REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 3 OF 2000

NATIONAL BANK OF KENYA …… PLAINTIFF

VERSUS

DANIEL OPANDE ASNANI …….. DEFENDANT

RULING

In a plaint dated 4th January 2000, and filed on the same day, the Plaintiff/Applicant, National Bank of Kenya Limited prayed for judgment against the Defendant/Respondent, Daniel Opande Aswani for KSh.565,859/75, interest on the same from 1st November 1999 until payment in full, costs and any other or further relief the court may deem fit. The claim was based on the balance of loan facilities advanced to the Respondent after the securities had been sold. The Defendant purportedly filed Defence and amended Defence. The purported amended Defence was filed purportedly with the leave of the court.

At the close of pleadings, the Applicant/Plaintiff has filed Notice of Motion dated 22nd December 2000 seeking that the Defence be struck out and judgment be entered for the Plaintiff together with costs and interest therein as prayed in the plaint and costs of the application be provided for on grounds that the Defendant admitted his liability to the Plaintiff and that the Defendant is truly indebted to the Plaintiff in the amount claimed in the plaint plus interest and Defence filed is a sham. There is an Affidavit in support of the same Application and several annextures to the same Affidavit.

The Respondent opposed the application and filed Replying Affidavit in which he stated what I do sum up as that the Application is defective and replete with traces of ambiguity and the same should be struck out; that there is good defence to the claim; that he had denied liability in the Defence and it is not true that he has admitted liability even in the correspondences exchanged between the parties; that circumstances of this case demand a full trial to be able to fully evaluate the entire case and that his property was sold without any statutory notice having been issued to him. When this application came up for hearing on 21.11.2002, neither the Respondent nor his counsel appeared notwithstanding that Mr. Mlongo, the learned counsel for the Respondent was there on 24th October 2002 when the hearing date was fixed.

I have however perused all the documents in this file and considered the application, the Affidavits, the annextures, the pleadings and the law. The law is now settled and that is that the admission upon which a court of law will act to strike out a defence and enter judgment must be clear and unambiguous. The same admission need not be in the pleadings only. It cannot be discerned in any other way. Order 12 Rule 6 states as follows:

"6. Any party at any stage of a suit; where, admission of facts

has been made, either on the pleadings or otherwise , apply to

the court for such judgment or orders as upon such admission

he may be entitled to, without waiting for the determination of any

other question between the parties; and the court may upon such

application make such order, or give such judgment as the court may think just."

In this case, the Defendant was granted leave to file Defence. This was by consent of the parties. It does appear however that the draft Defence that was annexed with application for leave to file defence is what is in the file. It is not properly drafted as it is not signed by the Advocate for the Defendant. All that is there is a signature on the part showing "Drawn & filed". It is in law no defence at all. I have gone further and looked at the original statement of Defence but that is also not signed and that also has only signature over Drawn & Filed but nothing shows that it was signed by the Defendant or his advocate. In law it is also not a pleading. In my mind there is no validly filed statement of Defence on record in this case. Indeed even the Memorandum of Appearance was not properly executed.

However, looking at the Replying Affidavit on record which I do feel is a valid document on record; the Defence put forward as I can gather from the same Affidavit is that the Defence raises triable issues; that the Defendant did not admit liability and that Defendant's property was wrongfully sold to satisfy the debt.

The application is based on grounds of admission. The Defendant denies having admitted liability. I will reproduce herebelow the last annexture to the Plaintiff's affidavit. It is a letter dated 4th August 1999. It states as follows:

" Daniel O. Aswani

Box 43844

NAIROBI.

4 th August 1999 T

The Manager,

N.B.K.

Nkrumah Ro ad

MOMBASA.

Dear Sir,

PAYMENT OF MY LOAN

ACC 201 001 276

Following my discussion with Mr. Were when he came

for training in Nairobi, we agreed that I should pay some

money until I complete payment of my outstanding debt.

My house in Kwale was auctione d in payment for the same

and it did not realise enough.

I have instructed my bank that with effect from 30.8.99, it will remit

to my account sum of 7,000 until the debt is fully paid. Enclosed

please find cheque No.002786 Bankers Cheque for 12,000 as

my commitment in the discussion.

Yours faithfully,

Daniel O. Aswani"

This letter is unambiguous. It is a clear admission. In fact in my humble opinion, it answers the questions raised by the Defendant such as that he has never admitted liability or that his property was wrongfully sold etc. If his property was wrongfully sold in 1996, why did he not move to set aside the sale even by 1999 when he wrote the letter dated 4th August 1999 I have reproduced above? The question of interest was also raised by the Defendant, though this did not come out clearly in the Affidavit in Reply. That however is answered by the charge documents which the Defendant did sign and which state that interest rates could be varied from time to time.

I am satisfied that the debt herein had been admitted. I am satisfied that indeed the security had been sold way back in 1996 and the proceeds did not satisfy the debt. I do allow the application. However in allowing the application, I want to state that I do note that way back in January 1996 the Applicant realised that the Respondent was unable to pay his debts. It did nothing till 15.7.96 when Statutory Notice was given and even after 11th December 1996 when the security was sold, it did nothing till the year 2000 when this suit was filed. The bank knew fully well that during all that time it was dilly dallying with this matter, the amount was increasing due to interest.The consequence is that a very small loan has now ended in an amount which on execution may very well exceed KSh.800,000/- all because the bank was still holding its action perhaps dishonestly to enable the amount to increase as a result of accumulated interest. I do not feel this is an honest way of doing business and I feel it must stop. The bank should have moved immediately the Respondent defaulted and when the security was still enough to meet the debt. After all the security was valued or should have been valued by the bank and was accepted on the basis that it would meet liability, why render it irrelevant through indolence on the part of the mortgagee.

Application granted. Defence struck out. Judgment entered for the Plaintiff as prayed in the plaint. Costs of this application to the Plaintiff. Orders accordingly.

Dated and delivered at Mombasa this 9th Day of December, 2002.

J.W. ONYANGO OTIENO

JUDGE