



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 164 of 2008

**DIAMOND TRUST BANK KENYA
LIMITED.....PLAINTIFF**

VERSUS

SARABJIT SINGH SEHMI.....DEFENDANT

RULING

Application dated 22.07.2008.

The applicant seeks summary judgment as prayed in the plaint dated the 13th March, 2008. The prayer is for the sum of Kshs. 4,384,158.42 with interest at the rate of 24 % per annum. The claim is founded on the overdraft facility agreed between Plaintiff and the Defendant. There is no defence to the claim.

The evidence is the annexures attached to the supporting affidavit of Elizabeth Hinga. Exhibit 1 is an application form for a current account with terms of conditions of operation, with the Bank.

Application for credit facility overdraft of Kshs. 5 million to aid the purchase of the neighboring property. The credit application was made by the Defendant. He stated that his associate company is Greenford Park Ltd. His account was 0108165001 at Bank Branch at Nation Centre. He also stated that he was proprietor/Director. He also opened in his name a Visa Credit Account. In his defence the Defendant admits he opened and maintains a current account with the Plaintiff. In paragraph 3 thereof the defendant says "If the plaintiff allowed his account to be overdrawn which is denied it was an arrangement made without authority of the Plaintiff's Board of Directors but with the Plaintiff's Manager."

This is clearly an admission that the Defendants account was overdrawn. Therefore he must have benefited therefrom. He has liability for his account. On the conditions of operation paragraph 5, the bank is entitled to charge interest on overdrawn overdrafts.

The provisions invoked in this matter is Order 35 Rule 1 & 2 of Civil Procedure Rules which is headed "Summary Procedure and states:

1. *In all suits where a Plaintiff seeks for :*

a. *A liquidated demand with or without interest.*

b. *Where the defendant has appeared, the plaintiff may apply for a judgment for the amount claimed or part thereof and interest....."*

The application must be supported by plaintiff's affidavit or of some other person who can swear positively to the facts verifying the cause of action and of amount claimed.

The Defendant may show either by affidavit or by evidence or otherwise that he should have leave to defend the suit.

The Plaintiff has supported his application by affidavit or Elizabeth Hinga an employee of the Plaintiff which particularly verifies that Plaintiffs claim. The Plaintiff has also relied on authorities:

1. *Civil Appeal No. 4 of 1981 Franz Haas-vs- N. Wainaina.* Court of Appeal decision in which the powers of High Court on an application under Order 35 Civil Procedure specified as to enter summary judgment or to grant leave to defendant to defend suit.

The second authority is decision of Court of Appeal in

2. *Appeal No. 207 of 1998, Yusuf K. Sayani & Another -vs- Barclays Bank of Kenya Limited.* The court found no triable issues on the sum claimed but disputes on interest and other disputes were reserved for hearing in court. Summary Judgment being entered for undisputed claim.

The third authority is:

3. *Civil Appeal No. 5 of 1997, Nairobi Golf Hotels (K) Ltd. -vs- Lalji Bhimji Sanghani Builders.* Also the court of Appeal decision, the court said that in applications of summary judgment the duty is cast on the Defendant to demonstrate that he should have leave to defend *prima facie* the existence of bona fide triable issues or that he has an arguable case.

In this case, the Defendant says there are triable issues. He does not dispute that he opened a current account with the Plaintiff Bank on agreed terms and conditions. He does not deny that he applied for credit facilities which application was contained in the letterheads of "Greenford Park Kyuna." Which was in reality made by the Defendant for himself as will be seen in the completed form dated 17.10.2007. Nowhere in that form does the name of a Limited liability company appear except where Green Ford Park Ltd is named as Associate Company. The company profile sent to the bank is in respect of S. S. Sehmi Building Civil Contractors with unlimited liability under the proprietorship of S. S. Sehmi.

This Company is his own business outfit and does not have separate liability status. The Memorandum and Articles of Association of Company Green Park Management Lt. were signed on 20.06.07 and there is no evidence of registration under the Companies Act. The defendant alone applied for Open Visa Account.

In view of the above the attempt by the Defendant to place the liability on another's door is not tenable. He alone is responsible.

The other issues raised like corporate governance and accountability necessitates of companies and the strength and status of companies are not triable issues between the defendant and the Plaintiff. As to the issue of claim made, the plaint showing clearly the facility overdraft Kshs.3,832,154.42 as at 16.01.2008 and Kshs.552,000/= is in respect of credit card (Visa) outstanding. There is no triable issue there. On the issue of rate of interest the conditions of Banking paragraph 5 indicates that the Bank will be paid interest on overdrafts and need not notify the customer and will demand immediate payment with interest of any account that is overdrawn. These conditions were accepted by the Defendant and there is no triable issue raised.

It is to be noted that the account through which the overdraft was channeled was No.0108165001 which was held by the defendant himself. The transactions on Credit Card (Visa) are also exhibited.

Upon considering all the pleadings particularly the statement of defence, I do not find any express denial from the Defendant that he did not take the money claimed. There is no evidence that he does not owe

the sum claimed by the Plaintiff. I do not find any triable issues raised at all.

I therefore allow the application and enter judgment for the Plaintiff in the sum of Kshs. 4,384,158.42 plus interest at the rate of 24 % p.a up to the date of filing suit. Thereafter the interest shall be at court rates until payment in full.

The plaintiff is awarded costs of the suit and this application.

It is so ordered

DATED this 22nd day of October 2008.

JOYCE N. KHAMINWA

JUDGE