



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 205 of 2000

INDUSTRIAL & COMMERCIAL

DEVELOPMENT CORPORATION..... PLAINTIFF

-VERSUS-

BARASELL CO. LTD..... 1st DEFENDANT

RODAH JEPTUI CHEBON..... 2nd DEFENDANT

JULIUS KIPROP CHEBON..... 3rd DEFENDANT

RULING

This is a motion on notice brought under O.XXXV rules 2 and 3 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. It was dated and filed in court on 5th June, 2003, and seeks order that summary judgment be entered against the defendants for Ksh.5,556,003.85 with interest at 24% per annum from the date of filing of this suit, and that the costs of this application and the suit be in the cause.

The application is founded on the grounds that the defendants are truly indebted to the plaintiff in the sum of Ksh.5,556,003.85

advanced to them by the plaintiff and were indebted at the commencement of this suit; that the defendants have no defence in this suit and that their defence is a sham and raises no triable issues. It is supported by the annexed affidavit of ISAAC B. MOGAKA, the Corporation Secretary of the Plaintiff/applicant. In the said affidavit, Mr. Mogaka reiterates that the defendant's defence herein is a sham. To his affidavit are attached copies of a loan agreement, guarantees, disbursement slips, demand notices, statements of account and a cheque register. He avers that the defendants in their defence have admitted taking the loan and are only delaying the plaintiff from trying the suit to recover the money they owe it. He also avers that on 9th June, 2000 the defendants paid Ksh.5,000/= in loan repayment and said they would pay the balance in due course. A copy of the receipt is attached as exhibit IBM 7.

At the hearing of this application on 25th March, 2004, Mr. Kinyanjui appeared for the plaintiff's/applicants whereas there was no attendance for the defendants. By an affidavit sworn by one Moku Otara, a court process server, and filed in court on 29th July, 2003, the defendant's advocates, M/s Mwangi Gachoka and Co. were

served on 21st July, 2003. By another affidavit sworn and filed by the same process server on 24th March, 2004, the process server aversthat he served a HEARING NOTICE for this matter due for hearing on 25th March, 2004 upon Mr. Mwangi advocate, personally. Mr. Mwangi accepted service but refused to sign and stamp at the back of any copy, remarking that he has filed an application to withdraw from acting and that he is looking for the defendants personally to serve them.

The court notes from the court file that the advocates for the defendant herein filed an application dated 3rd June, 2003 for an order for leave to withdraw from acting for the defendants. It would appear that to date, that application has not been heard. Under O.III rule 12 (1) of the Civil Procedure Rules, unless and until an advocate has served on every party to the cause or matter a copy of the court order to the effect that the advocate has ceased to be an advocate acting for the party, such advocate shall be considered the advocate of the party to the final conclusion of the cause or matter including any review or appeal. As matters stand now, Messrs Gachoka Mwangi & Co., advocates, are still on record for the

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defendants and are therefore considered to be the defendants' advocates. On 15th March, they were served with a hearing notice to the effect that this application would come for hearing on 25th March, 2004. They were therefore served in sufficient time to attend, and in their absence, the court proceeded ex parte.

Mr. Kinyanjui for the applicant argued that there were two loans. The first loan agreement was made on 13th April, 1995 and the sum borrowed was Ksh.1,330,000.00. This agreement was signed by the first defendant. The second loan agreement was made on 29th June, 1995 and sum borrowed was Ksh. 670,000/= . On both loans, the rate of interest was 24%. This was not a fixed rate, as it was liable to revision by the plaintiff. Both loan agreements were signed and sealed by the company, and for each of the two loans, the second and third defendants each provided a personal guarantee for repayment of the loans. The first defendant defaulted in the repayment of the loans, and made a few scattered payments. The default continued in spite of persistent demands. All the clauses in the defence consist of mere denials and some admissions. At the end of the day they know all about the loan and

non payment but they don't pay. Counsel thereupon urged the court to enter summary judgment against the defendants for the sum of Ksh.5,556,003.85, interest at 24% from the date of filing this suit, and costs of the application and the suit.

The plaintiff filed herein is very definite and specific. It seeks the recovery of the amounts of money advanced by the plaintiff to the first defendant, while the second and third defendants are sued in their capacities as guarantors. The plaintiff has exhibited copies of the loan agreements dated 13th April, 1995 and 29th June, 1995, and the duly executed personal guarantees of the two defendants also dated 13th April, 1995 and 29th June, 1995. Also attached to the application are copies of the disbursement slips, demand notices, and statements of account. On that basis, the plaintiff has established such a prima facie case as would entitle them to summary judgment under O.XXXV rule 1 of the Civil Procedure Rules. Order XXXV rule 2, however, accords the defendant(s) the right to demonstrate by affidavit, or by oral evidence or otherwise that he (they) should have leave to defend the suit. As the defendants have not, however, filed any replying affidavit or grounds of opposition to the application for summary judgment, the court will have recourse to the defence herein in order to ascertain whether it raises any triable issues.

The defendant's statement of defence is dated 2nd April, 2000 and was filed in court on 3rd April, 2000. In paragraphs 2 and 4 of that statement, the defendants admit that there were agreements between the plaintiff and the 1st defendant for the sums of Ksh.1,330,000/= and Ksh.670,000/= to be advanced by the plaintiff to the first defendant by way of loans. However, the defendants deny that the money was disbursed to the

first defendant. Among the plaintiff's bundle of documents attached to the supporting affidavit are copies of two letters dated 3rd May, 1995 and 3rd August, 1995. The letters were both addressed by the plaintiff to the first defendant, and they were forwarding cheques No.102214 for Ksh.1,330,000/= and No.103710 for Ksh.670,000/=, respectively, in favour of the first defendant. This disposes of the defendants' denial that any money was advanced and/or disbursed to the first defendant.

In paragraph 3 of the defence, the 2nd and 3rd defendants deny ever executing a guarantee in favour of the first defendant as alleged

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in paragraph 5 of the plaint. Again, in exhibit IBM 2A and 2B of the bundle of documents attached to the plaintiff's application are copies of the personal guarantees duly signed by the 2nd and 3rd defendants.

Paragraph 5 of the defence then states that if any monies were advanced by the plaintiff to the 1st defendant, then the 2nd and 3rd defendants were discharged of their liabilities as guarantors after the plaintiff made numerous variations of the loan between her and the first defendant. Let it suffice to say that this allegation is unsubstantiated as there is no evidence to support it.

In paragraph 6, the defendants deny ever having received the notice dated 18th November, 1999 and/or any other notice asking them to repay the money as alleged in the plaint. Copies of the letters dated 18th November, 1999 addressed by the plaintiffs to each of the three defendants are exhibited in this application as exhibit No. IBM 4A, B and C.

The defence also alleges that the defendants have severally requested for a full statement of accounts showing how the plaintiff arrived at the figures demanded but the plaintiff failed and/or has refused to supply the same. A copy of the statement of accounts is also attached to the application, and covers the period from 2nd May, 1995 up to 30th June, 2002. During that period, the first defendant's account is credited with payments of Ksh.100,000/= on 26th April 1996; another Ksh.100,000/= paid on 7th March, 1997; a sum of Ksh.2,000/= paid on 24th May, 1999; a sum of Ksh.70,050 paid on 24th January, 2000; and a sum of Ksh.5,000/= paid on 9th June, 2000 a copy of the receipt whereof is attached as exhibit No. IBM 7. The statement is interspersed with copies of annual statements for the years 1995, 1996, 1997, 1998 and 1999. I don't see why the plaintiffs would refuse to supply copies of those statements of accounts when such a statement is so elaborate and unchallenged. I don't accept the defendant's allegation as factual.

In total, I find that on a balance of probabilities, the defence herein is not only a sham, but a hollow sham, and the plaintiff has established its claim against the defendants as pleaded in the plaint. Although the plaintiff's application seems to be grounded on rules 2 and 3 instead of rule 1 of O.XXXV of the Civil Procedure Rules, the court has power to effect the correction under s.99 of the Civil Procedure Act, which correction is hereby effected. The court,

therefore, hereby enters judgment for the plaintiff against the defendants, jointly and severally, for-

- (a) the sum of Ksh.5,556,003.85
- (b) interest thereon at the rate of 24% per annum
- (c) costs of the suit together with interest thereon at court rates from the date of filing of the suit until payment in full.

(d) Costs of this application.

Dated and delivered at Nairobi this 2nd day of April 2004.

L. NJAGI

JUDGE