



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 1200 of 2000

BETTIE ATEMU NANGA.....PLAINTIFF
VERSUS
MIDDLE EAST BANK KENYA LIMITED.....DEFENDANT

R U L I N G

By a Notice of Motion dated 7th November 2006 brought under **Order 12 rule 6** of the Civil Procedure Rules, Middle East Bank Kenya Limited herein after referred to as the Applicant seeks judgment on admission against Bettie Atemo Nanga hereinafter referred to as the Respondent as follows:

- (a) A declaration that the Plaintiff is liable under the personal covenant to pay the Defendant the sum of Kshs.4,303,379.85 inclusive of interest up to August 1998 together with further interest thereon in accordance with the provisions in that regard set out in the said Instrument from 1st September 1998 until payment in full.***
- (b) A declaration that the Plaintiff is liable to execute a valid charge over Nairobi/Block 103/201 in favour of the Defendant to secure the repayment of the principal sum of Kshs.3,500,000/= together with interest and other charges as specified in the said Instrument.***
- (c) An order that the Plaintiff do pay to the Defendant the said sum of Kshs.4,303,379.85 inclusive of interest upto 31st August 1998 together with further interest thereon in accordance with the provisions in that regard set out in the said Instrument from 1st September 1998 until payment in full under the aforesaid personal covenant or in the alternative under the Letter of Guarantee dated 29th July 1997 executed by the Plaintiff.***
- (d) An order that the Plaintiff do specifically perform her agreement to execute a valid charge in terms of the declaration prayed in (b) above.***
- (e) Costs and incidental to this counterclaim.***

The suit was commenced by the Respondent who by her plaint dated 4th July 2000 sought orders as follows: -

- (i) This Honourable Court be pleased to injunct the defendant from selling, disposing, alienating or otherwise howsoever from dealing with property LR No. Nairobi/Block 103/201 in any manner whatsoever.***
- (ii) This Honourable Court be pleased to declare the charge dated 26th September 1997 null and void.***

(iii) ***This Honourable Court be pleased to declare that the Plaintiff is otherwise discharged from her guarantee and charge.***

(iv) ***This Honourable Court be pleased to order the Defendant to discharge the security by way of charge by the Defendant, or in default order the registrar of the High Court to execute the discharge.***

(v) ***Costs of this suit***

(vi) ***Such further or other orders this Honourable Court may deem just and equitable to grant.***

On 9th November 2005 the Applicant filed an amended defence and counterclaim in which it denied the Respondent's claim maintaining that the Respondent duly executed a charge in the presence of an advocate charging her property ***Nairobi/Block 103/201*** in favour of the Applicant, and that the Respondent confirmed the validity of the charge both orally and in writing and was therefore estopped from denying the validity of the charge or her liability thereunder.

The Applicant further maintained that the Respondent executed a letter of guarantee, in favour of the Applicant for due repayment of all amounts due to the Applicant not exceeding Kshs.3,500,000/= exclusive of interest and charges. The Applicant therefore prayed for orders in the counter-claim as aforesaid. The Respondent's advocates were duly served with the amended defence and counterclaim on the 9th November 2005, but did not respond thereto. Consequently the Applicant brought the current application seeking judgment on admission on the grounds that Respondent by failure to respond is deemed to have admitted the counterclaim and that the Respondent had made an admission in an affidavit sworn on 4th July 2000.

In support of the application Mr. Amoko who appeared for the Applicant submitted that the Respondent not having replied to the defence and counterclaim, the allegations contained in the counterclaim are deemed to be admitted. He relied on the case of ***Cleaver Hume Limited vs British Tutorial College (Africa) Limited [1975] E A 323***. Mr. Amoko further submitted that the Respondent having earlier sworn a replying affidavit on the 4th July 2000 in which She admitted having signed the charge she was bound by the consequences of signing the charge. Relying on the case of ***Hewatson vs Webb [1908] 77 L J K B 32*** Mr. Amoko submitted that the signing of the charge created a personal covenant to pay and a personal covenant to give a valid charge.

The cases of: -

- ***Mariano Almeida vs Caetano Antao and Another [1929-30] 12 K L R 368,***
- ***Kandie vs Daima Bank Limited [2003] K L R 672,***

were also relied upon.

In her grounds of opposition filed on 30th April 2007, the Respondent contended that the application was incompetent, bad in law, misconceived and an abuse of the process of the court. It was also contended that the purported admissions were made before the counterclaim was filed and cannot therefore be subject of the application before court. Ms Oduor who appeared for the Respondent submitted that the Applicant's counterclaim fell short of the requirements of pleadings as provided under ***Order VI*** of the Civil Procedure Rules as the same were not particularized in the proper manner and the Respondent could not therefore have properly responded to the counterclaim. It was submitted that the Applicant has not satisfied the court as to the basis upon which the court can deem the counterclaim to be admitted. The purported admission could also not be supported as it was based on an affidavit sworn on the 4th of July 2000 way before the amended counterclaim was filed in court.

It was submitted that the Respondent had contested the validity of the charge in her plaint and intended to raise questions of law at the hearing of the suit. There was therefore no proper material upon

which a judgment can be entered as there was no clear admission. Relying on the case of **Mburu vs AG and Another [1988] K L R 677** it was submitted that judgment could not be entered unless it was a plain and obvious cause. It was submitted that there was a clear dispute between the parties and that the execution of the charge was a special document governed by special rules and that the Respondent had pointed out clear violation of the Rules. The court was therefore urged not to exercise its discretion in favour of the Applicant.

In considering this application I find the case of **Kiprotich vs Gathua and Others [1979] K L R 87** which was on the 1st Defendant's supplementary list of authority to be quite instructive. In that case the judges of appeal stated as follows: -

“The jurisdiction to award judgment on admission under the Civil Procedure Rules, Order XII Rule 6, resulting from the failure to reply to a counterclaim should only be exercised in the clearest of cases and never where the subject-matter of the counterclaim is so closely related to the subject matter of the plaint as to be indivisible and the plaint has not been struck out or dismissed. Even where the subject-matter is distinct and divisible the party who has appeared and is in default of pleadings should not be debarred from defending if He can indicate the existence of a defence which is not patently frivolous and which he wishes to put forward.”

Looking at the pleadings it is evident that the Respondent's claims hinges on her allegations that the charge dated 26th September 1997 is null and void or that she should otherwise be discharged from the guarantee and charge. The Applicant's counterclaim hinges on the same documents i.e. the charge and guarantee which according to the Applicant is valid and under which, the Respondent is liable to the Applicant. The two claims are therefore so closely intertwined that the two cannot be separated. There is no way the Respondent could be said to have admitted the Applicant's counterclaim when the averment in her plaint clearly negates the allegations in the counterclaim. The failure by the Respondent to respond to the counterclaims could not therefore be construed to be an admission. Further the averment in the Respondent's affidavit sworn on 4th July 2000 do not constitute an unqualified admission of the Applicant's counterclaim. The Respondent maintains in that affidavit that the nature of the document she signed was not explained to her. Moreover, that affidavit was sworn way before the counterclaim was filed.

For the above stated reasons, I find no merit in this application and do therefore dismiss it with costs.

Dated, signed and delivered this 15th day of June 2007.

H. M. OKWENGU

JUDGE