



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 529 of 2003

NATIONAL BANK OF KENYA

LTD.....PLAINTIFF/APPLICANT

VERSUS

KENYA TIMES MEDIA TRUST

SCHEME.....DEFENDANT/RESPONDENT

RULING

The Ruling relates to an application by way of a Notice of Motion by the Plaintiff Bank against the Defendant a media company. The Plaintiff/Applicant seeks the court to grant it two prayers namely:-

- (1) that judgment be entered against the Defendant for the sum of Kshs. 7 million together with interest thereon.
- (2) the costs of this application.

The Plaintiff has based his application on two grounds namely:-

- (a) The Defendant has admitted guaranteeing the payment of the sum of Kshs. 7 million, and
- (b) That there is no issue to go for trial.

There is also the Supporting Affidavit of Leonard Kamweti, the Plaintiff's Company Secretary, who swears that he is in that capacity authorized to swear the Affidavit. To the Affidavit is annexed a copy of the guarantee executed by the Defendant in respect of a Car Loan Scheme to the Defendant's employees under which the Defendant guaranteed the loan in the said sum of Kshs. 7 million. The Affidavit also testifies that the Defendant's employees utilized the facility as covenanted but that it defaulted on its part of the bargain by failing to make remittances of repayments as agreed. This deponent swears that although the Defendant's employees borrowed over shs. 17,541,882/70 as at 31.07.2003, the Defendant unfortunately had only guaranteed up to Kshs. 7,000,000/= and that the guarantee for this sum is dated 26.09.1989. It is attached to the Supporting Affidavit of the said Leonard Kamweti and is marked Exhibit "LK1".

When this application was canvassed before me on 16.07.2004 Counsel for the Plaintiff, Mr. Murugu

referred to the above guarantee and cited a series of cases including:-

(1) Agricultural Finance Corporation vs. Kenya National Assurance Ltd (In Receivership) (Civil Appeal No. 271 of 1996).

(2) Lalchand Daulatram Bheroomal Choitram vs. Herta Elizabeth Charlotte Nazari [1982] K.L.R. 437.

The basic theme in these cases is that Order XII rule 6 of the Civil Procedure Rules empowers the Court to enter judgment and issue decrees in respect of admitted claims pending the disposal of disputed matters. In the Choitram vs. Nazari case, the Court said **“For the purposes of Order 12, rule 6, admissions can be express or implied either on the pleadings or otherwise e.g. in circumstances. Admissions have to be plain and obvious as plain as a pikestaff and clearly readable because they may result in judgment being entered.** They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning and went on to hold:-

“A plain and obvious case, even if established after substantial argument or analysis of documents entitles a Plaintiff to judgment on admissions.”

Miss Mudezi Counsel for the Defendant opposed the application, and relied upon her grounds of opposition filed on 2.07.2004, namely that:-

- (a) the application was premature and that there were triable issues raised in the defence.
- (b) the application is made in bad faith and is intended to pre-empt the defendant’s defence,
- (c) the application is without basis and merit, and
- (d) the application is an abuse of the process of Court.

Having set out these rival positions, I now express my position in the matter. Firstly the Defendant under paragraph 5 of its defence admits liability in the sum of Kshs. 7 million in these terms:-

“5. The Defendant concedes that it entered into an agreement with the Plaintiff to guarantee payment of staff scheme car loan as stated in paragraph 3 of the Plaint. The Defendant however contends that it was a term of the said contract that the maximum advance available to the Defendant shall not exceed Kshs. 7,000,000/= and that the guarantee was subject to the hirer exhausting all available remedies under the hire purchase agreements between the Plaintiff and the hirer (the Defendants staff).”

Secondly the Defendant has in paragraph 8 of the Defence argued in the alternative that it guaranteed upto Kshs. 7,000,000/= only.

Order XII rule 6 of the Civil Procedure Rules empowers the Court at any stage of the suit, where admission of facts has been made either on the pleadings or otherwise, upon the application of any party, to enter judgment.

I have already referred to the case of Lalchand Daulatram Bheroomal Choitram vs. Herta Elizabeth Charlotte Nazari (supra) which was quoted with approval in case of **AGRICULTURAL FINANCE CORPORATION vs. KENYA NATIONAL ASSURANCE COMPANY LTD** (Civil Appeal No.271 of 1996) (Kwach, Omolo & Tunoi JJA), at page 8 – 9 of the judgment of the Court said:-

“Order 12, rule 6 empowers the Court to pass judgment and decree in respect of admitted claims pending disposal of disputed claims in a suit. Final judgment ought not to be passed on admission unless they are clear, unambiguous, and unconditional. A judgment on admission is not a matter of right; rather it is a matter of discretion of the Court and where a Defendant has raised objections which go to the very root of the case, it would not be proper to exercise this discretion.”

Their Lordships then referred to the case of Choitram vs. Nazari (supra) and quoted with approval the passage in that case by Madan JA which I have already referred to above.

In the current case, it is clear that the Defendant guaranteed payment of upto Kshs. 7 million to the Plaintiff in respect of a loan to the staff. It is not implied it is express under the guarantee of 26.09.1989. It is a plain, and obvious case. The Plaintiff is entitled to judgment on admission in the defence.

There shall be judgment for the Plaintiff in the sum of Kshs. 7,000,000/= together with interest and costs.

Dated and delivered at Nairobi this 28th day of September 2004.

ANYARA EMUKULE

JUDGE