



REPUBLIC OF KENYA

IN HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION – MILIMANI
CIVIL CASE NO.737 OF 2003

CO-OPERATIVE BANK OF KENYA LTD.....PLAINTIFF

VERSUS

VICTORIA INSURANCE BROKERS LTD1ST DEFENDANT

ISAIAH NYABUTO ONCHONGA.....2ND DEFENDANT

RULING

By a Plaintiff filed on 18th November, 2003 the Plaintiff/Applicant claims against the Defendants/Respondents the sum of Kshs 3,157,144.65 being monies due from the 1st Defendant as the borrower and also from the 2nd Defendant as covenanted in a charge instrument and which sum carries interest at the rate of 25% p.a. from 31st September, 2003 and other bank charges until payment in full. As a security for the said sums the 2nd Defendant created a legal charge over Title No. Suna East/Wasweta 1/8023 in favour of the Plaintiff. Under the said charge the 2nd Defendant covenanted to pay to the Plaintiff on demand the sum advanced to the 1st Defendant together with interest and other bank charges.

The 1st Defendant defaulted in its repayment obligation and despite demands for payment no payments were made by the Defendants. The Plaintiff then tried to exercise its Statutory Power of Sale over the charged property but there were no bids for the said property. Hence the suit.

In an amended defence filed on 17th November, 2004, the 2nd Defendant denies consenting to bank charges and executing the charge. The 2nd Defendant further denies that he is obliged to settle the debts of the 1st Defendant which is an entity on its own. The 2nd Defendant further avers that despite demand the Plaintiff has refused and/or failed to provide him with statements of accounts and he is not aware that the 1st Defendant was in default. There is also an averment that the Plaintiff has not exhausted all avenues or efforts to realize the security it was given and has not disclosed what transpired at previous auctions carried out to recover the debt. The 2nd Defendant also avers that the interest rate of 25% charged and other bank charges are unconscionable, punitive, excessive, harsh and exaggerated. The 2nd Defendant further denies being served with a notice of demand or any statutory notice of sale as required by Law.

The Plaintiff does not think much of this defence and seeks Summary Judgment under Order 35 Rule 1 (1) (a) of the Civil Procedure Rules. This Application is made on the grounds that the 2nd Defendant's defence does not disclose any triable issue and is a mere denial. The said defence is also stated to be scandalous frivolous and/or vexatious and is intended to delay the determination of this suit and or is otherwise an abuse of the process of the Court.

The Application for Summary Judgment is supported by an affidavit sworn by one Kennedy K. Abuga a Senior Legal Officer of the Plaintiff. Several exhibits are annexed to the said affidavit. These are:-

1. Copies of charge and further charge executed by the 2nd Defendant.
2. A copy of a Statutory Notice of Sale duly acknowledged by the 2nd Defendant in the letter dated 10.9.99.
3. Copies of correspondence in respect of the failed auction sales.
4. A letter containing a settlement proposal dated 9.11.99.
5. A statement of account.

The 2nd Defendant did not respond to this application by a Replying Affidavit. He chose to rely on Grounds of Opposition. He states in the grounds of opposition that the Application for Summary Judgment is defective, frivolous, vexatious and an abuse of the Court process. He maintains the defence has triable issues without stating which. He also challenges the affidavit in support of the Application as being inadmissible without saying in what way it is inadmissible and lastly the 2nd Defendant says that the Application is solely intended to defeat his right to a full trial.

I have considered the application, the pleadings, the affidavit and its annexures, the Grounds of Opposition and the able submissions of the Learned Counsels appearing. Having done so I take the following view of the matter. The Law is now well settled that if a Defendant shows either by affidavit or by oral evidence or otherwise that he should have leave to defend the suit he will be granted unconditional leave to defend. The Defendant must however show a *bona fide* triable issue and not just any allegation. A bare denial will not do.

In this case the 2nd Defendant denies creating any charge over the said Title and further denies consenting to other bank charges as claimed. He also says that the Plaintiff has not supplied him with statements of account and he is not aware that the 1st Defendant is in default of its repayment obligation. He adds that even if the 1st Defendant is liable he is not obliged to settle its debts. He then denies that he is liable to pay the sum claimed as the Plaintiff has not exhausted other avenues available to it to realize the security and even if the Plaintiff has sought to realize the security it has not disclosed to the 2nd Defendant the results of the auction sale attempts. He also challenges the 25% interest rate charged and other bank charges describing them as punitive excessive and exaggerated. The 2nd Defendant further denies being served with notices of demand and Statutory Notice of sale as by law required. There is also an allegation that the Plaintiff is purporting to rely on an agreement made under the seal of the Plaintiffs Corporation and is therefore not binding.

The Plaintiff has annexed the charge and further charge instruments which were executed by the 2nd Defendant. It has also annexed copies of letters signed by the 2nd Defendant admitting the Defendants' indebtedness to the Plaintiff and proposing settlement of the same. There is also exhibited further correspondence evidencing attempts at realization of the charged property. The Plaintiff has exhibited a Statutory Notice of Sale and demand letters addressed to the 2nd Defendant to which the 2nd Defendant responded. Lastly there is a statement of account showing the Defendants' indebtedness to the Plaintiff.

All these exhibits were not denied by the 2nd Defendant. He chose not to respond by a replying affidavit to challenge the exhibits. The 2nd Defendant was content to file Grounds of Opposition which are not an answer to the affidavit evidence produced by the Plaintiff. The Grounds of Opposition alleged that the defence has triable issues. No single triable issue was identified in the grounds of opposition.

On the issue of interest the same was contractual. The 2nd Defendant in the charge and further charge instruments gave the Plaintiff the authority to charge the rates it applied.

I have said enough to show that the Plaintiffs case is a plain and straight forward case where no *bona fide* defence has been shown. The 2nd Defendant's amended defence does not disclose any triable issue in the light of the material availed to me. I accordingly strike it out. I enter summary judgment in favour of the Plaintiff against the 2nd Defendant as prayed in the Plaintiff's Complaint. Costs of this Application to the Plaintiff.

Order accordingly.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER, 2004.

F. AZANGALALA

AG. JUDGE

Read in the presence of:-