

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 107 of 2008

JEREMY KAMBOGO NJAU.....PLAINTIFF

VERSUS

CITY FINANCE BANK LIMITED.....DEFENDANT

RULING

Application dated 17.4.2008 by Notice of Motion

The application is brought under section 3 and 3A of Civil Procedure Act and Order XXXV rules rules 1 and 2 and 3 Civil Procedure Rules. The orders sought are summary judgment and the sum of Ksh.66 Million plus costs of the suit. That the statement of defence be struck out and costs of the application be provided for. The application is grounded on the facts that the defendant is indebted to the applicant in the sum of Kshs.66 million and that the defence is a sham intended to delay the fair hearing of this matter.

The supporting affidavit is sworn by the Plaintiff who swears that he wasto be their commitment by the Defendant. For such services payment was 40 % of total claim of Kshs.626 million. The plaintiff successfully recovered Kshs.466,764,461.80 in settlement. In the replying affidavit the respondent has admitted that the plaintiff was employed as committed and his commission was 40% of the total claim payable.

Statement of defence also confirms that some money was recovered due to efforts of the plaintiff. The Plaintiff swears in his further affidavit that the defendant received Kshs.210 million and his commission was 84,000,000/= and that only a sum of 18,000,000/= has been paid leaving a balance of Kshs.66 million the present claim. The defendant has caused our affidavit to be filed by Ms Esther Karanja who is the credit manager conversant with this case. In paragraph 4 of the affidavit she confirms the relationship of the plaintiff and the defendant but states no commission was payable for monies not recovered by defendant. She swears that not all monies were recovered due to the efforts of the Plaintiff. The defendant states only Kshs.50,000,000/= was brought by Plaintiff and that a commission of 40% has already been paid. The affidavits shows that there are triable issues and would have the suit tried. The respondent relies on the authority of decision on Civil Appeal NO. 248 of 1999 Vaiwin Limited vs Raekbham Mambhai Patel the court said "If a defendant is able to raise a prima facie triable issue he is entitled in law to unconditional leave to defend and also said. "The main concern of the court is to do justice to the parties". The Court of appeal found from affidavit evidence that triable issues of facts have already been adverted to". For the applicant the authorities relied upon are HCCC No. 36 of 2005. Business Imaging systems vs Co-operative Bank of Kenya Limited in which there was a dispute about payment of money. The court gave conditions with leave to Respondent to defend the suit. The case of Vishua Builds vs Moi Univesity. It was held that any dispute over the amount claimed not brought during the contractual period may be considered frivolous and it is for Defendant to concentrate that it should have leave to defend suit. Again in the cause of Standard Chartered Bank (K) Limited vs Arfan 2001 KLR. It was held (Ringera, J as he then was) that in case of a counterclaim "The Court must consider whether the counterclaim raises bona fide triable issues.

The applicant also relies on the ruling in the case of Genetics Technologies International Limited vs Kenya Sugar Board application for summary judgment where the court found that defendant had admitted the plaintiff's claim in a clear unambiguous and unconditional manner. Judgment was granted. The

provisions of Order 35 CPC is to provide a procedure whereby a litigant is not kept waiting for judgment when the defendant has no defence to his claim. This procedure does deprive the defendant the opportunity to be heard and therefore the court is to grant orders carefully in cases which are clear and the defendant does not raise any triable issues in the present case there is dispute as to the amount paid to plaintiff and the balance to be paid. This is a triable issue and the parties should proceed to trial.

I therefore do not allow application. The same is dismissed with costs in the cause. It is so ordered.

Dated at Nairobi this 4th day of November, 2008

J. KHAMINWA

JUDGE