

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NO. 609 OF 1993

NATIONAL BANK OF KENYA.....PLAINTIFF

VERSUS

JOHNSON KIPTONUI MITEY.....DEFENDANT

RULING

By a Notice of Motion made under **Order XXXV Rule 1 and Order XII Rule 6 of the Civil Procedure Rules** the Plaintiff has moved this Court seeking for the order that Summary Judgment be entered against the Defendant for the sum of Kshs. 7,069,818/70 as at the 6th of July 2001 with interest thereon at the rate of 27% per annum until the payment in full. The Plaintiff has alternatively prayed that judgment be entered on admission against the Defendant for the sum of Kshs 750,000/= as at the 1st of September 1993 with interest thereon at the rate of 27% per annum until payment in full. The Application is based on the grounds that the Defendant had admitted that he had obtained credit facilities from the Plaintiff which he had failed to repay. Further that the Defendant had admitted in paragraph 2 and 3 of his Defence being indebted to the Plaintiff. The Plaintiff further contended that the Defendant had no plausible defence to the Plaintiff's claim. The Plaintiff has further stated that the interest of justice dictated that the prayers sought by the Plaintiff be granted. The Plaintiff's application is supported by the annexed affidavit of Joshua T. Nauwankas

. Although the Plaintiff's application was filed on the 23rd of November 2001 and the Defendant duly served, the Defendant did not seem it necessary or appropriate to file either grounds of opposition or a replying affidavit in opposition to the Plaintiff's application.

When this Application came up for hearing, Mr Dawid, Learned Counsel for the Plaintiff submitted that the Plaintiff was praying for judgment to be entered for it as prayed in the Plaint. Mr Dawid submitted that the Defendant having admitted his indebtedness the Defendant consequently did not have defence. He further submitted that the Defence did not raise any triable issues. The Plaintiff further argued that according to the evidence annexed to the application, the Plaintiff had proved that the Defendant had applied for a loan from the Plaintiff which was advanced to him, and which the Defendant later failed to repay the same. The Plaintiff further submitted that all its efforts to have the said amount advanced to the Defendant repaid has not borne any fruits. The Plaintiff prayed for the Application to be allowed since the Defendant has not filed any pleadings in opposition to the Application.

Mr Mbeche, Learned Counsel for the Defendant submitted only on points of law. He submitted that the Plaintiff has not established that he is entitled to the orders of summary judgment sought since the Plaintiff's claim was not that of a liquidated claim. The Defendant urged the Court to consider the provisions of **Order XXXV Rule 1 and 2 of the Civil Procedure Rules** and find that the Plaintiff is not entitled to the orders sought. The Defendant further submitted that this Court should order that the Plaintiff be paid a lesser sum than that the one sought in the application.

I have anxiously considered the rival submissions made by the Counsel for the Plaintiff and Counsel for the defendant. The issue for determination by this Court is whether the Plaintiff has established that it is entitled to summary judgment being entered in its favour against the Defendant. The other issue for determination is whether the defence filed by the Defendant is infact an admission of the Plaintiff's claim to enable judgment to be entered for the Plaintiff against the Defendant on admission. By

its Plaintiff filed on the 24th of September 1993 the Plaintiff claimed the sum of Kshs. 975,536/50 as at the 31st of August 1993 from the Defendant being the amount allegedly owing from the money advanced to the Defendant which the Defendant had failed to pay. The Plaintiff was also claiming interest at the rate of 27% per annum on the said amount. When the Defendant was served with the Plaintiff, he filed a defence. In the said defence the Defendant averred as follows:-

“2. The Defendant states that in the year 1992 he applied to the Plaintiff for a loan of Kshs 1.2 million which was approved and the securities for the same were Plots No. Kericho/Kabianga/1959 and Kericho/Kabianga/1960.

3. The Plaintiff granted the Defendant a loan of Kshs. 500,000/= on the security of Plot No. Kericho/Kabianga/1960 and an overdraft of Kshs. 250,000/=.”

In the said defence the Defendant had admitted that the sum of Kshs 750,000/= was advanced to him as a loan at his own request by the Plaintiff. The Defendant does not state in the said defence that he has repaid the said sum of money advanced to him by the Plaintiff. Neither does the Defendant deny he owes the said sum advanced to him by the Plaintiff including the interest that was to be repaid together with the sum advanced.

In my opinion, the Defendant does not deny that he owes the amount sought by the Plaintiff in its application for Summary Judgment. The Defendant has in his defence admitted the said sum owing to the Plaintiff. I have read the affidavit in support of the application together with the annexures thereto. The Defendant has not filed any replying affidavit or grounds opposing what the Plaintiff has deposed. In law, the Defendant is deemed to have admitted the facts that the Plaintiff deposed to in the affidavit in support of the application for Summary Judgment. **Order XXXV Rule 2(1) of the Civil Procedure Rules provides that:**

“The Defendant may show either by affidavit or by oral evidence, or otherwise that he should have leave to defend the suit.”

The Defendant choose not to take advantage of this provision of the law.

In the circumstances therefore, I do find that the Plaintiff has established, on a balance of probabilities, that it is entitled to the order sought. I consequently allow the Plaintiff's application for Summary Judgment, and enter judgment for the Plaintiff as against the Defendant for the sum of Kshs. 7,069,818/70 as at the 6th of July 2001. Interest shall be applied on the said sum at the rate of 27% interest per annum until the payment in full. The Plaintiff shall have the costs of the Application and the costs of the main suit.

DATED at NAKURU this 22nd day of October, 2004.

L. KIMARU

AG. JUDGE