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

Civil Case 330 of 2005

TWIGA CAR HIRE & TOURS LIMITED…………......………..…PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED……........…....1ST DEFENDANT

BARCLAYS BANK PLC………………………………....2ND DEFENDANT

RULING

This suit was scheduled for hearing on 6th October, 2008, a date taken by consent by both parties at the court registry. When the matter was called out for hearing, the Defendants were unwilling to proceed with the trial and they sought adjournment on the ground they were unable to reach their witnesses and so had been unable to procure their presence. The adjournment was rejected and the parties were given a time allocation for the hearing of the case. At the allocated time, the Plaintiff was ready with a witness in court but the Defendants had no witness in court. The Plaintiff however made a very unique application under Order XVII rule 1 of the Civil Procedure Rules which stipulates:

"*The Plaintiff shall have the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant shall have the right to begin.*"

Mr. Hira for the Plaintiff submitted that by virtue of the Defendants' averments in paragraph 3, 4 and 5 of the amended defence, the onus of proof has shifted to the Defendants to prove that the Plaintiff knew or ought to have known -

i) that the authorization to pay was not a guarantee of payment;

ii) that authorization did not amount to a validation of the transactions carried out by the Plaintiff;

iii) that there was a great likelihood of chargeback for the whole amount of the transactions undertaken when it opted to render services to card holders by way of telephone in the absence of the cards and cardholders; and

iv) that such payments were subject to subsequent claims by cardholders and or card issuers.

Mr. Hira submitted that as pleaded the Defendants should show why they saw it fit to withhold payments.

Paragraphs 3, 4 and 5 of the Defendants defence are set out in full herein below:

"3. In response to paragraph 5 of the plaint, the Defendants state that: -

i. The Plaintiff knew and/or ought to have known that any authorization that may have been given by the 1st Defendant was not a guarantee of payment nor did such authorization confirm that the persons who placed the orders for services that were rendered by the Plaintiff were genuine cardholders.

ii. Any such authorization was not and did not constitute a bar against the card issuer from subsequently charging the card payment back to the Plaintiff.

iii. The 1st Defendant expressly denies that any such authorization it may have given amounted to a validation of the transactions carried out by the Plaintiff.

iv. The Plaintiff knew or ought to have known that there was great likelihood of chargebacks for the whole amount of transactions undertaken when it opted to render services to cardholders by mail or telephone and in the absence of the cards and cardholders.

3. With respect to paragraph 6 of the Plaint the Defendants state that:-

i. Such payments were always subject to the terms and conditions of the Agreement and were on the understanding that the Plaintiff did follow the prescribed procedure guide in rendering its services to the cardholders.

ii. The Plaintiff knew or ought to have known that such payments were subject to subsequent claims by the cardholders and or card issuers.

4. With respect to the contents of paragraph 7 of the Plaint, the Defendants deny that they are indebted to the Plaintiff as alleged and aver that: -

i. Clause 5.1 of the Agreement expressly empowered the Defendants to withhold payment if a Cardholder made a claim against the Defendants relating to a transaction in respect of which a sales voucher had been issued by the Plaintiff. The amount claimed by the Plaintiff is the subject of claims made by cardholders and received by the Defendants in relation to transactions undertaken by the Plaintiff.

ii. It was a further term of the said Agreement that where the Defendants withheld payment on any sales voucher, the Defendants were not under any responsibility to procure payment for the transaction represented by the sales voucher or otherwise deal with the cardholder in that respect.

iii. The amounts claimed by the Plaintiff represented transactions undertaken with one or all of the following fraudulent features:

a. Cardholders did not authorize the transactions;

b. Sales Vouchers presented by the Plaintiff do not bear the signatures of cardholders

c. Fake credit cards were used in the transactions.

Mr. Ogunde for the Defendants expressed surprise that the Plaintiff's Advocate had made the application under order XVII rule 1 of the Civil Procedure Rules to have the Defendants begin the case. He however submitted that there was no admission in the Defendants' statement of defence to warrant the exercise of the power provided under the said rule. Mr. Ogunde submitted that if indeed the Plaintiff felt that the responses to the plaint given by the Defendants were not properly pleaded, the proper cause of action should have been to seek particulars from the Defendants. Mr. Ogunde urged the court to find that there was no admission in the defence and to order that the hearing of the case proceed in the ordinary manner.

I have considered the submissions by both counsels. Mr. Hira who made this application did not rely on

any authorities. I have had to look for some cases which have dealt with this issue. The English case I looked at gives the law in England but their position is very clear that the power to require the Defendant to begin the case is only exercised where there is an admission of the averments in the plaint. For instance, in SELDON VS. DAVIDSON [1968] 2 ALL ER page 755, the Plaintiff sued the Defendant to recover money lent to the Defendant. In the Defendant's defence he admitted receiving the money but alleged that it was a gift and in the alternative the Defendant alleged that it was not repayable at the time the action was brought. The County Court held that the burden of proof lay on the Defendant in light of his admission of having received the money. The Defendant was therefore ordered to begin the case. On appeal, the Court of Appeal upheld the decision of the County Court. In dismissing the Defendant's appeal, the Justices of Appeal observed:

"*That the payment of the money having been admitted, prima facie, that payment imported the obligation to repay in the absence of any circumstances tending to show anything in the nature of a presumption of advancement. This is not a case of father and child, or husband and wife, or any other such blood relationship which could have given rise to a presumption of advancement.*"

Going by the holding of the court, it is clear that there must be a clear admission of the allegations in the plaint before the court can invoke order XVII rule 1 to require the Defendants to begin the case. Locally, in the case of Delphis Bank Limited vs. Channan Singh Chatthe & 5 Others [2006] eKLR (Civil Appl. NAI No. 136 of 2005), the Court of Appeal considered some of the principles that a court should apply in determining whether to require the Defendant to begin the case. This include whether there have been sufficiently material admissions by the Defendant of facts alleged by the Plaintiff to satisfy the initial requirements in Order XVII rule 1. The Justices of Appeal in the same case took into account the agreed issues signed by the respective Advocates of the parties in the suit in order to make a conclusion on that point. In the same case, the Justices of Appeal were not impressed by the Plaintiff's failure to give prior warning to the Defendant of their intention to seek an order that the Defendant should begin the case.

I am guided by these two authorities. I have also set out the excerpts of the amended defence and counterclaim which the Plaintiff submits contains admissions of the Plaintiff's case.

Having examined the pleadings in paragraphs 3, 4 and 5 of the amended defence, I do not consider that *prima facie*, there was any sufficient material admission by the Defendants of the facts alleged by the Plaintiff in its pleadings. If anything, the Defendants were imputing that the Plaintiff had knowledge of the reasons why the Defendants had failed to pay back to the Plaintiff for the transactions undertaken by cardholders as claimed by the Plaintiff. I do not agree with the Plaintiff's Advocate that there are material admissions in the statement of defence to warrant the court to require the Defendants to begin the case.

Having come to this conclusion, I find no basis upon which I would require the Defendants to begin the case. I rule that the suit should be heard in the ordinary manner and that the Plaintiff should be the first to begin the case as provided for in order XVII rule 1

Dated at Nairobi this 17th day of October, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered in presence of:-

N/A for Mr. Hira for the Plaintiff

N/A for Mr. Ogunde for Defendants

LESIIT, J.

JUDGE