REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 13 OF 1998

TRUST BANK LIMITED.....PLAINTIFF

VERSUS

PANGANI SERVICE STATION LIMITED & 4 OTHERS.....DEFENDANTS

RULING

The applicant in this case Trust Bank Limited, states in its plaint filed on 10th February 1998 that it advanced banking facilities to the first defendant and these were guaranteed by the 2nd, 3rd, 4th and 5th defendants. The first defendant failed to meet the repayment as required and the plaintiff called upon the second, third, fourth and fifth defendants to pay the sum outstanding which as at the date of the letters ie 10th September 1996 was Kshs 3,409,147/25 together with interest thereon within 14 days of the date of the same letter of demand. The 2nd, 3rd, 4th and 5th defendants also failed to meet the same demands and hence this suit which claims Kshs 3,917,860/40 which is the amount which was due as at 31st December 1997. Plaintiff is also claiming interest at 39% per annum from 1st January 1998 or at such other higher rates as shall be prevailing in the market when judgment is entered. He is also seeking costs.

There was some confusion on the entry of appearance as on 10th March 1998, the defendants entered appearance through Amolo & Gacoka Advocates and on 12th March 1998, the same defendants entered an appearance through Njenga Muchiri & Company Advocates but this was rectified when on 19th March 1998, Amolo & Gacoka, Advocates filed an amended memorandum of appearance indicating that they were only appearing for the 4th defendant only.

The first, second, third and fifth defendants filed defence which is not dated but was filed on 30th March 1998 stating in brief that they deny the allegations at paragraph 9 of the plaint and in particular deny being indebted to the plaintiff in the sum of Kshs 3,049,147/25 as at 31st July 1996 or at all; that they deny receipt of the letters calling upon them to pay the debt and that in the alternative if they owe any monies to the plaintiff then the amount so owed or to be paid is less than the sum claimed and does not attract the interest alleged. The 4th defendant denies the contents of paragraphs 7, 8, 9, 10, 11 and 12 of the plaint and denies having signed the alleged guarantee and indemnity in favour of the plaintiff. He also denies that the alleged monies were advanced to the first defendant and denies that the first defendant is indebted to the plaintiff as alleged or at all. He also denies being indebted to the plaintiff and denies that the demand notice of intention to sue have been issued and lastly he denies that the plaintiff is entitled to claim interest at the alleged rate or at all.

At the close of the pleadings, the applicant has now brought this application by way of notice of motion under order 35 rule 1 and order 12 rules 6 of the Civil procedure Rules and section 3A of the Civil Procedure Act seeking only one main prayer and that is that judgment be entered in favour of the plaintiff

against the defendants as prayed in the plaint and costs.

The application is based on the grounds that the respondents are truly indebted to the applicant and that the defences do not raise any triable issues. The applicant further contends that the first defendant has in any event admitted its indebtedness to the applicant.

In the supporting affidavit sworn by the Deputy Manager of the applicant Bank, Moi Avenue Branch, the applicant maintains in brief that the first respondent applied for overdraft facilities from the applicant and undertook to abide by the terms and conditions of the same facilities. The applicant granted the same facilities upon the 2nd, 3rd , 4th and 5th respondents each giving continuing guarantees and indemnities in writing. The first respondent neglected and/or failed to service the loan. As a result plaintiff recalled overdraft facilities *vide* its letter dated 1st July 1996 annexed as "NK4". The first defendant acknowledged its indebtedness to the plaintiff in a letter dated 29th August 1996 and in that letter is made proposals for repaying the loan and asked the applicant to convert its overdraft account to a loan account. This letter is marked "NK5". *Vide* letters all dated 10th September 1996 all the respondents were called upon to pay the outstanding debt. These letters are "NK6". As the respondents failed to pay the debt, the first defendant fixed deposit was uplifted to the tune of Kshs 895,588/95 and the proceeds were applied to pay the debt. Despite that the account was still in the red. He ended in stating that the Bank was truly owed the amount claimed which due to interest charge is now much more than what is claimed in the plaint. The loan facility was given to first defendant *vide* a letter dated 14th September 1995 which was annexed as "NKI". There were other annextures like the various guarantee and indemnity documents in respect of Nilesh Shah, the third respondent, Al-Karim Kanji, the 2nd respondent, Rafique Ebrahim, the fourth respondent, and Nazmudin Kanji, the fifth respondent and several other annexures mainly correspondences and statements of account.

The first, second, third and fifth respondents did not file any grounds of opposition and did not file any replying affidavit and were not present at the time of hearing this application although their learned counsel was duly served with the hearing notice. Thus, as far as these defendants are concerned, and under order 50 rule 16 (2), this application is not opposed. As to the fourth defendant, I have already set out his defence hereinabove. He filed grounds of opposition in which he maintained that the applicants claim has been fully settled by the 3rd and 4th respondents, that the applicant has acted in total disregard of the fiduciary duty owed to the defendants, that there are no grounds for granting the orders sought and lastly that without prejudice to the foregoing, each of the second, third, fourth and fifth respondents as co-guarantors are obliged in law to as between themselves make equal contribution to the liability if any does lie against them. He also did swear an affidavit stating in brief, that in June 1998 he held a meeting with the applicants at which it was agreed that the respondents pay Kshs 2,800,000/- in full settlement of the debt. That meeting was confirmed by two letters written to the applicant's Director stating that he had paid this debt by bankers cheque but the same cheque could not be banked so as to ensure that first defendant's account reflected the same debit in the papers to be presented to Court. He thus maintained that in view of this situation, the applicant's claim has been fully paid. He annexed two notes addressed to one Praful Shah who is Director to applicant Bank.

The law as regards application for summary judgment under order 35 rule 1 is now well settled.

In the case of *Kundanlal Restaurant v Devshi & Company (*1952) 19 EACA 77 the Court of Appeal concurred with the decision of Sheridan CJ in the case of *Hasmari v Banque Du Congo Belge* [1938] 5 EA 89 where the learned judge stated:

"If there is one triable issue contained in the affidavit in the application for leave to appear and defend then the appellant is entitled to have leave to appear and defend unconditionally."

This decision has been followed consistently in our Courts. It was quoted with approval by the Court of Appeal in the case of *Provincial Insurance Company of East Africa Limited now known as UAP Provincial Insurance Company Limited v Lenny M Kivuli* Court of Appeal Civil Appeal No 216 of 1996 where the Court of Appeal stated:-

"In an application for summary judgment, even one triable issue, if bonafide, would entitle the defendant to have unconditional leave to defend."

And finally in the case of *Nairobi Golf Hotels (Kenya) Limited vs Lalji Bhinji Builders & Contractors* Civil Appeal No 5 of 1997, (unreported) Court of Appeal stated in part as follows:

"It is trite law that in an application for summary judgment under order 35 rule 1 of the Civil Procedure Rules, the duty is cast on the defendant to demonstrate that he should have leave to defend the suit. His duty on the main is limited to showing, *prima facie*, the existence of bonafide triable issue or that he has an arguable case. On the other hand, it follows, a plaintiff who is able to show that a defence raised by a defendant in an action falling within the purview of order 35 is shadowy or a sham is entitled to summary judgment."

It is also trite law that under order 12 rule 6 where an application is made on grounds of admission, then if after arguments and perusal of the documents availed to the Court a plain and obvious case emerges, then the applicant/plaintiff is entitled to judgment.

In the case before me, the first, second, third and fifth defendants filed defence only which defence is in my humble opinion a mere denial. Such a defence as Omolo JA says in the case of *Raghbir Singh Chatte vs National Bank of Kenya Ltd* Court of Appeal Civil Appeal No 50 of 1996 is not sufficient.

The learned judge said as follows:-

"The position in law as I have always understood it to be, is that a mere denial or general traverse in a defence is not sufficient and a defendant who does not specifically plead to all the issues raised in a plaint risks the probability of his defence being struck out or being held to constitute an admission of the issues raised in the plaint."

Further the same defendants have not filed any grounds of opposition to this application and have not appeared in Court on the hearing date to press their side of the matter before me.

The fourth defendant has referred me to internal communications between the bank staff and says that the amount being demanded had been paid. The amount being demanded is Kshs 3,917,860/40. The fourth respondent according to these letters seems to have wanted the applicant to treat the guarantors differently, the same stand he took in his defence. Courts cannot go into internal feuds between the respondents and draw up a different contract between the defendants and the applicant/plaintiff based on a bid to solve the same internal misunderstandings between the respondents.

I have perused the annextures to the applicant's supporting affidavit and the 4th respondent's annextures. I have also seen the provisions of interest in the letter of offer and in the documents of guarantee and indemnity. It is clear the applicant retained the right to alter or vary interest rates and it is also in the same documents that any failure to inform the principal debtor and/or guarantors would not prejudice the applicant in its recovery of interest charged. These were all executed by the respondents and thus formed part of the contractual obligations between the applicant and respondents. I cannot change these without being shown that there was fraud on the part of the applicant or that there was proven mistake resulting into such a contract. Further, the letter dated 29th August, 1996 from the first respondent readily admitted the indebtedness. I have also seen letters written to each of respondents calling upon each to pay the debt.

I am satisfied that this is in my mind, a plain and obvious case. I cannot see any triable issues raised either by the defences and/or by the 4th respondent's affidavit. This is, in my humble opinion, a proper case for summary judgment.

The application by way of notice of motion dated 9th December 1998 is granted as prayed with costs to the applicant. To be clear, judgment is hereby entered in favour of the applicant against the respondents as prayed in the plaint.

Dated and Delivered at Nairobi this 12th day of April 2000.

J.W.ONYANGO OTIENO

JUDGE