REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT N0.1446 OF 2000

NATIONAL BANK OF KENYA LTD.....PLAINTIFF

VERSUS

PAUL KIBUGI MUITE .....DEFENDANT

RULING

In the plaint filed on 11.8.00, National Bank of Kenya, the plaintiff herein, claims from Paul Kibugi Muite, the defendant, the sum of Kshs.1,440,858.30 together with interest accrued thereon at 23% per year as at 1st August 2000, being the balance due and owing on credit card number 4999 6300 0000 8515. It is pleaded that the defendant at all material times held a National Bank Visa Card No.4999 6300 0000 8515 with the plaintiff bank as result of which he enjoyed credit facilities up to a limit of Kshs.500,000.00; that he voluntarily bound himself to the rules governing the use of the visa card and the subsequent amendments from time to time issued by the plaintiff; that he further bound himself to pay for all the charges incurred by the use of the card and that the use of the said Card would be evidence of receipt and acceptance of the said rules; that it was an express agreement between the plaintiff and the defendant that the plaintiff will pay and settle all charges incurred by the defendant at various outlets for services rendered and goods supplied to the defendant by use of the card and that the defendant would in turn immediately pay and compensate the plaintiff with interest thereon at the plaintiffs rates; that the defendant did utilize the visa card and did incur charges, which grossly exceeded the credit limit approved on his card, and as at 1st August 2000 the defendant's debt to the plaintiff stood at Kshs.1 ,440,858.30, and it continues to accrue interest at the rate of 23% per annum; and that the plaintiff avers that it has informed the defendant of his accrued debt but the defendant has ignored, failed, refused and/or neglected to regularize his account and pay to the plaintiff the sum of Kshs.1,440,858.30 together with the interest accrued thereon.

On being served with the summons to enter appearance, the defendant who is himself an advocate of long standing and experience filed a defence to the suit. The defence is a concise and precise one and I read it in full.

> ***"1. The defendant states that on 27th July, 2000 a receiving order was made against him by this Honourable court and by reason thereof this said suit ought not in law to have been filed and/or cannot be proceeded with and the defendant therefore will contend that as at the time of filing of this suit, the same was incurably incompetent in law and ought to be dismissed.***
>
> ***2. WHEREFOR the defendant prays that this suit be dismissed with costs."***

The plaintiff filed a reply to the said defence on 15.9.00. It reiterated all the contents of the plaint as

against the defendant and averred that there was no receiving order in force at the time of filing its plaint and that the suit was therefore not incompetent in law and the defendant was put to strict proof thereof.

The pleadings stood that state when on 10.9.01, the Bank filed a motion on notice under order 35 rule 1 of the Civil Procedure Rules for summary judgement against the defendant. The summary judgement was sought for the amount claimed in the plaint together with the costs of the suit and of the application. The motion was stated to be on the grounds that the defendant had no plausible defence to the plaintiffs claim, that he had not denied any of the averments made by the plaintiff, and on the documentary evidence of his debt to the plaintiff he could not have any or any reasonable defence against the plaintiffs claim, and it was just and fair in the circumstances to enter summary judgement against him. The motion was supported by a detailed affidavit of Rehema Ali, the Manager of the plaintiffs bank Card Centre. Paragraphs 2-5 inclusive of the said affidavit and the annextures thereto substantiated and verified on oath the plaintiffs claim as pleaded in the plaint. Paragraph 6 shows that the defendant was fully informed of the state of his account and that monthly statement were sent to him. Paragraph 7 deponed that she had been advised by the Bank's lawyers on record that the defence did not disclose any defence whatsoever to the plaintiffs claim. Paragraphs 8 and 9 of the affidavit deal squarely with the defendant's defence on record and I would read them in full-

> ***"8. That it is untrue that at the time of filing this suit a receiving order was operative against the defendant as the same had been stayed by an order issued on 2nd August 2000 at the behest of the defendant himself, on his application to have the said receiving order set aside, annexed hereto and marked "LMM 3" are copies of the defendant's said application as well as the order.***
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> ***9. That I am informed by my said advocate on record which information I verily believe to be true that the defendant's above application in Bankruptcy Cause No.25 of 2000, was granted in May, 2001, and the receiving order that had been stayed was lifted, rendering the defendant's defence of no consequence at all."***

On 7.11.01, the defendant filed a replying affidavit in answer to the affidavit of Rehema Ali and in opposition to the motion for summary judgement. Paragraph 3 and 4 thereof may usefully be read in full. They read -

> ***"3. That contrary to what the applicant says, there are indeed triable issues in this case.***
>
> ***(i) At the time the suit was filed, the plaintiff did not obtain leave of the court as mandatorily required by the Bankruptcy Act. There was inforce a receiving order. Any subsequent lifting or stay of such order cannot cure the defect in the institution of the suit which must in law be dismissed with costs.***
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> ***(ii) In any subsequent fresh suit which might be filed by the plaintiff, I shall raise the defence that the sum claimed in the plaint is unrecoverable in law in that the amount includes interest illegally charged in that in terms of the Central Bank of Kenya Act and the Banking Act, the plaintiff was and is limited to an interest rate of a maximum of 16.5% for short term loans i.e. loans for periods not exceeding 3 years.***
>
> ***(iii) In any subsequent fresh suit, I would also plead the defence that the plaintiff is claiming a global figure without particularizing what goods or services the card was used for.***
>
> ***4. That I make this affidavit in opposition to the summary judgement application, the facts deponed to being true and within my own knowledge."***

The motion was argued before on 22.4.02 by Mrs. Mbanya, advocate for the plaintiff and Mr. Muite, the defendant, himself. The plaintiffs advocate submitted that there was no denial of the facts constituting the plaintiffs cause of action. The only issue in contention was whether there was a receiving order against

the defendant when the suit was filed and the consequences thereof on the present suit. In that regard, she submitted that there was no receiving order in effect as the same had been stayed on 2.8.00 before the filing of the suit on 11.8.00. Furthermore, she argued, section 9 of the Bankruptcy Act shows that leave to file a suit against a person on whom a receiving order has been made is only required once the official receiver has been appointed and constituted the receiver of the property of the debtor. That step, she argued, had not been reached in the Bankruptcy proceedings against the defendant herein as the receiving order and further proceedings had been stayed. She submitted further that in the circumstances, the defendant had no plausible defence against the plaintiffs claim.

Mr. Muite for his part began by endeavouring to establish that he was not limited by the contents of his affidavit in his endeavour to show that he had triable issues entitling him to defend. In that connection he submitted that Order 35 rule 2 allowed the defendant to show "either by affidavit, or by oral evidence, or otherwise that he should have leave to defence the suit." He then proceeded to argue that he had two triable issues, namely whether or not leave to file the suit was required in the circumstances of this case and whether or not the interest charged by the plaintiff was illegal as offending the provisions of the Central Bank of Kenya (Amendment Act) 2000. On the first issue, he contended that under Section 9 of the Bankruptcy Act, as soon as a receiving order is made, the official receiver is thereby constituted a receiver of the assets of the debtor and no further action is required. He relied on the marginal note to the section. He also submitted that stay of the receiving order was not tantamount to a vacation of the same. In those circumstances, according to him, leave of the court was required before the suit could be instituted. On the interest claimed by the plaintiff, Mr. Muite submitted that the rate of 7.5 per month claimed in accordance with the contract between himself and the plaintiff was illegal *ab initio* because the last time the Central Bank of Kenya fixed interest rates in exercise of its power under sections 39 and 41 of the Central Bank of Kenya Act was in 1990 vide legal notice No.1617/90 and the same were fixed at 19% per annum for long term loans and 16.5.% per annum for short term loans. He argued that Parliament did not amend Sections 39 and 41 to control interest rates until 1997 under the Central Bank of Kenya Amendment Act No.9 of 1996 which came into force on 18th April, 1997. He also contended that by virtue of the provisions of Section 44 and 45 of the Banking Act, Cap.488, interest rates could not be increased without the consent of the Minister. He submitted that the Bank could not increase the rate of interest on short term loans beyond 16.5% without the consent of the Minister and that by doing so, it had violated Section 44 and 45 of the Banking Act which are still in force. He submitted that whether the rate of interest claimed by the plaintiff was lawful was a triable issue.

The defendant also took issue with the amount claimed by the plaintiff. He referred to the plaintiffs exhibit "LMM 2" (the monthly statements) and queried the debit entry in the sum of Kshs.424, 616.76 on 16.10.96 which was described as an adjustment and was indicated to be balance from ***KENCARD***. He pointed out that there was no pleading in the plaint about Kencard and that the plaintiff's claim was based on the use of kenCard No.4999 6300 8515. He also queried the credit entry of Kshs.482, 497.75 on 30.9.97 which was indicated as a credit transfer to card 4999 6300 8515. He said that the transfer was not explained. On the whole, he submitted, there was a triable issue on the amount claimed. He also contended that the plaintiff had not distinguished what amounts represented principal and what represented interest: On the contrary, it had claimed a global sum.

In reply to the defendant's submissions, Mrs Mbanya, submitted that he defence filed was not plausible. The court should look only at the pleadings on record. In that regard, she submitted that the matters raised in paragraph 3 (ii) and (iii) of the defendant's replying affidavit were speculative and could only be taken into account if a fresh suit was filed. The same were not taken in the defence and could not be canvassed at this stage. In any case, she further contended, the defendant had bound himself by contract to pay the interest claimed and he could not renege from his contractual obligations. On the queries to the two entries, she pointed out that the contract for the credit card required any queries to be raised immediately. As the defendant had not denied receiving the statements, he should have raised those queries then, it was contended. As regards the point that the plaintiff had claimed a global figure which was not broken down into principal and interest, counsel submitted that the global figure claimed had not been disputed and it was not necessary to break it down in the plaint.

I have now considered the motion and the submissions made thereon. The only issue in a motion for

summary judgement is whether the defendant has shown that he has a bona fide defence to the plaintiff's claim. He does that by showing that his defence raises **bona fide** triable issues. He is entitled to do so by affidavit or oral evidence or otherwise. In ***MUGAMBI V GATURURU*** [1967] E.A. 196, at P.197, letter I, Madan, J., as he then was, had the occasion to consider order 35 rule 2 of the Civil Procedure Rules and in particular the intendment and scope of the usage of the expression "or otherwise". He delivered himself as follows-

> ***"In my opinion, therefore, the expression "or otherwise" in rule 2 entitles a defendant to resist an application for summary judgement in manner other than by affidavit or by his own vica voce evidence but only by properly admissible means. But a method of satisfying the court otherwise than by affidavit or the defendant's own vica voce evidence is not to be encouraged. I would not like to see it gaining ground."***

I entirely concur. In the matter at hand the defendant did not adduce any oral evidence. He relied on his own affidavit. He also raised legal arguments. In my oprnion, legal arguments predicated on what is contained in the pleadings and the facts canvassed in an affidavit would be a proper means of satisfying the court that the defendant should have leave to defend. The only concern in the present motion is whether some of the legal arguments canvassed by the defendant were available to him given the state of the pleadings and the affidavit evidence on record. I will answer that question while I deal with the motion generally.

As the pleadings stood by the time the motion was filed, the defendant had not specifically traversed the allegations of fact pleaded by the plaintiff. By virtue of the provisions of Order 6 rule 9(1) the plaintiff's allegations of fact are deemed to have been admitted by the defendant. There was and there is now no issue of fact to be tried on this motion or even at the actual trial itself. The defendant did however raise a point of law in his defence as he was allowed to do by Order 6 rule 7. That point was whether or not the plaintiffs suit was incompetent in law on the basis that at the time it was filed there was a receiving order in place against the defendant and in consequence of that order, the plaintiff was required to obtain the court's leave to institute the suit against the defendant, which leave was not obtained. To made a finding on this issue, it is necessary to read section 9(1) of the Bankruptcy Act. It reads-

> ***"9. (1) On the making of a receiving order the official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt probable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, except with the leave of the court and on such terms as he court my impose".***

On a plain reading of the above provision I am of the opinion that the interpretation Mr. Muite seeks to place thereon is not without merit. The provision appears to me to mean that once a receiving order is made the official receiver is ***ipsofacto*** constituted the receiver of the property of the debtor and no suit can be filed against the said debtor or his property except with the leave of the court. As regards whether the order staying the receiving order had the same effect as if no receiving order had been made in the first instance or it merely suspended the taking of permitted actions consequent thereon but did no operate as a vacation thereof, I do, without deciding, take the view that a stay order does not have the same effect as an order vacating the receiving order. At any rate the defendant has shown he has definitely an arguable point of law on the issue. On that view of the matter it is evident that in my ***prima facie*** opinion, until the receiving order made against the debtor on 27th July, 2000 was set aside on May 2001,Section 9 (1) of the Bankruptcy Act, precluded the Bank from instituting the suit against the defendant without the leave of the court. Accordingly, it cannot but be found that the defendant has shown ***a bona fide*** triable issue of law which he has raised in his defence. And I doubt that the setting aside of the said receiving order could validate retrospectively the institution or continuation of a suit which was not ***prima facie*** competently instituted in the first instance.

As regards the arguments on the legality of the interest charged by or now claimable by the plaintiff against the defendant, I am of the opinion that those issues were improperly taken for the reason that the

same were not canvassed in the defendant's statement of defence. The words "or otherwise" in order 35 rule (2) of the civil procedure rules do not in my view entitle a defendant to resort to raising points of law which are not pleaded or which do arise not by necessary implication from the facts pleaded or contained in affidavits filed with the purposes of persuading the court that he is by force of those points of law entitled to leave to defend the action. I will in the premises decline to dignify those points with my opinion thereon. In any event the defendant himself has sworn in his replying affidavit that those are matters he will plead and take up in any suit filed by the plaintiff subsequent to the present one.

Last, but not least, is the issue taken on the details about the plaintiffs claim against the defendant. I agree with the plaintiffs submissions that the defendant should have raised those queries immediately he got his statements. Moreover the quantum of the plaintiffs claim was a matter of fact which was not traversed in the defence and the defendant is by the rules of pleading deemed to have admitted the same. He could not in those premises be said to have raised a ***bona fide*** triable issue on the matter.

The upshot is that I find the defendant has shown a ***bona fida*** triable on the issue of law which was raised in his defence and accordingly, he is granted unconditional leave to defend the suit. The motion for summary judgement is refused with costs to the defendant.

DATED at Nairobi this 3rd day of May 2002.

A.G RINGERA

JUDGE

DELIVERED at Nairobi this 10th day of May 2002. ,

JUDGE

CIVIL PRACTICE AND PROCEDURE

SUMMARY JUDGEMENT

- Consideration Of the words "or otherwise" in Order 35 rule (2) of the Civil Procedure Rules.
- A duly pleaded point of law, if arguable, may entitle a defendant to leave to defend the suit.