



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Suit 117 of 2004

KENYA COMMERCIAL BANK LIMITEDPLAINTIFF

VERSUS

MASUMIN INVESTMENT LTD. & 2 OTHERSDEFENDANTS

R U L I N G

Notice of Motion dated 1/7/04 seeks summary judgment under order 35 rule 1 & 8 and that the defence be struck out under order VI Rule 13 (1) b & (c) & (d).

The application is supported by affidavit of a manager of the Plaintiff's Bank that shows there has been a Commercial relationship between the Plaintiff and the three defendants who guaranteed a loan to Kenya Bus Services Ltd.

The replying affidavit confirms this portion and it is therein admitted that the defendants were guarantors to the plaintiff for first defendant's indebtedness.

The amount claimed is now Shs.32,350,000/- outstanding after long negotiations and part settlements. The defence filed by the defendants jointly raises the issue excessive rates of interest charged by the plaintiff in breach of statutory authorities and Central Bank Act.

The defendants also deny freely being entered to agreements with the plaintiff as pleaded and pleads mistake and misrepresentation by the plaintiff and that the same should be set aside.

In the Replying Affidavit the matters raised are that Bank Statements were never supplied to the guarantors therefore the guarantors were unaware of the operations of accounts of the principal debtor. The interest rates were excessive contrary to the Central Banking Act and that had the guarantors been aware of legal provisions as to interest. They would not have signed the agreements. They did not know the legal position. By agreement dated 16/8/01 the original debt was altered and new terms were made between the parties. The three guarantors (Defendants) in contradiction shown therein undertook to pay shs.32,350,000/- to the plaintiff within a period of twelve months after date of agreement. This agreement was reached.

Our clients the guarantors have asked us to point out that in the case of negotiations between Mr. Mohamed Jaffer and Mr. Ryan of your client and it was agreed that the balance of the amount outstanding (Shs.32,350,000/-) would be paid within the twelve months. It was in pursuance of that agreement reached that the letter of 16/8/2001 was signed by the guarantors and countersigned by the Bank which

please note.”

This letter was signed by Mr. Mansur Satchu for his clients the guarantors (PJ27). This letter was dated 3/10/2001 and from the comments the defendants were represented by Mr. Satchu. In the circumstances the issue raised that the defendants were not aware of the law regarding interest and the law as alleged has no merit these issues should have been raised much earlier before reaching the agreement which was negotiated.

The Principal debtor Kenya Bus Services was also represented by Mr. Satchu and these questions were not raised with the bank.

Moreover the matters were reduced into writing and no effort has been made to challenge the written documents. The defendants say there was misrepresentation and mistake that there was money still outstanding and due from the Principal debtor upon perusing the agreement and the correspondence, I am satisfied that no mistake or misrepresentation has been proved. The allegations made have no subsistence.

All people are presumed to know the law. The plaintiff has relied upon the case of Diamond Trust Bank (K) Ltd. –vs- Dhanjal & others in which the issue of interest was raised the court found the allegations not proved as no evidence was tendered to establish that unlawful interest has been charged or when it was charged and at what rate. It is the same here the defendants make allegations without any evidence at all.

Mr. Omondi also relied on the authority judgment of Court of Appeal in Magunga General Stores – vs- Pepco Distributors Ltd. In which the court explained that

1. Mere denial is not sufficient in all cases
2. It is for defendant to put forward his defence and when faced with a motion for summary judgment under order 35 the defendant must heed rule 2 thereof.

“The defendant may show either by affidavit or by oral evidence or otherwise that he should have leave to defend the suit.”

Mr. Omondi also relied on the case of Mpaka Road Dev. Ltd. –vs- Kane [2000] LLR (CCK) Ringera J where the meaning of frivolous scandalous and vexations were explained. The court has taken into considerations of all matters raised by the defendant in its statement of defence and the authorities of relied upon by the Defendant. The authority No. 1 Brook Bond Liebig (T) Ltd. V, Mallya [1975] EA 266 concerns a consent entered into during the hearing of suit.

On appeal it was held:

1. a disputed compromise may be challenged in suit itself.
2. a consent judgment may only be set aside for fraud, collusion or for any reason which would enable the court to set aside an agreement. In the present case the agreement was made outside court and before filing suit.

There is no evidence that the agreements were entered into by fraud, collusion or for any other vitiating element.

The allegation made of mistake and misrepresentation do not warrant opening of the agreement which was entered into by defendants after full negotiation. The case of Dedan Kingangi Thiongo held that unless there are raised by Defendant triable issues the court cannot grant leave to defendant

In the decision of court of Appeal in Civil appeal No. 306/2000 Fire Contents Ltd. V Mpaka

Investments Ltd. The court set aside judgment of court and granted leave to defend. The circumstances in that case were quite different. It was a claim for payment of charges for services rendered. The court of appeal found that there was a genuine dispute as to defendants liability to the Plaintiff.

The case of Osodo V. Barclays Bank International Civil Appeal No. 11 of 1980, it was held that where there are triable issues in an application for summary judgment there is no reason for discretion and the court must grant leave to defend.

In the present case, the case of Lucy Momanyi v. Nurein M.A. Hatimy & another Civil Appeal No. 139/2002, this is also a case of defendant raising triable issues this case was a dispute between advocate and client. The court found the defence did raise the defence and raise triable issues and allowed the appeal thereby set aside judgment of High Court no triable issue is disclosed.

The principal debtor to whom accommodation by the bank was guaranteed did not raise the issue of rates. A compromise was reached in which the Plaintiff/Applicant gave up a large proportion of debt in consideration of receiving an assured lesser amount i.e. by sale of securities and receipt of a guaranteed sum of shs.32,500,000/- from the Defendants.

I find no triable issue raised in the defence or replying affidavit.

I allow the application. I order defence to be struck off and enter judgment for Plaintiff/Applicant as prayed with costs of this application.

Delivered and dated at Mombasa this 12th day of October 2005.

J. KHAMINWA

J U D G E

Mr. Satchu:

I ask for 7 days stay to enable me to make formal application for stay pending appeal.

KHAMINWA, J