



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

Civil Case 1746 of 2000

NATIONAL BANK OF KENYA LTD. PLAINTIFF

VERSUS

ALLICEN TRAVEL LTD & 3 OTHERSDEFENDANT

RULING

By a plaint dated 28.9.2000, the plaintiff claimed from the 1st defendant Kshs.2,373,241.64 and from the 2nd, 3rd and 4th defendants Kshs.1,000,000/= each. The plaintiff further claimed interest and the amount claimed against the 1st defendant at the rate of 28% p.a. from 28.8.2000 and the amount claimed against the 2nd, 3rd and 4th defendants at the rate of 31% p.a from 4.3.1999 until payment in full.

The defendants did not attend at the trial, which took place on 28.2.2004. After hearing the plaintiffs evidence which was uncontroverted I found that the defendants from the documents produced admitted their indebtedness to the plaintiff and had promised to pay which promises were not honoured. I further found that the 2nd, 3rd and 4th defendants had guaranteed the overdraft facilities. In conclusion I said that the plaintiff was entitled to the amount sought in paragraph 10 of the plaint as I felt that the plaintiff had proved the same on a balance of probabilities. I further allowed the interest claimed. The defendant's counter-claim was dismissed with costs.

By its application dated 28.2.2006, the plaintiff moves the court under Order 44, Order L Rule 1 and 2 of the Civil Procedure Rules, Sections 3A, 80 and 100 of the Civil Procedure Act for one primary order that my said judgment be amended, varied or reviewed to correct an error on the face of the record. The substance of the plaintiff's complaint is that there occurred an error arising from a slip when in the said ruling I stated that I was satisfied that the plaintiff was entitled to the amount sought in paragraph 10 of the plaint as the same had been proved on a balance of probabilities.

Naturally the 4th defendant who resisted the plaintiff's application is of a different view. In his view there is no error on the face of the record and the court was right to come to the conclusion it came to in the light of the pleadings.

I have considered the submissions made by counsel keenly. I have perused my judgment sought to be reviewed. The alleged slip is in reality not a slip at all. After finding that the defendants from the documents produced admitted their indebtedness to the plaintiff and promised to pay which promises were not honoured, I said at page 9 of my judgment:-

“I am satisfied the plaintiff is entitled to the amount

sought in paragraph 10 of the plaint as I feel the

plaintiff has proved the same on a balance of probabilities.”

That finding was crystallised after considering the entire pleading in the plaint particularly paragraphs 8 and 9 thereof. In paragraph 9 the plaintiff pleaded that the sum of Kshs.1 million was part of the amount due from the 1st defendant to the plaintiff and which are amounts payable by the 2nd, 3rd and 4th defendants. In paragraph 10, the plaintiff averred as follows:-

“10: The defendants failed to comply with the notice and by a public auction held on 17.11.1999 the charged property was sold to the highest bidder at Kshs.750,000/= which monies offset the debt only in part leaving the balance now claimed of Kshs.2,373,241.65.”

Having pleaded in paragraph 9 of the plaint that the sum of Kshs.1,000,000/= was part of the amount due from the 1st defendant to the plaintiff and which are the sums payable by the 2nd, 3rd and 4th defendants, I was of the view that the 2nd, 3rd and 4th defendants would not accordingly be separately liable to distinct sums of 1 million each as the plaintiff had itself pleaded that the 1 million was part of the sum due from the 1st defendant. Indeed the sum of Kshs.2,373,241.65 as pleaded in paragraph 10 of the plaint is claimed against all the defendants. That sum in my view includes the sum of Kshs.1,000,000/= claimed against the 2nd, 3rd and 4th defendants as per the plaintiff’s averments in the plaint.

The judgment sought to be reviewed in my view does not suffer from any accidental slip or error. If I had granted judgment as prayed in the plaint, the effect would have been to hand the plaintiff a judgment for the sum of Kshs.2,373,241.65 which the plaintiff itself pleaded was the balance and an additional Kshs.3,000,000.00 making a total of Kshs.5,373,241.65 together with the interest claimed. I could not have granted that judgment. I am still of the same persuasion. My omission to grant judgment as prayed was not inadvertent. It was a meditated judicial decision. If I was wrong and I do not claim infallibility, I can be corrected on appeal. In the meantime the judgment I allowed in terms of paragraph 10 of the plaint remains the judgment on record against all the defendants.

The said sum as I ordered carries interest as pleaded. The Notice of Motion is dismissed with costs to the 4th defendant.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 28th day of November 2006.

F. AZANGALALA

JUDGE

Read in the presence of: Josiah for the 4th defendant and Were holding brief for Oduor, M/S for the plaintiff.

F. AZANGALALA

JUDGE