



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE 18 OF 2002

SHIGOG INVESTMENTS LTD. PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD. DEFENDANT

RULING

The application by Chamber Summons dated 22.11.02 is brought under the Provisions of Order 8 rule 10, order 24 rule 2 and 6, order 6 rule 13 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. Through it, the plaintiff seeks the following orders:

- “1. That the Plaintiff be granted leave to file defence to Counter Claim out of time.
2. That this Honourable Court do make the suit and the Defendant’s application dated 26 th June, 2002 as settled and/or compromised as per the letter of the Defendant dated 29 th April, 2002.
3. That further or alternatively with reference to the counter claim and the application dated 26 th June, 2002, to have been fully satisfied and the failure of the Defendant to observe the terms of the offer and acceptance is otherwise an abuse of the process of this court.
4. That the costs of this application be provided for” The plaintiff filed suit against the Defendant on 18th January, 2002 seeking various orders but which in a Nutshell would declare the intended sale by public Auction of the plaintiff’s 10 parcels of land situated in various parts of the Coast province with a view to recover a disputed debt unlawful for reasons that the debt had been fully settled. It also sought a further prayer for Damages for breach of contract. Simultaneously with the claim was filed an application by summons seeking orders of an Injunction as against the Defendant pending the hearing and determination of the suit. The application brought under a certificate of urgency was heard ex parte and interim orders of an Injunction granted on 18.1.02. I have perused the court file and noted that since then, the matter came up for hearing on two occasions but failed to proceed. The last order on the 27.3.02 allowed the interim orders to remain in place until the application was set down for hearing. This has to date not been done. Instead the Defendant filed an application dated 26.6.02 under order 12 rule 6 and the plaintiff followed suit and filed the application under consideration. The parties compromised on the first prayer and the Defendants defence to the counter-claim was allowed by consent. Prayer No.2 and 3 are interrelated and arise from correspondence exchanged between the parties with a view to reaching a compromise. The application is supported by an affidavit sworn on 22.11.02 by Saleh Muhsin Shigog a director of the plaintiff company. In reply the Defendant filed a replying Affidavit through it’s manager, legal services Mr. Z.K. Mogaka sworn on 13th December, 2002 as well as grounds of opposition dated 13th December 2002. Mr. Bryant who held brief for Mr. Wameyo for the plaintiff submitted that on the basis of the

annexed correspondence and in particular the Defendant's letter dated 29th April, 2002 addressed to the Bank's lawyers with instructions to counter offer to the plaintiff an amount of Kshs.11.8 million in full and final settlement and following an acceptance in writing by the plaintiff through its former lawyers by letter dated 6th May, 2002 the suit herein should and/or in the alternative the counter claim should be considered as settled. The letter of the 29th April, 2002 is very clear and a copy of the same was given to the Defendant's manager. It is to be noted that the offer was not on a "without prejudice" basis and reads as follows:

9th April, 2002

Ahmednasir Abdikadir & Co Advocates,

Prudential Assurance Building,

1st Floor,

Wabera Street

Nairobi

Dear Sir,

RE: MSA HCC NO. 18 OF 2002

SHIGOG INVESTMENTS LTD. –VS- THE BANK

We refer to previous correspondence herein resting with your letter dated 23rd April, 2002. The Bank has now finalized reviewing the above account vis a vis the Plaintiff's proposal. The decision reached is that we counter-offer the plaintiffs out of court settlement offer of Kshs.7 million in full and final settlement of the debt. Kindly communicate the above figure to the debtor's Advocates then revert as soon as their reaction is received. Yours faithfully,

J.M. MUTARA

MANAGER – LEGAL SERVICES

c.c. Manager – N.B.K. Portway

House Branch"

On receipt of this letter, the Bank lawyer communicated its contents by Telephone to the Defendant's Advocate and further the Defendant Manager, Portway House Branch handed over a copy to the Defendant's Director on the 6th May, 2002, the plaintiff's Advocates response was forwarded to the Defence lawyers. The letter reads as follows:- "6th May 2002

Ahmednasir, Abdikadir & Co. Advocates,

Prudential Assurance Building,

1st Floor, Wabera Street,

NAIROBI.

Dear Sir,

RE: MOMBASA HCCC NO. 18 OF 2002

SHIGOG INVESTMENTS LTD. -VS -

NATIONAL BANK OF KENYA LTD.

Please refer to the matter and to the telephone conversation between your MR. AHMEDNASIR advocates and the undersigned in respect of your client's letter dated 29 th April, 2002 wherein your client's counter offered on out of court settlement for a sum of Kshs.11.8 million in full and final settlement of the matter.

Indeed we confirm that our client has received the said counter -offer through the Branch Manager, Moi Avenue where his Ac counts are and you have further confirmed through our conversation the contents of the said letter.

Indeed therefore we have been instructed by our client to formally accept and/or enclose the said counter - offer, hence kindly please treat your client's offer as duly accepted and further confirm your client's willingness to accept instalments payment of Kshs.1 million with effect from 20 th May, 2002 and thereafter 20 th of each succeeding month till payment in full. Kindly please oblige and expedite. Yours faithfully,

WARSAME & CO. ADVOCATES

MOHAMED WARSAME c.c.

Client – (we have done as instructed by yourselves therefore be ready For immediate payment)”

Although in his letter the plaintiff's Advocate has requested for a quick response, none was forthcoming but nevertheless the plaintiff went ahead to honour his part of settlement by paying Kshs.1 million monthly instalment to the Defendants. On 11th June, 2002, the plaintiff through it's lawyer reminded the Defence advocate that they were still awaiting a response and the plaintiff had continued to remit the monthly instalments. On their part, the Defendant says no settlement was over reached as after the Bank had made it's offer, the Defendant made a counter-offer which was rejected. The question is, whether this is the correct position. Annexed to Mr. Mogaka's Affidavit are two letters which are intended to proof that no settlement had been reached and no offer accepted. These are the letter dated 19.6.02 by the Bank to its lawyer which was in response to a letter dated 2nd May, 2002 by the Defence lawyer. By the said letter the Bank was rejecting on earlier offer by the Defendant vide letter dated 2nd May, 2002 to settle the claim at Kshs.8 million.

On 21.6.02, the Banks lawyers wrote to the Defence Counsel conveying the said message. Therefore can it be said that no compromise was reached. I have carefully followed the sequence of correspondence and the following is to my understanding what transpired.

On 22.3.02 after several correspondence prior to it as between the parties and in an attempt to resolve the matter, the Defence lawyer then wrote to the Bank's lawyer and offered to have the matter settled in full at a figure of Kshs.8 million. The Bank does not appear to have responded. The next letter is one dated 23rd April, 2002 by the Bank's lawyer to the Bank which although not annexed the reply to it is the letter dated 29th April, 2002 which gives rise to the current application. The letter which I have reproduced herein before referred to "previous correspondence herein resting with your letter dated 23rd April, 2002". The letter was received by the Banks Lawyer on 30th April, 2002. However neither the plaintiff or his lawyer say when exactly the contents of the said letter were communicated to them and nor do the parties disclose whether at the time the Plaintiff lawyer wrote the letter dated 2nd May, 2002 again offering to settle the claim at Kshs.8 million, they were aware of the offer contained on the letter of 29th April, 2002.

Then on the 6th May, 2002 the Defence accepted the offer of the 29th April, 2002 and no response to the same is received. On 19th June, 2002, the Bank however after a period of about 1½ months decided to respond to the letter of the 2nd May, 2002 and instructed their lawyer to reject the counter offer of Kshs.8 million and proceed to recover the full date. This is where the matter rests.

As I had pointed out earlier none of the correspondence was written on a without prejudice basis and from my reading of them, I find that the Defendant did make a counter-offer to the plaintiff to settle the claim at Kshs.11.8 million which offer was accepted and performance commenced on the part of the plaintiff. The Defendant, it would appear have chosen to rely on their letter dated the 19th June, 2002 and which in its reading is clear and no doubt was in response to a counter offer of Kshs.8 million but chose to ignore the plaintiff's letter of acceptance of the 6th May, 2002 which letter was clearly worded and cannot be construed to have any other meaning Order 24 rule 6 (1) of the Civil Procedure Rules provides as follows in regard to compromise of a suit:

“6 (1) when it is proved to the satisfaction of the Court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part any lawful agreement or compromise or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall on the application of any party order that such agreement, compromise or satisfaction be recorded and enter judgement in accordance therein ----- “ As at the time of hearing of this application, the Defendant had not shown that indeed the acceptance by the plaintiff of their counter offer to settle the claim at Kshs.11.8 million was subsequently either withdrawn or otherwise rendered unenforceable. It has also not been shown that the plaintiff has either defaulted in its monthly payments or that the same were not acceptable to the defendant. I would have stopped here but the application requires the court either to declare the whole suit as settled or the counter-claim. The plaintiff has apart from the injunctive prayer and that for accounts, prayed for Damages for breach of contract. The Defendant has filed a defence to it together with the counter-claim. A defence to the counter-claim has also been filed and none of the other issues in the said pleadings have been canvassed save that of the amount due to the Defendant by the plaintiff. It is for the said reasons that I find the whole suit cannot be compromised at this stage.

For the reasons given I find that the plaintiff has satisfactorily shown this court that indeed a compromise had been arrived at Kshs.11.8 million. In respect of the counter-claim, therefore will enter judgement for the Defendant on the counter-claim in the sum of Kshs.11.8 million in full and final settlement.

The parties are however at liberty to pursue and conclude the rest of the matter as they deem acceptable.

Dated and delivered at Mombasa this 28th February, 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE