

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Civil Suit 24 of 1998

KENYA COMMERCIAL BANK LTD. PLAINTIFF

VERSUS

ALFRED ONYANGO OKOKO DEFENDANT

R U L I N G

The application dated 18.2.2004 is expressed to have been brought under Order 35 Rule 1 (c) and 5 Order VI Rule 13 (a) (b) (c) (d) Civil Procedure Rules and Section 3A Civil Procedure Act. The applicant prays for summary judgement in favour of the plaintiff for the sum of Kshs. 1,612,223.25 together with interest as prayed in the amended plaint dated 21.5.1999. Prayer 2 is that the court do enter judgement on admission by the defendant for the sum of Kshs. 1,612,223.25. There was a 3rd prayer in which the plaintiff sought to have the defendants defence struck out which was abandoned just before the application was argued. There are 6 grounds contained in the body of the application upon which the application is brought. It is also supported by an affidavit dated 18.2.2004 and sworn by Suleiman Hiribae, the Advances In charge at Kenya Commercial Bank Limited Mwingi Branch.

On 13.5.1995 the defendant applied for a financial facility from the plaintiff/applicant against his two accounts numbers 226720867 and 226 905 433 9. By an agreement dated 30.10.1995 the defendant was granted an overdraft facility of 500,000/- and a loan of Ksh. 500,000/- and the defendant offered his two plots 123 and 124 at Mwingi town as security. Mwingi and Kitui town councils where the plots are situate undertook to pass the plots to the plaintiff in the event of default. The defendant also signed his personal guarantee. The defendant defaulted in payment and a demand notice was issued by the plaintiff. On diverse dates, the – defendant admitted the claim and made proposals to pay but never fulfilled them and as at 31.7.2003 the debt stood at Ksh. 3,631,717/- as the amount has continued to accrue interest. It is the plaintiffs contention that the defendants defence is a bare denial and aimed at delaying finalisation of this matter and should be struck off. That the defence does not raise any triable issues and it is only fair that the application be allowed. Mrs. Mutua advocate for the applicant submitted that the plaintiffs claim is specific and can be ascertained arithmetically and that the defendant should only be given leave to defend the claim if he demonstrates that he should be given such a chance but that the defendant has not shown any evidence of payment. Counsel relied on the case of **GURBAKSH SINGH LTD. V. NJIRI EMPORIUM LTD. 1985 KLR 695** in which the Court of Appeal considered what conditions should be fulfilled before granting summary judgement.

The defendant/Respondent filed grounds of opposition dated 18.3.2004 in which he contends that the application is frivolous, vexatious and an abuse of court process, that it is bad in law defective and misplaced, has no legal basis and that the applicant does not stand to suffer any loss. In the replying affidavit, the respondent contends that the matter has been pending in court since 1998 and he denies that the debt has grown upto Ksh. 3,631,719/- and that the application is made in a bid to conceal some important facts which the court should know before it can make its final decision and lastly that the defence raises triable issues Mr. Ngolya holding brief for Mr. Mbaluka counsel for the Respondent argued that the court was not properly moved to enter judgement on admission and that since prayer 3 was abandoned the application remains without grounds and therefore contravenes Order 50 Rule 3. He also argued that judgement cannot be entered because there is a defence on record and the correct procedure would have been to ask court to strike out the defence and then ask for judgement. Counsel denied that the sum claimed is specific because the amount stated in the plaint is different from that claimed at paragraph 7 of the supporting affidavit. He further submitted that the only admission made was that the respondent was granted a loan but the figures claimed are not admitted.

It was Mr. Ngolya's arguments that summary judgement as prayed for cannot be allowed because there is a defence on record and his suggestion as to the procedure is that the defence be struck off first. With all due respect to counsel, that is not the procedure under Order 35 Civil Procedure Rules. Order 35 Rule 2 Civil Procedure Rules clearly indicates that under this order, one will have been expected to file a defence and may request court for leave to defend the suit upon an application for summary judgement being made under Rule 2. Rule 4 of the same order envisages a situation where an application for summary judgement has been filed and there is no defence filed and the court can still allow the defendant to file defence. The counsel's contention that there should be no defence on record for such an application to be made is misplaced and erroneous.

By his defence dated 12th March 1998 at paragraph 2, the defendant admitted having been granted a loan but denied owing the plaintiff Ksh. 1,612,223/=. The defendant did not state how much he owed or what he thought he owed, since he does admit having been granted the loan. The court will believe as authentic the documents filed by the plaintiff – application for award plaintiff/loan dated 23.5.2005 marked SYH I and an agreement dated 30.10.85 between the plaintiff and the defendant for overdraft of 500,000/- and a loan of 500,000/- (SYH 2) – which is a copy of the agreement and which has not been disputed by the defendant. The loan granted to the defendant and which he admits must be 1,000,000/- as of the date of the grant in 1995.

By annexure marked SYH 4, dated 27.5.1997 the bank was demanding a sum of 1,250,891.65 from the defendant. Thereafter the defendant wrote to the plaintiff several letters annexed as VH 5 dated from 1997 to 2002 when respondent made proposals to repay the loan. As of 12.5.2002 the respondent was still apologising for the default in payment due to poor performance of his business. The demand and the letters of proposals to pay are an admission that the loan was outstanding and was unpaid. So far there is no evidence that the defendant made any payments towards the loan of Ksh. 1,000,000/- that was granted to him either by affidavit, documentary or otherwise. All there is, is a bare denial both in the defence, affidavits files and submissions by counsel.

The question that this court needs to consider is whether the claim is for liquidated damages that the court can enter judgement for the plaintiff under Order 35 Civil Procedure Rules. The authority cited by the plaintiff's counsel Gurbash Singh v Njiri Emporium set out the conditions to be fulfilled before granting of summary judgement. The holding in that judgement was that summary judgement for a plaintiff may be granted under Order 35 Rule 1 (1) (a) for inter alia a debt or liquidated demand with or without interest unless the defendant shows he should have leave to defend the suit as per order 35 Rule 2 (1) and that summary judgement should only be entered where the amount claimed has been specified, is due and payable or has been ascertained or is capable of being ascertained as a mere matter of arithmetic. I have found above that the loan granted to the defendant was due and payable in 1995. There is no evidence that any part of it has been paid. The figure was specific, Kshs. 1,000,000.- in total. Once the loan was granted it started attracting interest as per the loan agreements. The loan was to be repaid in 3 years at an interest of 25% and 26%. The figure of 1 million which was granted could not remain static. When this suit was filed as per amended plaint dated 21.5.1999, the claim was for Kshs. 1,612,233.25. The defendant has not said that the interest has not been properly calculated. Even if it were, it is a mere question of calculating what the interest due on the amount is. Besides the amounts are much more now and there is no contradiction between the sums in the plaint and in the affidavit. The loan is ascertainable, it is specific and the interest that has accrued is a mere question of arithmetic. There is really nothing to go for hearing. In his defence the defendant refers to things that need to be disclosed at a hearing. None has been alluded to. The defendant has not shown that he should have leave to defend the suit. Mr. Ngolya took issue with whether the application was properly brought since it is alleged that there is an admission. An application for judgement on admission will normally be brought under Order 12 Civil Procedure Rules. However the applicant relied on Order 35 Rule 5 too. That rule provides as follows:

“If it appears that the defence set up by the defendant applies only to a part of the plaintiff's claim or that any part of his claim is admitted, the plaintiffs shall have judgement forthwith for such part of his claim as the defence does not apply to, or as is admitted subject to such terms, if any as to suspending execution.....”

In the present case the loan is not denied. So the applicant properly invoked Rules 5 which provides for entry of judgement on admission of part of the claim. Accordingly, I am satisfied that the plaintiff is entitled to judgement as prayed in the plaint plus costs and interest.

Dated at Machakos this 21st day of April 2005.

Read and delivered in the presence of

R. V. WENDOH

JUDGE