



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CIVIL CASE NO.30 OF 2002**

NATIONAL BANK OF KENYA LTD PLAINTIFF

VERSUS

SHEM SANYA BALONGO DEFENDANT

RULING

The applicant seeks court to strike out the suit or in the alternative to order plaintiff to comply with the provisions of Order X rule 16 CPR.

It was submitted that the Defendant used to maintain an account with Standard Chartered Bank Kisii Branch. He was a lawyer and he maintained a client and personal account. He would be advanced loans on the personal account. In 1985 the Standard Bank lent the defendant a loan of shs.100,000/= which was served by a charge over land No.BUKHAYO 40/MUNDIKA/239. Later Standard Bank closed its branch in Kisii and rolled all assets and obligation to National Bank now the plaintiff/Respondent. The plaintiff filed this suit claiming that the loan is still owed.

Plaintiff later filed an application dated 4/12/2002 seeking to amend the plaint. In the application he had annexed a draft amended plaint and he prayed that it be deemed as filed. The application was allowed on 26/5/03. Court ordered application allowed as prayed which meant the prayer from the annexed amended plaint to be deemed as filed was allowed. Mr. Soire submitted that that annexed draft of amended plaint was defective as it was not signed nor was it dated. That contravenes provision of Order 6 rule 14 and that amended plaint is therefore defective.

The plaintiff purported to file an amended plaint on 10/11/03 which is dated 7/11/03. That amended plaint was filed without leave as the Orders of 26/5/03 were very clear. The amended plaint filed on 10/11/03 is not the same as the one annexed to the application allowed on 26/5/03 as the one filed on 10/11/03 is signed and dated. As such there is no suit pending.

Applicant also stated that when Standard Chartered Bank transferred the loan to the plaintiff his consent was not sought and he was not promising to their agreement. No fresh Land Control Board consent was sought. The plaintiff therefore has no Locus Standi to suit.

Further it stated that the suit should have been filed by 1997 as the loan was given in 1985.

In reply it was said that the supporting affidavit is defective. It contravenes provision of S.34 and 35 of the Advocates Act as it does not show who drew and filed the affidavit. Further it was said that though the affidavit is shown to be sworn in Busia the Stamp of the commissioning Advocate shows that he is based in Kisii. It should therefore be struck out. Once struck out the chamber summons will stand bare and therefore it should be struck out too.

As for the amended plaintiff it was submitted that the draft amended plaintiff could not have been signed before the application for amendment was allowed. In any case this application was filed before the amended plaintiff was filed. As for limitation of time the Respondent exhibited correspondence with the applicant dated 1996 when he acknowledged indebtedness and proposed how to pay. There was another letter dated 26/11/02. The applicant was therefore aware of the debt and knew that his loan had been assigned to the Respondent by the Standard Chartered Bank.

The sale agreement between the Respondent and Standard Chartered Bank was defended and said to be a proper contract. Respondent do not seek to enforce the charge but have sued to recover his money.

I have considered application, submissions and annexures. It is clear that the affidavit of SHEM SANYA BALONGO in support of the application offends Section 34 and 35 of the Advocates Act and cannot therefore stand. It does not show the name and address of the maker. It is now trite law that an affidavit which offends provisions of S.34 and 35 of the Advocates Act is defective and should be expunged from the record. Once that is done the court may use its discretion to allow the deponent to file another and or not. There court has not been asked to do that and there is no good reasons to order another proper affidavit be filed.

The respondent in the replying affidavit of Francis Ogwao at Par.21 (a) raised another pertinent issue with the affidavit of the applicant. It shows to have been sworn at BUSIA on 19th day of September 2003. However the commissioning Advocate is shown as G. J. MASESE Advocate of Box 348, Kisii and not Busia. It was submitted that the affidavit could not have been sworn in Busia by an advocate in Kisii. I quite rightly agree with that. It is a matter well known that Mr. Masese has no office in Busia. He could therefore not have traveled all the way there carrying his stamp to Commission the affidavit. Though the issue was not raised in the replying affidavit the deponent nor the Advocate (G. J. Masese) swore any affidavit to controvert the averment by the respondent

. I therefore make a finding that the supporting affidavit is defective and I do order it be expunged from record together with all the annexures referred in it.

Counsel for Respondent stated that the application on expunging the affidavit should be dismissed as it would be left bare. I don't think this is the correct position. Order 50 rule CPR provides that application, unless otherwise provided should be supported by grounds and an affidavit if need be. There are grounds on the face of the application and the application cannot therefore be dismissed.

The first ground was that the amended plaintiff is defective. However I don't think this is so. The amended plaintiff was filed on 10/11/2003 while the application was filed on 22/9/2003. The application therefore could not be talking of the amended plaintiff filed about 2 months after the application was filed. It was therefore not clear which amended plaintiff the applicant alluded to. That the court ordered the application for amendment allowed as prayed but so far there is no application filed to challenge the amended plaintiff filed on 10/11/03. Applicant cannot use this application which was filed on 22/9/03 to attack the amended plaintiff filed after it.

As for issue of claim being Statutory barred the respondent exhibited correspondence with the applicant going up to 2002. The Respondent has not stated that the breach was in 1985 when the loan was given. Up to 1996 the applicant was still offering to pay the loan in monthly instalments until payment in full. The suit is therefore not time barred.

Ground 3 on the face of the application is that the transfer of charge from Standard Chartered Bank to the plaintiff was a fraud, defective and a forgery. The transaction was between Standard Bank and the Respondent. Neither of the two is complaining that the transaction was a forgery. Applicant has to bring evidence during the full hearing of the suit to attack that transaction.

What was transferred from Standard Bank to the respondent were the liabilities of the applicant. The applicant in the plaintiff seeks to recover specific sums of money. They have not prayed to be allowed to sell land NO.BUKHAYO/MUNDIKA/1239. There was no requirement for the parties to get consent

from Land Control Board to transfer the debt. Respondent has submitted that they are not seeking to sell the charged land. Thus the fact that they did not get consent from the Land Board does not make the suit bad in law. Applicant raised the issue that the debt rose from shs.100, 000/= to shs.595, 753.25 from 1st September 2000 to when the suit was filed. This I think should wait until full hearing where the Respondent would be expected to justify his claim. It will be upon him to show how the amount rose to what he is claiming. The applicant will have a chance to controvert whatever evidence will be adduced.

All in all I find the main grounds in support of the application have no merit and I decline to strike out the suit.

There was the alternative prayer of compelling the respondent comply with Provisions of Order 10 rule 16 CPR. There was no ground in support of this prayer.

I however direct that the applicant do serve the Respondent with a fresh Notice to produce for inspection under Order 10 rule 15 CPR specifying clearly the documents he want to inspect and the respondent to comply with the Notice by making arrangements for the respondent to inspect the documents in the respondents premises within 10 days of service.

Costs of the application in the cause.

Dated 24th November 2004

KABURU BAUNI

JUDGE