



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)
CIVIL CASE 658 OF 2003

NATIONAL BANK OF KENYA LTDPLAINTIFF

VERSUS

FRANKLIN KAMAU KIMANTHI1ST DEFENDANT

ALBERT MURERA NGARUNI.....2ND DEFENDANT

JAMLIC MPAKA M'MURIUNGI3RD DEFENDANT

RULING

The plaint in this matter states that there existed at all material times a banker and customer relationship between the plaintiff and the 1st Defendant. The 1st Defendant had an account No. 110–104 at the plaintiff's Narok Branch. The defendant by a letter dated 29th of October 1992 accepted a loan offer of the plaintiff whereby the plaintiff offered the defendant an overdraft facility for the sum of kshs 350, 000.00. In consideration of the plaintiff affording and or continuing to afford credit to the 1st defendant the 2nd and 3rd defendant by way of guarantee undertook to pay on demand in writing by the plaintiff the sum which may be due or owing from the plaintiff. The plaintiff averred in the plaint that the 1st defendant is indebted to the plaintiff for the amount of kshs 2,550,174.25 which amount accrues interest at the rate of 29% per annum which was last applied on the 17th of September 2002. The plaintiff averred that money had been demanded from all the defendants and they had failed to make payment. The plaintiff therefore prays for judgement against all the defendants jointly and severally for kshs 2, 550, 174. 25 with interest of 29% per annum from 17th September 2002. The plaintiff claim is denied by the defendants through their defence. The defendants without being specific alleged in their defence that the plaintiff had breached fundamental terms of the loan agreement and the further denied that any money is owed to the plaintiff. They alleged in the defence that the plaintiff's poor accounting had frustrated the defendants' efforts to liquidate the loan. They further stated that the facility given to the 1st defendant was adequately secured by a charge over immovable property. The plaintiff has now brought before court a Notice of Motion dated 22nd of February 2006. That Notice of Motion is brought under Order XXXV rule 1 of the Civil Procedure Rule and section 3A of the Civil Procedure Act. The plaintiff seeks for summary judgment to be entered in its favour against the defendants as prayed in the plaint. The affidavit

in support of that application is sworn by the manager legal services to the plaintiff bank. The said manager deponed that the claim against the defendant was as pleaded in the plaint. She stated that the same was in respect of loan and/or overdraft facility granted to the 1st defendant which was guaranteed by the 2nd and 3rd defendants. The deponent referred to the Bank Statement as evidence of that indebtedness which statements are annexed to the application. The deponent then gave the background of how this loan came about by stating that the 1st defendant at first enjoyed an overdraft facility with the plaintiff for the total sum of 350, 000. That this overdraft facility was granted to the 1st defendant after he signed the letter of offer of the plaintiff dated 29th of October 1992. That letter stated that the overdraft limit was for kshs 350, 000. The deponent thereafter referred to the guarantees that were signed by the 2nd and 3rd defendants. The two guarantees are annexed the applications and they indicate that they guaranteed for the total amount of kshs 350, 000 each which would be owed by the 1st defendant. The deponent thereafter referred to various letters that were written by the 1st defendant who requested for indulgencies in respect of his indebtedness with the plaintiff. The deponent stated that despite the admission which is obvious in those correspondences the defendants have filed in this court a defence denying indebtedness. That that defence consists of mere denials and accordingly the same should be struck out with cost. It is important to note that the present application was not opposed by the defendants. There was no affidavits to the opposition to the application and much more when the matter came up for hearing on the 29th of January 2007 the defendants were not represented.

Under Order XXXV rule 1 of the Civil Procedure Rules plaintiff may seek judgment for a liquidated demand with or without interest by way of an application for summary judgement. That indeed is what is before the court. In order for the plaintiff to succeed it is essential to show that the defendants have not raised any triable issues in their defence in the case **Zola & Another V Ralli Brothers Ltd & Another (1969) EA 691** the court found that: -

Order 35 is intended to enable a plaintiff with a liquidated claim, to which there is clearly no good defence, to obtain a quick and summary judgement without being unnecessarily kept from what is due to him by the delaying tactics of the defendant”.

The case of **Gupta Versus Continental Builders [1978]KLR 83** the court also found that: -

The first thing to say is that this was an application for summary judgement. If a defendant is able to raise a prima facie triable issue he is entitled in law to unconditional leave to defend. On the other hand, if no prima facie triable issue is put forward to the claim of the plaintiff, it is the duty of the court forthwith to enter summary judgement for it is as much against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a plaintiff out of his dues in a proper case. Prima facie triable issues ought to be allowed to go to trial, just as a sham or bogus defence out to be rejected peremptorily”.

Such an application should be supported by an affidavit sworn by one who can swear positively to the facts verifying the cause of action and any amount claimed. I have examined the affidavit in support of the application. The plaintiff's claim as stated in the plaintiff is for the amount of kshs 2, 550,174.25 together with interest at the rate of 29% last applied on the 17th September 2002. The Plaintiff annexed Bank Statements in support of its claim. I have examined those bank statements and can confirm that indeed they refer to the 1st defendant. However having gone through all the statements I find that they cover a period from the year 2004 to 2005. Again to remind myself the plaintiffs claim is as stated hereinbefore and it is indicated that the amount claimed was last applied interest on the 29th of September 2002. If that be the case looking at the 1st defendant bank statement particularly sheet No. 1-0001 this statement refers to the period of 30th June 2004. The amount that is reflected in the debit section of bank statement is kshs 174, 436. That figure is a far cry and of much less value than what the plaintiff claims it is owed by the 1st defendant as at September 2002. The plaintiff fails to give explanations in the difference in the amount between 2002 and the year 2004. It is not clear whether the 1st defendant had made payments towards the account and had reduced the amount as stated herein before. Indeed the whole evidence relating to the bank statement is very unsatisfactorily when one considers that the plaintiff

relies on those statements for judgment to be entered against the defendant. One only needs to remind themselves that the defendants have averred in their defence that the plaintiffs had a poor accounting system which frustrated the defendants in liquidating the loan. When one considers what is stated hereinbefore it does therefore seem that the defendants are justified in alleging poor account system by the plaintiff. In the supporting affidavit the guarantees sworn by the 2nd and 3rd defendants are mentioned. A close examination of those guarantees they indicate that the guarantors were guaranteed a total amount of kshs 350,000 only plus interest. For that interest to begin to accrue on the amount guaranteed it is essential for the plaintiff to prove a written demand had been made to the 2nd and 3rd defendants. Annexed to the supporting affidavit are two letters addressed to the 2nd and 3rd defendants dated 18th of November 1993. In those letters the plaintiff demanded payment from the said defendants for the guaranteed amount plus interest. When one considers that the guaranteed amount was kshs 350,000 for the plaintiff to prove its claim against the 2nd and 3rd defendant it is essential for the plaintiff to show a worked out statement for the guaranteed amount to prove the indebtedness of the 2nd and 3rd defendant. And of course it would be essential for the plaintiff first of all to prove indebtedness against the principal debtor the 1st defendant for the liability of the 2nd and 3rd defendants to arise. As stated hereinbefore the plaintiff has failed to prove to this court the exact indebtedness of the principal debtor. In considering the plaintiff's application for summary judgment I find that the application fails to meet the standard necessary for judgment to be entered against the defendants. For that reason I do hereby dismiss the plaintiffs application by way of Notice of Motion dated 22nd February 2006 with no orders as to costs.

MARY KASANGO

JUDGE

Dated and delivered this 19th day of February 2007

MARY KASANGO

JUDGE