NELSON MAINA ONDIBA.....PLAINTIFF

V E R S U S

DAVIES NAKITARE.....DEFENDANT

R U L I N G

This is an application for summary judgment. It is premised on the plaintiff's contention that the defendant has no defence to the liquidated claim which has been made against him.

It is the plaintiff's case that in 2001 and 2002 the defendant approached him, asking to be advanced some money, for use in developing 2 farms at Endebess

The plaintiff says that, being a friend to the defendant, he agreed to advance money to the defendant. He also says that the two parties entered into an oral agreement, pursuant to which the defendant was to pay interest at 13% per annum.

As part of the agreement, the plaintiff says that the defendant used to issue Cheques for the repayment of whatever sums the plaintiff had already advanced. However, towards the end of the year 2002, some of the Cheques issued by the defendant were dishonoured, as his bankers said that the defendant's accounts had insufficient funds.

When the defendant was informed about the dishonour of his cheques, he is said to have issued replacement Cheques. But the defendant instructed the plaintiff to only present the replacement Cheques as and when the defendant instructed him to do so.

However, the cheques became "***stale"*** before the defendant had given green light to the plaintiff to bank them.

The plaintiff submitted that as at 2002, he was owed Kshs.10, 000, 000/=, whilst as at April 2006, he was owed Kshs. 15, 200,000/=. At that stage, it is said that the defendant issued a standing order to his bankers to remit Kshs.500,000/= monthly to the plaintiff's bankers, with effect from April 2006.

Unfortunately, only one payment of Kshs.500, 000/= was received by the plaintiff, because the defendant is said to have instructed his bankers to stop payments of further sums.

Thereafter, the defendant is said to have remitted Kshs. 500, 000/= to the plaintiff's account on 27/2/2007.

Given the two payments of Kshs. 500, 000/= each, paid in April 2006 and on 27/2/2007, the plaintiff says that the balance still due and payable by the defendant was Kshs. 14, 200, 000/=.

Having paid Kshs. 1, 000, 000/= after the plaintiff had given notice to the defendant, the plaintiff believes that the defendant cannot have any defence in respect to the balance of the sums claimed by the plaintiff. Therefore, it is the plaintiff's view that the defence herein was only calculated to delay the case. It is for that reason that the plaintiff asked this court to strike out the defence, and to thereafter enter judgement in his favour.

In answer to the application the defendant submitted that his defence raises serious triable issues. The first such issue is said to arise from the fact that the plaintiff had failed to demonstrate to the court, the quantum of money which he had loaned to the defendant.

It is the defendant's case that the parties to this action will need to give evidence, so that the court could be in a position to ascertain how much was loaned to the plaintiff, and how much the defendant had already repaid.

Secondly, the defendant submitted that the plaintiff, being a private citizen of this country, had no authority to charge interest, as he was neither a bank nor a financial institution.

The defendant pointed out that as at the time he was loaned money by the plaintiff, the latter was an employee of Standard Chartered Bank, who were the defendant's bankers in Kenya. In those circumstances, the defendant contends that, by virtue of the Banking Act, the plaintiff was not allowed to engage in money lending.

The defendant also submitted that the plaintiff had failed to demonstrate to the court how he arrived at the sum of Kshs. 14, 200, 000/=, as the outstanding balance. In any event, said the defendant, there is nowhere that it is shown that the defendant had admitted the interest rate of 13% or at all.

In the case of ***GICIEM CONSTRUCTION COMPANY V AMALGANATED TRADE & SERVICES [1983] KLR 156*** the Hon. Hancox J.A (as he then was) quoted with approval the following words of Sir Charles Newbold in ***ZOLA V RALLI BROTHERS [1969] E.A 691***, at page 694.

" ***Order xxxv is intended to enable a plaintiff with a liquidated claim, to which there is clearly no good defence, to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by delaying tactics of the defendant. If the judge to whom the application is made considers that there is any reasonable ground of defence to the claim the plaintiff is not entitled to summary judgement***. . . . .

Normally a defendant who wished to resist the entry of summary judgement should place evidence by way of affidavit before the court showing some reasonable ground of defence."

Herein, the defendant swore an affidavit in which he alleged that the transactions between him and the plaintiff took place in the United States of America. For that reason, the defendant asserts that the High Court of Kenya lacks jurisdiction to entertain a suit emanating from the said transaction.

Although the defendant expressed that view, he also said that the plaintiff had been "***perpetrating an illegal business while an employee of the Standard Chartered Bank of Kenya as he was running financial business while an employer of the bank, a practice which is contrary to the Banking Act."***

That suggests that at all times, the plaintiff was conducting the money lending business whilst he was in Kenya.

The defendant has exhibited a letter (written on Wednesday 6th 2006, and marked "***DWN 3")*** showing the defendant got to know the plaintiff where the plaintiff was an employee of the Standard Chartered Bank, whilst the defendant was a customer. According to that letter, he used to change foreign currencies

whenever he was back in the country. During the said visits to the bank, the defendant says that the plaintiff used to give him assistance.

From the evidence tendered by the defendant himself, it appears that the same does not support his contention, that the transactions between him and the plaintiff took place in the United States of America.

Also he raises the issue of a payment which he made to the Plaintiff on 12/2/2005. The sum allegedly paid to the plaintiff was said to be US $ 95,000.00.

That sum was allegedly remitted to the plaintiff long after the cheques which had been issued by the defendant had been dishonoured. In other words, if the defendant actually wired that sum to the plaintiff, the dishonoured cheques would have been made good, to that extent.

In so saying, I have not overlooked the plaintiff's advocates' letter dated 9/9/2006, in which the plaintiff denied receipt of the sum of US $ 95,000.00. By that letter, the plaintiff sought proof that the defendant's bankers had remitted that sum. In response to that letter, the defendant then said that he had records which showed that he had paid to the plaintiff, the sum of US $ 35,000.

I n the light of the evidence made available to the court, so far, it appears that the defendant's story is not solid, in so far as he alleges that he had paid US $ 95, 000.00.

But even assuming that the defendant had only paid US $ 35, 000 , that sum would, at current exchange rates, translate to over Kshs.24 million.

In the circumstances, I find that the defendant has put forward a reasonable line of defence, which is arguable. The line of defence is as appertains to the payments allegedly made by the defendant. Also, there is the contention that the transaction was tainted with illegality, as the plaintiff is said to have lent money to the defendant, whilst the plaintiff was an employee of the bank. As to whether or not the plaintiff's said actions constituted a breach of the provisions of the Banking Act is arguable.

In the case of **GICIEM CONSTRUCTION COMPANY VS AMALGAMATED TRADES & SERVICES**, (above-cited), the Hon. Chesoni Ag. JA. (as he then was) said;

" ***In my view in a case involving an oral agreement like this one, where each party alleges its own terms and conditions of the oral agreement and one party's version differs from that one of the other, it is dangerous to give a summary judgement, for the variance in the parties' versions of the oral agreement if genuine and relevant to the matter at issue, automatically raise triable issues."***

In this case, the plaintiff seems to be implying that there was an agreement on the rate of interest payable by the defendant. Assuming for a moment, but without determining the issue for now, that the plaintiff was not barred from charging interest on the money he lent to the defendant, the plaintiff would still have to prove that there was an agreement on the actual rate of interest chargeable. Apart from the applicable rate of interest, I find that the plaintiff would need to demonstrate the date from when the interest was payable.

In ascertaining the amount of interest payable, the court will need to consider the evidence about the amount of money lent to the defendant, and the date (s) of the said lending. It is only after those issues are resolved that the court could then ascertain the accuracy or otherwise of the quantum still being claimed by the plaintiff.

For all those reasons, I find that this is not a fit and proper case for the grant of summary judgment. Therefore, the application is rejected, and the defendant is granted unconditional leave to defend the suit.

Finally, I order that the costs of the application be in the cause, in the main suit. I believe that it is only fair that the party who ultimately succeeds in the substantive suit should also be awarded the costs of the application for summary judgment.

Dated and Delivered at Kitale, this 22nd day of January, 2008.

FRED A. OCHIENG

JUDGE