



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Civil Case 91 of 2003

THE DELPHIS BANK LIMITED PLAINTIFF

VERSUS

DOUBLE FOUR SERVICES LIMITED 1ST DEFENDANT

GITAU KAMAU KARIRA 2ND DEFENDANT

JOCELINE JEBET CHEPTABOK 3RD DEFENDANT

R U L I N G

Order XXXV rule 1 (1) (a) and (2) of the Civil Procedure Rules (‘CPR’) stipulates that:

“1. (1) *In all suits where a plaintiff seeks judgment for-*

(a) a liquidated demand with or without interest;

or

(b)

Where the defendant has appeared the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.

(2) The application shall be made by motion supported by an affidavit wither of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.”

The Delphis Bank Limited, which I shall refer to as ‘the bank’ seeks an order to have the defence by Double Four Services Limited, Gitau Kamau Karira and Joceline Jebet Chetabok, who are the 1st to 3rd respondents, respectively, struck out and that summary judgment be entered for it in terms of its plaint.

The suit against the three is based on the claim that it advanced banking facilities to the 1st respondent who has failed to honour the repayment obligations, as a result of which the total sum outstanding as at 5/9/2003 was K.Shs. 9,011,926.99 which sum continues to attract interest at 12.75% p.a. and other charges until payment in full. It avers that the said facility was secured by a charge for K.Shs. 700,000.00

over land parcel known as Eldoret Municipality Block 4/121 ('the subject property'), which he owns. The 2nd and 3rd respondents, it is said were guarantors for the repayment of the said facility.

It was the submission of Mrs. Manani, for the bank that the three do not deny the existence of the Charge or even the contract in which the bank reserved the right to vary the rate without notice, and that they have no defence in the matter.

Mr. Machio was of the view that the bank had not established the nexus between it and Oriental Commercial Bank, whose Chief Officer has deposed in support of this application; that interest rates were varied unilaterally and that statutory notices were not issued as is required for which reasons he urged the court to dismiss the application.

I have considered the submissions of both counsel and I feel that it is important that I restate the legal position pertaining to applications of this nature for it is trite that "*summary judgment is a draconian measure and should be given in only the clearest of cases. And a trial must be ordered if a triable issue is found to exist or one which is fairly arguable. The Court should avoid the temptation to anticipate the ultimate result of the trial.*" **Vishram Ravji Halai Lalji Mulji Patel (trading as "Vakkep Building Contractors", a firm) v Carousel Limited Civil Appeal No. 11 of 1986 (unreported)**

Of interest, is the fact that the contracts which form the basis of this suit and the respective Charge document was drawn in the name of Delphis Bank Limited, yet the affidavit which supports this application is made by one Rabindra Nath Patuak who describes himself as "the General Manager of Oriental Commercial Bank Limited, formerly known as Delphis Bank Limited". It is almost certain that Oriental Commercial Bank Limited is the real applicant herein.

It would be necessary, in my view to find out how Oriental Commercial Bank Limited would proceed to apply for summary judgment for a facility which was granted by another bank especially in view of the fact that the Charge document which it relies on, does not recognize assignments or even succession in title. In my humble opinion that is a triable issue, and I would on that account find that this application lacks in merit and do dismiss it. Costs shall however be in the cause.

Dated and delivered at Eldoret this 12th day of October 2006.

JEANNE GACHECHE

JUDGE

Delivered in the presence of:

No appearance for either party