



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MILIMANI COMMERCIAL COURTS, NAIROBI
HCCC NO. 33 OF 2004**

TRANSNATIONAL BANK LIMITED..... PLAINTIFF

V E R S U S

RED BULL LIMITED.....1ST DEFENDANT

VICTOR S. OGETO.....2ND DEFENDANT

STANLEY OMOA.....3RD DEFENDANT

R U L I N G

The plaintiff in this suit applies for orders that judgment be entered against the defendants jointly and severally for Ksh.9,109,412.60 as prayed in the plaint, and that the costs of this application and those of the suit be borne by the defendant. The application is made by a notice of motion dated 16th September, 2004, and filed in court on 5th November, 2004, and expressed to be brought under O.XXXV rule 1 of the Civil Procedure Rules, S.3A of the Civil Procedure Act, and all enabling provisions of the law.

The application is supported by the annexed affidavit of JACQUELINE ONSANDO, the plaintiff's Legal and Human Resources Manager. It is further based on the grounds that the defendants are truly and justly indebted to the plaintiff jointly and severally for the entire sum claimed; that the defendants have no defence to the claim and their defence on record is a sham merely calculated to delay the trial of this action; and that the said defence raises no triable or arguable issues to warrant trial and will merely delay and/or embarrass the trial of the suit.

Opposing the application, the 2nd defendant, VICTOR OGETO, swore a lengthy replying affidavit in response to Jacqueline Onsando's supporting affidavit. He avers that the plaintiff's application is frivolous, vexatious and an abuse of the court process in that it seeks to defeat the defendant's chamber summons application filed herein seeking, inter alia, orders that the plaintiff do provide further and better particulars to the defendant and that in default the plaintiff's suit be struck out. He also sets out in the affidavit the defendant's version of what happened between the parties and sets out in paragraph 27 some 12 issues which in his perception are triable.

The matter was canvassed orally by Mr. Ngugi for the plaintiff/applicant and Mr. Mabeya for the defendant/respondent. Mr. Ngugi argued that the defendants accepted the general terms and conditions in connection with the business dealing with the bank. He narrated how the defendants first applied for an overdraft of Ksh.800,000/= and how this finally rose to Ksh.2million, and how the 2nd and 3rd defendants gave their security in the form of personal guarantees for Ksh.2million plus interest. By 31st January, 2000, the facility stood at Ksh.2.6million, and after that date, the defendants ceased depositing any money in the account. As a result, and owing to interest on the principal sum, the sum payable had escalated to Ksh.9,109,412.60 by 30th October, 2003. Referring to the defence filed by the respondents, counsel submitted that there was no evidence to show what terms of the agreement were breached, and

further that the rate of interest charged was contractual. He further submitted that neither the defence nor the replying affidavit raises any triable issues, and therefore the defendants do not have any defence to the plaintiff's suit. He then referred to **TRANSNATIONAL BANK LTD., v. MILLIGAN PROPERTIES LTD. & 2 ORS.**, (Milimani) HCCC No.420 of 2000 and asked the court to enter judgment for the plaintiff as prayed in the plaint.

The application is opposed. Mr. Mabeya for the respondent relied on the replying affidavit of Mr. Victor Ogeto, the 2nd defendant herein. He submitted that if there was any contract between the parties, it was breached by the plaintiff consequent whereupon the 1st defendant was discharged. The guarantee was granted upon a misrepresentation as to the facts, and here counsel referred to paragraph 9 of the defence. On account of those misrepresentations, Mr. Mabeya submitted, the defendants were discharged as guarantors. He further submitted that the interest rate to be applied was that authorised by the Central Bank of Kenya, and there was no evidence that the defendants agreed to be charged over and above the rate authorized by the Central Bank of Kenya. Furthermore, there was no provision in the agreement for the charging of penal interest.

Referring to the identity of the plaintiff counsel submitted that there was a difference between Red Bull Limited and Red Bull Restaurant Ltd., that there had been no attempt to connect the two companies, and the correspondence relied on by the plaintiff was not from the 1st defendant but a person without authority to give instructions on behalf of the 1st defendant. Counsel then submitted that the statements for the period from June 1995 to June 1999 were not exhibited and therefore there was no evidence of any financial accommodation during that period. The letter demanding the payment of Ksh.5,350,799.53 does not show how that figure was arrived at. Mr. Mabeya then referred to **HOLEM v BRUNSKILL** (1878] 3 QBD. 495 for the proposition that a surety is discharged if the guaranteed contract is altered. He also relied on Halsbury's Laws of England, 3rd Edition, Vol.18 p.502 for the same point; and finally on **MOMANYI v. HATIMY & ANOR.** [2003] 2 E.A. 600 (CAK) for the proposition that where triable issues are established, the court has no discretion but to grant unconditional leave to defend. He asked the court to dismiss the application with costs.

In his reply, Mr. Ngugi submitted that the interest charged is not higher than that allowed by the Central Bank of Kenya, but that the contract allows penal interest. He maintained that the plaintiff is entitled to judgment against the defendants and asked that the application be allowed as prayed.

I have considered the pleadings, the application and the submissions of learned counsel. The law governing summary judgment is fairly clear. Jurisdiction to grant summary judgment should be exercised with caution, and only in plain and obvious cases. If the defendant raises even one prima facie triable issue, he is entitled to unconditional leave to defend. The claim in this case arises out of some financial accommodation allegedly extended to the 1st defendant against guarantees by the 2nd and 3rd defendants. From the outset, the defendants deny that there was any accommodation between 1996 and 1998 as alleged in paragraph 6 of the plaint. The question as to whether or not such accommodation existed during that period becomes a triable issue.

Secondly, there is the element of the continuing guarantee. The defendants allege that there were misrepresentations that led them to executing the guarantees. The full particulars of the alleged misrepresentations are set out in paragraph 9 of the defence. If the 2nd and 3rd defendants executed any guarantee, an issue arises as to whether or not it was executed on the plaintiff's alleged misrepresentations as to the correct facts.

A third issue revolves around the rates charged. Whereas the defendants allege that the amounts claimed constitute monies levied on the 1st defendant contrary to the provisions of the Central Bank of Kenya Act, it is the plaintiff's case that all the amounts charged were contractual. Whether the moneys claimed in the plaint constitute moneys illegally charged on the 1st defendant's account becomes a triable issue. So does the alleged discharge of the 2nd and 3rd defendants from performing their obligations as guarantors.

Finally there is the issue of limitation. Is the plaintiff's suit time – barred under the provisions of the

Limitation of Actions Act? This is a triable issue. The defendants have themselves also set out under paragraph 27 of Mr. Ogeto's replying affidavit some 12 issues which they reckon to be triable, and these include some of those identified above.

In sum, I think that the defence is not frivolous as it raises some substantial triable issues for which leave to defend ought to be granted unconditionally. In MOMANYI v. HATIMY & ANOR., [2003] 2 E.A. 600, Omolo, Lakha and Keiwua JJA said at p.604-

“There is no discretion to be exercised if triable issues have been disclosed in an application for summary judgment. In the case of OSODO v. BARCLAYS BANK INTERNATIONAL LIMITED [1981] KLR 31 this Court stated that: ‘If upon an application for summary judgment a defendant is able to raise a prima facie triable issue as the appellant did in this case, there is no room for discretion. There is only one course for the court to follow, that is to grant unconditional leave to defend’.”

I find these sentiments apt in this case, as the defendants have raised some substantial, prima facie triable issues. They are entitled to unconditional leave to defend.

The application for summary judgment is accordingly dismissed with costs. Dated and delivered at Nairobi this 20th day of June 2005

L. NJAGI

JUDGE