

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

Civil Case 521 of 2001

**IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
Civil Case 521 of 2001**

CHAWAHIR HASSAN DUALE ALI.....1ST PLAINTIFF

FOMS LIMITED.....2ND PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD.....1ST DEFENDANT

JOSEPH M. GIKONYO

**t/a GARAM INVESTMENTS.....2ND
DEFENDANT**

R U L I N G

Delay in the preparation and delivery of this ruling has been occasioned by the last vacation of the court and my recent illness and hospitalization. The delay is regretted.

By amended plaint dated 24th February, 2004 the Plaintiffs seek,

among other reliefs, an order that the 1st Defendant do render a just, accurate and fair account of the facility variously pleaded in paragraphs 5, 7, 9 and 10. Amended defence was filed in which Plaintiffs' claims were denied. The Plaintiffs have now come to court by chamber summons dated 11th April, 2005 seeking the main orders that, firstly, proper and accurate accounts of the loan facility taken by the 2nd Plaintiff from the 1st Defendant and any prepayments thereof be taken to ascertain the total outstanding amount as at the date of filing the amended plaint, and secondly, that proper and accurate accounts of the total sum of security realized by the 1st Defendant in exercise of its statutory powers of sale be taken to ascertain the amount of the said loan facility that remains outstanding after the said realization. The application is brought under Order 19, Rules 1 and 2 of the Civil Procedure Rules. Under Rule 1 aforesaid, where a plaint prays for an account, or where the reliefs sought or the plaint involves the taking of an account, if the defendant either fails to appear or does not, after appearance, by affidavit or otherwise satisfy the court that there is some preliminary question to be tried, an order for the proper accounts with all necessary inquiries and directions usual in similar cases shall forthwith be made. Under Rule 2 and application for such order shall be made by summons in chambers and be supported by an affidavit when necessary filed on behalf of the plaintiff stating concisely the grounds of his claim to an account, and such application may be made at any time after the time for entering an appearance has expired.

My reading of these two rules which comprise the entire Order 19 of the Civil Procedure Rules is that an application for accounts must be made as soon as practicable after entry of appearance by the defendant and certainly before the defendant files defence, or as soon as practicable after the time for entering an appearance has expired where the defendant has not entered appearance. It appears to me that

where a defendant has filed a defence, in effect joining issue with the plaintiff upon his claims, an application for an account cannot properly lie.

The present suit was filed in the year 2001. The Defendants entered appearance and filed the defence. On 3rd of March, 2005 an amended plaint was filed. On 18th March, 2005 an amended defence was filed. It is too late for the Plaintiff to now seek an order for an account under Order 19. This is a sufficient reason to refuse the application forthwith. But even on merit, the Defendants have shown by the replying and supplementary affidavits filed and arguments by their learned counsel that there are preliminary issues disclosed by the pleadings that require to be tried first. These issues include, one, whether the 1st Defendant's statutory power of sale had accrued in respect to the securities; and, two, what rate of interest was contracted and the amount of such interest due. The determination of these issues must ultimately affect the amount, if any, due and owing from the Plaintiffs to the 1st Defendant.

For the above reasons this application must fail. It is hereby refused with costs to the Defendants. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF NOVEMBER, 2005.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 2ND DAY OF DECEMBER, 2005.