REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 854 of 2002

THE DELPHIS BANK LTD

(UNDER STATUTORY MANAGEMENT) ……..…….. PLAINTIFF

VERSUS

HESBON ONYURO & ALICE OKOTH…….....
…….DEFENDANTS

Coram: J. W. Mwera J.

Kihu for Defendant/Applicant

Oyalo for Plaintiff/Respondent

RULING

The defendants herein, husband and wife, filed the present application dated 2.12.02 under Order 9A rule 10. 11 Civil Procedure Rules and Section 3A Civil Procedure Act. They prayed that the execution of the **ex parte** judgment entered on 24.9.02 against them be stayed and then set aside so that they have leave to defend the suit as per the draft defence and counterclaim which was appended to the application. And that the same be deemed filed and served. Other than positing that the defendants were never served with summonses to enter appearance together with copies of the plaint, Mr. Kihu added that the intended defence raised triable issues and the intended counterclaim was merited. The first aspect of the grounds got the process server, Jackson Owidhi, examined on oath as to the affidavit of service he swore and filed on 16.9.2002, about the disputed service. Thereafter the court heard submissions.

Mr. Owidhi going over his affidavit of service told the court that the plaintiff's advocate (the present Mr. Oyalo) gave him two copies of summons to enter appearance plus a plaint to serve on the defendants. That together with these processes was an investigation report regarding where the defendants could be found and served. That Owidhi traveled to Kisumu and then on to Miwani. That using the same report, he went over to a local sugar mill which was then closed. That in his inquiries from a passenger cyclist carrier whom he came by, that cyclist, who seemed to know the defendants and the direction of their home not too far from the township, was ready to show the way. That Owidhi hired his services to be taken there. That this cyclist appeared to have worked with the defendants before. That on the way the cyclist noticed the defendants' motor vehicle and pointed it out to the process server. That it was a green TOYOTA COROLLA which Owidhi stopped. It had three occupants, one of them a woman at the driving wheel. It turned out to be the 2nd defendant whom Owidhi introduced himself to. That she told him that her husband (1st defendant) was away at Nairobi and the 2nd defendant was not sure as to the date of his return. That there Owidhi served the 2nd defendant with her own processes and those of her

husband, the 2nd defendant which she accepted and promised to pass on to. That she signed for both. That Owidhi then returned to file his papers and to him service was properly effected on the defendants. He tried and remembered that the cyclist was called Ochieng - a local resident. Looking at the signature appended by the 2nd defendant on the processes Owidhi said that she signed herself. The court was further told that Owidhi was visiting Miwani for the first time. That he served the processes on 16.8.2002 and Ochieng, the cyclist introduced Owidhi to Alice Okoth – the 2nd defendant. That this process server did not feel it necessary to depone that Ochieng did show the 2nd defendant to him particularly that the documents had been accepted by her. Owidhi maintained the cyclist knew the defendants who once worked for the local sugar company. That he relied on the investigation report with him and did not take it that Ochieng would or did mislead him.

During submissions the court heard that the defendants once got a loan of sh. 500,000/= from the plaintiff. It was secured by a deposit of sh. 1m. That then the defendants issued a cheque of sh. 400,000/= payable to a 3rd party when their loan account was in debit. That nonetheless the plaintiff bank paid it. That the defendants intended to plead in the intended defence that this raised indebtedness in their loan account was not regular. That the in March 1998 while the debt stood at over sh. 810,000/=, interest must have been accruing, the plaintiff redeemed the deposit and applied the proceeds to liquidate the debt. To Mr. Kihu that left the defendants with sh. 200,000/= in credit. He wondered why the plaintiff was claiming a further sh. 300,000/= even without accounting for the interest that had so far been earned on the deposit account. So the defendants had intended to claim sh. 500,000/= from the bank by way of counterclaim. It was maintained that the payment of sh. 400,000/= on the cheque (above) was contrary to the terms agreed.

Mr. Oyalo told the court that the defendants issued the sh. 400,000/= dated 27.10.97 payable to CMC Holdings Ltd. That it was paid on 29.10.97. That when the defendants purported to stop it on 27.10.97, it was too late. But even had that notice come in time, yet payment was effected, the defendants were still liable on it. Reference was made to the letter of offer dated 11.3.97 and the General Terms and Conditions of 20.3.97 both of which formed one contractual transaction. This was to demonstrate that at no time did the bank act contrary to letter or spirit of the contract. Mr Oyalo even charged that the defendants were guilty of non-disclosure of important material when at the **ex parte** stage they chose not to exhibit the General Terms and Conditions whose clear clauses were to the effect that the bank would act on it without being defaulted. Indeed the argument was that this application would as well be dismissed in limine on this important aspect. Mr. Kihu however was of the view that the exclusion of that document did not make difference at the time the **ex parte** stay orders were given.

Mr. Oyalo repeated that liquidating the deposit account meant applying the loan/overdraft account which, it must be borne in mind had itself been attracting interest. The plaintiff then exhibited the defendants' statement of account which showed that as at 5.3.98 when the deposit was liquidated and applied to pay off the debt, the deposit account sh.1m, had sh. 1,043,524.65. Thus the interest it earned was reflected. As at the time the suit was filed the debt was put at sh. 994,180/35 as at 23.5.02. It stands at sh. 1,097,600/35 as at 1.4.03. That the counterclaim had no merit.

Turning to the intended defence the court was told that for the defendants to get the orders setting aside the interlocutory judgment, they defendants must show a **prima facie** defence. That they had shown none and so it would be futile to set aside the judgment in issue.

After going over this application, the affidavits relating to it plus the annextures and also having heard counsel and gone over the plaint with the intended defence and counterclaim, this court has come to the following:

Beginning with the service of the summonses to enter appearance, it appears safe to accept that it was valid. Not only did the court hear and see the process server Mr. Owidhi, it also compared, without pretending to take unto itself the role of handwriting expert, the 2nd defendant's signatures on the specimen signature card she (with 1st defendant) signed and left with the plaintiff bank, plus the signatures on the account opening form, with what appears at the back of the processes she was served

with by Owidhi on 16.8.02. The likeness is such that in this case it did not have to await an expert's opinion. Coupled with the credible testimony of Owidhi, this court was more than fortified to conclude that the 2nd defendant was served not only with her own processes but also those of here husband, the 1st defendant. Accordingly the **ex parte** judgment entered, when the two failed to enter appearance and file defence, was proper and valid. It cannot be set aside on the basis of the claim that service was never effected. It was.

That being the court's view, can the defendants be allowed to set the judgment aside on the basis that they have a **prima facie** defence? What the plaintiff claims is already set out above.

The intended defence says that it denies paragraph 5 of the plaint. That paragraph averred that the defendants operated their account over the limit of sh. 50,000/= and further issued a cheque of sh. 400,000/= to 3rd party which the plaintiff paid thereby increasing the debt. The defendants say that such payment was on the plaintiff's own volition and the plaintiff had no express instruction to make such payment.

That all this was unlawful and that the cheque ought actually to have been dishonoured. But the letter of offer and terms of conditions say something totally different. They formed the contract between the litigants. This cannot be denied in the light of clause 15 of the letter of offer dated 11.3.97. The defendants bound themselves:

"15. We hereby acknowledge receipt of the original of this facility letter and the Banks General Terms and Conditions and we accept the offer and undertake to comply with the terms and conditions."

The said General Terms and Conditions signed on 20.3.97 said in pertinent parts:

"1. The Customer requests the Bank to honour and to debit to his account all cheques, drafts, bills …….. drawn, accepted and made out by him …… notwithstanding that any such debiting ……. may cause his account to be overdrawn or an overdraft to be increased……,"

and that the bank would decline to do such a thing anyway. And:

"3 (a) The Bank may, without notice set off against any account or indebtedness of the customer:

(i) any other account whether current loan, savings or any other type."

(ii) ……

(b) ……."

When it came to the cheque books the parties agreed:

"18. (a) …… (c)

(d) on receipt, in a form accepted by the Bank, of notice from the Customer to stop payment of a cheque, the Bank will record the notice. The Bank is not responsible if such notice is not acted on otherwise than through negligence.

If by reason of negligence a cheque is in fact paid after receipt of such notice, the Bank will repay the Customer upon proof of its satisfaction that the payment has not discharged or partially discharged any liabilities of the Customer to any party to the cheque ……..".

With all the above the defendants' intended defence cannot be of much use here. The Court of Appeal did reproduce the following principle annunciated in another case when it was deciding **PHILIP CHEMWOLO & AUGUSTINE KUBENDE** [1982 –88) 1 KAR 1036 which featured the reliefs sought here:

"The discretion is in terms, conditional. The courts, however have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima face defence."

In this matter the conclusion is that the judgment was regularly obtained and there is no **prima facie** defence to the claim.

Now the counterclaim: the defendants want to plead that due to the plaintiff's unlawful actions, they were debited with sh. 300,000/= and that the plaintiff was only expected to take up to sh. 500,000/= only of the sh. 1m deposit account in case there was default. So they counterclaimed for this.

It is trite law that a counterclaim is and constitutes a separate cause of action which can even be ordered to be tried separately.

Nonetheless, here the court has found that the plaintiff did not act outside the mandate of the letter of offer or the general terms and conditions. The defendants ran the loan/overdraft account with the plaintiff bank. They also had a deposit account there – the latter even acted to secure the loan. It was agreed that the plaintiff would set off any account. There is no doubt that the defendants overdrew their loan account which was subject to 6 points interest over and above the banks base rates. So the excess sums attracted interest and it continues to do so. The court is similarly satisfied that the deposit

account earned interest. But after utilizing the funds there with the loan account still attracting interest, the sums were/are bound to reach the levels reflected in the statement of account.

Finally, it was considered fatal as against the defendants that they chose not to append the General Terms and Conditions of their transaction with the plaintiff. It contained the vital and material aspects on how the plaintiff would treat cheques even those instructed to be stopped,. It could still honour them and the defendants would be liable. Yet the affidavit supporting the application which the court must have considered when giving the **ex parte** stay said that the plaintiff was instructed not at all to honour cheques that the defendant had issued to M/s C.M.C. Holdings Ltd. Had the court been shown that document, it could have told the defendants that as at that time, they did not seem to have a case on the face of which a stay would issue because as per the terms the bank would get a notice not to honour a given cheque but still go ahead to do so on the agreed basis.

In sum the orders sought are not granted on the foregoing grounds.

The application is dismissed with costs.

Delivered on 3rd July 2003.

J. W. MWERA

JUDGE