



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 439 OF 1999

TAVINDER KAUR CHADHA PLAINTIFF

VERSUS

GIRO BANK LTD. DEFENDANT

RULING

The application by Notice of Motion dated 17th September, 1999 is brought under the provisions of Order 12 rule 6 and 35 rules 1 and 8 of the Civil Procedure Rules and is supported of an affidavit by the manager of the Defendant Giro Bank Ltd. Mr. ANURAG SPIVASTAVA. The application seeks summary judgement as against the plaintiff in the sum of Kshs.5,339,796.60 on the grounds that no defence or any reasonable defence to the Counterclaim is disclosed and further that there is an admission in writing.

At the hearing only Counsel for the Defendant was present despite the Counsel for the plaintiff having been served. On record however is a reply to Defence and Defence to Counter-claim filed on 30th June, 2000 as well as an affidavit in reply filed on 3rd July, 2000.

The Defence to Counter-claim in paragraph 3 states that the instrument of charge is unenforceable as the same is defective. Paragraph 4 and 6 is a general denial that the amounts are owing while paragraph 5 says the Guarantee and Indemnity executed by the Guarantor are null and void as there was no consideration. The Replying Affidavit is more or less a replice of the Defence to the Counter-claim.

The plaintiff is one of the Directors of a Company known as Genesco Ltd. while her husband B.S. Chanda is the other Director. On 13th January, 1997 the plaintiff executed a charge over her property known as Subdivision No.2167 Section No.1, Mainland North Nyali to secure a loan of Kshs.6,600,000/= which was advanced to Genesco Ltd. In addition she also executed a personal Guarantee and Indemnity on the 6th March, 1997.

The borrowing Company however fell into arrears and the Defendant issued a notice of it's intention to exercise it's rights under the charge and that is when the plaintiff rushed to Court and the auction scheduled for the 6/10/99 was postponed by Consent of both parties. Since then no further action has been taken.

In support of the application before the Court is a letter dated 9th September, 1999 which is annexed to the affidavit in support The letter is written by B.S. Chanda the 2nd Director of the borrowing company and in it he acknowledges the debt and gives a proposal on how the same was to be settled. The issue of the charge or Guarantee of the charge being defective is not raised. Mr. Khanna for the applicant submitted that the issue was infact raised as an after thought. The words of Plat J.A. in MAGUNA

GENERAL STORES VS REPCO DISTRIBUTORS LTD. (1988-92) 2 KAR 89 are relevant while considering an application of this nature.

“First of all a mere general denial is not a sufficient defence in this type of a case there must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment has been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given”.

As I have stated earlier, the defence to the Counter Claim and the Affidavit in reply are simply mere denials yet there is a clear admission by letter by Mr. B.S. Chanda one of the Directors. In my view, the plaintiff filed the suit herein simply to buy time and the Courts are not to be used by one party to frustrate the efforts of another to recover what is rightfully owing as MADAN J.A. said in the case of GUPTA – VS- CONTINENTAL BUILDERS LTD. (1978) KLR P9.87.

“----- if no prima facie triable issue is put forward to the claim of the plaintiff,. It is the duty of the Court forthwith to enter Summary judgement for it is much against natural justice to shut out without proper cause a litigant from defending himself as it to keep a plaintiff out of his does in a paper case prima facie triable issues ought to be allowed to go to trial just as a sham or bogus defence ought to be rejected”

The Guarantee executed by the plaintiff is specific in that it gives the defendant full discretionary power, without any further consents from the Guarantor to do all acts contained therein including calling upon the Guarantor to make good any outstanding payments under the instrument of charge.

On the whole, I find the defence to the Counter-claim as nothing less than an attempt to delay and deny the Defendant what is rightfully owing. I therefore enter judgement on the Counter-claim for a sum of Kshs.5,339,796.60 plus costs and interest.

Dated and Delivered at Mombasa 26th day of October, 2001.

P.M. TUTUI

COMMISSIONER OF ASSIZE