



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI MILIMANI LAW COURT**

**CIVIL CASE 449 OF 2004**

**RAHUL DILESH BID.....PLAINTIFF**

**V E R S U S**

**CHARTERHOUSE BANK LIMITED.....DEFENDANT**

**R U L I N G**

By this application, the plaintiff/applicant seeks orders that the defendant's defence and counterclaim dated 7th September, 2004 and filed in court on 10th September, 2004 be struck out and judgment be entered against the defendant in the sum of Ksh.10,000,000/= together with interest and costs as prayed in the plaint. The application is made by way of a chamber summons dated 15th December, 2004, and expressed to be brought under O.VI Rule 13(1) (c) and (d) of the Civil Procedure Rules, S.3A of the Civil Procedure Act, and all other enabling provisions of the law.

The grounds upon which the application is premised are that the defence was served on the plaintiff's advocates in contravention of O.III rule 1 (2) of the Civil Procedure Rules; that the defence filed will prejudice, embarrass or delay the fair trial of the action and is otherwise an abuse of the process of the court; that the defendant is justly indebted to the plaintiff in the sum claimed in the plaint and the defendant has admitted liability in writing; that the defendant's defence is a sham; and that the grant of this application will operate to meet the ends of justice. The application is also supported by the annexed affidavit of RAHUL DILESH BID, the plaintiff himself.

In opposition to the application, the defendants managing director, Mr. Sanjay Shah, on an undisclosed date, swore a replying affidavit which was filed in court on 21st February, 2005. The thrust of that affidavit is that the deponent adopts and reiterates the contents of the defendant's defence and counterclaim filed in court on 10th September, 2004. In particular he avers that the defence was served within the time frame indulged by the applicant, and that contrary to the plaintiff's insinuations, no injustice has been committed or prejudice suffered by the plaintiff as a result of serving the defence on 24th September, 2004.

He also avers that the application is maliciously designed to perpetuate a fraud on the defendant and the deponent, and that the application ought to be dismissed with costs. At the oral canvassing of the application, Mr. Sehmi appeared for the applicant while the respondent was represented by Mr. Taibjee. Mr. Sehmi candidly submitted that the only ground for striking out the defence and counterclaim was breach of O.VIII Rule 1 of the Civil Procedure Rules. In addition thereto, counsel submitted that the defence filed herein was an abuse of court process, and that the application should be allowed with costs.

In his response, Mr. Taibjee adopted the contents of the replying affidavit and submitted that the defence denies the claim entirely and that evidence will be adduced in proof. He further submitted that putting a matter in the alternative is not an abuse of the court process and that the application should not be

allowed. In a short reply, Mr. Sehmi said that the respondent was put on notice but never applied for an extension of time. Secondly, the defence on record is on behalf of Mr. Sanjay Shah who is not a party to the suit. The defence should therefore be struck out along with the counterclaim which is of no substance.

After hearing counsel for both sides, I am of the view that there are two main issues which call for determination. These are, firstly, whether there is a breach of compliance with O.VIII Rule 1 of the Civil Procedure Rules and, if so, whether such breach justifies the striking out of the defence and counterclaim filed herein. Secondly, whether the said defence and counterclaim may prejudice, embarrass or delay the fair trial of the action, or whether they are otherwise an abuse of the process of the court. With regard to the first issue, the facts are not in dispute. The defence and counterclaim were filed in court on 10th September, 2004, and served on the plaintiff's advocates on 24th September, 2004. This was about 14 days after the filing of the same. Order VIII Rule 1 (2) is in the following words-

“Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fifteen days after he has entered an appearance in the suit and serve it on the plaintiff within seven days from the date of filing the defence.” Since the defence herein was served on the plaintiff's advocates, some 14 days after it was filed, I find that this was clearly contrary to the express provisions of O.VIII Rule 1 (2). In *WILFRED ODHIAMBO MUSINGO v. HABO AGENCIES LTD.*

*Milimani HCCC No.2047 of 2000(unreported)* it was held that where a document is required to be served within a prescribed period is not so served, and the court has not made any order extending such period of service, such a document ought to be struck out. While, prima facie, that seems to be the fate of the defence and counterclaim, the next question is whether this remedy is available to the defendant. By a short letter dated 21st September, 2004, the plaintiff's advocates wrote to the defendant's advocates as follows- “Dear Sirs, RE: HCCC NO. 449 OF 2004 RAHUL DILESH BID v. CHARTERBRIDGE BANK LTD.

We note that you filed the memorandum of appearance in the above case on 26th August, 2004. The defence has not been served on us despite the fact that the time for doing so has expired. In the circumstances, we give you a further opportunity of THREE days within which to serve the defence on us, failing which, we shall proceed to apply for judgment.” Three days within which to serve the defence were due to expire on 24th September, 2004, and on that day, the defendant's advocates duly served on the plaintiff's advocates a copy of the defence.

Having offered the defendant's advocates a three days' opportunity within which to redeem themselves, and with those advocates having accepted the opportunity and served the defence within the specified time, I think that it would be inequitable for the plaintiff's advocates to turn around and plead that they were not served on time. To allow such a plea would be tantamount to allowing them to approbate and reprobate at the same time. In my view, from the moment the defendants served a copy of the defence within the time offered by the plaintiffs, the latter waived their right to seek to strike out the defence and, by extension, the right to apply for judgment for breach of O.VIII Rule 1 (2). Considering the merits of the application, it is notable that the plaintiff's case revolves around a call deposit receipt No.0085 issued by the defendant to the plaintiff on 14th July, 2000. The substance of the plaintiff's case is summarised in paragraphs 3, 4, 5 and 6 of the plaint which read- “3. At all material times the plaintiff was a customer of the defendant and kept a deposit account with the defendant.

4. The plaintiff's claim against the defendant is in the sum of Sh.10,000,000/= due and owing by the defendant to the plaintiff in respect of a deposit maintained by the plaintiff with the defendant at Nairobi aforesaid in respect of which the defendant has issued to the plaintiff a Call Deposit Receipt number 0085 dated 14th July, 2000 in the said sum of Sh.10,000,000/= and stipulating and agreeing to interest at the rate of 12% per annum from the said date of 14th July, 2000 until payment in full.

5. The defendant (sic) also claims interest on the said sum of Sh.10,000,000/= at the said agreed rate of 12% per annum from 14th July, 2000 until payment in full.”

6. The plaintiff states that the said Call Deposit Account has at all material times been in credit and the defendant has by its letter dated 20th December, 2000 admitted its liability in respect of the plaintiff's claim." In paragraphs 3, 14 and 15 of its defence, which Mr. Sanjay Shah has adopted in his replying affidavit, the defendant pleads as follows-

"3. The defendant denies paragraph 3 of the plaint and puts the plaintiff to the strict proof thereof. The defendant avers that the plaintiff never did come to the defendant's offices to open an account or any account as alleged or at all. 14. The defendant denies the contents of paragraph 6 and avers that the plaintiff has never held any account with the defendant and has never been the defendant's customer.

15. The defendant does not owe the plaintiff any money and is unable to comprehend the contents of paragraph 7 and paragraph 8." Attached to the applicant's affidavit in support of the application are 2 informative exhibits, "RDB I" and RDB 4". Exhibit "RDB I" is a copy of a Call Deposit Receipt No.0085 dated 14th July, 2000. The entire document reads-

"CALL DEPOSIT RECEIPT Received from MR. RAHUL DILESH BID the sum of Ksh.TEN MILLION ONLY as deposit for a period of CALL bearing interest at the rate of 12% per annum as per our terms and conditions with respect to such deposits." The figure of Ksh.10,000,000/= is then printed and the document is signed by two "authorised" signatories. Exhibit "RDB 4" is a copy of a letter dated 20th December, 2000, addressed to Rahul Dilesh Bid, the plaintiff, by Charterhouse Bank Ltd., the plaintiff. The relevant part thereof reads- "Dear Sir/Madam, Our records indicate that at the close of business on 30th November, 2000 the balance (s) on your account (s) were as set out below; A/c No. Shs. CD 01 201889 10,000,000

In connection with the audit of our books of account now being done by our Auditors, we shall be grateful if you will confirm that the amounts shown above agree with your records (after reconciliation if necessary)..." The import of these two exhibits is that they confirm, beyond peradventure, the contents of paragraphs 3,4,5, and 6 of the plaint. Conversely the denials in paragraphs 3, 7, 14 and 15 of the defence and counterclaim purport to deny the obvious.

Paragraph 5 of the defence pleads, in the alternative, that both the defendant and the plaintiff hold the funds in dispute as trustees to the benefit of one Sanjay Shah, the defendant's managing director. The paragraph goes on to add that the defendant will seek leave of this Honourable Court to allow the said Sanjay Shah, being the true beneficiary, to be brought into these proceedings as a third party. My first observation about this statement is that it is made in a document dated 7th September, 2004 and filed in court on 10th September, 2004.

The application which is the subject of this ruling was filed in court on 16th December, 2004. That was more than three months since the date of the filing of the defence, and yet, no application had been made to join Mr. Shah as an interested third party. In addition to that, when this application first came for hearing on 24th February, 2004, counsel for the defendant/respondent applied for an adjournment stating that they received the hearing notice under protest as they had other matters on the material date, and that they also had a proposal to make to the plaintiff. Nothing was mentioned about the intention to join Mr. Shah as a third party. The application was heard on 14th March, 2005 which was more than 6 months from the date of the filing of the defence.

If the defendant genuinely intended to join Mr. Shah as a party to the suit, it had ample time to do so before the hearing of this application. It did not do so. Consequently, Mr. Shah is a third party and remains a third party to these proceedings to the present day. References to Mr. Shah in paragraphs 5,6,9,11,12 and 13 of the defence as the benefactor who provided the funds claimed, and therefore the true beneficial owner thereof, are references to a total stranger. They are defences which Mr. Shah would have set up if he were a party to the proceedings. In present context, these defences do not assist either the defendant or Mr. Shah.

On the issue of the rightful owner of the funds in dispute, the defendant has engaged itself in some contradiction. Whereas in paragraphs 5 and 6.4.0 of the defence it is expressly stated that Mr. Shah is the

rightful owner of these moneys, this is contradicted in paragraph (a) of the counterclaim which describes the defendant as the rightful owner. Paragraph 6.4.1. also suggests that the defendant is the rightful owner.

The defendant and Mr. Shah are separate legal personalities and whatever belongs to the one does not belong to the other. In the face of such a contradiction, the defendant would appear to be at war against itself. It is also significant that paragraph 6.3.0 of the defence refers to a letter and some receipts which should have been conveniently exhibited in the defendant's replying affidavit. That was not done. This erodes the probative value of that affidavit vis-a-vis the alleged receipts. Finally, paragraphs 8,10,11 and 12 of the defence are in the following terms-

"8. The plaintiff is a dishonest person and a pathological liar and it is on record that he has lied on oath before in criminal case no.1686/2000 when he stated that he was employed as a driver earning Ksh.50,000/= per month. 10. The plaintiff's act of bringing to court this suit demonstrates his wickedness and his penchant to reap where he has not sown and he personifies the ingratitude that one can show to another.

11. It is a matter of fact that the funds in respect of the Fixed Deposit Receipts were not provided by the plaintiff but Mr. Sanjay Shah and it is morally reprehensible that after showing kindness to the plaintiff and his family when they were in dire straits, he now wants to defraud Mr. Sanjay Shah of Ten Million Shillings (Ksh.10,000,000/=).

12. The claim by the plaintiff is fraudulent, ludicrous and intended to not only defraud Mr. Sanjay Shah but to punish him for his acts of kindness." In my view, paragraphs 8 and 9 are scandalous inasmuch as they seek to portray the plaintiff as a very wicked person. They do not add any value to the defendant's case. Paragraphs 11 and 12 are embarrassing as they do not advance the defendant's cause, but that of Mr. Shah and yet Mr. Shah is not a party to the proceedings. The paragraphs also leave the plaintiff in suspense as to what the defendant's defence really is.

The counterclaim seeks from the court some four orders without laying down the basis for making such orders. Paragraph (a) thereof states that the defendant is the rightful owner of Fixed Deposit Receipt No.0085, yet it has also been stated in the defence that Mr. Sanjay Shah is the rightful owner. Paragraph (b) seeks interest at 12% per annum and yet in paragraph 17 of the defence, the same rate is described as "the most exorbitant rate claimed by the plaintiff." If that rate is exorbitant, it is exorbitant regardless of which party claims it. It can't be exorbitant when the plaintiff claims it, and then become a market rate when the defendant claims it.

In sum, the defence leaves a lot to be desired. Paragraph 3 and 4 thereof fly respectively in the face of the Call Deposit Receipt and the letter written to the plaintiff by the defendant on 20th December, 2000. The said letter also answers the statements in paragraphs 14 and 15 of the defence. Paragraphs 5,6,9,12, and 13 merely front Mr. Sanjay Shah's defence, yet Mr. Shah is not party to these proceedings. Paragraphs 8, 10 and 11 are scandalous and embarrassing, and there is no foundation to the counterclaim.

I am satisfied that the defence and counterclaim on record may prejudice, embarrass or delay the fair trial of this action and that they ought to be struck out. It is so ordered. Judgment is accordingly entered for the plaintiff against the defendant for the sum of Ksh.10,000,000/= together with interest and costs as prayed in the plaint. The defendant will also bear the costs of this application.

Dated and delivered at Nairobi this 21st day of April 2005

**L. NJAGI**

**JUDGE**