REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
Civil Case 534 of 2003

HARITH ALI EL-BUSAIDY……..PLAINTIFF/APPLICANT

VERSUS

KENYA COMMERCIAL BANK LTD…….DEFENDANT/RESPONDENT

R U L I N G

The Plaintiff has filed this application pursuant to the provisions of Order IX rule 2(3), Order VIII rule 1(2); Order VI rules 7 and 13 (1) (b (c) & (d) of the Civil Procedure Rules, as read together with Section 3A of the Civil Procedure Act.

He seeks the striking out of the Defence, so that judgement may be entered in favour of the Plaintiff. He also seeks a date for the assessment of General Damages.

As far as the Plaintiff is concerned, the defence on record is wholly irrelevant to the claims against the Defendant, and is thus scandalous, frivolous and vexatious. The Defence is also perceived to be a sham, which was lacking bona fides. It is said to be plainly and obviously unsustainable and an abuse of the process of the court.

Furthermore, the Plaintiff contends that the Defence contravenes the law of limitation of actions. It is deemed to be calculated to prejudice, embarrass or delay the fair trial of the suit. Why does the Plaintiff feel so strongly about the issue?

He is the owner of the suit property, which is L.R. No. 2645 Malindi. That property is charged to the Defendant, as security for a loan facility accorded to Cleopatra Theatre Limited.

It is the Plaintiff's case that as the Defendant's borrower (Cleopatra Theatre Limited) did not sign the letter of offer which the defendant had prepared, the offer by the bank was automatically cancelled. In those circumstances, the Plaintiff asserts, in his plaint, that he was not obliged to effect a legal charge over his property.

In the alternative, the Plaintiff contends that there was a total failure of consideration upon which he had charged his property.

In the further alternative, the Plaintiff said that no charge was ever created or registered over his property, since the borrower never signed the letter of offer.

He therefore believes that the Defendant should only look to Cleopatra Theatre Limited for such money as the Defendant gave to that company.

In the final analysis, the Plaintiff prays for a declaration that the charge over the suit property

was wrongful or had become invalid. He asks that the said charge be discharged, and that the title documents be handed over to him. The Plaintiff also seeks General Damages for the maintenance of a wrongful charge over his property.

In the alternative, the Plaintiff prays for a declaration that the interest and charges levied by the Defendant were unjustified, unlawful, oppressive, harsh, unconscionable and without basis.

When faced with those averments, the Defendant filed a Defence. In the first place, the Defendant asserts that the letter of offer was executed by the borrower as well as the Plaintiff, as a guarantor. The Letter of offer cited by the Defendant is dated December 1985.

But the Plaintiff now says that the loan facility dating back to 1985 was paid in full. He points out that the letter of offer which was in issue was dated 24th November 1993.

A look at that letter (Annexture "HB 1") confirms that it was not signed by the Plaintiff or Cleopatra Theatre Limited. For that reason, the Plaintiff submits that there is no contract between him and the Defendant.

It is explained, by the Defendant, that the guarantee relating to the letter of offer issued in 1985, was discharged. Therefore, in his considered opinion that letter of offer cannot be available to the Defendant, as any claims relating thereto would be time-barred, in any event. It is also submitted that the continuity of the charge issued in 1985 was broken by the letter of offer dated 24th November 1993.

Faced with those submissions, the Defendant said that the very arguments put forward by the Plaintiff, proved that the Defence raised triable issues. I accept that contention, for the reason that the Defence is neither shallow nor evasive. For instance, when it is said that the Plaintiff as well as the borrower did sign the letter of offer, that averment will need to be tested, by way of evidence.

Of course, the Plaintiff has produced an unsigned copy of a letter dated 23rd November 1993, whilst the Defendant has not put forward any signed letter of offer. But that alone does not mean that the Defendant would be precluded from proving why they said that the letter of offer was executed. And, even if it should transpire, that the letter of offer cited by the Defendant is the one dated December 1985, the court would have to address the question as to whether or not the guarantee relating to that letter had been discharged, as submitted by the Plaintiff. At the moment, the Plaintiff has not produced any evidence to prove his assertion that the guarantee had been discharged. He is only inviting the court to hold that the said guarantee was "discharged in equity."

Secondly, the Plaintiff asserts that the 1985 document cannot be available to the Defendant, as any claim founded thereon would be time-barred. That submission leads to the question as to when a claim founded on a continuing security may be deemed as timebarred.

There will be questions of fact, as to whether or not the Plaintiff or the borrower did pay the loan facility afforded to the borrower in 1985. To my mind, it cannot merely be assumed that the issuance of another letter of offer in November 1993, implied that the old facility had been repaid.

The Plaintiff has not proved that the old facility was either paid-off, or that the Defendant opened a totally new account for the facility given in 1993.

Then, there are questions as to how and when the charge became invalid. Would the Plaintiff be right to say that a registered charge was invalid simply because the letter of offer dated 24th November 1993 was not signed?

All those are questions which can only be properly determined if the case went to trial. I therefore find that this is not a fit and proper case for the exercise of the court's discretion to summarily dispose of the Defence.

The Defence on record is not so hopeless that it plainly discloses no reasonable defence. To my mind, the said Defence discloses matters that require to be dealt with by way of evidence, which would then enable the court make a determination, that was informed adequately.

I therefore decline to use this court's discretion, in the manner I was invited to do, by the Plaintiff, for I do not find the Defence story so improbable that it was incapable of proof.

Accordingly, the Plaintiff's application is dismissed with costs.

But before concluding this Ruling, I must say that I believe the Plaintiff should have taken the cue from the decision of my brother, Azangalala J. The said Ruling which was delivered on 26th April 2005, stated, inter alia, as follows:-

> "**I am also satisfied that the defendant's defence does raise triable issues, which ought to go to trial. Issues such as; did the Plaintiff execute the charge; did the charge provide a continuing security; did the charge provide that the defendant could charge different rates of interest, and did the plaintiff understand the provisions of Section 69 (1) of the T.P.A.?"**

In the circumstances, I was somewhat surprised at the applicant's contention that the findings (that there were triable issues) were irrelevant.

Dated and Delivered at Nairobi this 28th day of July 2005.

FRED A. OCHIENG

JUDGE