



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT 62 OF 2008

ROY MACHARA NDUATI1ST PLAINTIFF

DOROTHY MAY WATTS T/A SHANZU SEA HAVEN.....2ND PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD.DEFENDANT

RULING

The subject matter of this ruling is the Notice of Motion dated 9th April 2008 in which Barclays Bank (K) Ltd, the defendant/Applicant herein is seeking for the entire suit to be struck out. The motion is said to be brought under order VI rule 13(1) (b) and (d) of the Civil Procedure rules. The applicant also cited the inherent jurisdiction of the court. When served with the motion the plaintiffs namely Roy Macharia Nduati and Dorothy May Watts t/a Shanzu Sea Haven filed grounds of opposition and the replying affidavit of Roy Macharia Nduati to resist the motion.

When the motion came up for inter partes hearing, Mr. Ogunde learned advocate for the defendant/applicant urged this court to strike out the plaint. The learned advocate heavily relied on the grounds set out on the face of the motion and the facts deponed in the supporting affidavit of Faith Majiwa sworn on 9th April 2008. It is the defendant's submission that the parties to this dispute had negotiated and compromised the settlement of the matter. It is said that the parties agreed on the status of the accounts hence there is no need for statements of account to be supplied to the plaintiffs as prayed in the plaint. For this reason the defendant asked this court to strike out the plaint. It is argued that the suit is frivolous, vexatious and an abuse of the court process. It is argued that it is improper for the court to reopen a matter already settled.

Mr. Muthama, learned advocate for the plaintiffs urged this court to dismiss the motion on the ground that the suit is not frivolous nor vexatious as alleged. It is Mr. Muthama's submission that the defendant/bank is bound to supply bank statements to the plaintiffs as its customers. It is said that the deed of settlement only related to the settlement of a charge debt hence the bank was not discharged from its obligation of availing bank statements.

I have considered grounds set out on the face of the motion and the facts deponed in the affidavit filed in support of the application. I have also taken into account the facts deponed in the replying affidavit and the grounds of opposition. I have also considered the able submissions presented by learned counsels

appearing in this matter. The substantive matter in this dispute is expressed in the amended plaint dated 24th April 2008. In that plaint, the plaintiffs are seeking for the following main orders namely:

(i) An order of declaration that the defendant's refusal to provide bank statements sought is in breach of the defendant's contractual, statutory and fiduciary obligation to the plaintiffs.

(ii) a mandatory order of injunction to compel the directors

of the defendant to furnish the plaintiffs statements in respect of specified accounts held by the plaintiffs.

(iii) Costs.

The plaintiffs filed this suit after taking all steps to secure these statements. The defendant admits that it did not release those statements to the plaintiffs. The defendants in fact admitted that it held the accounts in which the plaintiffs had demanded to be supplied with the bank statements. It is alleged by the defendant that there is no statute nor contracts between the parties or commercial practice that gives the plaintiffs the rights to the statements of accounts or impose on the defendant an obligation to provide the statements of accounts have not been specified. On this account it said that the suit ought to be struck out for not setting out these necessary particulars. From the submissions tendered by both sides two issues arose for determination.

First Is whether or not the deed of settlement executed by the parties excluded the defendant from giving the plaintiffs bank statements .

Secondly whether or not the defendant was obliged to supply statements to the plaintiffs.

Let me start with the second issue. I must state from the beginning that whatever opinions I will express should be treated as merely provisional in nature because the application to have the suit struck out cannot be equated to a substantive hearing of the suit although it may, if it succeeds to determine the whole suit. The question is whether or not the defendant is obliged to supply bank statements to the plaintiffs. The relationship between the plaintiffs and the defendant is that of bank-customer in respect of the following accounts:

- (i) Shanzu Sea Haven A/C No. 0165286-332
- (ii) Shanzu Sea Haven A/C No. 1065286 – 367
- (iii) Roy Macharia A/C No. 016 – 1294 – 152
- (iv) Dorothy May Watts A/C No. 016=1506-044.

The above accounts are said to be held at the Defendant's branch at Nkrumah Road, Mombasa. The defendant admitted the existence of these accounts. The defendant's contention is that it is not an obligation for it to supply bank statements to the plaintiffs. The law and banking practice impose certain duties and obligations to the bank. One of the inescapable duties is that the bank must render accounts to the customer by supplying bank statements. It is a duty which cannot be waived by agreement. I refer to Cases and materials in Banking Law, by Arora:

At page 95, it is stated as follows:

“Duty to Account

The bank is under a duty to render accounts to its customers either periodically (e.g. every three months) or on demand. Failure to render account will entitled the customer to demand repayment of any balance on his account and then (if necessary) to sue for debt.

The real point of interest with regard to the bank's duty to render an account is whether the customer can rely on any credit balance of his account as shown in bank statements supplied by the bank. A situation of this sort arises where the bank under a mistake credits the customer's account with larger credit balances than those actually due to the customer, or the bank due to an error fails to debit the customer's account with a payment made from the account."

It would appear that the duty to supply statements of accounts is mandatory and obligatory by the bank, Having disposed of that issue let me now turn to the other issue which came up for my determination.

The first issue is whether the deed of settlement discharged the defendant bank from supplying bank statements to the plaintiffs. In order to determine this issue one must look at and interpret the deed of settlement. In a nutshell, the defendant (bank) and the plaintiffs(customers) executed the settlement dated 30th June 2007. The deed clearly spells out that the bank granted the plaintiffs banking facilities and other financial accommodation. The plaintiffs defaulted in paying the principal and interest. The default prompted the bank to demand full repayment of the outstanding debt with a threat to realize the securities. The customers requested the bank not to realize the securities. Proposals were made by the customers to settle the charge sum which proposals were accepted by the bank. The deed in part stated that the outstanding was agreed and settled at Kshs.15,000,000/-. The customers were also required to pay over and above the aforesaid, a further sum of Kshs.303,500/- as contribution to the legal fees. In the entire deed there is no mention of bank statements. I am convinced that the settlement deed did not expressly discharge the bank from supplying bank statements to its customers.

In this matter I opted not to deal with the peripheral issues raised touching on the form and competency of the motion and the affidavits because I found that the key issues in dispute were largely admitted and only needed to be determined on merit. The aforesaid issues touching on the competency of the motion and the affidavits were ignored in broad interest of justice and on the basis that even if I were to consider them it would not dispose of the whole motion and the affidavit.

From the above material, can it be said that the plaint is frivolous, vexatious and an abuse of the court process? In my humble view, the answer is no. The issues raised are1 serious issues which can only be determined through a substantive hearing of the suit. That right cannot be curtailed by this motion. Consequently the motion is hereby ordered dismissed with costs to the plaintiffs.

Dated and delivered at Mombasa this 30th day of June 2008.

J. K. SERGON

J U D G E

In open court in the presence of Mr. Muthama for the plaintiff Respondent

N/A for Applicant.