REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI COMMERCIAL COURTS)
CIVIL SUIT NO. 781 OF 2001

THE CO-OPERATIVE MERCHANT BANK OF KENYA LTD…..1ST PLAINTIFF

VERSUS

BENSON W. K. MUIGAI ……..……...…….DEFENDANT

RULING

This Ruling relates to an application by way of a Chamber Summons dated 16.02.2005 in which the Plaintiff seeks that the Defence herein dated 10.09.2001 be struck out, and judgement be entered for the Plaintiff as prayed in the Plaint.

The application is supported by the Affidavit of one Kenneth Kaunda Abuga, the Plaintiff's Legal Officer sworn on 8.03.2004 and the Further Affidavit of the said Kenneth Kaunda Abuga sworn on 17th May 2004, and the grounds set out in the face of the Application.

This is the short history of this matter. By a charge dated 9.04.1996, the Defendant charged his property LR. No. 4953/96 situated in Thika Town to the Plaintiff to secure an advance of Kshs.4 million. The Defendant failed to service the loan, and the Plaintiff in exercise of his statutory power of sale sold the property by public Auction on 25.07.1997 and the property realised a price of Kshs.4,500,000/= which the Plaintiff applied to the credit of the Defendant. After applying the said sum, there was left outstanding on the account, the sum of Kshs.1,997,107.75 as at 25.07.1997.

With interest, and interest upon interest and bank charges this sum escalated to Kshs.6,271,561.20 as at 23.05.2000 when the Plaintiff's Advocate, Kimani Waweru sent a demand letter to the Defendant. By the time this suit was filed on 29.05.2001 the sum due had rocketed to Kshs.8,616,786.45 and was rising higher and higher with interest thereon @ 25% p.a. as from 19.05.2001 till payment in full.

To this action, the Defendant has filed a Defence dated 10.09.2001 in which he says that if any loan was ever advanced (which he denies), it has been paid in full, and the Plaintiff is estopped from pursuing him for any further funds. He accuses the Plaintiff of being guilty of latches, and says that the Plaintiff's claim is unreasonable, punitive, extortionist and not maintainable in law, and prays for the dismissal of the Plaintiff's action.

Strangely enough, in his Replying Affidavit sworn on 8.03.2004, the Defendant admits that he took a loan of Kshs.4 million from the Plaintiff, that he fell into arrears, and that his property was sold in 1997. The Defendant laments that after the sale of his property, the Plaintiff's never communicated to him and informed him of the state of his account or the application of the proceeds of sale until 3 years later when the Plaintiff demanded Kshs.6,271,561.20/= and subsequently filed the current suit for the sum of Kshs.8,616,756.15/=. His punch line is that it is unjust for the Plaintiff to wait for years then file suit claiming interest and penalties which were never communicated to him so that he would have taken

action at the right time.

So far as the Defendant is concerned, he says, the matter was concluded with the sale of his property, and that this suit is meant to unjustly enrich the Plaintiff. In any event, he depones in paragraph 12 of the Replying Affidavit, his defence raises triable issues, including the terms and conditions of the loan facility, account of moneys paid by the Defendant to the Plaintiff prior to the sale of the property, and whether the Plaintiff should charge interest after July 1997, when the Plaintiff auctioned his property and failed to communicate the results of the sale to him, and whether the doctrine of estoppel applies in this case.

The Defendant depones that those are issues which can only be canvassed at the trial and the Defence should not be struck out.

Mutahi and Adhuok, learned Counsel for the Plaintiff and the Defendant respectively relied on the respective pleadings and Affidavits as summarised above. This is my view of the matter.

The application herein is premised upon the provisions of Order VI rule 13 (1) (a) (c) (d) of the Civil Procedure Rules, and Sections 3 and 3A of the Civil Procedure Act, (Cap 21, Laws of Kenya).

Rule 13 (1) empowers the Court at any stage of the proceedings to order to be struck out or amended any pleading on the ground that –

(a) It discloses no reasonable cause of action or defence; or

(b) …..

(c) It may prejudice, embarrass or delay the fair trial of the action: or

(d) it is otherwise an abuse of the process of the Court

Rule 13 (2) of Order VI, prohibits the admission of any evidence on application under sub rule 1 (a), but that the application shall state concisely the grounds on which it is made.

The Plaintiff has jumbled the current application as if the Defendant's Defence is all those things set out in rule 13 (1). A careful reading of that rule requires that the Court may strike out a pleading on any of the four grounds. The grounds are clearly disjunctive, and Counsel should be careful in their pleading as to which ground the party wishes to rely upon in seeking to strike out a pleading. For instance if the application is that the pleading discloses no reasonable cause of action or defence, then evidence by Affidavit is not admissible. It is a matter to be determined purely on law upon examination of the pleadings, the Plaint, the Defence as amended if that is the case.

Applications under the other heads of rule 13 (1) may be supported by Affidavit.

Without therefore being unduly technical on matters of procedure, and taking the Plaintiff's application to strike out the Defence, under rule 13 (1) (a) that it is a sham and bogus, and discloses no reasonable defence to the Plaintiff's action, I am of the opinion that indeed the Defence herein constitutes no viable defence to the Plaintiff's action. It has been an accepted principle from early times in common law jurisdictions, that where a defence raises even one triable issue, the Court will allow that one issue to go for trial.

It is an equally accepted principle in the said jurisdictions that it is as much unjust to keep the Plaintiff away from a just judgement where there is no viable defence to his action.

In the current suit, the Defendant admits that he applied for, was advanced a loan of Kshs.4 million by the Plaintiff. He admits that he fell into arrears. He admits that his property was sold to recover the principal sum and arrears of the loan repayments. He then suffers selective amnesia, that nobody told him

that there were still arrears on his loan from 1997. He accuses the Plaintiff of being guilty of latches. On this the Defendant is I think correct. There is no evidence attached to the Supporting Affidavit of Kenneth Kaunda Abuga showing that the Defendant was informed of the arrears or any outstanding balance after the sale of his property. This was in my view a serious but not fatal oversight on the part of the Plaintiff.

In all the circumstances however, the Defendant can only blame himself. After his valuable property was taken away in a forced sale, it was incumbent upon the Defendant to find out whether there were any more liabilities on the account. He sat back, and expected the hard nosed merchants of money to forgo their shillings and cents.Unless someone brings back the "**Donde Act**" they will keep on piling interest upon interest, and the little, we thought left will be taken away from the poor borrowers who must borrow to do commerce.

So for the Defendant in this matter, he has no viable defence. The applicable rule 13 (1) (a) requires the Court to strike out the pleading or direct that it be amended, and where there is no direction to amend as in this case, it is struck out, and judgement entered.

My orders will therefore be, that the Defendant's defence filed on 10.02.2001 is struck out, and judgement be entered for the Plaintiff as prayed in the Plaint.

As the Plaintiff is in my view guilty of latches in this matter, it shall not have the costs of the suit or this application and each party shall bear its own costs.

There shall be orders accordingly.

Dated and delivered at Nairobi this 19th day of May 2005.

ANYARA EMUKULE

JUDGE