



REPUBLIC OF KENYA

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

Civil Suit No. 236 of 2005

GIRO COMMERCIAL BANK LTD.....PLAINTIFF

VERSUS

JASVINDER SINGH DHADIALLADEFENDANT

R U L I N G

The plaintiff by this action sued the defendant seeking to recover money, allegedly loaned to the defendant, as a short-term loan, of kshs 7 million. The plaintiff also seeks for judgement for kshs 87, 000/- which amount it states it paid as storage charge when it obtained some 20 units of vacuum interrupters, in exercise of its rights under lien.

Before the defendant filed his defence the plaintiff filed an application by way of Notice of motion seeking summary judgment against the defendant for the amount of kshs 7, 087, 000 with interest at court rate plus storage charges for the vacuum interrupters at the rate of kshs 3, 480/- per month. The application is brought under Order XII Rule 6 and Order XXXV Rules 1 and 2 of the Civil Procedure Rules.

The plaintiff's application is based on the ground that the defendant accepted the facility of kshs 7 million and acknowledged it in writing and that he released 20 units of vacuum interrupters to the plaintiff as a commitment of his indebtedness.

The plaintiff annexed the aforesaid letter, which is dated 7th May 2003. It is written by the plaintiff and is entitled "**letter of offer short term loan facility.**" It is addressed to the defendant.

The offer is made, by that letter, to the defendant, subject to completion of security documentation and subject also to; the amount being kshs 7 million; for a short term of 12 months; the amount to be used to reduce the defendant's indebtedness in respect of a guarantee he gave in favour of the plaintiff guaranteeing indebtedness of a company called Gamma Delta & Co Ltd. The most important condition relates to payment of that facility. The payment was stated to be made "**in lump sum on sale of the 20 units of vacuum interrupters, currently held at Express (K) Ltd, (sale expected within the next twelve months and/or from your other sources.)**"

The plaintiff further in support of the application annexed a delivery note by Gamma Delta Co Ltd indicating that on 4th March 2003, 20 units of vacuum interrupters were delivered to the plaintiff. The

value of those units was indicated as US \$ 143, 060.

The plaintiff also annexed a storage receipt by Express Kenya Ltd, which indicated that the plaintiff on 7th March 2003 stored 20 units of vacuum interrupters.

The defendant filed a defence on 21st June 2005.

The defendant pleaded thereof that Gamma Delta Co. Ltd had obtained a facility with the plaintiff of some kshs 16, 500, 000. That the plaintiff requested the defendant, who was a director of Gamma Delta Co. Ltd, to guarantee the said facility, which the defendant declined. That it was agreed between the parties, hereof, that the plaintiff be handed over the 20 units of vacuum interrupters to sell the same to Kenya Power and Lighting Company, that at the time they were worth Kshs 7 million.

The defence and the replying affidavit pleaded that the letter dated 7th May 2003 was a forgery. The defendant therefore denied being indebted to the plaintiff for the amount claimed in the plaint.

Further in his replying affidavit the defendant annexed statements to the only account he averred he holds at the plaintiff bank which reflected as at 30th October 2004, a credit balance of kshs 3, 166. 15. It is pertinent to note that there was no reply filed to the defendant's defence or was any further affidavit filed by the plaintiff to respond to the issues raised therein.

The allegation of a loan being granted to the defendant is vehemently disputed by the defendant.

The case of GUPTA – V – CONTINENTAL BUILDERS LTD [1978] KLR as per Madan J.A. is: -

“If a defendant is able to raise a prima facie triable issue he is entitled in law to unconditional leave to defend. On the other hand, if no prima facie triable issue is put forward to the claim of the plaintiff, it is the duty of the court forthwith to enter summary judgement for it is as much against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a plaintiff out of his dues in a proper case. Prima facie triable issues ought to be allowed to go to trial, just as a sham or bogus defence ought to be rejected peremptorily.”

The prima facie issues raised by the defendant are that he did not obtain the loan of kshs 7 million. The plaintiff did not prove that loan by means of statements. The letter relied upon by the plaintiff as evidence of that loan was disputed by the defendant and much more than that the defendant alleged that his signature was forged. That is a strong allegation and it did not meet a response from the plaintiff.

The 20 units of vacuum interrupters were evidently released to the plaintiff by Gamma Delta Co. Ltd, not the defendant.

I find that the prima facie issues proffered by the defendant are fit to go for trial and lend themselves to leave being granted to the defendant to defend this suit.

Accordingly the order of this court is that the plaintiff's application dated 13th June 2005 is dismissed with costs to the defendant.

MARY KASANGO

JUDGE

Dated and delivered this 24th March 2005.

MARY KASANGO

JUDGE