CIVIL PRACTICE AND PROCEDURE

- Striking out a defence under Order 6 rule 13(1) (b) of Civil Procedure Rules.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA MILIMANI

COMMERCIAL COURTS NAIROBI

CIVIL SUIT N0.701 OF 2002 .

ASHOK MORJARIA……..…….PLAINTIFF

VERSUS

KENYA BATTERIES (1981) LTD……...……..…1ST DEFENDANT

PARESH M. PATEL…….2ND DEFENDANT

S.M. PATEL…….…… 3RD DEFENDANT

RULING

I have before me an application by the plaintiff to strike out the defendants defence and enter judgement for the plaintiff as prayed in the plaint. The application is expressed to be brought under Order 6 rule 13(1) (b) and is made on the ground that the defence filed is scandalous, frivolous and vexatious. The application is supported by an affidavit sworn by Ashok Morjaria the plaintiff himself, on 5.9.2002. The defendants oppose the application. There are two replying affidavits sworn by Paresh M. Patel and S.M. Patel, the 2nd and 3rd defendants.

The subject matter of the suit is a money lending contract between the plaintiff as lender and the 1st defendant company as borrower whereby the plaintiff advanced to the 1st defendant a sum ofKshs.600,000.00 to be repaid on or before 30th June 1999 and failing which the same would be repaid with interest at 7% per month for the period of default. The second defendant, a director of the 1st defendant company gave a personal guarantee for the repayment of the said loan with interest as aforesaid. The company did not repay the said loan on due date or at all and the lender filed this suit for recovery.

In the statement of defence filed, the defendants deny liability on several grounds. They aver that the money was not received, that the borrowing was unauthorized by the company and the agreement was not executed by the company as required by its articles of association, that the agreement was not registered, and that the rate of interest was unconscionable, unreasonable, harsh and oppressive.

I have now considered the application, the affidavits filed in support and in opposition thereto and the submissions of the learned advocates who appeared before me. From the contents of the agreement itself

exhibited as "AM 1" and the receipt exhibited as "AM 2" and the post dated cheque No.22235 dated 1.7.99 it is perfectly plain that the plaintiff did on 1.6.99 advance to the defendant a sum of Kshs.600,000.00 in cash payable on 1.7.99 and the defendant acknowledged receipt thereof. The defence that no money was advanced to the company is a sham. As regards the defence that the agreement was not executed properly by the company and that the borrowing was unauthorized, I am persuaded by the plaintiff's advocate that whether a company has or has not complied with its internal procedures as to borrowing or execution of contracts is an internal management issue and cannot afford a defence to a third party dealing with the company. The third party is entitled to assume that the company has complied with its internal rules and regulations unless he has had actual knowledge of them or there are suspicious circumstances putting him on inquiry. That is what is called the rule in ***TURQUANDS CASE*** and was propounded in ***ROYAL BRITISH BANK V TURQUAND*** (1856) 119 E.R. 886. The case of ***SHAH MANEK LTD V UKAY ESTATE LTD & 2 OTHERS*** [HCCC N0.883 OF 1998] cited by the plaintiff also supports the above view of the matter. So where, as here, a Director of a company executes a loan agreement on behalf of the company and stamps it with a company stamp, as the second defendant did, the company cannot wriggle away from its obligation to repay by contending that the borrowing was net authorized, or one director's signature was not enough or the company seal itself was not affixed to the agreement if what he did was within his ostensible authority a director of the company as indeed it was.

The other 'defence' was that the borrowing agreement was not registered as required. Again if indeed the agreement was required to be registered and it was not that was an internal matter for the company. It would not compromise the rights of the third party dealing with the company. In the course of argument, it was pointed out that the agreement was stamped fairly late. I say it matters not. As long gas it is stamped it is admissible in evidence for the agreement complies with section 19 of the Stamp Duty Act, Cap.480 of the Laws of Kenya.

On the alleged rate of interest being unconscionable, unreasonable, harsh or oppressive two observations may be made. First, interest was not to be charged if the borrower paid on due date. In the premises any adverse consequences arising from a levying of interest on the loan are self inflicted and the borrower cannot be heard to complain. Secondly, it is not the business of the court to rewrite contracts for parties. If the parties have negotiated and agreed on a genuine pre-estimate of the loss one would suffer if the other did not honour its part of the bargain, the defaulting party cannot be heard to complain that the estimate of loss is high. In the premises, I don’t think the defendant's claim on the unconsicionability of the interest rate is sustainable. As regards the liability of the 2nd defendant, he gave a personal guarantee which was incorporated in the agreement and he must be held to it. The consideration for his guarantee was the advance of the loan to the company itself. And on the affidavit evidence before the court, his claim that the indulgence to the company was extended without his knowledge or acquiescence is hollow.

To summarise, I take the view that the plaintiff advanced to the 1st defendant the loan on the terms set out in the agreement and on the personal guarantee of the 2nd defendant. The said amount was received by the borrower and the same has not been paid to date. And the interest rate is not unconscionable as claimed. In those circumstances, the defences of the 1st and 2nd defendants are unsustainable. They are frivolous and indeed vexatious. They are however not scandalous as no improper motives or conduct which does not form an essential part of the defendant's defence is imputed to the plaintiff.

As regards the case against the 3rd defendant, I find that his protest that he was not a party to the agreement is on the face of it well merited. However it would appear that the plaintiff's case as against him is that he was a co-signatory of the post dated cheque which was dishonoured with remarks that the account had been closed. As I understand the law, a signatory to a company cheque is not personally liable thereon. The 3rd defendant could therefore only be liable if fraud is pleaded and proved against him. In that regard, when I consider the allegations of fraud made in paragraph 16 of the plaint and the defendant's denial thereof and in particular the 3rd defendant's denial in paragraph 5 of the replying affidavit, I am of the opinion that the 3rd defendant may have a sustainable defence to the plaintiff's claim as against him. His defence is not frivolous and/or vexatious.

In the above premises, I find that the defence of the 1st and 2nd defendants against the plaintiff's suit is frivolous and vexatious. However the 3rd defendant’s defence is not. In the result, I order struck out the

defence of the 1st and 2nd defendants with costs and enter judgement for the plaintiff against them jointly and severally for Kshs.600,000.00 together with interest thereon at 7% per month with effect from 1st July 1999 until payment in full together with the costs of the application. The application is refused as against the 3rd defendant with costs thereof being in the cause.

Orders accordingly.

DATED at Nairobi this 6th day of November 2002.

A.G. RINGERA

JUDGE