under the facility. Further to the above, the learned counsel also referred the court to two letters dated 1st July, 2009 and 31st July, 2009 respectively. Apparently in both letters the respondent has given proposals and given two cheques for Kshs. 1 million each. In addition to the above, the applicant's counsel also referred the court to bank statements from 1st January, 2006 up to 31st July, 2007 which show that the outstanding loan was Kshs. 300,000,000/-. That apart, he also pointed out that there is an acknowledgment by the defendant. In support of the above submission, Mr. Ondieki quoted the case of **GUPTA VS. CONTINENTAL BUILDERS LTD. [1983] KLR.**

Besides the above, the learned counsel also submitted that for a defendant to be given leave to defend, he must have a defence on record that raises *bona fide* issues that are allowed to be canvassed in a trial. As far as he was concerned, the defence on record contains mere denials that cannot give rise to a bona fide triable issue. Apart from the above, the learned counsel also quoted the case of **SPENCON (K) LTD. VS. MUNICIPAL COUNCIL OF KERICHO.**

In addition to the above, the learned counsel also referred to the shares that belonged to the respondent but were sold by the applicant bank. He also invited the court to take judicial notice of the bear and bull run at the stock exchange that is dictated by the market. Mr. Ondieki concluded his submissions by quoting the following cases:

- **MRAO LIMITED VS. FIRST AMERICAN BANK OF KENYA LIMITED**
- **NATIONAL INDUSTRIAL CREDIT BANK LIMITED VS. RAPHAEL OBONYO OKELLO**
- **DUNCAN WACHIRA & OTHERS VS. BETHLEHEM ENGINEERS & CONSTRUCTION COMPANY.**

On the other hand, Mr. Wandabwa for the Respondent has opposed the application on the ground that the applicant's counsel had not discharged its duty of verifying the cause of action and the amount involved. In support of his submissions Mr. Wandabwa quoted the case of **ROMA TRADING CO. LTD. vs. PURCHOTAM PATHA MSA HCC NO. 780 OF 1995.**

Besides the above, the learned counsel has also taken issue with the fact that no loan agreement has been attached and that the terms have not been presented to the court. In addition to the above, the respondent's counsel also submitted that the bank statements had not been verified in accordance to section 177 of the Evidence Act. Apart from the above, he also submitted that the statements have not been verified as required by the above provisions. He was convinced that the accounts fall foul of section 177 of the Evidence Act and hence the same are not admissible. Subsequently, the learned counsel quoted a criminal case; **MASESE VS. REPUBLIC.**

As far as the letters enclosing cheques by the defendant are concerned, he submitted that the same do not admit the debt that is claimed and it falls short of an unequivocal admission. That apart, the learned counsel urged me to find that the shares sold must have been enough to liquidate any outstanding monies.

This court has carefully considered the application together with the detailed submissions by the two learned counsels. No doubt the two letters dated 1st and 31st July, 2009 clearly show that the respondent was remitting a total of Kshs. 2 million to the applicant. Apart from the above, both letters show a high sense of desperation by the respondent to meet the Managing Director of Equity Bank (the applicant) to discuss the matters. In addition to the above, the respondent also made his intentions clear of wanting "to increase the monthly payment to larger amounts when (his) financial position permits".

The above statements explicitly show that the respondent was trying to pay back a large debt. Since

he felt guilty that he was paying small amounts, he promised to increase the same. That apart, he also wanted an audience with the Managing Director of the plaintiff so that he could discuss issues. Besides the above, though the defendant/respondent stated in paragraph (3) of the defence that he was not indebted to the plaintiff in the amount of Kshs. 194,702,385/- as alleged or AT ALL by reason of the matters set out in paragraphs 4, 5 and 6, he later explained that the value of the said shares was more than double the amount of the monies advanced to the defendant. Since the defendant could make such calculations, it meant that he had known what was owing.

Paragraph 4 (e) of the defence also shows that the respondent was fully aware and informed about the outstanding amount. The only reasonable explanation that one can give is that the respondent was fully aware of the debt and magnitude of the same. However, his main objective and motive was to be granted more time to pay. Order XXXV rule 1 of the Civil Procedure Code states as follows:

“1(1) In all suits where a plaintiff seeks judgment for –

(a) A liquidated demand with or without interest; or

(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose tenancy has expired or been determined by notice to quit or before forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,

where the defendant has appeared the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.

(2) The application shall be made by motion supported by an affidavit either of the Plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.

(3) sufficient notice of the motion shall be given to the defendant which notice shall in no case be less than seven days.”

This court is satisfied that the applicant in this case has complied fully with the explicit position of the law as indicated above. I am also convinced that the respondent is indebted to the applicant to the sum of Kshs. 194,702,385.68 as shown in both the plaint and application. The upshot is that I hereby concede to the application in terms of Prayer No. 1 and 2.

Costs to the applicant in any event.

Those are the orders of the court.

MUGA APONDI

JUDGE

Ruling read signed and delivered in open court in the presence of: Karungo for Ondieki - Applicant's Counsel

Ms. Lusweti for Wandabwa - Respondent's Counsel

MUGA APONDI

JUDGE

3RD DECEMBER 2009