



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

Civil Case 1267 of 2005

WEDUBE ESTATES LIMITED

PLAINTIFF

VERSUS

SARAH MBITHE KIVUVA

DEFENDANT

RULING

The Applicant herein has moved the court by way of a Notice of Motion dated 16th November, 2005 brought under Order XXXV Rules 1(1) a and 2 of the Civil Procedure Rules in which he prays that summary judgment be entered against the Defendant/Respondent in the sum of **Kshs.1,872,000/=** plus interest at 20% per month from February 2005. The said sum represents the balance of a friendly loan of **Kshs.2,197,000/=** advanced to the Defendant by the Plaintiff on 24th June 2004. According to the applicant, the same was to be paid on or before 30th September, 2004 and as a show of good faith the Defendant gave the Plaintiff a post dated cheque, drawn on her law firm's account in the sum of **Shs.2,197,000/=**. She also secured the same with a professional undertaking by her advocates M/s L.M. Wambua & Co. Advocates dated 24th June, 2004. Copies of the said cheque dated 30th September, 2004 and the undertaking are annexed to the Plaintiff/Applicants' supporting affidavit together with the request for the loan. The Applicant has told the Court that on presentation, the cheque was dishonored and returned by the bank with the remarks that the Account on which it was drawn had been closed. That was on 9th November, 2004. The applicant has also annexed various letters and reminders sent to the Respondent demanding payment, which the applicant says have been ignored by the Respondent.

The Application is opposed on the strength of the Respondent's Replying Affidavit sworn on 24th May, 2006 in which the Respondent claims, inter alia, that the loan was for **Shs.1,000,000/=** and that the cheque of **Shs.2,197,000/=** was obtained from her under duress. The Respondent also denies that the loan was advanced to her by the applicant, asserting that she had requested the same from Mr. Peter Leo Onalo Advocate as a Professional Colleague and does not know the applicant. She also challenges the rate of interest claimed on grounds that he Lender is not a money lending institution which means that the rate of interest is illegal, unconscionable and contrary to public policy. For these reasons the Respondent through her advocate Mr. Kyalo has submitted that there are triable issues raised in her defence which raises the same issues as are contained in the Replying Advocates. She prays that leave be granted for her to defend the suit.

Counsel for the Applicant submitted that in requesting for summary judgment the Applicant is relying

on the Bills of Exchange Act under which a cheque is actionable per se. He cited the authority of **JAMES LAMONT & CO. LTD –vs - HYLAND [1950] 1 KB 585** and **HASSANALI ISSA & CO. [1967] EALR 555** in support of this contention and **STEWAN HOLDING LTD & WANGAI NYUTHE –vs- DUNCAN KINGORI MUKIRA HCCC No.714 of 1999** to support his argument that even friendly loans can and do attract interest at commercial rates. The above authority was challenged by the Applicant’s counsel and distinguished on the ground that the case before me is not one for summary judgment and/or judgment on admission as was the Stewan Holdings Case. Although this argument was put forth at the very end of the Respondents submissions and very briefly, it is in my view, one of great importance in an application as is before me as it touches on the very essence of the suit sought to be terminated by way of a quick judgment without going to trial.

The Court of Appeal in **GICIEM CONSTRUCTION COMPANY –vs- AMALGAMATED TRADE & SERVICES [1983] KLR** upholding the decision of **Zola vs. Ralli Bros, [1969] E.A 691**, held, inter alia, that

“ The object of Order XXXV of the Civil Procedure Rules is to enable the Plaintiff with a liquidated claim in which the defendant has no reasonable defence to a quick judgment without being subjected to a lengthy unnecessary trial.”

and that

“That power to grant summary judgment under Order XXXV should be exercised cautiously bearing in mind that, it was intended to apply only to cases where there is no reasonable doubt that the Plaintiff is entitled to judgment and where therefore it is inexpedient to allow the Defendant to defend for mere purposes of delay...”

and further that

“ ... leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to the facts or law which raises a reasonable doubt that the Plaintiff is entitled to judgment...”

It is a well accepted Principle that leave to defend ought to be given where there genuinely exist triable issues and according to the holding in the **GICIEM** case above cited, this should be so **“even if the court is sceptical about the success or merits of the proposed defence...”**

This appears to have been the reasoning adopted by the Honourable Mr. Justice Ringera in the Respondents authority **ORBIT CHEMICAL INDUSTRIES LTD –vs- MYTRADE LTD & R.Y.K. VOHORA H.C.C.C No.631 of 1998** where he held, inter alia, that

“Whether the Defendants or the Plaintiffs are likely to succeed or not is not a pertinent matter in an application for summary judgment. It is for the trial court.”

Considering that summary judgment under Order XXXV is only available where the Plaintiff has a liquidated claim it is imperative that the Court examines not only the defence case as is thought to be the case by many applicants but more so the Plaintiff’s claim which sets out the claim for which the Defendant is called to answer and the relief sought from the court. It is by doing so the Court will be able to tell whether the Defendant raises triable issues in that suit and also to determine whether, the Plaintiff is clearly entitled to judgment. Such judgment is obviously intended to be the final judgment in the Plaintiffs action.

I have examined the Plaintiffs Notice of Motion against the Plaintiff filed herein and have found that the judgment sought in the application is at variance with the judgment sought in the Plaintiff which prays for judgment against the Defendant for:

(a) General Damages for breach of contracts of payment

- (b) Interest on (a) above at 20% Court rates**
- (c) Costs of this suit**
- (d) Any other relief (s) that the Court may deem fit to grant.**

The above prayers do not contain one for a liquidated sum and it is no wonder that the Notice of Motion does not ask that judgment be entered as prayed in the Plaint. I am of the view that the sum sought to be awarded by way of summary judgment not being part of the prayers sought in Plaint there exists clear doubt, on a point of law whether the Plaintiff is entitled to judgment under order XXXV.

Regarding the defence filed herein I find that the same raises the following triable issues.

- (1) Whether there exists any contract between the Plaintiff in this suit and the Defendant
- (2) What was the amount lent to the Defendant under the friendly loan
- (3) Is the defence of duress and undue influence available to the Defendant
- (4) Is the applicant entitled to charge any interest on the friendly loan and if so what is the applicable rate?

I find that given my finding on the applicability of order XXXV and the existence of the above triable issues the order for summary judgment sought herein cannot issue. I therefore disallow the application and dismiss the same with costs as prayed by the Respondent.

Dated and delivered at Nairobi this 29th day September, 2006

M. MUGO

JUDGE

Ruling delivered in the presence of

Mr. Weru for Applicants

Miss Kamende holding brief for Kyalo for Respondents.