



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET
Civil Suit 77 of 1997

NATIONAL BANK OF KENYA PLAINTIFF

VERSUS

PETER KIPKOECH KORAT 1ST DEFENDANT

JOSEPH SERONEI 2ND DEFENDANT

R U L I N G

Order XXXV rules 1(1) (a) and (2) of the Civil Procedure Rules ('CPR'), stipulates that:

“(1) In all suits where a plaintiff seeks judgment

for-

(a) a liquidated demand with or without interest;

(b)

where the defendant has appeared the plaintiff may apply for judgment for the amount claimed, or part hereof, 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 either 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 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 trialthe Court should not grant an application for summary judgment where there is a reasonable ground of defence” (Zola v. Ralli Brothers [1969] EA p 691).

National Bank of Kenya Limited, which I shall hereinafter refer to as (“the bank”), has moved this court under the above provisions of the law, and it seeks “*summary judgment for the sum of K.Shs. 2,590,499.85 and interest at the rate of 32% per annum from 23/10/1996 till payment in full, against Peter Korat and Joseph Seronei jointly and severally*”. It also prays for costs of this application, and it bases its application on the grounds that its claim against the two is for a liquidated demand with interest; that the two who are aware of their indebtedness have not raised any triable issues in their defence.

As expected the application is strenuously opposed by Korat and Seronei who I shall henceforth refer to as the 1st and 2nd respondents respectively.

I need not reiterate the legal position that “a party who opposes an application for summary judgment ought to place evidence by way of an affidavit showing some reasonable ground of defence, in accordance with order XXXV rule 2 of the Civil Procedure Rules (**Giciem Construction Company v. Amalgamated Trades & Services – Court of Appeal (Mombasa) No. 17/1983**).

The two who take issue with the application claim inter alia, that the suit is not only statute barred but that the application has not been brought expeditiously.

It is also their ground that the bank failed to issue statutory notices as required under section 74 of the Registered Lands Act Cap 300 of the laws of Kenya (‘RLA’), which stipulates that:

“(1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the charger notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.

(2) If the charger does not comply, within three months of the date of service, with a notice served on him under subsection (1), the chargee may-

(a) appoint a receiver of the income of the charged property; or

(b) sell the charged property:

Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the charger fails to comply, within three months of the date of service, with a further notice served on him under that subsection.

(3) The chargee shall be entitled to sue for the money secured by the charge in the following cases only-

(a) where the charger is bound to repay the same;

(b) where, by any cause other than the wrongful act of the charger or chargee, the charged property is wholly or partially destroyed or the security is rendered insufficient and the chargee has given the charger a reasonable opportunity of providing further security which will render the whole security sufficient, and the charger has failed to provide such security;

(c) where the chargee is deprived of the whole or part of his security by, or in consequence of, the wrongful act or default of the charger;

Provided that-

(i) in the case specified in paragraph (a)-

(a) a transferee from the charger shall not be liable to be sued for the money unless he has agreed with the chargee to pay the same; and

(b) no action shall be commenced until a notice served in accordance with subsection (1) has expired;

(ii) the court may, at its discretion, stay a suit brought under paragraph (a) or paragraph (b), notwithstanding any agreement to the contrary, until the chargee has exhausted all his other remedies against the charged property, unless the chargee agrees to discharged the charge.”

Mr. Kuloba, learned counsel for the bank relied on the supporting affidavit by one J.W. Kiama who deposes that he is the bank’s Branch Manager in Eldoret; that his bank granted the 1st respondent banking facilities by way of overdraft facilities on 14/5/1990 and 24/9/1990 in the sum of K.Shs. 200,000/- and

K.Shs. 250,000/- respectively; that the said facilities were guaranteed by the 2nd respondent; that both the respondents have failed to honour their repayment obligations, leading to accrual of arrears and that the total sum outstanding against the 1st respondents account as at 23/10/1996 was the sum of K.Shs. 2,590,499.85, which sum continues to earn interest at the rate of 32% p.a., and which sum it demanded from 2nd respondent on 23/10/1996, when it gave him 14 days notice to redeem the loan in default of which it would file suit against him. He also deposes that the 1st respondent has acknowledged the debt and that the 2nd respondent is bound to honour the guarantee. To his affidavit is attached several annexures including loan agreements for each of the facility, the respective guarantee forms, the demand letter of 23/10/1996 and the said acknowledgements of the debts by the 1st respondent.

Mr. Kuloba therefore urged the court to find that the defence on record does not raise any triable issues and that it is a mere denial. It was also his submission that the suit filed within time, in which case, the bank's suit which was filed in November 1997 is not time barred especially in view of the fact that the 1st respondents had '*acknowledged the indebtedness*' as late as 4/12/1992, and in this connection he relied on the case of **Abdi S. Rahman Shire v. Thabiti Finance Co. Limited CA (Nrb) No. 76/2000**, in which the learned Judges of Appeal held that "*any acknowledgement or part payment not only extends the limitation period but also revives an otherwise statute barred action falling within section 23 (3) of the Limitations of Actions Act Cap 22 of the Laws of Kenya, which specifically provides that where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefore acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment. Provided that a payment of a part of the rent or interest due at any time does not extend the period for claiming the remainder then due, but a payment of interest is treated as a payment in respect of the principal debt.*"

Mr. Kigamwa, for the respondents was however of a different view and it was his submission that in order for an applicant to rely on an acknowledgement of a debt, the acknowledgement must be specific; that his clients had not '*acknowledged the debt*' as alleged, and that in the circumstances, the bank's claim for loans which were repayable by 31/12/1990, were already time barred. He also took issue with the facts the bank had not issued statutory notices, and further that the deponent of the supporting affidavit had not exhibited the statements of the accounts in issue. He urged the court to find that there was a variation of the terms of the initial letter of offer, especially as it pertains to the rate of interest applicable to the claim, which raises doubts about his clients' indebtedness to the bank.

The principles to be considered by a court in an application of this nature was laid down in the case of **Giciem Construction Company v. Amalgamated Trades & Services** aforementioned, where the learned Judges of appeal held that '*the power to grant summary judgment under order XXXV should be exercised cautiously bearing in mind that, it was intended to apply on to cases where there is no reasonable doubt that a plaintiff is entitled to judgment and where therefore it is inexpedient to all the defendant to defend for mere purposes of delay.....in considering applications under order XXXV the courts should grant leave to defend if there genuinely exists triable issues even if the court is sceptical about the success or merits of the proposed defence, and where the court has doubts as to the bona fides of the application it ought to impose an appropriate condition when granting leave to defend.....*'

I have taken the submissions of both counsel into account and I do note that the banks claim is against a principal borrower and his guarantor. While the bank claims interest at the rate of 32%, the exhibited loan agreements clearly stipulate that interest "*to be at the rate of 16.5% p.a. on monthly rests for the time being, calculated on daily balances*", and further that "*the bank however reserves the right to give notice and thereafter vary the rate of interest charged as may be required*". Such notices of increase or increases were not exhibited to the supporting affidavit to explain how the rate rose to the current rate of 32% p.a., which in my mind is a triable issue.

The 2nd respondent maintains that he guaranteed a specific sum, which is way below what the bank now claims from him. Needless to say, whether the 2nd respondent can be bound to pay more than he guaranteed to pay, and even then whether the claim against him can stand due to what appears to have

been rescheduling of the loan which was repayable within a year, will also be a triable issue for there is no evidence before me that he was involved or even consulted before the said rescheduling. I need not say more, for fear of prejudicing the trial where the issuer of whether notices were issued will be taken up for determination, for it is clear that the defence is not a sham. It is not for me, at this stage, to try to establish whether the issues which I deem to be triable have a chance of success for so long as they are triable, I am afraid I can not allow this application.

It must be clear by now that this application is bound to fail, and in view of my above sentiments I do dismiss it.

Costs shall however be in the cause.

Dated and delivered at Eldoret this 1st day of November 2006.

JEANNE GACHECHE

JUDGE

Delivered in the presence of:

Mr. Kuloba for the plaintiff/applicant

Mr. Kigamwa for the defendants/respondents