

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil suit 584 of 2002

**CO-OPERATIVE MERCHANT BANK LTD.....
PLAINTIFF**

VERSUS

**ISAAC WACHIRA MIGWI T/A MIGWI & BROTHERS
GENERALCONSTRUCTION.....DEFENDANT**

RULING

The defendant by a letter dated 17th October 1995 was granted a facility of kshs 200, 000. At that time the plaintiff was trading under the name and style of 'Cooperative Finance Limited.' The defendant signed and accepted the offer in the aforesaid letter. The plaintiff, on or about 26th January 1996, changed its name to 'Co-operative Merchant Bank Ltd.'

The defendant charged his parcel of land LAIKIPIA/SALAMA MURUKU BLOCK 4/3/42 (PESI) to secure the aforesaid facility. The defendant defaulted in the repayment of the aforesaid facility and consequently the plaintiff attempted to realize its security. Despite many attempts, to so realize that security, which was evidence by the plaintiff's exhibit MWB-5; the plaintiff could not sell the security and resulted in filing the present suit. The plaintiff's present application seeks for summary judgment to be entered in its favour, on the ground that the defendant's defence is a sham, and does not raise any triable issues to warrant the suit to go for hearing. The application is brought under Order XXXV Rule 1(1) and (2) of the Civil Procedure Rules.

The defendant defence pleads as follows: - · That the defendant did not accept nor sign the letter of offer; · That the plaintiff is not privy to the defendant's contract with the former entity; · That the plaintiff failed to pursue its remedy under the charge; · That the plaintiff did not disburse any funds to the defendant; · That the defendant denies indebtedness to the plaintiff.

In regard to the first issue, the plaintiff exhibited the letter after which clearly had the defendant's signature appended thereof. In regard to the second issue the plaintiff exhibited the charge, which was executed by the defendant and Co-operative Finance Ltd, which subsequently changes its name to Co-operative Merchant Bank, the plaintiff hereof. In regard to the third issue the plaintiff annexed its application evidence of many attempts made, unsuccessfully, to sell the charged property. The fourth and fifth issue meets its answer in the annexed statements of account, which show the defendant's indebtedness.

I have examined the evidence presented by the plaintiff. That evidence was uncontroverted by the defendant, who even though was served, failed to file any papers in opposition to the plaintiff's application and failed to attend the hearing of that application. The evidence presented before court shows that the plaintiffs application dated 19th September 2005 is merited and indeed does prove that the defendant's defence is a sham.

The orders of the court are: - (1) That judgment is entered in favour of the plaintiff as prayed in the plaint. (2) The plaintiff is granted costs of the application dated 19th September 2005.

Dated and delivered 11th November 2005.

MARY KASANGO

JUDGE