REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 2243 OF 2000

ASHVINDCHAND HIRJI SHAR)

MUKESHKUMAR HIRJI SHAH) ……..……. PLAINTIFFS

VERSUS

ACME PRESS (K) LTD. …… DEFENDANT

R U L I N G

Plaint filed in this case states at paragraphs 3, 4, 5, 6, 7, and 8 as follows:

"3. On or about the 20th May 1997, the Plaintiffs agreed to lend the Defendant a friendly loan in the sum of K.shs 2 million which the Defendant agreed to repay by 31st December 1997.

4. The said agreement was made orally between the Plaintiffs and the Defendant.

5. Pursuant to the said Agreement on the 20th May 1997, the Plaintiffs secured a Banker's cheque of K.shs 2 million with Imperial Bank Limited drawn in favour of the Defendant's company.

6. The Defendant in purporting to honour this repayment issued a cheque of K.shs 2 million in favour of Imperial Bank Limited who were both the Bankers of the Plaintiffs and the Defendant with instructions to credit the same in the Plaintiffs' account.

7. That the Defendant in instructing the Bank, wrote a letter dated 31st December 1997 seeking the cheque to be credited in the accounts of the Plaintiff.

8. Since the cheque was not drawn in favour of the Plaintiffs, the same was not credited in their account but instead in the Defendant's account.

The claim is based on the allegation that the amount in question has not been repaid either through Imperial Bank or in any other way. The Defendant's stand is contained in its Statement of Defence filed into the court on 24th January 2001. That Statement of defence states at paragraphs 3 and 4 as follows:

> "3. Paragraph 3 of the Plaint is admitted. In addition to the foregoing, the Defendant avers that as alleged by the Plaintiff in paragraph 7 of the Plaint, it duly instructed Imperial Bank Limited to credit the sum of K.shs 2,000,000/- in the Plaintiffs' account and the Plaintiffs were duly paid the outstanding money by the said Imperial Bank Limited.
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> 4. Without prejudice to the generality of the foregoing, the Defendant avers that pursuant to the instructions given to Imperial Bank Limited, one Indravadan Bhimji Shah, who was then a Director of the Defendant and who was the one dealing on a day today basis with the Plaintiffs, in

conjunction with the said Imperial Bank Limited, paid the aforesaid outstanding sum of money to the Plaintiffs. In the circumstances, the Defendant denies owing the Plaintiffs the sum of K.shs 2,000,000/-."

This application before me is seeking an order to strike out the defence and enter judgment against the Defendant on grounds that the Defence is scandalous, frivolous, vexatious, an abuse of the court process and may prejudice and delay the fair trial of this suit. It is supported by an affidavit sworn by one A.H. Shah. The application is opposed and there is a Replying Affidavit sworn by R.M. Shah in opposition. The Respondent states in the Affidavit of R.M. Shah that various meetings were held between the parties regarding payment of any amount that was outstanding to the Plaintiff and that as far as the Defendant records are concerned there is no money outstanding to the Plaintiffs.

The Statement of Defence is raising a defence that the amount being claimed has been fully paid and that it was paid through Imperial Bank Limited and specifically mentions one I.B. Shah as the one who paid it. The Plaintiff admits in its Plaint that it knew something about such allegations relating to payment but the same payment has not been made. There are allegations that discussions have taken place on the same allegations of payments and that as far as the Defendant is concerned its records show that payment has been made. It is not in dispute that both parties had accounts at Imperial Bank Limited.

The law is clear, as is found in the case of Dr. Murray Watson vs. Rent a Plane Ltd & Others, HCCC No. 2180 of 1994. It states in part as follows:

> "To strike out a pleading is a very draconian remedy. It could be devastating to an adversary. The general policy of the law is that unless a pleading is inconsistently bad and beyond the curative remedy of a suitable amendment, it ought not to be struck out. The courts will where it is possible, to do so without injustice to the other party lean in favour of settling justiciable dispute after a trial on merits".

It seems to me that there is a bonafide dispute as to whether the friendly loan has been paid or not and it is a dispute that has been discussed by the parties. Whether the bank honoured the Defendants instructions or not are matters that I cannot decide on at this stage. They are matters requiring evidence which can only be availed at the time of hearing. The Plaintiff may feel the Defendant is not being genuine and that may very well be so, but I have no means of coming to that conclusion and hence to the conclusion that the defence is frivolous, vexatious, scandalous, or that it may prejudice, embarrass or delay the fair trial of this action. I cannot say that a defence which denies the allegation that the amount lent out as a friendly loan has not been paid as being an abuse of the court process. If it was denying the obvious, then I would agree that such a Defence would be scandalous. However here, it is stating how the debt was paid and the circumstances surrounding the whole transaction (e.g. Bank being one for both parties, and the Plaintiff also knew about the alleged repayment cheque and the alleged instructions) are all matters that tend to show that a court of law should act on the application with caution and that the matter should be heard fully.

I decline to grant this application. It is dismissed with costs to the Respondent. Let the matter proceed to full hearing. I do however feel that this is a matter that needs to be heard as early as possible and I will direct that it be given a hearing date at the Registry on priority basis. Orders accordingly.

Dated and delivered at Nairobi this 18th day of October 2001.

ONYANGO OTIENO

JUDGE