



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT
MILIMANI COMMERCIAL COURTS, NAIROBI**

CIVIL CASE 85 OF 2002

SOUTHERN CREDIT BANKING CORP. LTD.....PLAINTIFF

- V E R S U S

CHARLES WACHIRA NGUNDO.....DEFENDANT

R U L I N G

The application before the court is brought by way of a Notice of Motion dated 4th May, 2004 under O.XXXV rule 1 (1) and (2) of the Civil Procedure Rules, and other enabling provisions of the law. It seeks from the court orders that summary judgment be entered in favour of the plaintiff against the defendant for the sum of Ksh.25,611,497.70 plus interest thereon at 4% per month as prayed in the plaint, and that the costs of this application be the plaintiffs in any event.

The application is supported by the annexed affidavit of WILFRED OROKO, a legal officer with the plaintiff company, and is based on the following grounds-

1. That the defendant's defence filed herein raises no triable issues to warrant the matter to proceed to full hearing.
2. That the defence is otherwise an abuse of the court's process.
3. That the defendant is truly indebted to the plaintiff as claimed in the plaint.

By a replying affidavit sworn on 28th September, 2004 and filed in court on 29th September, 2004, the defendant/respondent, CHARLES WACHIRA NGUNDO opposes the application.

At the oral hearing of the application, Mr. Havi appeared for the applicant while Mr. Ingosi appeared for the respondent. Mr. Havi narrated how in February, 1998, the plaintiff advanced to the defendant a facility for Ksh.8million secured by a charge over L.R. No.209/8000/185. Thereafter the defendant fell into arrears whereupon the plaintiff exercised its statutory power under the charge. It realised Ksh.8 million which was credited to the defendant's account. The account was not being serviced save for about 4 payments. The closing balance is Ksh.25million which is claimed by the plaintiff in the plaint. It is largely made up of accrual interest which was occasioned by defendant's actions by filing numerous suits, which he either lost or withdrew. Mr. Havi further submitted that the defence which was initially filed contained mere denials which do not sufficiently answer the plaintiff's claim. He also submitted that the amended defence is a smokescreen to shelter the defendant's indebtedness, and that the matter can be dealt with summarily, the counterclaim notwithstanding.

Opposing the application, Mr. Ingosi relied on the replying affidavit of Charles Wachira Ngundo and submitted that the defendant had a good defence with triable issues. These include such matters as

whether the suit property was fraudulently sold; whether it was sold at an undervalue; and whether the defendant was served with the requisite notices. He submitted that the defendant should be allowed to defend the suit unconditionally. He also submitted that the affidavit in support of the application offended S.35 of the Advocates Act and therefore should be struck out.

In his reply, Mr. Havi submitted that recent jurisprudence is to disregard technicalities and proceed on substance. The amendment to the defence was made after this application had been filed and therefore it was an afterthought. Finally he submitted that the defendant's allegation that he was never served with notice was untrue, and that in the event the court gives him leave to defend, then let it be conditional leave.

Having considered the pleadings and submissions of counsel, I am minded, first, to deal with the plea by the respondent's counsel that the supporting affidavit should be struck out as being non compliant with the requirements of S.35 of the Advocates Act. I am well alive to the decision of this court in **BARCLAYS BANK OF KENYA LIMITED v. DR. SOLLLOMON HCCC No. 1736 of 2001** as well as that line of such cases as **MIBEN (K) LTD. v. MARK WANGAI MUCHEMI T/A BORDER SERVICES STATION & ORS**, Kisumu HCCC No. 234 of 2001, and **JOVENNA EAST AFRICA LTD. v. SYLVESTER ONYANGO & ORS**, (Milimani) HCCC No.

1086 of 2002. In all these and other cases, the High Court has ruled that failure to comply with the requirements of S.35 of the Advocates Act renders an affidavit fatally defective. It is in response to this state of affairs that Mr. Havi stated that recent jurisprudence is to disregard technicalities and proceed on substance. If there be such a wind of change, I would embrace it with open arms and become one of the first converts. I cant wait to see the dawn of that day when court matters will be decided on substantive law and without undue regard to those technicalities of procedure non-compliance with which does not prejudice anyone.

Coming back to the substance of this application, I find that the parties are in agreement that on 10th February, 1998, the defendant applied for and was granted an overdraft facility of Ksh.8 million by the plaintiff, which facility was secured by a legal charge on L.R. No.209/8000/185 at New Muthaiga, Nairobi, owned by the defendant. According to the applicant, the defendant defaulted in the repayment of the facility consequent whereupon the plaintiff sold the security by private treaty. The sale realized Ksh.8million which sum was credited to the defendant's account. Under paragraph 4 of the plaint, the plaintiff's claim against the defendant is for the sum of Ksh.25,611,497/70 being the sum due and owing to the plaintiffs from the defendant as at 15th October, 2001 under the said facility. This sum continues to accrue interest at 4% per month calculated on daily balances and compounded monthly, last applied on the said 15th October, 2001. It is this sum which the applicant seeks to recover by way of summary judgement.

The summary procedure prescribed under O.XXXV of the Civil Procedure Rules applies to all suits where a plaintiff seeks judgment for, inter alia, a liquidated demand with or without interest. The principles governing the entering of summary judgment are fairly well settled. If a defendant can raise a prima facie triable issue, he is entitled in law to unconditional leave to defend. However, if no prima facie triable issue is put forward to the claim of the plaintiff, it is the duty of the court forthwith to enter summary judgment. In the instant matter, and on the basis of the evidence before the court, it seems to me that there is genuine concern about the amount actually owed to the plaintiff. This is brought about by the subtle interplay of two factors – the date of the account and the amount realized out of the sale of the suit property.

In paragraph 3 of the supporting affidavit sworn by Wilfred Oroko, the plaintiff company's legal officer, the deponent avers-

“That the defendant defaulted in repayment of the said facility and the plaintiff sold the said security by private treaty which sale realized Ksh.8,000,000/= which sum was credited into the defendants account. At the time that the property was sold the amount due on the account had accumulated to the amount set out in the accounts attached

herein below.”

The accounts attached relate to the period from 1st May, 1998 to 22nd March, 2001 and run to two pages only. The closing balance is Ksh.25,742,615.15. According to paragraph 4 of the plaint, the sum of Ksh.8million was credited into the defendants account on 6th August, 2001. Unfortunately the accounts for the period from 23rd March, 2001, have not been exhibited. This raises a few questions. What was the state of the defendant’s account before the sum of Ksh.8million was credited thereto? What effect did that amount have on the account? What was the balance thereafter?

Although the suit property is said to have been sold at Ksh.8million, which is repeated both in the plaint and the supporting affidavit, a copy of the certificate of title discloses a totally different story. It shows that a transfer to William Ouko Okello for Ksh.7million was registered on 12th March, 2003. This raises the question as to when the property was actually sold, and for how much. Paragraph 4 of the plaint states that the realisation and completion of the sale of the security was delayed and hampered by the defendant who filed several actions in court seeking to protect the same. Whereas this might perhaps explain the delay in completion of the sale, it certainly would not explain the disparity in the sale price of Ksh.8million as stated in the pleadings, one the one had, and the consideration of Ksh.7million as disclosed in the copy of the certificate of title.

As the accounts exhibited to the court run to 22nd March, 2001 while the sale took place much later, it is difficult to tell the defendant’s true indebtedness at the time of sale and thereafter. I would not say, without such evidence, that the defendant plainly and obviously owed the plaintiff the sum claimed of Ksh.25,611,497.70. I would not therefore enter summary judgment for the plaintiff for the said sum in the circumstances. It is not certain how much the defendant owed at the material time.

The application for summary judgment is accordingly dismissed with costs, and the defendant granted unconditional leave to defend.

Dated and delivered at Nairobi this 14th day of July 2005

L. NJAGI

JUDGE