

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 1077 OF 1996

KENYA COMMERCIAL BANK LTD. PLAINTIFF

VERSUS

DATA STREAM LIMITED DEFENDANT

RULING

This is an application for summary judgment under O. XXXV Rule 1, Order L Rule 1, 2, 3 and 15 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The application is supported by an affidavit sworn on 23.9.1999 by Stephen N. Mburu, the applicant's Branch Manager at Kenyatta Avenue Branch. Though the application itself and a hearing notice relating thereto had been served upon the defendant/respondent, the defendant failed to file a replying affidavit and to turn up in court on 27.2.2001 when the application was listed for hearing. In the event the application was heard ex parte.

The suit pursuant to which this application has been lodged is for the recovery of Shs.2,134,677/15 said to be due and owing by the defendant to the plaintiff on account of a money lent and/or overdraft allowed and money paid to the use of the defendant at his request plus interest thereon.

The defendant filed a defence to the suit on 28.7.1997 through M/S Ochieng Oduol & Company Advocates who have since withdrawn, with leave of this court, from acting for the defendant. That defence apart from denying the plaintiff's claim, avers that the defendant was guilty of making an illegal debit in its account.

The affidavit in support of the application reveals that the claim by the plaintiff against the defendant arises from a cheque in the sum of Shs.941,625/= issued by the defendant which said cheque was rejected by the collecting bank after the proceeds had been cleared by the plaintiff. In a letter dated 31.10.1994, a copy of which is annexed to Mr. Mburu's affidavit, the defendant acknowledges the debt. Because of the admission, Mr. Mburu depones that the defendant's denial of the debt is dishonest.

As to the averments of illegal debits alleged in the defence, Mr. Mburu depones that those matters transpired in 1993 prior to the events leading to this suit and had been exhaustively dealt with.

As aforesaid, no replying affidavit has been filed on behalf of the defendant to controvert what Mr. Mburu states in his affidavit and accordingly the evidence contained in that affidavit stands unchallenged.

That evidence establishes that the defendant is truly indebted to the plaintiff in the sum claimed in the plaint and that the defence filed herein does not raise any triable issue. Given those circumstances, this court has no option but to allow the application and to enter judgment in favour of the plaintiff against the defendant as prayed in the plaint. It is so ordered. The defendant will bear the plaintiff's costs of this application.

Dated at Nairobi this 9th day of March, 2001.

T. MBALUTO

JUDGE