



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL CASE NO. 80 OF 2002

RAMESH THAKKAR.....PLAINTIFF

VERSUS

R. S. SHAH).....1ST DEFENDANT

R. S. SANDHU).....2ND DEFENDANT

RULING

The Plaintiff filed this suit against the Defendants seeking Judgment for Kshs. 1,230,851/= as at November 9, 2001 together with interest at Bank rates from that date until payment in full. He also sought costs of the suit. The basis of the claim was an alleged agreement dated October 2, 1995 between him and the Defendants which contained the following special conditions as set out in paragraph four of the Plaintiff:

“(e) The Seller (Plaintiff) has agreed to retain his personal security through FIXED DEPOSIT RECEIPTS (FDR’S) for the over draft facility for use by the Company (the shares whereof were the Subject of the agreement) for a period of 12 months after which period the overdraft facility will either be liquidated or the shareholders furnish the Bank with fresh security as they would deem fit.

“(f) The purchasers undertake to furnish their own personal guarantee to redeem the seller’s security for the ... (FDR’S) with Delphis Bank upon expiry of 12 months period in default whereof, the seller will be at liberty to take up necessary steps to have the same redeemed.”

The Plaintiff’s case was that the Defendants breached the above conditions by failing to provide “personal security” causing him to suffer loss of Kshs. 1,230,851/= as at November 9, 2001.

The Defendants filed a defence to the action and the Plaintiff thereafter filed an application under Order VI Rule 13(1) (b) and (d) and Order XXXV Rule 1 of the Civil Procedure Rules in which he sought the following orders:

- “1. THAT the Statement of Defence filed herein be struck out with costs ...*
- 2. THAT further and/or in the alternative, Summary Judgment be entered against the Defendants ... as set out in the Plaintiff.*
- 3. (Costs)”*

It is that application which is before me presently. The application was served upon the Defendants and

the 2nd Defendant swore a Replying Affidavit to it. When the application came up for hearing, there was no appearance although they had been duly served with a hearing notice to that effect as per the affidavit of service of Julius Kamotho sworn on June 18, 2003.

According to the affidavit of the Plaintiff sworn on September 2, 2002 in support of the application, there is evidence that he entered into an agreement with the Defendants as pleaded in his Complaint. On February 8, 2001 the Bank referred to in the Agreement uplifted the amount in the Plaintiff's fixed deposit account plus interest to the overdraft account of Hotel Royale Ltd. This is the conduct which constituted breach as the Defendants had not provided the "personal guarantee" as agreed. The Defendants raised the issue of limitation in their defence and also in the Replying Affidavit aforesaid but I agree with Mr. Githui for the Plaintiff that the cause of action in this case accrued when the Bank in question uplifted the Plaintiff's fixed deposit account in the manner it did. The suit was, therefore, brought in time.

I, therefore, find that the Plaintiff is entitled to Judgment as prayed, and accordingly allow his application dated September 2, 2003 as prayed.

Dated and Delivered at Nakuru this 8th day of July, 2003.

ALNASHIR VISRAM

JUDGE