

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 98 OF 1999

NATIONAL INDUSTRIAL CREDIT BANK LIMITED.....PLAINTIFF

VERSUS

JACKSON RUIRU.....DEFENDANT

R U L I N G

This is an application for summary judgment under Order XXXV Rule 1(1) (a) and 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The application is supported by an affidavit sworn 31.10.2001 by Reuben Nyanganga who is the Manager of the plaintiff's Debt Management Unit. Annexed to the affidavit is a mass of documents which according to Mr. Nyanganga show that the defendant/respondent was indebted to the plaintiff applicant in the sum of Shs.25,266,594/= as at 15.1.2001 with interest accruing therein at 33% per annum from that date till payment in full. Apart from the allegation of indebtedness the other grounds advanced for the application are:

The pleadings herein as reflected in the reamended plaint and amended defence disclose that the claim by the plaintiff against the defence arises from several hire purchase transactions in respect of which the claim for the sum aforesaid now arises. As well be obvious from the documents annexed to the affidavit sworn by Mr. Nyanganga the sum of Shs.25,266,594/= is the total of various figures emanating from calculations done for and on behalf of the defendant in respect of the various, hire purchase agreements obviously for the purpose of this suit. They are therefore not and cannot be treated as entries in a banker's book within the meaning of Sections 176 and 177 of the Evidence Act so that what is recorded therein can be accepted as prima facie evidence of such entries.

The defendant claims that the accounts are wrong based on wrong interest rates which are exorbitant punitive and oppressive and outside what the parties agreed. But the defendant disagrees with those contents and claims that the interest charges are correct and in accordance with the agreements between the parties.

Given the foregoing positions which party is right and which is wrong. Bearing in mind that the sums claimed is the result of calculations made by the plaintiff's employees and that the figures claimed are denied by the defendant, the possibility of a mistake in the calculations must arise. As I say the court is not by law obliged to accept the figures because clearly they are not what section 176 of the Evidence Act contemplated. So where does that leave us.

In my view the position is very clear. In Provincial Insurance Company of East Africa Limited (now known as UAP Provincial Insurance Company Limited) v Lenny M. Kivuti the Court of Appeal held:-

"In an application for summary judgment even one triable issue, if bona fide, would entitle the defendant to have unconditional leave to defend."

And in Orbit Chemical Industries Limited v Mytrade Limited and Another (Court of Appeal Civil Appeal No.631 of 1998) the Court of Appeal stated:-

“unless the matter is plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination.”

The Court of Appeal referred to another of its decisions in Industrial and Commercial Development Corporation v Daber Enterprises Ltd. (Court of Appeal Civil Appeal No.41 of 2000) in which it stated:

The claim in the instant case is huge. Even the plaintiff admits that a big sum namely of Shs.33,046,334/= has been paid to it by the plaintiff. The plaintiff claims that according to those calculations the balance remaining unpaid is only Shs.2,739,615/= which he still disputes. The documents involved are colossal and they run into hundreds. If any mistake has been committed, that could translate into huge summons. In my view this is not the type of case in which summary procedure is appropriate. I would for that reason dismiss the application with costs. It is so ordered.

Dated at Nairobi this 7th day of February, 2002.

T. MBALUTO

JUDGE