



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 1104 of 2002

GUARDIAN BANK LIMITED..... PLAINTIFF

VERSUS

SKYFLYERS TRAVEL AND TOURS LIMITED..... DEFENDANT

RULING

This is an application by the Plaintiff, a commercial Bank, byway of a Notice of Motion dated 7th May 2004. It is made under Orders VIII, Rule 1 (2), XXXV, Rule 1 and the Evidence Act, Cap80, Laws of Kenya. The application seeks the following orders: -

1. That the Defence dated 4th November 2002 and filed in this Honorable Court on 7th November 2002 be struck out pursuant to the Mandatory Provisions of Order VIII, Rule 1 (2) of the Civil Procedure Rules.
2. That in the alternative and without prejudice to prayer 1 hereinabove the defence herein be dismissed and Summary Judgment be entered for the Plaintiff against the Defendant as prayed in the Plaintiff.
3. That the costs of this application be provided.

The application is supported by an affidavit sworn by one Carroll W. Kabiru who is a legal officer with the Plaintiff Bank on 7th May 2003. The grounds given for the application are as follows: -

1. That the Defence dated November 2002 and filed in this Honourable Court on 7th November 2002 was filed out of time by the rules in pursuance of entering an appearance.
2. No formal order or leave of the court was sought to file the aforesaid defence in clear contravention of the Mandatory Provisions of Order VIII, Rule 1 (2).
3. The Defendant is truly and justly indebted to the Plaintiff and paragraph 3 of the Defence alludes to the circumstances surrounding the indebtedness.
4. The defence is a mere sham and bare denial, which attempts to shift the Defendant's liability/indebtedness to persons not parties to this suit and is thus vexatious and frivolous.
5. The Defendant admits demand and Notice of Intention to sue yet does not state that the Defences herein constituted a reply to demand and notice to sue.
6. The custom and trade in Banking in this Court's jurisdiction and the reasonableness or otherwise

of interest rates charged by the Banks in this Court's jurisdiction is a matter this Honourable court can take

judicial notice of and especially on a running overdraft current account.

The application is opposed by the Defendant Company, which filed a Replying Affidavit sworn on 5th June 2004 by its director, Mr. Naval Kishore Bhalla. The Plaintiff in return filed a further affidavit pursuant to leave of this Court. It is made by the Branch Manager, Mr. Pallvi Gudka on 18th June 2003. Before the hearing of the application, the parties recorded a consent on 3.10.2003 in which the issue of filing of Defence out of time was amicably resolved. Prayer 1 of the application was therefore spent leaving Prayers 2 and 3 for the Court's determination.

I have carefully considered the Plaintiffs application, supporting and further affidavit, the Replying Affidavit, the pleadings and counsel's submission. The relationship of banker and customer between the parties is common ground and undisputed. The Defendant in its defence admits that it had maintained a current account with the Plaintiff but avers that the account should not have been overdrawn under any circumstances.

That if the Plaintiff allowed it to overdraw its account, then it was a private arrangement, made without the Defendant's authority, between the Plaintiff and the Defendant's manager.

The Defendant denies owing a sum of Kshs. 1, 532, 658. 55 together with interest at the rate of 36% p.m. as claimed in the plaint. Lastly, the Defendant in its defence contends that if any monies are owing, it is as a result of illegal debits from the account and was used by the Plaintiff to cover shortfalls in 3rd parties accounts and in particular two customers, Minar Restaurants and Afrigas Limited.

The aforesaid position is explained and elaborated by the Defendant in its Replying Affidavit. After due consideration of all the foregoing, I find that the letter dated 10th December, 2001 is quite crucial in this matter and it may be necessary to fully set out

its content herein: -

December 10, 2001

"The Manager Guardian Bank Limited Brick Court House

Westlands

NAIROBI

ATTENTION: MRS PALVIGUDKA

RE; ACCOUNT NUMBER 015504-0100

I refer to your letter dated November 26, 2001 and of Reference number GBL/P.G/0152 and have noted its contents.

You are fully aware that the debt has remained unpaid because of your taking unreasonable abrupt decision not to allow us the hitherto allowed facilities of credit against uncleared effects. Till the time this was allowed we made an average payment to this account of Kshs.50, 000/- to Kshs.60, 000/- on daily

basis and reduced the debt from kshs. 3,400,000/- to the present outstanding amount. You are fully aware of this fact.

The present situation has been created entirely by you. The figures shown by you is incorrect and the interest charged by you is not inline with the interest applied by the banks.

Our companies have made full efforts and have paid you in full and because of the attitude of your bank we have moved out. We with your personal untiring efforts we were doing extremely well and meeting our daily commitments honorably and found the obstacles created by your bank as unreasonable and not conducive to the banking ethics.

Kindly let us have the revised figure of the outstanding amount for our perusal and comments.

Yours faithfully

SKY FLYERS TRAVEL & TOURS LIMITED

J.K. Bhalla

FINANCIAL DIRECTOR"

I do agree with the Plaintiff's counsel that this letter amounts to an admission of a debt owing to the Plaintiff by the Defendant. The words in paragraph 2 speak for themselves. The Defendant says that it "reduced the debt from Kshs. 3, 400, 000/-. The date of this

letter is 10th December 2001. According to the statement of Accounts of the Defendant produced by the Plaintiff, the amount outstanding was kshs 1, 402, 162. 70.

From the contents of the said letter, it would appear that the Defendant decided to stop payment of the debt because the Plaintiff stopped the credit facility it had given the Defendant wherein the Defendant was allowed to enjoy credit facilities against uncleared effects or cheques. The Defendant also questions the interest charged by the Plaintiff. In the said letter the Defendant claims that the debt had been paid in full but having perused all the documents there is no evidence of any such payment. True to its word, the Defendant stopped all transactions and moved out of the Plaintiff bank from 10th December 2001. The Plaintiff as a Bank relies on the statements of Account - Ex. "CWK 1" in support of its application for summary judgment. The plaintiff has referred to various entries to show the withdrawals of kshs 79, 140 and kshs 2, 492, 710/- on 19th April 2001, which was the genesis of the Defendant's indebtedness to the Plaintiff. The Defendant's counsel in his submissions has taken issue with the Statements of Accounts which were produced in Court. He invoked the provisions of Section 177, of the Evidence Act, which reads as follows: -

"177 (1) a copy of an entry in a banker's book shall not be received in evidence under section 176 unless it be first proved that

(a) *The book was, at the time of making the entry, one of the ordinary books of the bank; and*

(b) *The book is in the custody and control of the bank; and*

(c) *The entry was made in the usual and ordinary course of banking business; and*

(d) *The copy has been examined with the original entry, and is correct.*

(2) Such proof may be given by an officer of the bank, or, in the case of the proof required. Under subsection 1 (d), by the person who has performed the examination, and may be given either orally or by an affidavit sworn before a commissioner for Oaths or a person authorized to take affidavits. "

I have perused the affidavit of Carroll W. Kabiru sworn on 7th May 2004 through which the Statement of Accounts were produced. The said affidavit does not make any attempt to comply with the provisions of section 177 of the Evidence Act. The said provisions are mandatory. I do hold that the copies of the Statements of Accounts herein have yet to be proved and verified in accordance with the Law.

I do not agree that an admission of the debt can be used to circumvent the express provision of the statute. While the Plaintiff in its letter did admit the debt, it did not specify or state the amount. The amount could have possibly been proven by the Statements of Accounts. However, the said statements and entries therein can only be relied upon by this Court and admit them in evidence if the provisions of Section 177 of the Evidence Act are complied with.

In the premises, I hold that the authenticity and correctness of the accounts are in issue and to this extent are triable issues.

I do sympathise with the Plaintiff Bank since it presented an extremely strong case for summary judgment but for this flaw.

This situation is similar to that in *H C C C No. 606 OF 1998 KENYA COMMERCIAL BANK LIMITED - V - JAMES KURIA NJINE* in which Justice Ringera, said as follows: -

"To sum up, the Defendant appears to be a drowning man. However at the moment he is firmly holding onto the reed of inadmissibility of the Plaintiffs most crucial evidence. The force of the tide of full trial may or may not sweep him away to certain death. Until then he is entitled to a respite on the basis that he has one single triable issue, namely whether or not he is truly indebted to the Plaintiff in the amount claimed in the plaint."

The Plaintiffs application meets the same fate and the Defendants here have another retreat to face another battle.

As a result, there will be no use in going into the other issues raised in this application. The application is dismissed but with no order as to costs considering all the circumstances.

M K IBRAHIM JUDGE Coram M K Ibrahim - Judge Cc Manoah

Mr. Masese for Mr. Muturi for Plaintiff No appearance for Defendant Dated and Delivered at Nairobi this 3rd day of June 2004

.M K IBRAHIM

JUDGE