

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 538 OF 2002

ABDUL GAFFOR.....PLAINTIFF

VERSUS

JAVID IQBAL MALIK.....DEFENDANT

RULING

By this application filed on 3rd October, 2002, the plaintiff who had earlier filed suit for taking accounts and profits due after taking accounts now seeks to have the defendants defence filed in that suit denying existence of any agreement between the parties by which he had allegedly borrowed shs 3,000,000/= towards a joint venture from which he was to share profits with the applicant. To support the application, the applicant attached an agreement between the parties by which it had been agreed to enter into a joint business venture and the applicant had invested shs. 3,000,000/= for which the respondent had given a post dated cheque for shs 3,000,000/= by way of security as he was in control of the business.

As the respondent failed to repay the capital and the agreed profits, the applicant filed this suit for accounts and seeks the defence to be struck out and for the judgment to be entered as prayed. The respondent did not file an affidavit contraverting the applicants allegations. He however filed ground of opposition contending that the defence is reasonable and that there are triable issues.

As can be seen, this is a typical suit for money lent out under Islamic Law where a loan is expressed as money invested and interest as a share profits. The respondent does not deny executing the agreement dated 7th day of June, 2001 for shs 3000/= for 1 year for which he gave a cheque for shs 3,000,000/= to banked after 1 year and that the applicant would be paying shs 150,000/= per month as profits to the applicant per month.

On account of the above, Mr. Owino for the applicant submits that the defence of denial of the agreement is a mere sham and should be struck out.

In his view, as the cheque was returned unpaid for closure of the account, it is clear that the respondent had no defence to the suit. On the other hand Miss Manyasi, the learned counsel for the respondent, submitted that the defence though made up of denials raised a triable issue as the liability for shs 4.2 million was denied. In the counsel's view, the application is frivolous and an abuse of the process of court.

Looking at the defence, it is observed that what is raised is whether the parties had an agreement as alleged by the applicant. As copy thereof is attached to the application and the contents thereof are not challenged by the respondent. The only conclusion is therefore that the respondent's defence is a mere denial. It is therefore a sham and is merely intended to delay the trial of the suit.

In view of the above I find that the defence raises no triable issues and I hereby grant prayers 1 and 2 of the application as prayed. Orders accordingly.

Delivered and signed this 16th day of December, 2002.

G. P. Mbito

JUDGE