



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

Civil Case 450 of 2003

PARMEX LIMITED.....PLAINTIFF

VERSUS

AUSTIN & PARTNERS LIMITED.....DEFENDANT

RULING

This is an application for summary judgement.

In a very brief address to the court, the plaintiff asserted that there was sufficient material before the court, to justify the grant of summary judgement.

The plaintiff submitted that the sums claimed had been advanced to the defendant. It was pointed out that the defendant had admitted having borrowed the funds. The said admissions are said to be contained in paragraph 5 of the affidavit which the defendant's Managing Director swore on 23rd December 2003.

Apart from that alleged admission of liability, the defendant is said to have made other admissions of its indebtedness, in the correspondence exchanged between the parties herein.

Furthermore, the plaintiff states that the statements of account were self-explanatory. By that, I understand the plaintiff to be saying that the statements of account reflect not only the fact that the plaintiff did disburse a loan to the defendant; but also that the said loan increased through the charging of interest, as more particularly shown in the statements.

In a affidavit sworn by the plaintiff's Managing Director, it is deponed that the agreement between the parties herein was oral; and that it was entered into on 6th September 2001.

The Managing Director says that the plaintiff agreed to lend to the defendant, the sum of Sterling Pounds £ 29,773. He then says that the plaintiff performed its part of the Agreement, by disbursing the loan amount.

Thereafter, the defendant is said to have failed to repay the loan, hence the decision to institute court proceedings herein. And, it is also said that the defendant did acknowledge its indebtedness to the plaintiff. Therefore, as far as the plaintiff is concerned, the court should proceed to grant summary judgement.

But the defendant holds a very different opinion. It states that the evidence tendered by the plaintiff is at variance with the pleadings. For instance, it is emphasized that nowhere in the plaint is there any assertion that the defendant had borrowed a loan from the plaintiff.

Having perused the Further Amended plaint herein, I noted that the claim therein is **“for monies had and received by the Defendant.”**

Suffice it to say that had the plaintiff given a loan to the defendant, there would have been nothing easier than claiming for the repayment of such loan. There has been no explanation by the plaintiff why it decided to sue for money had and received, yet now seek to recover in respect of a loan.

Bearing in mind the fact that a loan has not been shown to constitute the same thing as money had and received, I hold that the plaintiff has not satisfied me that he should be granted summary judgement for the alleged loan.

Secondly, whereas the claim is said to be for the sum Sterling Pounds £29,773, the only documents which the plaintiff has placed before the court relate to only Sterling Pounds £20,000. In other words, there has been no evidence at all, to back the claim for the sum of Sterling Pounds £29,773.

And as regards the sum of Sterling Pounds £20,000, the letter which the plaintiff cited as being proof that there was an Agreement pursuant to which **“the plaintiff sent the initial sum of Sterling Pounds £20,000, to the Second Defendant’s Company’s account”**.

From my reading of that fax, I found an indication that the sum of Sterling Pounds £20,000 constituted a portion of any larger amount. But, there is no indication that the funds were being dispatched to the defendant, in the form of a loan. And finally, the said fax is dated 8th October 1997. Therefore it would appear to have had nothing to do with the Agreement which the plaintiff’s Managing Director said was arrived at on 6th September 2000.

Having perused the statements of account which were provided by the plaintiff, I noted that each and every single one pre-dates the Agreement which Mr. Parmar M. Bhagwanji, the plaintiff’s Managing Director, has cited as the foundation of the claim herein.

Similarly, the two fax messages which the plaintiff cites as proof of the defendant’s acknowledgement of the debt, also pre-date the Agreement. The said faxes are dated 22nd December 1999 and 28th January 2000.

And as regards the contents of the affidavit that was sworn by Mr. Erach Jehangir Austin on 23rd December 2003, paragraph 5 thereof reads as follows:

“The defendant had in or about the year 1997 borrowed a sum of approximately Pound Sterling £20,000 from a company known as Parmex Limited, a company registered in England with its registered office in Middlesex, England. It is that company, Parmex Limited registered in England that the defendant transacted business with and it was not a sale of goods. The English Company has regularly been sending statements of accounts to the defendant.”

Whilst the said deposition appears to be an admission that the defendant borrowed Sterling Pounds £20,000, from the defendant, the period of that borrowing does not tally with that in relation to which the plaintiff is asking for summary judgement.

The plaintiff’s application is founded on an Agreement entered into, on 6th September 2001. That is what the plaintiff’s Managing Director has deponed to, in his affidavit sworn on 2nd December 2004. That would imply that the borrowing of a similar sum, in 1997, would have no bearing on the claim now before the court. Therefore, unless the plaintiff was able to adduce further evidence, from which the court could establish the nexus between the borrowing in 1997 and the Agreement entered into on 6th

September 2001, I hold the considered view that the plaintiff's claim may not bear fruit.

Finally, I was unable to find any agreement on the issue of the interest which would be chargeable to the defendant's account. The two documents which form the annexure "MS-4", to the affidavit in support of the application, do not as much as mention the word "interest". Secondly, (as already indicated earlier herein), the two letters pre-date the oral Agreement which the plaintiff is relying upon as the foundation for its case.

In the defence, the defendant denies entering into any Agreement with the plaintiff in September 2001 or at all. As the said Agreement is said (by the plaintiff) to have been oral, the plaintiff would have to prove it.

The defendant also denies the plaintiff's claim for interest at 24% per annum. And, the highest rate of interest reflected on the face of the statements of account is 12% per annum. In the circumstances, the plaintiff would be obliged to make out a case for interest at 24% per annum.

All said and done, I hold that the Defence on record raises several triable issues. The said issues would thus have to be adjudicated upon by a trial court, rather than through the summary process invoked by the plaintiff. Therefore, the defendant is hereby accorded an unconditional leave to defend the suit. In effect, the application for summary judgement is dismissed, with costs to the defendant.

FRED A. OCHIENG

JUDGE

Read and Delivered at Nairobi by Azangalala J. this 20th day of November 2006.

F. AZANGALALA

JUDGE