



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Suit 21 of 2005

DOUBLE FOUR SERVICES LIMITED PLAINTIFF

VERSUS

EAST AFRICAN BUILDING SOCIETY DEFENDANT

RULING

I have considered the application and submissions by Mr. Njuguna, Counsel for the Plaintiff. I have also considered the response by Mr. Kuloba, Counsel for the Defendant. The suit came up for hearing this morning. Both parties are ready to proceed.

On instructions Mr. Njuguna has in effect applied for adjournment of the hearing to enable him file an application to amend the plaint to take into account a payment of Shs. 783,379/= by Mercantile Insurance Company Limited to the Defendant which the Defendant acknowledged by a letter dated 28th February, 2007.

In the Plaint the Plaintiff has inter alia prayed for:-

“35 (3) – A Declaration that:

(b) “3) The Plaintiff mortgaged is fully redeemed and overpaid as at 11th June, 2004 by an amount of Kshs. 129,368/95.

(c) Damages for fraudulent miss-statement of mortgage account and for breach of contract.”

In its Amended Defence, the Defendant denies that the Plaintiff has fully paid the loan and/or overpaid the loan to the tune of Shs. 1,055,488.11 (as set out in another part of the plaint). In my view, the question of accounts is at the centre of this dispute. During the pendency of this suit and when the case has been fixed for hearing, the Defendant through its Counsel writes to the Plaintiff and confirms receipt of Shs. 783,370/= being an amount received from the insurers Mercantile Insurance Company Limited in respect of Life Insurance Cover for one of the Directors of the Plaintiff’s Company who died in the course of 2006. The Defendant asserted that it had already credited the said amount to the Plaintiff’s mortgage account. The Defendant insisted that interest had been accruing ever since the Court granted the injunction herein. It concluded that:

“..... in the event that you lose this case, which is highly likely event, our client will demand the balance of the claim together with interests that will have accrued. Otherwise, the property will be

auctioned.”

The Defendant’s case is that the amount was paid under the mortgage protection policy that had been taken out by the Plaintiff in pursuance with its obligations with the Defendant under the Loan or Mortgage Agreement between the Parties.

The said payment was credited into the mortgage loan account which is the subject-matter of this suit in the course of this year. If this act had any possible implications on the indebtedness or otherwise of the Plaintiff, then they have a right to be heard in this suit as to the impact and implications thereof. In my view, looking at the pleadings, the said credit definitely will be reflected at the end of these proceedings, one way or the other.

I do therefore hold that the Plaintiff is entitled to consider whether to apply for amendment of the Plaint to take into account the question of the credit of the amount stated and its effect on its claim. This is the opportune time to deal with this development rather than later.

In the premises I do hereby allow the adjournment. The hearing of this suit is hereby taken out and stood over generally. The Plaintiff, if it elects to file an application for leave to amend the Plaint shall do so and serve within the next 21 days and set it down for hearing on priority basis. If the Plaintiff is in default of this Condition, the Defendant will be at liberty to set down the suit for trial.

Costs in the cause.

M. K. IBRAHIM

JUDGE

FURTHER ORDER BY CONSENT

Counsel Mr. Kuloba has indicated that he would not oppose the application for amendment on the basis of the credit in question and on this basis has asked for a hearing date of the suit.

In the light of the foregoing, I do hereby fix this suit for hearing on 12th and 13th June, 2007 at 9 a.m. After 21 days from the date hereof the Counsel for the Parties shall file a consent within three days allowing the application for leave to amend the Plaint. The Plaintiff shall file and serve the Amended Plaint within three days of the Consent being filed. The Defendant shall file its Amended Defence if any within 14 days of service of Amended Plaint.

DATED AND DELIVERED AT ELDORET ON THIS 20TH DAY OF MARCH, 2007.

M. K. IBRAHIM

JUDGE