



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CIVIL SUIT NO. 127 OF 1998

CO-OPERATIVE BANK OF KENYA LIMITED PLAINTIFF

VERSUS

1. LAKE PUBLISHERS &

ENTERPRISES LTD..... 1ST DEFENDANT

2. JAMES CHARLES ODAGA 2ND DEFENDANT

3. ASENATH BOLE ODAGA..... 3RD DEFENDANT

4. PETER ODHIAMBO ODAGA 4TH DEFENDANT

JUDGMENT

In a Notice of Motion dated 4th December 2003 expressed under Order 35 rule 1 (1)(a), 2 and 8 of the Civil Procedure Rules. The application is seeking one major prayer namely:

a. That summary judgment be entered for the plaintiff against the defendants herein as prayed in the plaint.

It is an application for summary judgment against the defendants jointly and severally. The application is supported by the affidavit of one Joseph Okal who is the branch manager of the applicant. It was submitted on behalf of the applicant by Mr. Owiti Advocate that the defendants took a loan from the plaintiff which they never repaid. The application was served on the defendants but never took any step to file any papers in opposition. When the application came up before me on 25th March 2004 the respondent's Advocates applied for adjournment, though the application was resisted by Mr. Odhiambo Owiti Advocate, I granted the application, in order to give the respondents a chance to put in their papers and to enable the parties to ventilate their case before me for determination.

On 22nd April 2004, the application came up for hearing before me, However the respondent's Advocate made a similar application for adjournment. Suffice to say that the respondents did not file any papers to resist the application and as a result I rejected the application for adjournment for it was unmeritorious. The matter proceeded and Mr. Masese Advocate did not utter a word in favour of his clients – the respondents.

The plaintiff's claim against the defendants can be found in paragraph 5 of the plaint which states:

"Further and/or in the alternative the plaintiff's claim against the second, third, and fourth defendants as in the sum of KSh.1320,429.25 due and owing by the second, third and fourth defendants as at 29th October 1996 on account of personal guarantees dated 20th March

1995, executed by the second, third and fourth, defendants to pay to the plaintiff and satisfy on demand all sums of money owed to the plaintiff by the first defendant as aforesaid and for interest thereon at the Bank rate of interest calculated on daily balances at monthly rests upon the said sum of money and for Bank charges thereon upon the said sum of money."

The Bank is seeking an interest on the principal sum and Bank charges both at 32% per annum calculated on daily balances at monthly rests from 29th October 1996 until payment in full.

According to the documents attached to the application sometimes December 1994, the plaintiff agreed with Dag Hammerskjold Foundation to advance loans to full time publishing professionals as would be recommended by the foundation's Advisory Board. Which means that Dag Hammerskjold foundation was to offer a full guarantee for the loans advanced by the plaintiff. The foundation appointed Kenya Rural Enterprises Programme to be facilitating the agreement. The said agreement provided and conferred on the plaintiff the right of subrogation to stand in the place of the foundation, if any of the person or institutions advanced loan failed to repay the sums advanced.

On or about 11th November 1996 upon request by the plaintiff and the recommendation by Kenya Rural Enterprises Programme, the foundation repaid the amount due on the facility as per its obligation under the agreement with the plaintiff. As a result the Bank is now obliged to demand and seek the recovery of the said monies on behalf of the foundation under clause 2.4 of the agreement between the Bank and the foundation which provides for subrogation. Under the said clause the Bank was mandated to take all reasonable steps to attempt to recover any monies paid by the foundation, which is due and outstanding. The plaintiff now wants to enforce that obligation by seeking the present application for summary judgment.

In **Civil Appeal No. 124/1996 East African Packaging Industries Ltd. Vs. Zoeb Alibhai, Bosire Ag. J.A.** Held:

"In an application for summary judgment under XXXV rule 1 of the Civil Procedure Rules, the duty is on the defendant to show he should have leave to defend www.kenyalawreports.or.ke the suit. His duty is limited to showing, prima facie, the existence of triable issues or that he has an arguable case. In the other hand a plaintiff who is able to show that a defence raised by a defendant in an action falling within the purview of Order XXXV above is shadowy or a sham is entitled to summary judgment."

In **Continental Butchery Ltd. Vs. Samson Musila Nthiwa Civil Appeal No. 35/1977 Madan J.A.** held:

"With a view to eliminate delays in the administration of justice which would keep litigants out of their just dues or enjoyment of their property the court is empowered in an appropriate suit to enter judgment for the claim of the plaintiff under the summary procedure provided by order 35 subject to there being no triable issue which would entitle a defendant to leave to defend."

It is clear that the purpose of summary judgment is to eliminate delays in an action filed by a party so that he can enjoy the fruits which are due and to allow a person to enjoy his property for there is no triable issues in his path. If there is no triable and/or arguable case in existence, it would be automatic to enter judgment for such litigant for there is no proper defence to hinder the grant of the application.

In **Jacob Vs. Booths Distillery Co. 85 LTR at 262.** It was held:

"There are some things too plain for argument and where there were pleas put in simply for the purposes of delay which only added to the expense and where it was not in aid of justice that such things should continue ----- and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who are endeavouring to enforce their rights."

It is clear from the documents that the defendants were advanced a sum of KSh.980,000/= by the Bank under the instruction of the foundation which was meant to empower publishers through the Kenya Rural Enterprise Programme. The role of the Bank was to facilitate the lending of monies availed by the foundation which is a non profit organization established and based in Sweden. I am unable to discern how the interest of 32% as claimed in the plaint was arrived as it is not clear from the document which has been filed on behalf of the plaintiffs. It is also not clear how much of the sum of KSh.980,000/= was repaid back by the defendants and how much was paid by the foundation to the plaintiff, as a result of the default of defendants so as to give an accurate figure payable under the contract.

As stated by the plaintiff sometimes in November 1996 through the recommendation by K-REP, the foundation repaid the amount due on the facility. The present suit was filed on 18th May 1998 and there is no reason why the plaintiff delayed to file the suit in order to recover the monies paid by the foundation, as it was the obligation of the plaintiff to recover and pay back all monies paid in default by the foundation. According to the affidavit in support of the present application the suit is brought to enforce the right of subrogation for it was obligated and/or mandated to take all reasonable step to recover on behalf of the foundation, However in paragraph 4 of the plaint states:

"The plaintiff's claim against the first defendant is in the sum of KSh.1320,429.25 due and owing by the first defendant to the plaintiff as at 29th October, 1996 being the balance of money lent and/or overdraft allowed and money paid to the use of the first defendant at its own request and instances and for interest thereon at the Bank rate."

The defendants in their defence vehemently deny owing the plaintiff the claimed sum or any part thereof and on the same breadth the issue of 32% interest is also totally denied. The issue of subrogation is not pleaded in the plaint. It appears as though the monies claimed is due and owing to the plaintiff which is not correct. There is no evidence that the foundation is still interested in the money. There is no material that they actually exist to receive the money.

In my view the purpose of order 35 of the Civil Procedure Rules is meant to aid litigants against delays and to allow him to enjoy the fruits of his case in which the defendants has no triable issues or a defendant who has no proper defence to the claim. Order 35 is summary in nature and any person seeking to benefit from the import of the summary nature must act in a swift and prompt manner. The application for summary judgment must be contemporaneous with the close of pleading in order to justify the grant of the orders sought. In my view since the order is meant to circumvent delays any person who delays an application for summary judgment would not be able to benefit from that summary procedure.

As stated earlier the suit was filed in court on 18th May 1998 and the defence was filed on 29th May 1998, which means pleading, must have closed on or about 15th June 1998, while the present application for summary judgment was filed on 9th February 2004. It is now six years since the suit was filed by the plaintiff and of course six years down the line the applicant wants to invoke the summary nature of order 35 of the Civil Procedure Rules and in my judgment such is not available and is not amenable to the plaintiff in the circumstances of the matter. The delay is inordinate and no excuse was provided by the applicant to enable me to consider their plea, which means the application is not justified for it would be against the objectives and intention of order 35 of the Civil Procedure Rules. The delay is self inflicted and the defendant has not in any where kept them away from enjoying their just dues and I am as an administrator of justice powerless in this appropriate suit to enter judgment for the plaintiff. The plaintiff is to blame for the mischief order 35 of the Civil Procedure Rules is meant to cure.

The upshot is that the application is dismissed with costs to the defendants.

Dated and Delivered and Signed at Kisumu.

This 20th day of May 2004.

MOHAMED A. WARSAME

AG. JUDGE

Judgment delivered and read in open Court in the presence of:

Mr. Owiti for the applicant.

Mr. Menezes for the respondent.