



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 333 of 2004

DHANJAL BROTHERS LIMITED..... 1ST PLAINTIFF

DHANJAL PROPERTIES LIMITED.....2ND PLAINTIFF

VERSUS

AFRICAN BANKING CORPORATION.....DEFENDANT

RULING

The application under consideration is dated 9th September, 2004 brought by the Defendant under Order XII rule 6, Order XXXV rule 1(1)(a), 2 and 8 of Civil Procedure Rules and Section 3A of Civil Procedure Rules.

It seeks an order for judgment on admission in the sum of Kshs.15,500,000/= and alternatively summary judgment in same sum, to be entered for the Defendant against the Plaintiff.

The grounds for the application are cited on the face of the application; that the Plaintiff is truly indebted to the Defendant in the said sum under a loan agreement dated 23rd July, 1997; that the sum has been admitted by the Plaintiff's through correspondence and by conduct; and that the Plaintiffs have no defence to the Defendant's counterclaim. There is also an affidavit sworn by **SHAIKH GHULAM HUSSAIN** in support of the application and in which various exhibits are annexed. I have considered each of these documents together with the submissions by Ms. Kanyi for the Applicant.

The application is opposed. The Respondents did on 15th October 2004, file two replying affidavits sworn by **DALJI SINGH DHANJAL** and **JASWANT SINGH DHANJAL**.

Mr. Ouma for the Respondents has drawn this court's attention to the ruling of my brother, **Hon. Njagi J**, made in this case on the 5th August 2004. In particular my attention was drawn to the orders made by the learned Judge regarding the taking of accounts. It is Mr. Ouma's contention that until accounts were taken as ordered by the Judge, the application for summary judgment and or judgment on admission must fail as it was not clear how much money is owed by the Plaintiffs to the Defendants. Mr. Ouma also raised a further issue that the learned Judge made specific findings to the effect that a statutory notice was not served on the 2nd Plaintiff herein as provided under Section 74 of the Registered Land Act; Mr. Ouma urged the court to find that in view of the learned Judges ruling there was a misjoinder of parties in the application for summary judgment. Secondly, since the actual amount owing could not be deciphered from documents before court, which were same ones before **Hon. Njagi J** when he made the order for taking of accounts, Mr. Ouma argued that in the circumstances the application must fail. Counsel contended further that the amounts of debt owing kept varying in each correspondence exchanged, and that the dispute existing between parties involved the mode of interest charged and that therefore these

documents could form the basis for summary judgment. Learned counsel contended further that the issues could only be resolved during the hearing of the case and after the parties called expert witnesses. Besides, counsel concluded, the Plaintiffs had filed an undertaking as to costs which covered the sum found owing, if at all, by the court.

The ruling of **Hon. Njagi J**, made on 5th August, 2004 was in following terms:

“In sum, I am satisfied that the applicants have made out a prima facie case with a probability of success and therefore grant orders 3 and 4 as prayed, on condition the Plaintiffs will file an undertaking as to damages within fifteen days from today.”

The learned Judge was ruling on an application for injunction, made by the Plaintiffs to this suit on 22nd June 2004. Prayers 3 and 4 sought the following orders:

3. That the honourable court be pleased to grant an order of injunction restraining the defendant, by itself, its servants, and/or its agent, M/s Garam Investments, auctioneers or any of them or otherwise from advertising for sale, selling by public auction or private treaty or whatsoever however the 2nd Plaintiff’s piece of land known as L.R. No. KWALE/GALU/KINONDO/670 until the hearing and determination of this suit.

4. That the honourable court be pleased to grant an order of injunction requiring that full accounts be taken between the parties pending the hearing and final determination of this suit.

Prayer 4 is very clear that the Respondent’s herein were granted an injunctive relief requiring the taking of accounts between the parties before the case is heard or finalized. The Application now before me, if allowed, would have the effect of determining the suit. In my understanding of my learned brother’s ruling, this suit should not be determined until accounts between parties are taken.

There is no dispute that the accounts are yet to be taken. There is no dispute either that the learned **Njagi J’s**, order of 5th August 2004 has neither been varied or set aside. I find myself bound to the terms of that order, that any step which could dispose of the suit, ought not to be undertaken unless and until the order is complied with. Since the order is yet to be complied with, the application before court cannot succeed.

There is another side to this application and which is the fact that the learned **Hon. Njagi J**, made specific findings, even though at an interlocutory stage as follows:

“Another issue that was raised was with regard to accounts. Mr. Havi, for the Respondent, argued that a mandatory injunction for the taking of accounts cannot be granted as the application was not made by way of Notice of Motion under Order L Rule 1. While I agree with Mr. Havi as a matter of principle, I also bear in mind the circumstances of this case whereby the amount of the debt due from the first plaintiff is not clear, especially because of the fluctuating date of interest. At the same time, the applicants have invoked section 3A of the Civil Procedure Act which empowers the court to make such orders as may be necessary for the ends of justice. I think that this is an appropriate case for invoking such powers, otherwise it would have been difficult to combine a Notice of Motion and a chamber summons in one application”.

The finding that the sum due to the Defendants is not clear has not been set aside, and for purposes of summary procedure as sought herein where the court cannot have the benefit of trying the case and considering evidence in the matter that finding still stands.

I believe that finding otherwise herein would be a fallacy given the fact that this is not an appellate court. This case is not a plain and obvious case. It is a claim for a liquidated sum, which cannot be ascertained until the accounts are taken as ordered by this court, or evidence adduced during trial. For the two reasons I have given herein, I find that the Applicant’s application must fail in totality. I accordingly

dismiss it with costs to the Respondents.

Dated at Nairobi this 19th October, 2007,

LESIIT, J.

JUDGE

Read, signed and delivered in presence of:-

Njenga holding brief Ms. Thangei for Applicant

Ochunu holding brief Ms. Nduati for Respondent

LESIIT, J.

JUDGE