



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 2370 OF 1996

MIDDLE AFRICA ACCEPTANCE.....PLAINTIFF

VERSUS

EDWARD CHARLES ARNOLD.....DEFENDANT

JUDGMENT

Background

The applicant advanced some Shs.10 million to the Defendant under the terms of what the parties are referring to as a promissory note dated 10th December, 1993. The Defendant having failed to repay the money as per the terms of this note the applicant filed a suit on 23.9.96 by way of a plaint. The applicant duly filed a defence on 31st October, 1997 and thereafter the applicant filed the present applicant asking for a Summary Judgment on the grounds that there are no triable issues raised by the defence or by the replying affidavit and that the defence is a sham. The Respondents position being that the defence raises triable issues and, as such the defendant should be given liberty to prosecute his defence without any conditions.

Evidence

The grounds in support of this applications are that the agreement between the parties was in writing and that the defendant after being advanced the money has failed to pay back which is a contravention of the terms of the agreement which constitute the Promissory Note.

The application is opposed on the grounds that there are triable issues raised by the Defence. The affidavits in support and in reply give the facts relied upon by each party.

Findings

The replying affidavit of Mr. Arnold raises the first point that the document referred to as a Promissory Note is not a Promissory Note as required by the **Bills of Exchange Act Chapter 27 of the Laws of Kenya.**

I have examined this document and without going into the details; there are some merits in this argument. The document contains 10 conditions, which must be met while Section 3 of the Act provides that a Promissory Note should not have such conditions. As to what the parties mean by these conditions if they meant the document to be a Promissory Note can only be explained by evidence during a trial. I FIND therefore this constitutes a triable issue. The other point raised in the Defence is the question of interest

and paragraph 2 of the document states:

“Interest Rate: This note shall bear interest at the rate of forty per cent per annum payable monthly in arrears”

Examination of the Schedule of payment, which is annexed to these pleadings, shows interest charged in advance. It is not clear from the affidavit whether there was amendment to this paragraph of the document and whether the interest is indeed charged in advance. This can only be explained by evidence. No attempt was made by the applicant to explain how the interest was charged. It therefore remains a point, which constitutes a defence, and therefore it is a triable issue.

The applicant raises the point that the money borrowed was repaid. Some unexplained entries in the Statement of Account annexed to the proceedings were pointed out by Mr. Bowry for the Respondent. Some of these entries for money paid to some other parties would need some explanation. The affidavit in support did not throw any light on these payments. This clearly then amounts to a triable issue.

The other matter, which came out during the hearing, was the absence of the agreement referred to in paragraph 4 of the plaint. Is it the plaintiff's case that the “Promissory Note constituted the agreement referred to? This can only be explained through evidence, as there is nothing in the supporting Affidavit attempting to explain the existence or otherwise such an agreement. I find that this is a triable issue. The principles for the application of Order 35 of the Civil Procedure Rules with regard to Summary Judgments are expounded in **Civil Appeal No. 17 of 1998 Wakari and Barclays Bank of Kenya Ltd. and another.**

In this case taking into accounts these several point raised during the hearing of this application and which points are in the defence to the claim I consider that they constitute reasonable grounds of defence.

Ruling

Based on these findings I hold that the defence raises triable issues. The application is therefore dismissed with costs to the Respondent. Delivered at Nairobi this 16th day of February, 2000. -

KASANGA MULWA
JUDGE