



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 1017 OF 1999

AFRICAN BANKING CORPORATION PLAINTIFF

VERSUS

SUISE LIMITED)

MOSES WACHIRA)..... DEFENDANTS

NGINGE MONDO)

RULING

The application dated 15th June 2000 and brought under Order 6 Rule 13 (1) (b) (c) and (d) of the Civil Procedure Rules is seeking an Order that the Defendants defence as filed herein on 4th October 1999 be struck out for being frivolous, vexatious and/or otherwise an abuse of the process of court and that judgment be entered in favour of the Plaintiff as against the Defendants as prayed for in the Plaint. It is also seeking costs of the application. The grounds cited in the application are mainly that the Defendants are truly and justly indebted to the Plaintiff in the sum of K.shs 10,770,184/50 and were so indebted at the commencement of this suit; that the Defence is scandalous, frivolous, vexatious, an abuse of court and is merely aimed at delaying the hearing of the suit; that the defence is incurably defective, spurious, evasive and offends the rules and law governing pleadings; that it is a mere denial and does not raise any triable issues in law. There is an Affidavit in support of it plus several annexures.

The application was opposed on points of law only as no Reply to the application was filed and no grounds of opposition were filed.

As against the 2nd & 3rd Defendants the suit is based on an allegation that they jointly and severally signed Guarantee which was a joint and several guarantees in writing. This is clearly pleaded at paragraph 8 of the Plaint. The Defence states among other things as follows at paragraph 5:

“5. The Defendants deny that the 2nd and 3rd Defendants jointly

and/or severally guaranteed in writing the financial accommodation

granted to 1st Defendant as set out in paragraph 8 of the Plaint and Plaintiff is put to strict proof thereof”.

The Plaintiff in its Affidavit in support of this application states at paragraph 3 as follows:

“3. THAT by a joint and several continuing guarantee in writing dated 26th August 1997 signed by the Second and third Defendants and addressed to the Plaintiff, the Second and third Defendants guaranteed to the Plaintiff the due payment of and undertook on the Plaintiff demand in writing to pay to the Plaintiff all sums including interest that may be due from the First Defendant to the Plaintiff. I annex hereto a true copy of the said guarantee marked ‘NW 2’.

A look at the exhibit marked as NW2 and annexed to the said Affidavit, it is clear that it is not executed by the 2nd and 3rd Defendants at all. It is in fact signed by one George Wanyee. It is therefore not relevant as far as this application is concerned and it is not the guarantee that was executed by the 2nd and 3rd Defendants. This means in effect that the application is not supported by any document that would prove that the two did guarantee the facilities allegedly advanced to the First Defendant.

On this being pointed out by the Defendant’s counsel the Plaintiff’s counsel referred me to a document which was filed as part of the particulars in this suit. I cannot rely on that document as it was a copy which in the first place was not part of the application and secondly a document which is not properly produced as evidence before me as none produced it in evidence and it was not placed before the Commissioner for Oaths to confirm that it was the right document annexed in evidence. It would have been different if it had been properly annexed as exhibit in another application in this matter. The effect of this is that I cannot say that the Defendant’s plea at paragraph 5 of the statement of defence is frivolous or vexatious. I cannot say it is an abuse of the court process or is meant to delay the hearing of this suit as no proper evidence has been adduced to demonstrate the same. This issue is a triable issue.

Further, I have perused the pleadings, even as regards the First Defendant. In my humble opinion this is not a fit case where Defence can be struck out and judgment entered. I do feel that action is such a draconian action that can only be taken in very plain and obvious cases. This is not such a case.

Application dismissed with costs to the Respondents. Let the matter proceed to full hearing.

Dated at Nairobi this 31st January, 2002.

ONYANGO OTIENO

JUDGE