REPUBLIC OF KENYA

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

Civil Suit 710 of 2005

STARLINE GENERAL SUPPLIES LTD.…….....….PLAINTIFF

VERSUS

DISCOUNT CASH & CARRY LTD. …….....DEFENDANT

RULING

The Plaintiff has moved the court by way of a Notice of Motion dated 30th January 2006. By that application, the plaintiff seeks either summary judgement, or in the alternative, judgement on admission.

It is the plaintiff's case that the parties herein did enter into an arrangement, in which the plaintiff was to give to the defendant, a soft loan for Kshs.14,430,000/-. The plaintiff says that it did give to the defendant the said soft loan, as between 23rd September 2004 and 10th January 2005.

It is said that the defendant was supposed to pay the loan at agreed intervals. Meanwhile, the interest on the loan was also said to have been agreed upon, as being Kshs.1,237,493/-.

The plaintiff says that the defendant made a good effort to repay the loan, and that he had already paid a sum of Kshs.12,059,198/-. Thereafter, a dispute arose between the parties, and the defendant declined to pay the balance of Kshs.2,370,802/- together with the agreed interest amounts.

The parties are said to have held negotiations, which culminated in an agreement, pursuant to which the defendant agreed to pay the whole outstanding debt, of Kshs.3,608,295/-.

However, even though the defendant issued a total of nine cheques, to settle whole agreed amount, the said cheques were all dishonoured by their bankers.

It is the plaintiff's submission that the issuance of the cheques, by the defendant, constituted an admission, that it owed the money to the plaintiff.

Furthermore, the defendant is said to have written a letter dated 1st August 2005, through which he admitted owing the money in question.

On their part, the defendant first submitted that as the plaintiff has not sought to strike out the defence which is on record, the said Defence stands. The reason for that contention is that if any party wishes to seek summary judgement, he must do so before a defence was filed.

As far as the defendant is concerned, there was legal authority for the proposition that an application for a

summary judgement ought to be filed only before a defence was filed. The defendant cited the case of **NATIONAL INDUSTRIAL CREDIT BANK LIMITED –VS- LUCY WAKONYO NJINO, HCCC NO. 1049 of 2000,**as authority for that proposition.

Having perused the ruling of the Hon. Khamoni J., in that case, I find that at page 2 thereof, the learned judge expressed himself thus:

"What has happened as summarised above has created a situation where the Defendant is already defending herself in this suit. By filing the defence, she was already defending herself and that was as of right because there was nothing unlawful preventing her from defending herself.

That being the position today, how proper is it for the court to say hereinafter, if the Applicant is successful, that the Defendant is now being given leave to defend herself in this suit.

In any case Order XXXV Rule 2(1) says that the Defendant may show either by affidavit or by oral evidence, or otherwise that he should have leave to defend the suit."

From my understanding, the foregoing remarks certainly seem to suggest that once a Defence had been filed, the defendant did not need the leave of the court to defend himself. In a manner of speaking, that is correct, but I believe that that is only so to the extent that every defendant has a legal right to file a Defence. He cannot be denied the right to file a defence, if the proceedings are of the kind which call for such a pleading. But, I do not understand the learned judge to be saying that the court could not entertain an application for summary judgement if it was filed after a defence had been placed on record.

The provisions of O. 35 rule 1 of the Civil Procedure Rules stipulate that where the plaintiff has appeared, the plaintiff may seek judgement for a liquidated demand or for the recovery of land. Clearly, by reference to a defendant who had appeared, the said rule was not contemplating a defendant who had also filed a defence. It is thus possible that even before a defendant had filed a defence, the plaintiff could seek judgement against him, provided that the defendant would have appeared.

However, in my understanding of O.35 rule 4, the rules committee envisaged two possible scenarios. The first, would be one in which the defendant had appeared, but had not yet filed a defence. Whilst the second scenario would be one in which the defendant had filed a defence, but the plaintiff deemed the said defence to be no more than a sham. Rule 4 reads as follows;

"If a defendant who has not already filed his defence is granted leave to defend he shall file his defence within fourteen days of the grant of leave unless the court otherwise orders."

If there was any doubt about the above reasoning, I believe that such doubt is cast aside by the provisions of O. 35 rule 5, which reads as follows;

"If it appears that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted, the plaintiff shall have judgement forthwith for such part of his claim as the defence does not apply to, or as is admitted, subject to such terms, if any, as to suspending execution, or the payment of the amount realised or any part thereof into court, the taxation of costs, or otherwise as the court thinks fit, and the defendant may be allowed to defend as to the residue of the plaintiff's claim."

From the foregoing, it is evident that even where a defence had been set up, the court may entertain a summary judgement application, and then proceed to grant judgement to that part of the claim which is either not covered by the said defence, or which is admitted in the defence.

In my considered view, when the rule says that the defendant would then be allowed to defend as to the residue of the plaintiff's claim, that does not imply that the defendant would file another defence in that regard. No. The defendant would continue to oppose the said residue of the plaintiff's claim using the defence already filed, and to the extent that the said defence appears to provide an answer to the claim.

Even in the case of **NATIONAL INDUSTRIAL CREDIT BANK LIMITED -VS- LUCY WAKONYO NJINU,** (above), the Hon. Khamoni J. went on to state that the court would look at the replying affidavit, defence, reply to defence and the submissions. Having carried out that exercise, the learned judge held, at page 5 of his ruling, that;

"Such a defence cannot with all due respect, be said to be a sham and that it does not raise any triable issues. The law is that the presence of any one triable issue is sufficient to give the Defendant leave to defend under Order XXXV Rules 1 and 2."

In order to establish whether or not there were any triable issues arising from any case, the court would ordinarily give due consideration to the contents of the Plaint and the Defence, as well other pleadings, including affidavits.

I therefore hold that an application for summary judgement need not be filed before the defendant files his defence. Even after a defence has been filed, the plaintiff may bring an application for summary judgement.

Furthermore, if the court were to allow an application for summary judgement, the defence would no longer "remain" in place, as asserted by the defendant herein. Once the court allowed an application for summary judgement, it would have declared that there was no defence to such part of the plaintiff's claim as the judgement was in respect of.

In this case, the claim was for Kshs.3,134,334/-, which sum was described as the balance of the loan which the plaintiff had given to the defendant. The said sum was made up of Kshs.1,237,493/-, in respect of "agreed interest", and Kshs.2,370,802/- which was the balance of the principal sum.

In the defence the defendant admitted getting a loan of Kshs.14,430,000/-. However, it denied the existence of an agreement to pay Kshs.1,237,493/-as interest. It also denied having only paid Kshs.12,533,159/-, towards the principal sum.

Later, in a replying affidavit, filed in response to this application, the defendant's director Rajesh Vyas stated as follows, at paragraph 9;

"THAT in reply to paragraph 8 of the supporting affidavit, I wish to state that the defendant did expressly admit that the sum of Kshs.2,370,802/- was owing as the balance but disputes the fact that the sum of Kshs.3,608,295/- was admitted."

In line with that deposition, counsel for the defendant did tell the court that judgement on admission could be entered for that amount. It was submitted that the defendant was only disputing the interest sum of Kshs.1,237,493/-.

I note that the admission contained in the replying affidavit is a deviation from the Defence, in which the defendant had denied the whole claim by the plaintiff. That was a violation of Order 6 rule 6 of the Civil Procedure Rules, which prohibits a departure from pleadings. However, insofar as the said departure does not prejudice the plaintiff, I shall not stand in its way.

Following that admission by the defendant, the only issue remaining relates to the interest sum of Kshs.1,237,493/-. Whilst the plaintiff insists that there was an agreement on the issue, the defendant says otherwise.

In a letter dated 1st August 2005, the defendant told the plaintiff, inter alia, as follows;

"With regard to the interest amount of Kshs.1,237,493.00, we suggest that upon settlement of the principal amount we shall propose a cash payment schedule similar to the re-payment of the principal amount."

To my mind that is an unequivocal admission of liability as appertains to the issue of interest. Indeed, the defendant expressly acknowledged not only the fact that it would give proposals for the payment of interest, after paying the principal amount; they even specified the quantum of the said interest.

And, as if that letter did not constitute sufficient admission of liability, the defendant then tendered four cheques, for the payment of Kshs.1,237,493/00. Those cheques were as follows:

(i) Cheque No. 795657 dated 2/8/05, for Kshs.298,493/-

(ii) Cheque No. 795658 dated 12/8/05, for Kshs.305,000/-

(iii) Cheque No. 795659 dated 25/8/05, for Kshs.313,000/-

(iv) Cheque No. 795660 dated 30/8/05, for Kshs.321,000/-

In the light of the letter dated 1st August 2005, coupled with the four cheques cited above, I hold that the defendant did admit liability for the interest, and even tendered cheques towards payment thereof. However, the cheques were dishonoured. Consequently, the defendant still owes the interest as well.

In my considered opinion, the letter dated 11th October 2005 can be no more than a belated attempt by the defendants to extricate itself from liability. I do not buy it at all.

Consequently, I find that there is absolutely no triable issue in this matter. There is thus absolutely no need to have the suit proceed to trial. There is hereby now granted summary judgement in favour of the plaintiff for Kshs.3,134,334/-. The said sum shall attract interest at court rates from the date of judgement.

Finally, the plaintiff is awarded the costs of the application dated 30th January 2006, as well as the costs of the suit.

Dated and Delivered at Nairobi this 31st day of March 2006.

FRED A. OCHIENG

JUDGE