



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 355 OF 1998

COMMERCIAL BANK OF AFRICA LIMITED PLAINTIFF

VERSUS

HYDROSTYLES LIMITED 1ST DEFENDANT

HUSSEIN R. NURMOHAMED..... 2ND DEFENDANT

RULING

The motion is brought under the provisions of Order 35 rules 1, 3 and 8 of the Civil Procedure Rules and seeks an order for judgement as against the defendants as prayed in the plaint together with costs. It is supported by an affidavit in support as well as a supplementary affidavit sworn by the plaintiff's credit manager Joseph Muchemi Kimburi.

In reply the 2nd defendant filed an affidavit but there is no reply by the 1st defendant. The claim arises from monies advanced to the 1st defendant by the plaintiff upon the security of a second charge on the property known as MSA/BLOCK XI/691 registered in the 2nd defendant's favour and upon the execution of a personal guarantee by the 2nd defendant. The 1st defendant then defaulted in the agreed repayments as a result of which the plaintiff called for the payment of the amounts outstanding in full by first issuing a statutory notice to the 1st defendant. However it then transpired that the holders of the 1st charge Diamond Trust Bank Kenya ("DTBKL") had already taken steps in the exercise of their rights under the charge and the amounts realized was Kshs.3,100,000.00/= while the debt due to DTBKL was KShs.4,099,131.15 as at the 11th February 1998. The plaintiff then did issue through it's lawyers a demand notice to the 2nd defendant as the guarantor and thereafter filed the current suit on 29th September 1998 by which time the property had been sold and it was aparent the amounts realized was not enough even to cover the debt to DTBKL. The defendants then filed a joint defence on 26th October 1998 and the same is comprised of 5 paragraph, the first being the usual description and address of the defendants. The others read as follows:

“2. The defendants deny being indebted to the plaintiff for the sum claimed in paragraphs 4 and 5 of the plaint and the plaintiff is put to strict proof.

3. The defendants state that no demand and /or notice of intention to sue has been given as alleged in paragraph 6 of the plaint and the plaintiff is put to strict proof thereof.

4. The jurisdiction of this honourable court is admitted.

5. Save what is herein before expressly admitted, the defendants deny each and every

particular of allegation set out in the plaint as if the same were set out singly and traversed seriatim”.

Mr. Devani for the plaintiff argued that the defence as filed was a sham and raised no triable issues. I have reproduced the same herebefore and paragraph 2 therein denies that the amounts as set out in paragraphs 4 and 5 of the plaint are denied. Yet the 2nd defendant in the replying affidavit does admit the amount owing is as contained in the statements referred to in paragraph 6 of the affidavit in support by Kimburi. In fact Mr. Gikandi for the defendant did concede in his submission that some money is due but avoided stating the amounts. There has been no allegation that the statements of accounts are correct and in the absence of any other evidence to the contrary, then it can only be stated that the amounts as claimed by the plaintiff are indeed correct.

The other issue raised in the defence is that of failure to serve demand notice upon the defendants. In his supporting affidavit Mr. Kimburi has annexed a copy of a demand letter by registered post to the 2nd defendant dated 9th June 1998 in which the plaintiff is demanding payment of Kshs.1,044,485.75. The box number given therein is the same as that given by the 2nd defendant in the guarantee and indemnity to the plaintiff. While on 2nd December 1997, a statutory notice was issued to the same defendant by registered post to the address given in the 2nd charge in favour of the plaintiff. The 2nd defendant has not denied that the two addresses are his and are incorrect and the plaintiff has annexed the certificates of posting. In fact Mr. Gikandi did not address the issue and I will not dwell on it.

The main crux of Mr. Gikandi's argument is based on the issue of the property having been sold irregularly and undervalued without taking into account the debt owing to the plaintiff. He accuses the plaintiff of having failed to ensure their rights under the second charge were catered for. He has also emphasized the fact that the recovery in respect of both DTBKL and the plaintiff was being handled by the same firm of advocates and therefore there is one reason why the property should have been sold with the two creditors in mind. This fact is not denied and Mr. Devani referred to the provisions of section 77 of Cap 308 as regards the rights of each bank under the said charge. The charge by DTBKL was first and any money recovered would go into satisfying that debt before any proceeds can be applied to service a second debt. It is a fact the amounts realized fell short of the debt due to DTBKL. In the circumstances the plaintiff had to move to its second option. This is because under section 77 (3) (4) the transfer by a chargee is free from all liabilities on account of the charge or on account of any other encumbrances.

Mr. Gikandi further raised the issue of irregularities in the sale of the charged property and Mr. Devani's answer to this was and rightly so that a remedy in such a case can only be upon the culprit in this case DTBKL as the plaintiff was not involved in the sale or application of the proceeds therein. The mortgagee has a right to choose any of the remedies open to it in recovery of the debt when it falls due. Halsbury's laws of England (4th Ed) Vol.32 at page 302 para 785:

“Right to exercise remedies concurrently once the mortgagor has made default in payment of the mortgage debt, the mortgagee is entitled to pursue any or all of his remedies, subject, as regards the powers of sale and appointing a receiver, to the restrictions imposed by agreement or by statute, according as the powers are express or statutory”.

In fact the tendency of a foreclosure is not a bar to a mortgagee to pursue his remedies. The plaintiff herein has gone ahead and applied one of the other remedies available after failure to benefit from the sale proceeds. I agree with Mr. Gikandi that the issue of whether the sale was handled properly is an issue that needs to be addressed. However that issue as shown earlier is as between the defendants and DTBKL who are not a party to this suit. In fact the issue was not even raised in the defence and is introduced through affidavit.

And in the absence of any other issue(s) that may be regarded as triable as between the parties herein and the amounts owing having been admitted the defence is hereby struck out and judgement is entered for the plaintiff in the sum of Kshs.1,044,483.75 plus costs and interest.

Dated at Mombasa this 23rd day of August 2002.

P.M. TUTUI

COMMISSIONER OF ASSIZE