REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO 393 OF 2003

1. GALEB GULAM (SUING AS THE EXECUTOR OF THE

ESTATE OF SADRUDIN SHAMSUDIN ESMAIL NURANI)

2. ELDOMART HOLDINGS LIMITED ..... PLAINTIFFS

VERSUS

CYRUS SHAKHALAGA KWAH JIRONGO ..... DEFENDANT

RULING

I have before me a summons in chambers expressed to be brought under order VI rules 13(1) (b) (c) and (d) and 16 of the Civil Procedure Rules, section 3A of the Civil Procedure Act and all enabling provisions of law. The relief sought is that the defendant's defence be struck out on the grounds that it does not disclose any defence in law and that it is an abuse of the process of the court, is scandalous, frivolous and vexatious and it will delay the fair trial of the action. The application is supported by the affidavit of Feizal Sadrudin Nurani. The defendant, Cyrus Jirongo, has filed a replying affidavit in opposition thereto. In addition, the defendant's advocate has filed a notice of a preliminary objection to the application. The substance thereof is that the application is premised upon a suit which is fatally defective and does not lie, and the same should be struck out.

When the application came up for hearing on 9.2.04, it was agreed by counsel, contrary to the usual practice, that both the said application and the preliminary objection be argued together. The usual practice is that a preliminary objection is heard and determined before the merits of the substantive suit application are investigated. In the circumstances of this matter I will consider the points taken in the preliminary objection as points of substantive objection to the application. Be that as it may, I think that in view of the nature of the objection taken, it is necessary to examine the merits thereof before considering the substantive application.

If I understood Mr Wandabwa, counsel for the defendant/respondent alright, and I think I did, the substance of his argument was order VII rule 1(2) requires that the plaint be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint. That requirement was not satisfied here as the plaint was accompanied by a defective affidavit which should be struck out. If the said affidavit is struck out, the suit becomes fatally defective and should consequently be struck out. And if the suit is for striking out, the application to strike out the defence cannot lie as the suit on which it is predicated will be no more. In that respect, I think it is necessary to read in full the verifying affidavit in order to understand the criticism thereof. It reads:-

"I, Galeb Gulam of Post Office Box Number 66672, Nairobi, in the Republic of Kenya hereby make oath and states as follows:-

1. That I am the executor of the estates of Sadrudin Shamshudiri Asmail Nurani (deceased) and that I am conversant with the facts of this case.

2. That I have read the contents of the plaint herein and confirm the correctness of paragraphs 1 to 9.

Sworn by the said Galeb Gulam at Nairobi this 2nd July, 2003."

Mr Wandabwa's objection is that the affidavit has not disclosed the basis upon which the deponent is making the averments on oath: is it from his knowledge, information or belief? He contends that such an omission is fatal. In support of his argument, he cited the cases of *Noor Mohammed v Madhani* [1953] EACA 8 (where it was held that an affidavit which does not say whether the facts sworn to are of the deponent's own knowledge or on information given by someone else, ought not to be accepted in court), *Standard Goods Corporation, Ltd v Harakhchand Nathu & Co* [1950] EA 99 (where it was held that an affidavit made on information should not be acted upon unless the sources of the information are specified) and *Stephen Kibunja v Forest Road Flats Ltd* [HCCC No 371 of 2000] (unreported) where it was held that an affidavit which does not show which part is based on information and which on belief is bad in law.

In response to these objections, Mr Magan, counsel for the plaintiffs, argued as follows. The preliminary objection should be disallowed on equitable grounds for the reason that notice of it was given on 9.1.04 long after the defence had been filed on 12.8.03 (two days outside the prescribed period) and also long after the plaintiff's application was filed on 15.9.03. in that regard, it was further pointed out that the application had been scheduled for hearing on 20.11.03, there had been several adjournments since then and all along there was no indication that a preliminary objection would be taken on the alleged defects of the verifying affidavit. He also contended that the plaintiffs had complied with the Civil Procedure Rules as order VII rule 1 (2) only required a plaint to be accompanied by an affidavit verifying the correctness of the averments in the plaint. Paragraph (2) of the affidavit in question had done exactly that, it was contended. Counsel further argued that sub rule (3) of rule 1 of order VII gave the Court a discretion to strike out or not strike out plaint if either it was not accompanied by a verifying affidavit or it was accompanied by a defective affidavit. It was submitted that the present case was a proper one for exercising the discretion to save the plaint for if due regard was had to the contents of the plaint, the defence, and the agreement exhibited in support of the application, it was evident that the plaintiff was verifying the matters from his own personal knowledge. In those circumstances it was not necessary to ask the plaintiff to depose that the facts were within his own knowledge. If, however, the Court found that it was necessary to do so, counsel sought leave to file an affidavit to that effect. In that regard it was submitted that the Court has a discretion under order XVIII rule 7 to admit any affidavit notwithstanding any irregularity in form and further that under its inherent power under section 3A, the Court has discretion and jurisdiction to order a defective affidavit struck out and to grant leave to file a fresh one. Reliance was placed on the unreported High Court decisions of *Microsoft Corporation v Mitsumi Computer Garage Ltd* [HCCC No 810 of 2001], *Jovenna East Africa Ltd v Silvester Onyango Etal* [HCCC No 1086 of 2002] and *Registrar of Co-operative Societies v Pearl Dry Cleaners Ltd* [HCCC No 1440 of 2000]

As regards the substantive application for striking out the defence, it was pointed out that the plaintiff's claim was for Kshs 45,843,750/= together with interest thereon at 15% per annum from 1.7.2003 until payment in full and vacant possession of the property known as subdivision No 1677 Section 1, Mainland North, Ziwani Road Nyali. And in the affidavit in support of the application, it had been deposed that by a written agreement dated 10.5.02 and exhibited thereto as "FSN 2", the defendant had acknowledged being indebted to the estate of Sadrudin Esmail Nurani in the sum of Kshs 45,000,000/= which the defendant undertook to pay to the estate on or before 15.2.02, that since the execution of the said agreement the defendant had not paid a single cent and that the defendant had made several promises to pay but he had not honoured those promises. It was further pointed out that none of the depositions in the supporting affidavit had been denied by the defendant. That notwithstanding, the defence canvassed in the written statement of defence in paragraphs 2,4 and 5 was that the debt had been paid in full. It was further contended that paragraphs 1-7 of the replying affidavit relate to matters or events that occurred before the execution of the agreement on the defendant's indebtedness to the plaintiffs and are accordingly

irrelevant. As regards the property whose vacant possession was sought, the plaintiff's dismiss the defendant's defence that they cannot have both the agreed money repaid and the property offered as security thereof.

In reply, Mr Wandabwa, argued that it was not an abuse of the court process for the defendant to raise points with regard to the verifying affidavit which even the plaintiff's themselves concede may be omissions. As regards the point that it was evident from the plaint and other material on record that the plaintiff had deposed to matters within his own knowledge he contended that first, from the contents of paragraph 6 of the plaint it was clear that the matters pleaded therein involved the 2nd plaintiff and accordingly they could not be within the knowledge of the 1st plaintiff and yet he had not stated whether he was informed of them by the 2nd plaintiff, and secondly, gaps or omissions in an affidavit could not be filled or supplied by reference to matter in other documents however accurate those other documents were. As regards the contention that all order VII rule 1 (2) required was a deposition that what was contained in plaint was correct, he argued that the affidavit in which the deposition was made should be one known to the law. Counsel however conceded that the Court had a discretion on whether or not to strike out a plaint if the verifying affidavit was struck out. Be that as it may, he argued, the exercise of such discretion infavour of the applicant was not automatic and the same had to be properly invoked and the Court had to be satisfied there were good grounds for exercising it.

On the substantive application, counsel argued that the plaintiffs could not have judgement on the applications their only prayer was for striking out the defence. He conceded that the defendant had not paid the money claimed to be due to the plaintiff. He said the defendant's contention was that security for that money had been given in the form of the suit property and the plaintiffs could not be awarded both the money and the security. In his view their defence, which raised that point could not be struck out as it raised the issue of whether the plaintiffs could have the money and the security or only one of them. He further contended that paragraphs 1- 7 of the replying affidavit were geared to showing that there was no consideration for the agreement relied upon as it was entered after the expiry of the limitation period for the debt in question and that if there was consideration which was not good consideration in law. He conceded that he had not pleaded want of consideration in the defence but contended that such an omission could be cured by an amendment to the defence. The matter of consideration is therefore another issue. On the question of how the defendant was prejudiced by the alleged defects in the verifying affidavit, he contended that as a result of the defects the defendant did not know the basis on which the allegations in the plaint were made and could not therefore effectively cross examine the plaintiff on those allegations at the trial.

In response to Mr Wandabwa, Mr Magan argues that there was no formal application to be made for the exercise of the Court's discretion and that he had made an informal application. As regards alleged want of consideration for the agreement on which the suit is predicated, counsel argued that that was water under the bridge: such considerations had been superseded by the written agreement.

I have now considered the application, the objection thereto and the above arguments by learned counsel. I think the issues which call for determination are whether the preliminary objection is belated, the proper format and content of a verifying affidavit, the effect on a plaint of a defective verifying affidavit, and whether or not the defence on record should be struck out as disclosing no defence in law or for being an abuse of the process of the court, scandalous, frivolous and vexatious or intended to delay the fair trial of the action. I take the following view of those matters.

A preliminary point of law may be taken at any stage of the proceedings. Accordingly the plaintiff's arguments herein that the objection should not be entertained on equitable grounds for the reason that it is made after the defendant has filed a defence and the plaintiffs have filed an application to strike out the defence (which application the defendant has given notice of intention to oppose by filing grounds of opposition and a replying affidavit to boot) is for rejection and is hereby rejected. I should therefore examine the merits of the objection.

Order VII rule 1 (2) requires a plaint to be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained therein. I accept counsel for the defendant's submission that a

verifying affidavit should be a proper affidavit in the first instance. In my judgement, an affidavit which, as here, merely says the deponent is conversant with the facts and verifies the correctness of the averments in the plaint is not a proper affidavit for the following reasons. Order XVIII rule 3 of the Civil Procedure Rules provides that affidavits should be confined to such facts as the deponent is able of his own knowledge to prove provided that in interlocutory proceedings, or by leave of the Court, an affidavit may contain certain statements of information and belief showing the sources and grounds thereof. Now a verifying affidavit is not filed in interlocutory proceedings for a plaint does not originate such proceedings and is not filed with the leave of the Court either but as a procedural obligation. There is therefore no need to warrant or even admissibility of any deposition that the facts stated therein are on belief and/or information. To that extent all the authorities cited by the defendant are irrelevant as they dealt with the proper form of affidavits in interlocutory proceedings. A verifying affidavit therefore ought to be confined to matters which the plaintiff can depose from his own knowledge to be correct. In that regard the statement that the plaintiff is conversant with the facts of the case is not an adequate or satisfactory deposition for it is not synonymous with the statement that the plaintiff has personal knowledge or information. It is not clear here what the basis of the plaintiff's knowledge of the facts was. In that regard, the gap in the affidavit cannot be filled by considering other material on record. It must be clear on the face of the affidavit that the plaintiff is deposing from his own knowledge or not at all. Being of that persuasion it follows that I find the affidavit defective for failure to disclose whether it is made from the plaintiff's own knowledge. There is yet another defect in the affidavit. The plaintiffs are two. Yet the affidavit is made only by the 1st plaintiff. Nowhere does he in the said affidavit state that he is making it on behalf of himself and the second plaintiff and the authority and basis on which he would do so on behalf of the second plaintiff which is a limited liability company is not disclosed at all. In short the verifying affidavit is inadequate and doubly defective. Should the Court overlook those defects? Order XVIII rule 7 allows the Court to overlook defects of form in any affidavit. In my view the defects I have highlighted are not defects of form: they go to the very validity of an affidavit as such. They cannot therefore be overlooked. It follows that the verifying affidavit is for striking out.

Should the suit itself be struck out on that basis? It is common ground, and the authorities cited by the plaintiff's counsel show, that the Court has a discretion not to strike out a plaint which is accompanied by a defective verifying affidavit. In that regard I accept party may make an oral application for the exercise of such discretion and the Court should exercise its discretion as appropriate in the light of the circumstances. Speaking for myself, I am of the conviction that rules of procedure should be seen as hand maidens of justice and not its mistress and, accordingly, unless procedural lapses have caused the adversary a prejudice which cannot be compensated with costs or there is a clear manifestation of an intention to overreach, the same should not be accorded fatal consequences. Here I cannot see what prejudice the defendant has suffered for the suit is at its very early stages and the plaintiff far from attempting to overreach has done his incompetent best to comply with the rules. I am accordingly inclined to strike out the verifying affidavit and to grant leave to the plaintiffs to file a proper and compliant affidavit within 7 days of today.

As regards the application to strike out the defence I am persuaded that although the plaintiff's claim for Kshs 45,000,000/= is incontestable on the material placed before me, on the pleadings as they stand and in particular paragraphs 6 and 7 of the plaint read in juxtaposition with paragraphs 4 and 5 of the defence, the defence on record does raise one bona fide arguable point, namely whether or not the plaintiffs are entitled to judgement for both the debt admitted and the property which was given in security thereof or they should be put to an election so to speak. As regards the allegation issue of consideration, I must say that the Court cannot consider an issue to be raised otherwise than by the pleadings. The pleadings here raised no such issue and defendant's counsel's submission thereon were lost on me. Now where the defence raises a substantial and bona fide arguable point, can it be for striking out under order VI rule (13) (1) (b) (c) and (e) of the Civil Procedure Rules? Obviously not. And I cannot enter judgement for the amount which I find due to the plaintiff as the relief is not sought in the alternative but conjunctively with vacanty possession of the property transferred to the 2nd plaintiff as security.

The upshot of this matter is that the verifying affidavit is struck out, the plaintiffs are granted leave to file a fresh and compliant affidavit within 7 days of today, and the plaintiff's application to strike out the defence refused. The defendant will have the costs of the application and the preliminary objection.

Dated and Delivered at Nairobi this 2nd day of March 2004.

A.RINGERA

JUDGE