REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 1511 OF 2000

STANDARD CHARTERED BANK KENYA LTD ....… PLAINTIFF

VERSUS

ARJAN………………………………………...……...….. DEFENDANT

JUDGMENT

The plaintiff applied for summary judgment against the defendant in the sum of Kshs 2,952,789.15 and interest thereon at 16% calculated on daily balances at monthly rates from 31.7.2000 until payment in full. The application is under order XXXV rules 1(1) (a), (2) and (3) of the Civil Procedure Rules. The defendant has appeared and filed a defence and a counterclaim. The motion is made on the grounds that the claim is a liquidated one; the defendant is truly indebted to the plaintiff; and the defence and counterclaim filed does not raise any triable issues and is a sham calculated to mislead the Court. The application is supported by a lengthy affidavit sworn by one Sam Okello, the Accounts Manager of the plaintiff bank who is dealing with the defendant's account.

The defendant has not filed a replying affidavit but has filed what he calls "Notice of Objection". He objects to the application on the grounds that it lacks merit in view of the express provisions of order 35 rule 2 (2); that the amount claimed is not a liquidated demand; that the defence and counterclaim raise triable issues that can only be dealt with at a trial, and the application is bad in law.

The plaintiff's case is that by a letter of offer dated 4.7.1997 duly accepted by the defendant on 11.7.1997, the plaintiff granted the defendant an overdraft facility whose upper limit was Kshs 5 million on the terms specified therein. To secure the facility, the defendant charged his property known as Nairobi/Block 103/480. The said property was valued at Kshs 7.2 million by a firm of valuers approved by the plaintiff. The defendant defaulted in payment of the facility. The debt stood at Kshs 5,634,956.45 as at 22.4.1998 when the plaintiff issued a demand notice to the defendant.

Thereafter the plaintiff instructed its advocates on record to proceed with legal action for recovery. The plaintiff proceeded with security realization and the charged property was sold for Kshs 3 million to the highest bidder at an auction held on 2.3.2000. The reserve price at the auction was based on a valuation report prepared by M/s Bogonko Mironga & Associates dated 25.2.2000. The proceeds of sale were credited to the defendant's account. The principal amount in the sum of Kshs 2,952,789.15 claimed from the defendant represents the principal and interest due to the plaintiff as at 31st July, 2000 after giving due credit to the defendant for the sale proceeds.

As pointed out earlier, the defendant did not file a replying affidavit. And no oral evidence was given on its behalf. However, there is a "Notice of Objection" which I referred to earlier and a defence and

counterclaim on record. In this regard, order XXXV rule 2 is pertinent. It reads:-

"2 (1) The defendant may show either by affidavit, or by evidence, or otherwise that he should have leave to defend suit.

(2) Any set-off or counterclaim may entitle a defendant to defend to the extent of such set-off or counterclaim." It would appear that in light of subrule (1) the defendant has opted to show otherwise than by way of affidavit or oral evidence that he is entitled to have leave to defend. In *Zora v Ralli Brothers Ltd* [1969] EA 691, the East African Court of Appeal held that the words "or otherwise" would enable a judge to consider the pleadings or any other matter properly before him in order to enable him to arrive at a decision on the application.

I am therefore at liberty to consider the pleadings as well as the legal submissions by counsel for the defendant in deciding whether the defendant should have leave to defend.

The first legal submission made on behalf of the defendant is that since it has a counterclaim it is entitled to leave to defend. The plaintiff's submission on this point is that the defendant must show the counterclaim raises triable issues in order to prevent the plaintiff from obtaining summary judgement on the main suit. The plaintiff also contends that entry of judgement will not prevent prosecution of the counterclaim. I agree with counsel for the plaintiff that the mere pleading of a counterclaim does not *ipso facto* entitle a defendant to leave to defend. Subrule (2) is in permissive terms. The matter is one for discretion by the Court. One consideration which may weigh with the Court is whether or not the counterclaim discloses a *bona fide* triable issue. The other is whether or not what is counterclaimed is equal to or in excess of the plaintiff's claim.

The defendant has not quantified his counterclaim. However, a reading of the defence and counterclaim in its entirety points out that the defendant's grievance is that the charged property was sold at an undervalue in that the same was not sold at its true value and he is accordingly entitled to the balance between the true value thereof and the actual sale price. Let me say straight away that if I were persuaded that this raised a substantial and reasonable issue for trial, I would grant leave to defend notwithstanding the plaintiff's submission that a judgement on the main suit would not disentitle the defendant from a subsequent prosecution of the counterclaim.

The plaintiff's submission is a technically valid one but it ignores the purpose of allowing counterclaims and set-offs. The purpose is to avoid multiplicity of suits between the same parties. Trial of the main suit and a counterclaim together ought to be the rule and exceptions ought to be clearly justifiable. Be that as it may, I am not persuaded that the counterclaim here raises a substantial *bona fide* triable issue. Everybody knows or ought to know that a forced sale cannot realize the true or market value of any property. This is a matter of common notoriety of which I take judicial notice. Accordingly I would not grant the defendant leave to defend on the basis of the counterclaim on record. The defendant's second submission is that what is claimed is not a liquidated demand. The argument is that since no accounts have been exhibited in support of the claim, the plaintiff is required to specifically prove the amount claimed to enable a Court to make a finding in its favour. As the amount has to be investigated, the same is not a liquidated demand, even though it is specified. The following passage from the *Supreme Court Practice Volume 1 [1997]* at page 35 is cited to support this submission:-

"A liquidated demand is in the nature of a debt; ie, a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a 'debt or liquidated demand', but constitutes damages."

I agree with this definition of a liquidated demand. The plaintiff's rejoinder is that the plaint is clear and what is claimed is a liquidated demand. On a consideration of the above definition and the plaint, I am of the very clear and unequivocal view that the plaintiff's claim is a liquidated demand. What is being claimed is the principal amount and interest thereon on account of an overdraft facility. The claim is

based on the contract constituted by the letter of offer and the quantum thereof is entirely ascertainable as a matter of arithmetic. I would therefore not dismiss the plaintiff's motion as being outside the ambit of order XXXV as the defendant seems to think.

The next line of attack is that the defence and counterclaim raise triable issues that can only be dealt with at the trial. This is based on the defendant's averments in the defence that the plaintiff was under a duty to ensure that the amount outstanding on the overdraft did not exceed the value of the security and further that it was the understanding of both parties that in the event of defendant's default, the plaintiff would recover all outstanding arrears from the sale of the charged property. The averment is also made that the plaintiff did not exercise due diligence in exercising the power of sale to ensure that the property was sold for an amount commensurate with the initial valuation. The plaintiff's response to these averments are: first, it was actually for the defendant as borrower to ensure he did not exceed the limit of the facility and he was aware that interest was accruing on the amount due; secondly, the terms of the offer of facility are clearly set out in the letter of offer and the general terms and conditions and the representations and understanding contended for by the defendant is not there, and finally, there was no want of good faith or diligence as the property was sold in a public auction within the parameters of the valuation in respect of a forced sale. I agree with the plaintiff's submissions in this regard. The defendant appears to me to be endeavouring to manufacture triable issues by introducing terms, conditions and understandings which fly in the face of the written contract between the parties and also by ignoring the notorious reality of what may be realized from a security sold not by private treaty but by public auction on the occasion of a forced sale. All in all I find that the defence and counter claim herein do not raise *bona fide* triable issues.

The last stand of the defendant is that as he had filed a defence and counterclaim the motion for summary judgement was incompetent and the proper procedure was to apply to strike out the pleadings under order VI of the Civil Procedure Rules. The plaintiff did not reply to this point. I don't know whether the plaintiff felt the objection was so obviously devoid of merit that it should not be dignified by a reply. Whatever the plaintiff's reason for not replying, I must say quite unequivocally that the defendant's submission is wholly misconceived. It is not and it has never been the procedural law that once a defence is filed an application for summary judgement cannot be made. All the case law in the law reports is to the contrary. And if further fortification is necessary for such a view, rule 4 of order XXXV affords it. It reads:-

"If a defendant who has not already filed his defence is granted leave to defend he shall file his defence within fourteen days of the grant of leave unless the Court otherwise orders."

This rule clearly contemplates that the issue of whether or not to grant leave to defend may be canvassed either before or after a defence has been filed on record. And of course if the opposite were true, all the learning on "*bona fide* triable issues" and "sham defences" calculated to delay the plaintiff from obtaining his just dues would be thrown out of the window much to the dismay of advocates who act for plaintiffs in actions for liquidated demands and possession of land.

The upshot of all these considerations is that I allow the motion and enter judgment for the plaintiff as prayed in the plaint together with costs of the suit and of this application.

Dated and Delivered at Nairobi this 4th day of May, 2001

A.G. RINGERA

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JUDGE