



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

Civil Suit 352 of 2006

DAWOOD KHAN M. KHAN.....PLAINTIFF

VERSUS

EABS BANK LIMITED.....DEFENDANT

R U L I N G

I have before me an application to strike out the defendant’s statement of defence with costs and for judgment as prayed in the plaint. The application is expressed to be under the provisions of Order VI Rule 13 (1) (a) of the Civil Procedure Rules: that the defence discloses no reasonable defence.

The reasons for the application as stated on the face thereof are as follows:-

1) That the defendant’s statement of defence is untenable in the light of the express provisions of the Building Societies Act, Chapter 489 of the Laws of Kenya

an’t stand.

2) That the alleged defence by the defendant is contra statute and thus untenable in Law.

As the application has been brought under Rule 13 (1) (a) aforesaid no evidence is admissible and accordingly no affidavit was filed in support of the application. I am therefore enjoined to consider the pleadings only. I am however alive to the prevailing position of the Law and practice that the jurisdiction to strike out a pleading should be exercised with extreme caution and only in obvious and plain cases. The plaintiff has based his application on Section 23 of the Building Societies Act which reads as follows:-

“23 (1) Subject to the provisions of the Government Lands Act, the Trust Land Act and the Land Control Act, a building society may:-

(a) acquire and hold land which the society requires for its business premises or for housing of its staff and

(b) acquire by foreclosure or surrender land mortgaged to the society

but land acquired by a building society under paragraph (b) shall be sold and converted into money within a period of two years or such longer period as the Registrar may authorize in writing.

(1A) Notwithstanding subsection (1) a building society may at a general meeting resolve to

acquire and hold land and may acquire and hold land for the purposes of developing residential houses for its members in accordance with the rules of the building society.

(2) A building society may let any part of its business premises which is not required for the immediate use of the society.”

Is the defence untenable in the light of the above provisions of the Building Societies Act? Is the defence contra statute? Before considering those questions let me consider the plaint and the defence. In the plaint filed on 4.7.2006, the plaintiff seeks the following primary reliefs:

- (a) An order setting aside all the transactions executed by the defendant in relation to the suit property.
- (b) An order of rescission rescinding the sale and transfer of the suit property from the plaintiff to the defendant.
- (c) A declaration that the defendant had no right over the suit property when it purported to sell the same to itself.
- (d) An order compelling the defendant to retransfer the suit property to the plaintiff free from any encumbrances and pay the stamp duty due in the process.
- (e) A permanent injunction restraining the defendant, its agents or servants from selling, alienating, disposing of, collecting or receiving rent or in any way whatsoever in dealing with the suit property.
- (f) An order that the defendant delivers possession of the suit premises.
- (g) A refund of any money received as rent by the defendant that is in excess of the portion of the loan advanced by the defendant to the plaintiff.

The foundation of the plaintiff's claim is substantially pleaded in the body of his plaint aforesaid. Various allegations are made against the defendant to justify the awarding of the said reliefs. Among them are the following:-

- 1) Validity of the charge.
- 2) Breach of the charge over the suit property.
- 3) Waiver or suspension of loan repayment and interest until construction of 4 maisonettes on the suit premises.
- 4) Validity of the statutory notice served upon the plaintiff.
- 5) Validity of the auction sale or any sale of the suit premises.
- 6) Unlawful collection of rent income from the suit premises.
- 7) Validity of the transfer documents of the suit property to the defendant from itself.

It is plain therefore that the plaintiff's complaints are not limited to the contravention of the Building Societies Act by the defendant.

The defendant has in its defence delivered on 26.7.2006 specifically responded to the plaintiff's allegations. In paragraph 3 it denies that it was a building society licenced and/or operating under the Building Societies Act or that it has merged with Akiba Bank of Kenya Limited to be called EABS Bank Limited. It then avers that it was and has always been a bank, formerly called Akiba Bank Limited

carrying on banking business in its former name until the name was changed to EABS Bank Limited. In paragraph 4 it pleads that prior to the said change of name, it had (in its former name of Akiba Bank Limited) entered into an agreement with East African Building Society, a separate and distinct entity which was licensed and operating under the Building Societies Act, to take over the assets and liabilities of the said society including the plaintiff's property but a formal transfer has not yet been effected in favour of the defendant and the legal title of the suit property is still vested in the said society which is still registered as proprietor of the said property. It is then averred that the defendant not having acquired the legal title to the said property and there being no trust registered against the title, it is the said society not the defendant which is the right and proper party to answer the plaintiff's claim. It is only in the event that the court finds in favour of the plaintiff on the issue of who is answerable that the defendant pleads to the rest of the allegations made in the plaint.

So the defendant challenges the applicability of the Building Societies Act. A final and definitive determination of the issue must await the trial as the finding made at the hearing of the application for temporary injunction was not and could not be definitive. In any event, even if the finding was to be taken as definitive, a conclusion that the defendant contravened the provisions of Section 23 of the Building Societies Act would have to be supported by evidence. The section gives power to a Building Society to hold land. There must be evidence that the society did not satisfy any of the conditions set by the said section. Sub-section (1) (b) allows the society to acquire by foreclosure or surrender land mortgaged to the society; but land thereby acquired should be sold and converted into money within a period of two years or such longer period as the Registrar may authorize in writing. There is no evidence that the society could not benefit from the discretion given by the subsection to the Registrar or that there is any impediment to the society availing itself of that discretion.

Subsection (1A) of the same section provides that a building society may at a general meeting resolve to acquire and hold land and may acquire and hold land for the purposes of developing residential houses for its members in accordance with the rules of the building society. Again, a contravention of this subsection can only be shown by evidence which could not be possible under Order VI Rule 13 (1) (a).

In my view, other than the issues raised and dealt with both in the plaint and the defence regarding the provisions of the Building Societies Act, several other issues are raised in the plaint and adequately answered in the defence. I am unable to find that the defendant's statement of defence discloses no reasonable defence. The upshot is that the plaintiff's application fails. It is dismissed.

Costs to be in the cause.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF SEPTEMBER, 2007.

F. AZANGALALA

JUDGE

Read in the presence of:

Sagana holding brief for Ahmednassir and Ogonya holding brief for Gudka.

F. AZANGALALA

JUDGE

17/9/07