

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL DIVISION – MILIMANI
CIVIL CASE NO. 79 OF 2003

NATIONAL BANK OF KENYA LTD ::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

INNOVATION ADVERTISING LTD ::::::::::::::::::::::::::::::: 1ST DEFENDANT

GEORGE WILLIAM OGENDI :::::::::::::::::::::::::::::::2ND DEFENDANT

IRIS NDUKU OGENDI :::::::::::::::::::::::::::::::3RD DEFENDANT

RULING

The Plaintiff has brought this Chamber Summons under the provisions of Order VI Rule 13 (1) (b) and (d) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all the enabling provisions of the Law. It seeks an order that the defence filed in this suit be struck out for being an abuse of the due process of the Court.

The grounds for the Application are that the defence filed is a sham evasive an elaborate unmitigated untruth, frivolous and vexatious and constitutes a flagrant and undisguised abuse of the process of the Court. The Application is supported by an affidavit sworn on 23rd March 2004 by one J.O. Konchellah the Manager of the Plaintiff.

The Defendants' answer to the Application is in the form of a Replying Affidavit by the 2nd Defendant sworn on the authority of all the Defendants. There are also Grounds of Opposition filed on behalf of the Defendants by the Defendant's Legal Advisors.

The application came up for hearing before me on 11th March 2005. Mr. Mose Learned Counsel was instructed for the Plaintiff/Applicant. Counsel for the Respondent/Defendant did not attend at the hearing despite the fact that he had been served with a hearing notice. The application therefore proceeded ex parte.

Counsel for the Applicant took me through the pleadings, the affidavits and annexures. The affidavit evidence availed shows that the 1st Respondent applied for and was granted banking/overdraft facilities by the Plaintiff. These facilities were secured by properties owned by the 2nd and 3rd Respondents. The 2nd and 3rd Respondents as directors of the 1st Respondent also guaranteed repayment of the facilities accessed by the 1st Respondent from the Applicant. The evidence further shows that the Respondents are indeed indebted to the Applicant and previously made proposals for repayment which proposals were never fulfilled. The Applicant has further shown how the Respondents' indebtedness has risen to the sum claimed.

The Respondents' Grounds of Opposition, Replying Affidavit and statement of defence do not answer the Applicant's claim. The Defendants admit having borrowed Kshs 1.1 million but not the sum claimed of Kshs 3,011,428.95. The challenge is made against interest charged and yet the documents show that the same is contractual. At paragraph 5 of the defence the Respondents aver that they are ready and willing to pay the correct amount in reasonable installments. I find and hold that the defence on record is a sham and does not raise bona fide triable issues.

In my view a defence which is a sham is not serious and I find and hold that the defence on record is

frivolous and vexatious and amounts to abuse of the process of the Court. The same is struck out. I see no reason why I should not enter judgment against the Defendants. Accordingly the further order of this Court is that judgment be and is hereby entered for the Plaintiff against the Defendants as prayed in the Plaint plus costs of this Application.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL, 2005.

F. AZANGALALA

JUDGE

Read in the presence of :-