



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CIVIL CASE NO. 213 OF 1997

NICHOLAS R.O. OMBIJA.....PLAINTIFF

OMBIJA & ASSOCIATES

VERSUS

NATIONAL BANK OF KENYA LTD.....DEFENDANT

JUDGMENT

By a consent letter of 5th April 2003, the defendant withdrew its notice of appeal to the Court of Appeal against the striking out of its defence and counterclaim and at the same time the plaintiffs also withdrew their claim for general damages against the defendant. It was further agreed that the plaintiffs' suit was to proceed to hearing by way of a formal proof. By another consent letter filed later on the hearing date of the formal proof was fixed.

After the withdrawal of the claim for general damages against the defendant by the said consent, when the plaintiffs' suit came up for hearing, it became clear that what remained of that case consisted of only three reliefs which had been sought by the 1st plaintiff and which were:-

- (1) 43(b)(ii) A declaration that as surety and guarantor of the 2nd plaintiff he be discharged from all liability to the defendant whatsoever;
- (2) (43 a)(ii) An order for a discharge of charge of all documents of title of all his immovable properties charged in favour of the defendant and that the documents be returned to him after their discharge; and
- (3) (43(b)(iv) A permanent injunction to restrain the defendant from selling or disposing of any of all the 1st plaintiff's properties.

The 1st plaintiff testified and said that the 2nd plaintiff is an insurance firm in which he was its sole proprietor. He claimed that during 1989 and 1990 he operated two accounts with the defendant Nos. 501-007-822 under his own name and 501-020-144 under the 2nd plaintiff. He added that on 27th May 1991 he was indebted to the defendant to the tune of KShs. 2.7 million in respect to both accounts which debt had arisen from a series of lendings to him and to the 2nd plaintiff by the defendant which had been made earlier on. In support of the claim the 1st plaintiff put in as exhibits letters he had exchanged with the defendant between September 1990 and February 1992 relating to the loan facilities offered to them by the defendant showing the amounts and security agreed upon.

The 1st plaintiff claimed that he thereafter made payments to the defendant and that he prepared a schedule of all repayments he made from 2nd January 1990 to 1996. He added that during the course of his transactions with the defendant he discharged several of his properties which had been charged in favour of the defendant and that by May 1992 he was no longer indebted to the defendant as he had

repaid all his dues. The 1st plaintiff further claimed that during 1992 he was prevailed upon by the then Manager of the defendants' Kisumu Branch to apply for a loan of Kshs. 7.3 million from the defendant of which Kshs. 4.9 million he was to use to set up a printing – cum-bookshop business and that in anticipation of that facility he released 85 title deeds of his properties to the defendant as security and personal guarantee to that loan. He also said that charges of all the said 85 titles in favour of the defendant were prepared and executed and were eventually registered, but the loan was never granted. It was a contention of the 1st plaintiff that there was no consideration for the said charges now held by the defendant. He added that he had also given a personal guarantee in the sum of Kshs. 8 million which was for undisclosed past loans advances and overdrafts which guarantee was also without any consideration. The 1st plaintiff also referred to an alleged statutory dated 31st July 1994 which was stated to have been under Section 74 of the Registered Land Act which demanded Kshs. 32,736,254/90 at 40% and gave 3 months notice. Further more the 1st plaintiff said he was served with another statutory notice dated 5th March 1997 which demanded Kshs. 17,864,314/80 as at 19th February 1997 at 32% interest. The 1st plaintiff pointed that in his schedule the property No. Kisumu Municipality Block 10/199 was sold by private treaty with the consent of the defendant and that all of the proceeds thereof amounting to Kshs. 1.7 million was paid over to the defendant through the account No. 501-007-822 on 24th July 1995. He stated that he did not admit any of the defendant's demands made in the two letters as he had paid all that was due from him and the 2nd plaintiff, consequently he filed this suit against the defendant seeking inter alia:-

- (i) a declaration that he and the 2nd plaintiff did not owe anything to the defendant.
- (ii) an order directing the defendant to discharge the titles of all of his properties which were charged to it;
- (iii) an order that he be discharged as guarantor of the 2nd plaintiff and from his personal guarantee in the sum of Kshs. 8.0 million.
- (iv) A permanent injunction to restrain the defendant from selling or disposing of any of the said properties.

The 1st plaintiff said that the defendant filed a defence and counterclaim against him, the 2nd plaintiff and the 3rd party known as the Vital Products Distributors claiming a sum of Kshs. 52,789,000/30 at 32% interest, as at 1st February 1997. The 1st plaintiff further stated that under the aforesaid counterclaim the sum claimed by the defendant was alleged to be in form of loans, advances and overdrafts made to the plaintiffs and M/S Vital Products Distributors but he claims that in their reply to the defence and defence to the counter claim they denied all the defendants' allegations and claims. He indicated that following the hearing of their application dated 24th September 1997 the aforesaid defence and the counterclaim were struck off and that that prompted the defendant to file a Notice of Appeal which as stated above was later on withdrawn. When he was cross-examined the 1st plaintiff stated that the defence and counter-claim were struck off under Order V1 Rule 13(1) (a) of the Civil Procedure Rules on the ground that they did not disclose reasonable defence and did not furnish any reasonable cause of action against them. He admitted that as it was only an application that was heard leading to the striking out the said pleadings the parties could not testify, and that they did not call any witnesses. It was the 1st plaintiff's contention that what had then come up for hearing by way of formal proof as agreed by consent by parties was the plaintiff's case and that the defendant could not call witnesses to testify as it no longer had a defence or counterclaim on record which it had to prove. The 1st plaintiff claimed that the issue of whether they owed money to the defendant was no longer an issue in this case.

As indicated above the fact that the defendants' defence and counter claim had been struck off and that following the consent letter of 5th April 2003 which was endorsed as an order of the Court on 14th April 2003, the plaintiffs' case that remained to be formally proved consisted only of reliefs sought by the 1st plaintiff which related to discharge of all his immovable properties charged to the defendant, his a discharge from his guarantee of loan facilities offered to the 2nd plaintiff by the defendant, the discharge from his personal guarantee of loans, advances and overdrafts in the sum of Kshs. 8.0 million, and a permanent injunction to restrain the defendant from disposing of or proclaiming or selling any of

his immoveable properties charged to it.

In his testimony the 1st plaintiff contended that he had paid all the loan advance and overdraft facilities offered to him and to the 2nd plaintiff and that he had not admitted any debt alleged by the defendant in his reply to defence and defence to counter claim. The 1st plaintiff also put in his schedule of the repayments he had made . He claimed that a loan for Kshs. 7.3 million applied for in 1992 for which he offered and charged titles for 85 of his properties in favour of the defendant as security was not granted and was not disbursed. According to the 1st plaintiff the consideration for that loan had failed together with his personal guarantee in the sum of kshs. 8 million for undisclosed past loans and overdraft facilities.

On the material made available to me and I am satisfied that the 1st plaintiff has proved on the balance of probabilities that he no longer owes any debt to the defendant either through his name or under the name of the 2nd plaintiff . I therefore order the defendant to discharge all the titles of the properties charged to it by the 1st plaintiff as security for alleged loans, advances and overdraft facilities and that the same be returned to the 1st plaintiff after being discharged. There will be also a permanent injunction to restrain the defendant in terms of prayer IV of his plaint. In the spirit of the consent of 5th April 2003 there will be no order as to costs for the formal proof.

Dated this 24th November 2003, and delivered on 27th November 2003 in the presence of Mr. Wasuna for the plaintiffs and Mr. Siganga for defendants.

B.K. Tanui

JUDGE