



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET.**  
**CIVIL SUIT NO. 229 OF 2000**

**TRANSNATIONAL BANK LTD.....PLAINTIFF**

**VERSUS**

**HENRY WANYAMA KHAEMBA..... DEFENDANT**

**RULING**

Trans-National bank Limited hereinafter called the bank instituted in suit against Henry Wanyama Khaemba on 27/9/2000, in pursuit of recovery of the sum of Kshs4,854,949.70 together with interest therein at bank rates, costs plus VAT and interest on the aforementioned sum and on the costs and VAT.

It bases its claim on an overdraft and on a loan facility, which it granted to Khaemba in 1996.

Khaemba who disputed the debt averred that the overdraft facility had been fully secured by way of a legal charge over his property, which property, the bank had disposed of, six months prior to instituting the suit, and that it had failed to account to him. It was also his averment that the property had been sold at a gross undervalue and that the sale was illegal, unlawful, null and void. He claims to have paid further sum of Kshs200,000/- to the bank before learning of the sale, which payment was never accounted for. He denies that the bank is entitled to the interest that it now demands. It is therefore his prayers inter alia, that the banks suit be dismissed with costs, that the aforementioned sale be declared unlawful, that or be declared a gross under-sale and that it be ordered that the bank provide him with a true and accurate account and he be allowed a set-off to the banks claim after the above transactions have been concluded.

The application before me now is made under orders VI rule 13 1(b) (c) (d) and XXXV rule 1 (1) and (2) of the Civil Procedure Rules. The bank seeks orders to strike out the defence and that judgment be entered with favour against Khaemba who I shall hereinafter refer to as the respondent. It also seeks an alternative prayer, namely that summary judgment be entered for it against the respondent as prayed in the plaint.

The application is based on several grounds, but mainly that the respondent's defence offers no plausible answers to the applicant's claim, that the debt is owing and he has acknowledged the indebtedness and that his defence consists of mere denials.

First and foremost, this application is for the striking off, of the defence. I am well alive to the fact that striking off of pleadings is a very draconian measure and it is a discretion which should be exercised cautiously and only in very clear cases, for where life can be breathed into a pleading to sustain it, the court should allow an amendment, it being well understood that the applicant would be well compensated by costs.

Secondly, and alternatively, the bank wishes to have an order for summary judgment. An order for

summary judgment can only be granted where the claim is liquidated and where it is clear to the court that the defence raises not a single triable issue, that it is so hopeless and there would be no need for the matter to go to trial.

Having said all that, the court is expected to peruse both the plaint the defence and the pleadings filed in support or against the application with a view to establishing whether the application is well merited. I do bear in mind the fact that the respondent was served with this application and that he filed a detailed replying affidavit, and though a hearing notice had been duly served he was not represented during the hearing.

Order VI rule 13 (1) (b), (c) and (d) and XXXV rules 1 (1) and (2) under which this application is made stipulates as follows:

”(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that -

- (a) it discloses no reasonable cause of action or defence; or
- (b) it is scandalous, frivolous or vexatious; or
- (c) it may prejudice, embarrass or delay the fair trial of the action; or
- (d) it otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be”.

Order XXXV rule 1 (1):

“ In all suits where a plaintiff seeks judgment for

- (a) a liquidated demand with or without interest; or
- (b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term

has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,

where the defendant has appeared the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits. (2) The application shall be made by motion supported by an affidavit wither of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed”.

My understanding of order XXXV rule 1 is that the bank, can only file one affidavit in support of its application. There is no provision in the said order to cater for supplementary or further affidavits. The applicant must have a very clear claim and hence the requirement that, the deponent must be a person who is very well versed with the circumstances that would support the claim, and that he be a person who can swear positively to the said facts.

This applicant has filed supplementary and further affidavits, contrary to the mandatory provisions of Order XXXV and I would not hesitate in ordering the striking out of the supplementary and further affidavits of 5/8/2002 and 17/10/2002 respectively both of which tend to support the alleged indebtedness, which would leave me with the supporting affidavit of 12/11/2001. But what does the said affidavit support?

I have looked at it and I do note that the deponent who swore it 12/11/2001 has annexed their documents in bundles, which for some strange reasons are marked as exhibits referred to in an affidavit of

9/11/2001. The supporting affidavit and the one that is referred to in the exhibits are clearly different, having sworn on different dates with the annexures bearing an earlier date, and one can safely assume that the exhibits are annexures to another affidavit, leading to a situation where the affidavit before me is not supported by any annexures, which would mean that it contains mere statements of deposition without any supporting evidence, and it would be very difficult in the circumstances to convince the court that the defence should be struck out or even that judgment should be entered in the banks' favour.

Be that as it may, the respondent has raised issues pertaining to the mode of sale of the property which formed the security for this facility, he questions the value at which the property was disposed of. He also takes issue with certain credits, which are owing to him by the Bank.

In my humble opinion, the issues that he raises cannot just be wished away, and for those reasons it cannot be said that his defence vexatious, frivolous or scandalous or that it is an abuse of the process of the court. These are triable issues and it is trite law that where the defendant raises even one triable issue, it is not for the court to scrutinize whether the defendant it will succeed or not, the defendant should be allowed either unconditional or conditional leave to defend the suit.

The upshot of all this is that the application must fail in its entirety with costs. The respondent shall have unconditional leave to defend the suit. Dated and delivered at Eldoret this 26th day of May 2004.

**JEANNE GACHECHE**

**JUDGE**

Delivered in the presence of: