



Civil Procedure and Practice

- Application on admission under Order 12 Rule 6.

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
CIVIL CASE NO. 259 OF 2004**

LAKE DRYCLEANERS LIMITED.....PLAINTIFF

VERSUS

INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION.....DEFENDANT

R U L I N G

The plaintiff simultaneously filed the plaint and a chamber summons dated 18th May 2004.

The chamber summons sought: -

“

- That a proper account be taken in conformity with the Memorandum of charge by deposit of document of Title, Debenture and Further charge instrument to ascertain which of the party is owed money by the other party.
- That the taking examination and computation of the accounts be referred to Interest Rates Advisory Centre Ltd,"

That application came up for hearing before Justice Emukule and he delivered his ruling on 6th July 2004. The Judge dismissed the application but ordered the defendant to prepare a statement of account on the basis of fixed rate of interest.

The defendant through the affidavit of Isaac Buddy Mogaka sworn on 13th September 2004 annexed statements of account, which were prepared from the interpretation of the court's order of 6th July 2004. The statements of account show an over payment by the plaintiff of kshs 3, 613, 546. 05.

On the basis of these statements of account the plaintiff's have moved this court by a Notice of Motion dated 6th October 2004. It is this application that was argued before me. The application seeks the following orders: -

- That judgment be entered in favour of the plaintiffs against the defendants on admission in the sum of kshs 3, 613, 546. 05

- That the charges by way of Memorandum of charge by Deposit of documents of Title Debenture and Further charge be and is hereby discharged and the defendant do release to the plaintiff the title documents in respect of L.R. No. 209/8777. ·
- That a proper account be taken in conformity with the orders of this Honourble court given on 6th day of July 2004.
- That the taking examination and computation of the accounts be referred to Interest Rates Advisory Centre Ltd.”

In oral submission the plaintiff’s advocate laid emphasis on the order for judgment to be entered for the plaintiff on admission and the order for release of title documents.

Counsel for the plaintiff submitted that the order for statements of account to be prepared by the defendant, having been made; that order having not been appealed from, or reviewed, the defendants account showing a credit of kshs 3, 613, 546. 05 was an admission and judgment should be entered, as such in favour of the plaintiff. That the defendant’s admission of the aforesaid amount having being made under Oath there could be no better admission than that. That the defendant’s attack in their reply, of Justice Emukule’s ruling should not be entertained in the absence of an appeal. That the loan agreement annexed to the defendant’s replying affidavit should be struck out for having failed to comply with the Stamp Duty Act.

Defence counsel opposed the application by relying on the grounds of opposition and the replying affidavit.

The defence argument is that the court’s ruling of 6th July 2004 did not determine that interest rate be fixed both the loan period and after the loan period, and it is important for the court to consider interest applicable for both these periods. That the defendant prepared and filed another set of statements of account, which reflect interest rate for the two periods. That the defendant’s defence raises very critical issues for consideration/and determination by this court.

As I begin to consider the arguments before me it is important to comment on the prayers of the plaintiff’s application. The prayer seeking the referral of the account to the Interest Rates Advisory Centre Ltd was a prayer that was entertained or ruled upon by www.kenyalawreports.or.ke Lake Drycleaners Limited v Industrial & Commercial Development Corporation [[22200000555]] e eeKLLRR 4 Justice Emukule by his ruling of 6th July 2004. That being so that prayer is rejected for being res judicata.

At the center of the present plaintiff’s application is the ruling of Justice Emukule of 6th July 2004. I have read the entire ruling and I must say I am unclear on what would be the consequence of the final orders of the Judge. The Judge stated that

“I am not however called upon to adjudicate whether or not interest rates, were fixed. The application before me is for an order for taking of accounts as to what the plaintiff is liable to pay to the defendant if the agreed rate of interest is applied, and what is payable if the unilateral rate of interest is applied.”

It is clear that the judge recognized that there were two-interest rate according to the plaintiff and the defendant. He recognized also that there needed to be agreement on the rate of interest applicable for the court to order for accounts.

The Judge proceeded to dismiss the plaintiffs application for account then stated thereof: -

“Have however found upon perusal of (1) the Memorandum of charge by deposit of Documents of Title Registered as Number I.R. 3089/2 (2) the Debenture dated 15.12.1998, and (3) further charge registered as Number I.R. 3089/3 that interest for the loan of kshs 1, 200, 000/- was fixed @ 9 ½ per annum and that for the loan of kshs 110, 000/- was fixed @ 11 % per annum, I order that the defendant shall prepare a statement of account on the basis of the fixed rate of interest for the two loans (kshs 1, 200, 000 @ 9 ½ % per annum) and (kshs 110, 000/- @ 11 % per annum), showing

on each loan the payments of principal and interest paid to date....”

I have taken the pain to quote extensively the two passages of Justice Emukule just to shown why I find that the ruling was not intended to have the end results that the plaintiff would have me believe.

The judge in making the order for the statements of account to be prepared was not categorically saying on these statements being prepared, that is the amount that is due and payable. If that is what the judge intended he would not have earlier stated that he was not called to adjudicate whether or not interest were fixed so if the judge was of that opinion it follows that the statement were not to confirm the rate of interest.

I also accept that the defendants counter-claim has an arguable claim, which is very inter related to the plaintiffs claim. That is, was the fix rate of interest was applicable even after the period of the loan. In the court of appeal case; CASSAM V SACHANIA (1982) KLR 191, it was held:

“Granting judgment on admissions of fact is a discretionary power which must be exercised sparingly in only plain cases where the admission is clear and un equivocal. Judgment on admission cannot be granted.....where one has to resort to interpretation of documents to reach a decision.”

That quote I think say it all. Here the plaintiff seeks the interpretation of the ruling of 6th July 2004, which cannot be said to have clearly found that only the fixed rate of interest is applicable.

Having made the findings herein before the order of the court is that the plaintiff’s application dated 6th October 2004 is dismissed with costs to the defendant.

It is so ordered.

Dated and delivered this 29th day of April 2005.

MARY KASANGO

JUDGE

Read and delivered at Nairobi by Azangalala J, this 29th day of April 2005

F AZANGALALA

JUDGE

Read in the presence of: -