



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI MILIMANI LAW COURT
CIVIL CASE 1158 OF 1999

BULLION BANK LIMITED.....PLAINTIFF

VERSUS

JAMES KINYANJUIDEFENDANT

PARK ENTERPRISES LIMITED.....THIRD PARTY

RULING

The plaintiff filed suit herein against the defendant claiming kshs 9 million with interest at the rate of 30% which money was advanced on 13th September 1996. The plaintiff alleges that the defendant instructed it to forward kshs 4 million, of the aforesaid facility, to M/s Park Enterprises Ltd.

The defendant in his defence denied receiving the said facility and denied requesting the plaintiff to forward kshs 4 million to M/s Park Enterprises Ltd. He then averred that if such amounts were forwarded the same was due to fraud perpetrated by the plaintiff and M/s Park Enterprises Ltd. The application argued before me was one brought under Notice of Motion under Order XII Rule 6 of the Civil Procedure Rules.

The application seeks for orders: -

- That judgment on admission be entered in favour of the plaintiff and against the defendant in the sum of kshs 4 million together with interest and the costs of the suit.
- That the suit do proceed for full hearing in respect of the outstanding balance after payment of kshs 4 million.
- That in the alternative judgment be entered against the defendant and in favour of the plaintiff as prayed in the plaint.

The application is supported by affidavit of the legal officer of the plaintiff. The affidavit annexed the account opening forms duly filled and signed by the defendant; an application for credit facility made by the defendant for kshs 9 million; a letter dated 13th September 1996 written by the defendant to the plaintiff, instructing the plaintiff to pay park Enterprises Ltd, kshs 4 million. The letter in part stated: - “Further, I authorize you to pay shs 4 million to account of M/s Park Enterprises Ltd; P O Box 45288, Nairobi with you”.

The Letter proceeded to offer mortgage on defendant’s 9 properties as security. The plaintiff’s affidavit in support also annexed a cheque (banker’s cheque) written by the plaintiff in favour of Park Enterprises Ltd; for shs 4 million; a paying slip of payment by the defendant of shs 300, 000 made to the plaintiff; a

letter written by the defendant to the plaintiff dated 7th January 1999 which in part stated: - “As you are aware the subject matter has always been handled by a representative of M/s Park Enterprises Ltd; P O Box 45288, Nairobi. The representative and I have consistently discussed the matter with a view of resolving it over the period.”

Then the affidavit annexes the defendant’s letter dated 7th June 2004. This letter is addressed to “Southern Credit Banking Corporation Limited.” What this entity has to do with this matter, I was at a loss. But my confusion was laid to rest by the defendant’s averments in his replying affidavit sworn on 12th November 2004, Paragraph 8, which states: -

“That whereas I wrote to the plaintiff the letter dated 7th June 2004 the same was pursuant to out of court negotiation entered into without prejudice to the rights of the parties under this suit.”

That letter in part state: -

MY INDEBTEDNESS TO THE BANK

I refer to our meeting with you this morning regarding my indebtedness to the bank. As already explained the borrowing was granted as bridging finance for my farming operations. This was to be repaid from proceeds of business done outside Kenya i.e. Zanzibar, that ran into problems at the final stage that culminated into a legal suit in 1993 I am proposing that when the funds are recovered I will pay in lump sum of kshs 4 million immediately as full and final settlement. Thanking you in anticipation.”

The defendant opposes the application in following regard; that he had denied the debt in his defence and denied being aware that the plaintiff approved the loan; that kshs 4 million was irregularly paid to a third party before the contract was entered into that he had not agreed to repay kshs 4 million with interest at 30% within three months; that the indebtedness is a fraudulent scheme of the plaintiff and a third party; that the letter dated 7th June 2004 were after discussion with a director of the third party; that those proposals were rejected by the plaintiff; that the defendant being a lay man and due to mistake failed to head that letter as ‘without prejudice’.

The third party, Park Enterprises Ltd file an affidavit, where it denied borrowing money from the plaintiff or defendant; it denied participating in any fraud against the defendant; it denied ever holding discussion with the defendant; and stated that the admission contained in the defendant’s letter dated 7th June 2004 was unequivocal admission of indebtedness to the plaintiff in regard to kshs 4 million. Having outlined the arguments as aforesaid I think it is necessary to state the rule, which the plaintiff has moved under. The plaintiff has come under Order 12 Rule 6 of the Civil Procedure Rules, which states: -

“Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or given such judgment, as the court may think just.”

It is clear that the rule provides for an application on admission to be made at any stage of the proceedings. That being so the present application is not defeated by the fact that the parties had set the suit down for full hearing or that there are 31 odd, issues drafted.

The admission, to qualify to be relied upon, can either be in the pleadings or otherwise. The word, ‘otherwise’ qualifies the defendant’s correspondence to be considered hereof.

The defendant as is evident from the summary of the pleadings denied, categorically, the debt, denied authorising payment to the third party. When documents were presented in the plaintiff’s application which proved that he opened an account with the plaintiff, he applied for a facility of kshs 9 million, he authorized, by letter, kshs 4 million to be paid to the third party, he made payment of the loan kshs 300, 000 he failed to specifically address himself to these documents in his replying affidavit. He alleged fraud

between the plaintiff and the defendant but failed to elaborate on this fraud, particularly in view of the documents aforesaid. Instead the defendant concentrated on responding to the letter dated 7th June 2004, where he offered to make a full and final payment to the plaintiff of kshs 4 million. He alleges that the same was after without prejudice discussion. That letter is not marked, that it is without prejudice, and although the defendant claims that he failed to so mark due to a mistake I find that, that is not sufficient explanation when one considers that he defendant seems very capable of expressing himself, one get the idea that he is an intelligent man. It does seem that the retraction of the letter is an after thought. I would say ignorantia juris neminem excusal (ignorance of the Law excuses no man).

The defendant relied on the case of CASSAM V SACHANIA (1982) KLR 191. He relied on the second holding, which is as follows: -

“Judgment on admission cannot be granted where points of law have been raised and where one has to resort to interpretation of documents to reach a decision.”

Counsel failed to show which point’s law have been raised or what documents are in need of interpretation. What I find is that there is evidence that the defendant applied for financial facility and thereafter there is his acknowledgment of receiving kshs 4 million. I do not find acknowledgment of the amount prayed in the plaint, that is kshs 9 million. Accordingly, considering the application, the affidavit in support and the replying affidavits I find and I hold that there is evidence of indebtedness of the defendant to the plaintiff of kshs 4 million, which amounts, was admitted by the defendant in various correspondence culminating with the letter dated 7th June 2004. I am however unable to find, in the annexed documents, evidence of the agreed rate of interest and accordingly I will only allow interest at court rate.

The orders of this court are as follows: -

- (1) That judgment is entered in favour of the plaintiff and against the defendant in the sum of kshs 4 million, with interest at court rate from the date of filing suit till payment in full plus costs thereof.
- (2) That the suit do proceed for full hearing in respect of the outstanding balance in the suit.
- (3) That the defendant shall pay the plaintiff’s and the third party’s costs of the application dated 22nd September 2004.

Dated and delivered at Nairobi this 27th April 2005.

MARY KASANGO

JUDGE

Read and delivered at Nairobi by Azangalala J, this 27th April 2005

F AZANGALALA

JUDGE