REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 635 OF 1999

RELIANCE BANK LIMITED

(UNDER CBK MANAGEMENT)…….PLAINTIFF

versus

METALLICA ENGINEERING INDUSTRIES LTD…….1ST DEFENDANT

RAJNIKANT BABUBHAI PATEL…… 2ND DEFENDANT

JITENDRA JASHBAHAI PATEL……3RD DEFENDANT

PINAKIRAI RAMBHAI PATEL……..4TH DEFENDANT

R U L I N G

Reliance Bank Ltd., (hereinafter called 'the bank') has moved this court under Order XXXV, and seeks an order for, inter alia summary judgment against Metallica Engineering Industries Ltd. (hereinafter called 'the company'), and three other defendants jointly and severally. The application is based on the grounds that the defendants have no defence to the bank's claim.

It is supported by the affidavit of Johnson Kamau Karuga who depones that he is the appointed Central Bank of Kenya Manager for the bank.

The application is opposed on the grounds that it is misconceived as the defence raises several triable issues, that it is an abuse of the process in that it attempts to seek pretrial hearing on matters raised in the defence. That it is based on the assumption that sums were disbursed to the company when such assumptions are untenable, and also on the ground that the supporting affidavit is defective and bad in law.

Before I proceed it is important that I give brief details of the suit t this point.

By its plaint filed on 20th May 1999, the bank alleges that following a request by the company, it made available to it certain banking facilities. The bank claims that the 2nd, 3rd and 4th defendants guaranteed the said facilities. It avers that the company has failed to liquidate its indebtedness, and that the guarantors have also failed to honour their undertakings. It therefore prays for judgment against the defendants jointly and severally for, inter alia the sum of Shs.75,570,184.85, together with interest thereon at 21% p.a. from 1st April 1999 until payment in full.

The defendants deny that the company applied for or that it received or utilised the loan facility as alleged. They however aver that the directors of the bank prepared a letter dated 15th September 1997, and requested the company to retype the said letter on the company's letterhead and to sign it. That the

company did so on the express agreement that it would not incur any liability for the contents of the letter, but that the letter was to be utilized as an explanation to Central Bank inspectors.

The defendants aver that the bank's directors utilized the company's account to withdraw and disburse funds to a third party based in Tanzania and apparently owned by the directors of the bank. The defendants claim that the fact remained concealed by the bank as it withheld all it's statements of accounts and bank records. In effect, the defendants deny being indebted to the bank.

Whiles the 3rd defendant denies having signed any guarantees in favour of the bank, the 2nd and 4th defendants aver that they signed blank forms that had been availed to them by directors of the bank. That they did so on the understanding that no liability would arise therefrom.

Finally the defendants state that the joinder of the directors of the bank in the suit is necessary as they were the ones who utilized the funds.

In reply the bank denies the allegations on the basis of the fact that fraud is alleged and it avers that there would be no necessity to join the directors of the bank.

Mr. Ngatia, learned counsel for the defendants took the first available opportunity and took issue with the affidavit, and it is imperative that I determine the issue prior to embarking on the other issues that arise in this application. I have in mind the fact that applications of this nature are "tried" on affidavit material and it is imperative that one exercises due care and diligence especially in view of the fact that summary judgment can only be granted in the clearest of all cases. Where the defendant establishes that he has a reasonable triable issue, even one, he should be granted leave to defend the suit.

I must appreciate at this stage of the suit that I am not required to delve in to the pleadings for to do so would amount to conducting the trial. That is not my current duty.

It was Mr. Ngatia's, submission that paragraph 8 of the supporting affidavit was based on information and that it should be struck out. Mr. Karuga depones that he bases his deposition on information derived from his advocates. Would this pass the test as laid down in Order XVIII rule 3? It stipulates that:

> " 3 (1) affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove
>
> Provided that in interlocutory proceedings, or by leave of the court, an affidavits may contain statements of information and belief showing the source and grounds thereof."

The contents of the rule are clear. It is only in "interlocutory applications, or with the leave of the court that at affidavit can contain statements of information and belief."

The issue that arises is whether, this is an interlocutory application, for if I were to find that it is, then the said paragraph would be admissible under the proviso. In the case of Kamlesh Mansukhlal Pattni & another V. Central Bank of Kenya, Milimani H.C.C.C. No. 648 of 1998, Justice Mbaluto, while faced with a similar issue, cited Justice Ringera's observations in Kentainers Ltd., V. V.M. Ajwani & Others Nrb. H.C.C.C. 1625 of 1996, which is quite persuasive. He states:

> "regard must be had to the substance rather than the form of the application with the (underlying consideration) being whether the court is called upon to decide the ultimate rights of the parties."

Should the applicants succeed in this particular instance, they would obtain judgment ass prayed in the plaint, and that would bring this suit to a conclusion. It cannot therefore be said that it is an interlocutory application to which the provision to rule 3 of the said order would apply. That being the case, and no leave having been obtained, par 8 of the said affidavit offends the said rule and the same is struck out.

But that was not all that the defence counsel took issue with pertaining to the affidavit. It was Mr.

Ngatia's further submission that the whole affidavit offends the requirements Order XXXV under which the application was made. It was his contention that it's deponent had no positive knowledge of the facts but could only derive his knowledge from information.

Order XXXV rule 1(1) and 2 stipulate that:

> 1. (1) In all suits where a plaintiff seeks judgment fora) a liquidated demand with or without interest; or b) …… Where the defendant has appeared the plaintiff may apply for judgment for the amount claimed or part thereof, and interest, or for recovery of the land and aren't or mesne profits.
>
> 2. The application shall be made by motion supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed."

Mr. Karuga, depones that:

> "I am the Approved Central Bank of Kenya Manager for Reliance Bank Limited in Liquidation and I am duly authorized to make this affidavit."

It is not indicated when his appointment became effective. The subject debt was allegedly incurred in September 1997, and the suit was filed in May 1999. One would safely assume that the bank was placed under liquidation after September 1997, as it would not conceivable that a bank already placed under liquidation or management would have granted the loan facility. It is not quite clear from the pleadings whether the bank was under statutory management or had been placed under liquidation. To my mind this is an issue that would need to be clarified at the earliest opportunity for avoidance of doubt.

However, whether the bank was placed in liquidation or statutory management and Mr. Karuga became the appointed Manager, or liquidator as the case shall be, then one can reasonably assume that the transactions that led to the granting of the facility were carried out by persons other than himself. Apart from paragraph 8 which I have struck out, his supporting affidavit contains nine substantive paragraphs which do not indicate how he acquired the knowledge or information contained therein.

I do however note that in paragraph 12 he depones:

> "THAT what is deponed to herein is true to the best of only knowledge, information and belief save where otherwise stated to the contrary and sources divulged."

As I have stated earlier none of the said paragraphs gives an indication of the source of information. Would paragraph 12, breath life to the otherwise inadmissible affidavit?

The issue was considered in the aforementioned case of Kentainers Ltd., where Justice Ringera quoted Sarkar on Evidence 12th Edn., page 1404:

> "An affidavit which contains neither a specification as to which part is based on information and which is based on belief nor the grounds of belief offends against Order 19 rule 13 (similar to our Order XVIII rule 3). An affidavit containing a verification that ' paragraphs 1-3 above are true according to my knowledge and according to my information received and believed to be true' is meaningless and infractious as the identical facts can not be verified on both knowledge and information"

Paragraph 12 of Karuga's affidavit would thus not pass the test, nor would the affidavit whose substantive paragraphs do not disclose what information is based on information and which is based on belief, nor is it indicated that he believes on the information contained therein.

The test for applications that are made under order XXXV are even more strict and it is imperative

that the deponent can "swear positively to the facts verifying the cause of action and any amount claimed". The supporting affidavit falls short of that requirement and cannot be admissible in support of the application, as it is incompetent. But Mr. Karuga has filed a further supporting affidavit in which he seeks to cure the defects in the earlier affidavit. He depones that the matters deponed upon in the first affidavit are based on records available from the bank. Dr Kiplagat however relied on the case of Les Fils Societe Anonyme v. Clarke [1958] 1 A.E.R. 459. Where the court in allowing an application for summary judgment stated that

> " a court has jurisdiction to allow a defective affidavit to be supplemented by further affidavits and the defect can thus be cured"

In my humble opinion that case would be distinguished from this case where the deponent has not deponed as to his belief, nor can he be said to be swearing positively to the facts verifying the cause of action. Needless to say, in the Les Fils case, the affidavit that was allowed by the court, had not verified the original debt or it's assignment which omissions were cured by the supplementary affidavit.

Yet and surprisingly too, in his further affidavit, Karuga does not even depone that he verily believes that same to be true. In this application, the affidavits fall short of the required standards for the aforementioned reasons, both are defective and inadmissible.

That being the case then, the application is thus not supported by an affidavit, which is a mandatory requirement under order XXXV, and on that ground alone, I would be inclined to dismiss it.

Be that as it may, I feel that it is imperative that I determine whether despite the above findings, the application would have otherwise qualified under Order XXXV.

The 3rd defendant denies having executed any form of guarantee in favour of the bank. None was exhibited and in its absence, that raises a triable issue.

The respondents take an issue with two debits to their accounts which were transacted in August 1996 and which the company complained about in 1998.

It reads in part

> "We are absolutely at a loss to understand how these huge debits entries were made in our account. We never authorized any payment to Norlake Investments Ltd. (leave alone an amount of Shs.48 million …) to any other party"

But thereafter, on 15th September 1997, the company had signed another letter whereby it had instructed the bank to undertake various transactions and while the defendants claim that they only signed it on the understanding that they would not incur any liability on it, bank however relies upon that letter heavily in this application. It urges the court to find that it is an admission and therefore to grant it the orders that it seeks.

Dr Kiplagat urges the court to find that having signed and issued the letter, the defendants cannot now claim to have a triable issue. He relied on the case of Saunders v. Anglia Building Society [1971] AC 1004 where the plea of non-est fuctum was considered by the court. Lord Hodson held that

"the appellant had signed the questioned documents, obviously a legal document, upon which the building society advanced money on the faith of its being her document, she cannot now be allowed to disallow her signature no man may take advantage of his own wrong." He held that "the difference to support a plea of non est fuctum must be in particular which goes to the substance of the whole consideration or to the root of the matter."

I have perused the letter and the pleadings in this matter, and acknowledge the fact that on it's motion, the bank has instituted a suit against it's own directors in H.C.C.C. No. 1887of 1999 for the recovery of

substantial sums of money. Karuga has again sworn the supporting affidavit therein. He makes reference to Norlake Investments, in whose accounts, it is alleged that fraudulent transaction took place at the behest of the directors who have been sued. That is the same company to whose account, these defendants claim that the sum of Shs 48,000,000.00 was fraudulently transferred without their knowledge and/or authority. There is more than meets the eye in this application, especially in view of the facts that have been disclosed in the suit against the directors of the bank. It raises a triable issue, and it would be in the interest of justice that viva voce evidence be adduced for the determination of the issue.

The defendants claim that they intend to seek indemnification from the directors of the bank. Although Dr. Kiplagat urged the court to find that such a plea cannot bar the bar from seeking and obtaining the orders that it seeks in this application. In my humble opinion having alluded to fraud in their defence, a matter which I find goes to the basis of the core of the relationship between the bank and the respondents, it raises triable issues which cannot be tried on affidavit material. Further, whether the company signed the letter of 15th September 1997, with the full knowledge of its repercussion and with an assurance from the bank that it would not be liable, can only be determined after the adducing of viva voce evidence which can only be taken at a full hearing.

Summary judgment can only be granted in the very clearest of cases, this is not one of them and I decline to grant the orders being sought.

The application is dismissed with costs.

Dated and delivered this 11th day of May 2001.

JEANNE W. GACHECHE

COMMISSIONER OF ASSIZE

Delivered in the presence of:

Mr. Kimani holding brief Mr. Ngatia for the respondent

Mr. Maingi for the applicants.