



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 629 OF 2000

DIAMOND TRUST BANK KENYA LTD. PLAINTIFF

VERSUS

1. SAMEH TEXTILE INDUSTRIES LIMITED

2. JITU CHUNILAL JAVANI

3. RAJEN CHUNILAL SAVANI

4. SAMJI KALA & CO. LTD. DEFENDANTS

RULING

The application by the Diamond Trust Bank Kenya Ltd. the Plaintiff (Bank) seeks Summary Judgement against the defendants as prayed in the plaint. The application which is brought under order 25 rules 1 and 2 of the Civil Procedure Rules is on the grounds that the Defence filed by the Defendants is not a tenable one and lacks triable issues and the Defendants owe the amounts as claimed in the plaint. It is further supported by an Affidavit sworn by Shafique Pirbhai who describes himself as the manager of the Plaintiff Bank, Mombasa Branch. At the hearing of the application there was no appearance on the part of the Defendants and nor did they file any reply or grounds of opposition to the application. Evidence to the effect that the Defendants were indeed served with the current Notice of Motion through Mr. Kinyua Kamundi their Counsel on record and the same accepted and acknowledged by his court clerk who signed a copy therein was adduced in form of an Affidavit of service on record.

In or about the 12th March, 1997, the first Defendant SAMEH TEXTILE INDUSTRIES LTD. (STIL) applied for and obtained a Kshs.25 million loan from Premier Savings and Finance Ltd. on a security of a first charge over the property known as Subdivision 540, Section V. Mainland North, Mombasa as well as under a loan Agreement of the samedate. STIL however defaulted in the repayment of all amounts due and in the meantime Premier Savings and Finance Ltd. transferred it's entire business and undertaking to the Bank and formerly assigned to it absolutely all rights and claims and obligations under the loan Agreement and charge. STIL acknowledged the debt and the Bank agreed to discharge the property to allow STIL sale the same free from any encumbrances and apply the proceeds in reducing the indebtedness to the Bank. However after application of the sale proceeds in reduction of the indebtedness there stood an outstanding balance of Kshs.9,793,537.90 which amounts the Bank agreed to reduce to a figure of Kshs.4,977.091.95 in full settlement of the debt. The parties did proceed to enter into a fresh Agreement of acknowledgement of debt on 20th March, 2000.

In the said agreement, STIL acknowledged the debt and agreed to modes of payment by instalments as well as interest to be charged on the amounts due. Under clause 8 of the loan Agreement dated 20th March, 2000. STIL expressed satisfaction as regards amounts owing. It reads:-

“STIL renounces any legal exemption or reservation that STIL may have with regard to the debts acknowledged in this Agreement, and in particular, but without prejudice to the generality of the foregoing, in regard to the correctness of the amount of the debt the cause of the debt the revision of accounts the calculation of the indebtedness comprised in expression “Total outstanding” and “Settlement Amount” and interest thereon and confirms it’s obligations towards the Bank as set out herein.”

STIL defaulted in the repayment of the “settlement Amount” which prompted the Bank to file the suit herein and subsequently the current application. At the time of filing suit the amounts due stood at Kshs.4,946,896.20 together with accruing interest. According to Mr. Shafique Pirbhai, several meetings were held between the parties followed by an exchange of correspondence in an endeavour to bring the issue to an end. STIL did by letter dated 31st July, 2000 assure the Bank that there would be no more default but by 16th August, 2000 the situation was not any different and once again they requested for further indulgence. On the 12th September, 2000 the Bank issued a Formal demand Notice to STIL to clear the loan arrears which at the time stood at Kshs.1,929,142.95 by the 16th September, 2000 followed by a reminder on 20th September, 2000. In reply STIL by their letter dated 29th September, 2000 confirmed their inability to clear the Loan arrears. The said letter reads in part:

“29th September, 2000

Diamond Trust Bank (K) Ltd.,

P.O. Box 90564,

Mombasa.

Attn: Mr. Sunderji/Pir bhai

Dear Sirs,

RE: YOUR LETTER TO US DATED 20/09/00 IN CONNECTION

WITH AGREEMENT NO.8299301005 (PSFML 839/13) We refer to your above letter to us and to our previous letter to you whereby we were hoping to regularize the arrears in the account by 30 th September, 2000. Unfortunately funds we were expecting from various sources have been delayed. Also in the last 2/3 months due to power shortages upcountry effecting our principle raw materials suppliers, we have been forced to reduce produci ng severally and this has effected our cash cycle and not allowing it to go as per planned schedules.

In the light of the background I have given there is no doubt the debt is outstanding. However in an application for summary judgement by striking out the defence, the court has to look at the defence put forward. The Defendants did file a common defence

on 19th February, 2001. In paragraph 2 therein, the debt is admitted. It states:

“2. Without prejudice to paragraphs 6, 7, 8, 9, 10 and 11 th e defendants admit paragraphs 5 of the plaint” Paragraph 5 of the plaint reads:-

“5 By an Agreement made and entered into between the plaintiff and the first Defendant dated 20 th March, 2000 “hereinafter referred to as the Agreement”), the first Defendant acknowledged that it was truly and lawfully indebted to the plaintiff in

the sum of Kshs.9,793,357.90 (hereinafter agreed referred to as the "Principal Debt") and the plaintiff agreed to accept payment of the sum of 4,977,091.95 (hereinafter referred to as the "settlement Amount") in full and final settlement of the Principal Debt -----

However, the Defence goes further to say in paragraph 3, that the interest rates charged were excessive, punitive, unreasonable, extortionate and denied in Toto. But what does the Agreement of indebtedness dated 20th March, 2000 between the parties say? At clause 2 it says:-

a) The Bank at the request of STIL agrees to accept payment of the settlement Amount together with interest accrued thereon as provided herein in full and final satisfaction of the Total outstanding.

(c) Interest shall accrue on the settlement Amount at the rate (subject to the terms hereof of twenty five percent (25%) per annum and shall be calculated on a monthly reducing balance basis and a 365 day year".

In the case of default clause 5 therein provides that STIL would pay to the Bank interest at per annum rate which is ten per cent (10%) above the per annum rate then charged pursuant to clause 2(c) Infact it goes further to say that the said rate of interest represented a reasonable pre-estimate of the loss to be suffered by the Bank in funding the default of STIL. I have read the various correspondence attached in support of the Affidavit and at no time was the issue of interest raised by STIL. They are all along asking for indulgence and acknowledging the debt in full including the interest. Neither has STIL at any time denounced the Agreement dated 20th March, 2000 in which the interest clauses are entrenched. They again introduce new issues in the defence and in particulars paragraph 6,7,8,9 and 10 of their defence in which they allege they had been misled by their own Advocates into signing the document. They however on the same breath say these same Advocates having been acting for them in the last 40 years. With respect, I would expect the Defendants then to direct their grievouses as concerns the said issues to their lawyers who are not parties to the current suit and more so because the relationship between the Defendants and their lawyers is governed by a separate contract. The determination of the said issues would not be adequately addressed even if the matter was to proceed to full trial as it stands.

For the defendant to qualify and be allowed to defend the suit either conditionally or unconditionally, it has to be shown that the defence does raise triable issues. Plat J.A. in MAGUNA GENERAL STORES VS REPCO DISTRIBUTORS "----- There must be some reason why the defendant does not owe money. Either there was no contract or it was not carried out and failed. It is not sufficient therefore simply to deny liability without some reasonness"

I have summarized the reasons given by the defendant which are that the interest rate charged is illegal. In my assessment of the defendants line of defence, I see nothing but a scheme to delay the matter. I have shown that the debt of Kshs.4,977,091.95 is admitted in the defence and yet there has been no attempt to pay the said sums since the filing of the defence. The defence has opted not to respond to the application and to show indeed there are triable issues, and yet they want the court to exercise it's discretion in their favour and on the face of clear admission as seen in the various

correspondences referred to should the court then simply deny the plaintiff a chance to recover what is rightfully his just to give the Defendant a second chance. MADAN J.A. in GUPTA provided the answer.

" ----- If no prima facie triable issue is put forward to the claim of the plaintiff, it is the duty of the court forthwith to enter summary Judgement for it is much against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a plaintiff out of his dues, in a proper case prima facie triable issues ought to be allowed to go to trial just as a charm or bogus defence ought to be rejected".

In the present case I find no reason to deny the plaintiff what is due to it and consequently the defence is struck out and judgement is entered for the plaintiff in the sum of Kshs.4,946,896.20 plus costs and

interest as prayed in the plaint.

Dated and Delivered at Mombasa this 4th day of July, 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE