REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 606 OF 1998

KENYA COMMERCIAL BANK LIMITED..... PLAINTIFF

VERSUS

JAMES KURIA NJINE..... DEFENDANT

RULING

I have before me a motion on notice expressed to be brought under order 35 rules 1 and 9; order 12 rule 6; Section 3A of the Civil Procedure Act and all other enabling provisions of law. The motion prays for judgement to be entered against the plaintiff as prayed in the plaint. It is stated to be based on the grounds that (a) the defendant is truly and justly indebted to the plaintiff in the amount claimed in the plaint and that the defence filed is a sham and does not raise any triable issues and (b) the defendant has unequivocally and on several occasions admitted indebtedness to the plaintiff. The application is supported by an affidavit sworn by one A. S. Kangogo, the Credit Manager of the plaintiff bank, on 18th July 2001. The application is opposed and there is in that regard a replying affidavit by the defendant himself sworn on 25th January, 2002. The application was canvassed before me on 29.1.2002.

I have now considered the pleadings and the application including the affidavits on record and the submissions of the Advocates. I think the principle issue calling for an answer is this. Is the plaintiff on the material before the court entitled to either a judgement on admission or a summary judgement? To answer that issue it must be appreciated that a judgement on admission is not to be entered save where there is a clear, complete, unambiguous and unqualified admission of the plaintiffs claim. Such admission may be contained in the pleadings, in correspondence before action or in the affidavits filed. And summary judgement cannot be entered unless the court is satisfied that there isn't even a single ***bona fide*** triable issue. The onus is on the plaintiff to show that the defendant is truly indebted to him as claimed and the defence filed is not worth proceeding to full trial. The corollary of that is that if the defendant shows by affidavit or otherwise that he has triable issues or indeed even a single triable issue, he is entitled to unconditional leave to defend.

So I begin by asking whether the defendant has made the kind of admission which would suffice at law to support a judgement against him. In this connection it is noted that the plaintiffs claim against the defendant is for the sum of Kshs.2, 776,698.92 together with interest thereon at 13.25 per annum. The defendant expressly denies in his statement of defence to being indebted in that sum. And he does not make any admission of indebtedness in his replying affidavit. Is there some other admission elsewhere? In several letters between December 1992 and August 1995, the defendant severally admits to being indebted to the plaintiff and makes promises to pay which he doesn't honour. However in none of them does he admit the amount claimed in the plaint. The amounts admitted are less. In his letter of 22.8.95, he reckons that his own indebtedness is approximately Kshs.1, 800,000/-. In those circumstances I am afraid

that the court cannot find that the defendant has clearly, completely, unambiguously and unequivocally admitted the amountt in the plaint. Judgement cannot therefore be entered against him as prayed in the plaint pursuant to the provisions of order 12 rule 6.

How about Summary Judgement under order 35 rule 1? The plaintiff has in the affidavit of A. S. Kangogo amply demonstrated that between 1992 and 1995 several demands were made and that the defendant always acknowledged his indebtedness. He never questioned the amounts claimed or the interest applied. On the contrary he asked for indulgence and made several promises of repayment none of which were honoured. And in the defence on record filed on 7.4.99, the defendant advances defences to the effect that he has cleared the original loan in full, that the various amounts paid by him have not been shown or accounted for and that the plaintiff charged enormous interest which is not provided for in the legal charge. Neither in the said defence nor in the replying affidavit does the defendant indicate what payments he made and when. His defence is in the premises nothing but a bare denial of indebtedness and a bare assertion of payment. As regards the defence that the interest charged was enormous and not provided for in the charge, the same is belied by clause A (i) and (ii) of the charge which authorized the plaintiff to charge interest at the rate of 18.5% per annum with power in its sole discretion to vary the same without prior advice to the defendant and to charge a penal interest rate of 3% per annum on all sums due and unpaid. So although the interest may be enormous it is not illegal or baseless. The same is perfectly contractual.

In the replying affidavit, the defendant swears that the rate of interest charged by the plaintiff was not agreed upon and has no basis at all. He avers that it is illegal. He further swears that the plaintiff has failed to exercise its right to realize the security and that it is guilty of inordinate delay in filing the suit. He also takes up the issue of accounts and swears that the statements of account annexed to the application do not include statements from inception and that they do not show how the amount ofKshs.2,776,698.92 is made up. He also demurs that Mr. A. S. Kangogo who has sworn the plaintiff's affidavit in support of the application has not shown how the statement of account was compiled or by whom it was compiled. He further swears that the same is inadmissible in evidence as it is not certified to be a true copy of anything. Furthermore, he swears, the said statement being one generated by one party cannot in contract or law be relied on against the other party unless otherwise acknowledged by that other. He denies on oath having admitted the amount claimed by the plaintiff. He concludes by opining that the defence filed by him raises the following five triable issues: (i) the true state of accounts, (ii) the rate of interest applicable, (iii) the admissibility of self generated statements of account, (iv) whether the plaintiff is entitled to file suit and to charge interest without first moving to realize the security, and (v) whether the plaintiff has moved to realize the security. Are these ***bona fide*** or sham triable issues manufactured to cloud the plaintiffs march to summary judgement?

As I have pointed out elsewhere, the matter of interest is spelt out in the instrument of charge. It is not therefore a bona fide triable issue. As regards whether the plaintiff can file suit to recover the charge debt before realizing the security, the law is clear that a chargee need not realize the security before he can sue for the money secured. Provided a notice under Section 74 (1) of the Registered Land Act has been given and there is default, the charge can sue if the charger had covenanted to repay the debt. That is the conclusion one arrives at by reading Sections 74 (3) and the provision thereto. Of course the court has a discretion to stay a suit for payment until the chargee has exhausted his other remedies against the charged property but where, as here, no such discretion is prayed for but the defendant contends that a suit cannot lie unless the security is first realized, he must be told in no uncertain terms that he is plainly wrong. So the fourth and fifth issues identified by the defendant cannot afford a basis for resisting the plaintiff's claim. They are sham issues predicated on a misapprehension or misrepresentation of the law. Having taken that view of the matter, the only reed left for the defendant to hold on to is the admissibility in evidence of the statement of account annexed to the plaintiff's supporting affidavit and depending on whether it is admissible or not, the true state of the defendant's indebtedness to the plaintiff. During the hearing of the motion, I asked Counsel for the plaintiff what difference it would make to the plaintiff's case if I were to find that that statement of account was inadmissible in evidence. He confidently replied that it would make no difference to the case. I am afraid, I cannot agree. Without that statement which is marked as exhibit "ASK 2" in the affidavit of the plaintiff, there would be nothing to support the plaintiff’s pleading that at the commencement of the suit the defendant was indebted to it in the sum of

Kshs.2,776,698.90. That figure would be no better that any figure plucked from the air above the Commercial Court here in Nairobi. The admissibility or otherwise of that statement is therefore crucial to the success or failure of the application for summary judgment. Counsel for the plaintiff was of the view that the statement constituted entries in a book of account regularly kept in the course of business and was therefore admissible under Section 37 of the Evidence Act which reads-

> **"37. Ent`ries in books of account regularly kept in the course of business are admissible whenever they refer to a matter into which the court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability."**

The defendant's Counsel on the other hand was of the opinion that the statement of the defendant's current account was in the nature of an entry in a banker's book and the proper statutory basis for its admissibility was Sections 176 and 177 of the Evidence Act which read -

> **"176. Subject to this Chapter a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transaction and accounts therein recorded.**
>
> **177. (1) A copy of an entry in a banker's book shall not be received in evidence under Section 176 unless it be first proved that -**
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> > **(a) the book was, at the time of making the entry, one of the ordinary books of the bank; and**
> >
> > **(b) the book is in the custody and control of the bank; and**
> >
> > **(c) the entry was made in the usual and ordinary course of banking business; and**
> >
> > **(d) the copy has been examined with the original entry and is correct**
>
> **(2) Such proof may be given by an officer of the bank, or, in the case of the proof required under subsection (1) (d), by the person who has performed the examination, and may be given either orally or by an affidavit sworn before a commissioner for oaths or a person authorized to take affidavits."**

The defendant's argument was that although entries in a banker's books are prima facie evidence of the matters, transactions and accounts recorded therein they had nevertheless to be proved and verified in accordance with the provisions of Section 177. In the instant case, he argued, Mr. Kangogo had not deponed that he had examined the copy with the original entries and found the same to be correct.

In view of the foregoing, it is clear that the parties clash on whether the statement of current account is to be treated as an ordinary entry in ordinary books of account or as an entry in a banker's book. Depending on the classification of that statement of current account, a serious issue of its admissibility in evidence is joined. If it is held to be inadmissible it would follow that the plaintiff's claim in the sum of Kshs.2, 776,698.90 which is denied by the defendant would remain unproven. Speaking for myself, I would without deciding the issue, take the prima facie view that the follow that the plaintiffs claim in the sum of Kshs.2,776,698.90 which is denied by the defendant would remain unproven. Speaking for myself, I would without deciding the issue, take the prima facie view that the defendant's perception of the statement of account as constituting entries in a banker's book is to be preferred and accordingly the same is required to be proved and verified in the manner provided by Section 177 of the Evidence Act. If that view were correct, the exhibit would be inadmissible in evidence as it has not been verified as required.

To sum up, the defendant appears to be a drowning man. However at the moment he is firmly holding onto the reed of inadmissibility of the plaintiffs most crucial evidence. The force of the tide of a full trial may or may not sweep him away to certain death. Until then, he is entitled to a respite on the basis that he has raised one single trial issue, namely, whether or not he is truly indebted to the plaintiff in the amount

claimed in the plaint.

In the result and in the circumstances of this application, the motion for Summary judgment is rejected but with no order at costs.

DATED at Nairobi this 8th day of February, 2002.

A.G RINGERA

JUDGE

CIVIL PRACITICE AND PROCEDURE

- Judgement on admissions.
- Summary Judgement.
- Admissibility of statements of current account in evidence.