REPUBLIC OF KENYA

IN ThE HIGH COURT OF KENYA AT MILIMANI

CIVIL CASE NO. 984 OF 1999

TRUST BANK LIMITED.....PLAINTIFF/APPLICANT

VERSUS

H.S.AMIN & CO. LTD.....1ST DEFENDANT/RESPONDENT

H.S.AMIN.....2ND DEFENDANT/RESPONDENT

RULING

In a plaint dated 26th July 1999, and filed in Court on 28th July 1999, the plaintiff/applicant, Trust Bank Limited is seeking judgment against the defendants/respondents jointly and severally for the sum of Kshs 2,377,398/90, interest on the same claim at the rate of 21% per annum from 14th July 1999, costs and interest on such costs, being the amount advanced to the first respondent and guaranteed by the second respondent and which has remained unpaid despite demands made upon the respondents to pay the same.

The respondents filed a joint statement of defence dated 27th September 1999 and filed into the Court on 6th October 1999 in which they both denied being in any way indebted to the applicant. Upon the pleadings being closed, the applicant has now filed this application by way of chamber summons under orders VI rule 13(1) (b) (c) and (d), XXXV rule 1(1) (a) of the Civil Procedure Rules and section 3A of the Civil Procedure Act, seeking that summary judgment be entered against the first defendant in the sum of Kshs 2, 377,398/90 together with interest at the rate of 21% per annum from 14th July 1999 until payment in full and that the defence dated 27th September 1999 be struck out.

The applicant is also seeking costs of this application. Prayer 3 was abandoned after another counsel replaced Rajui Somaia, Esq Advocate. The grounds in support of the application are that the defendants have no defence to the applicants claim; that the defence is frivolous and vexatious and does not answer the plaintiff's claim; that the defence will delay the fair trial of this action and is otherwise an abuse of the process of this Court and that the defendant/respondent has admitted owing the applicant the sums claimed. There is also supporting affidavit sworn by Michael Monari, the Branch Manager of the plaintiff's bank Kisumu branch together with several annextures to which I will refer hereafter in this Ruling.

The respondents grounds of opposition are four in number and these are:-

"1. That the application is incompetent, misconceived and is otherwise an abuse of the process of Court.

2. That the defence discloses triable issues.

3. That the applicant has not submitted proper statements of accounts to the defendants. and

4. That the applicant herein has levied harsh and unconscionable interest rates on the monies advanced to the first defendant."

These grounds of opposition were accompanied by an affidavit sworn by the 2nd respondent, Hemanshu Suryankant Amin, who is also the Director of the first defendant.

The law to be applied in cases where an applicant is seeking striking out of the defence under orders VI rule 13 (1) (b) (c) and (d) order 35 rule 1 of the Civil Procedure Rules is now well settled. The Court can strike out a pleading or have it amended in plain and obvious cases only. If a pleading is arguable or if a pleading raises even a single triable issue, the Court will allow the defendant to argue it.

In cases falling under order VI rule 13(1) (b) (c) and (d) it must be shown to the Court that the pleading is scandalous, frivolous and vexatious, tends to prejudice, embarrass or delay the fair trial of the suit or is an abuse of the process of the Court. These are words of phrases in our legal terminology which have been well defined.

I will start with defences which may be considered scandalous by the Courts.

In the case of *J P Machira vs Wangechi Mwangi and Nation Newspaper* Court of Appeal Civil Appeal No 179 of 1997 Omolo JA after quoting Ringera J in the case of *Dr Muray Watson vs Rent A Plane Ltd & 2 others* HCCC No 2180 of 1994, had this to say:-

"While I would broadly agree with the judge, I can find no warrant for restricting the meaning of the term scandalous to only that which is indecent, offensive or improper. Surely if everybody who knows a man including his parents know his name to be Tom Njuguna Onyango and when he is sued under these names he pleads

"I deny that my names are Tom Njuguna Onyango, that kind of denial, apart from being frivolous and vexatious, can also be properly described as scandalous. What I am saying is that the category of what may be described as scandalous cannot be limited to the indecent, the offensive, and the improper. Denial of a well known fact can also be rightly described as scandalous."

Thus if the applicant can prove that the defence filed in this case is either indecent, or offensive or improper, or amounts to a denial of what the defendant had clearly admitted earlier on, then he can be said to have brought this case within the standards required under order VI rule 13 (1) (b).

How about the allegation by the applicant that the defence is frivolous and vexatious?

In *Buller & Leake and Jacobs Precedents of Pleading* (12th Edition) on chapter dealing with striking out pleadings at page 145 it stated:

"A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense. "

And a pleading which tends to embarrass or delay fair trial is described as a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses, trouble and delay and that which contains unnecessary or irrelevant allegations which will prejudice the fair trial of the action and lastly a pleading which is abuse of the process of the court really means in brief a pleading which is a misuse of the court machinery or process.

Order 35 rule 1 (1) (a) requires the Court to act in a case where defence raises no triable issues.

All in all the main difference between order VI rule 13 (1) (b) (c) and (d) and order 35 rule 1(1) (a) apart

from the fact that order VI rule 13 deals with pleadings in general whereas order 35 (1) (a) deals with defence, as far as I can see really in the onus of proof. Under order VI rule 13 (1) (b) (c) and (d) the pleading in itself, in this case the defence has to show that it cannot stand, because of the pleadings in the plaint and/or matters raised in the affidavits and annextures whereas in order 35 (1) (1) (a) the defendant has to show that the defences he has filed raise at least one triable issue before the defendant can be allowed unconditional leave to defend. In either case, the power given to the Court is enormous and has to be exercised with a lot of care for it is a power that brings a case to an end without hearing the parties in their evidence.

I will now consider the case before me basing my approach on the need to first find out in case of the application under order VI rule 13 (1) (b) (c) and (d) whether the standards required by that rule has been satisfied and in case of the application under order 35 (1) (a) whether the defence filed raises even a single triable issue. First however, I must deal with a point of law which was raised concerning certain parts of the supporting affidavit although the same objections were raised very belatedly. The objection concerns paragraphs 11, 12, 13 and 16 of the affidavit of Michael Monari in support of the application. I do agree with Mr Agimba, the learned counsel for the respondent that this application cannot be treated as an interlocutory application. It is an application which is seeking to have the matter fully determined. Therefore under order 18 rule 3, affidavit based on information cannot be admissible even if the source of information is revealed. I have however, perused the affidavit of Michael Monari and I am satisfied that paragraph 11 of the same affidavit is not composed of deponments on facts, paragraph 12 is exhibiting a document prepared by his lawyer on other relevant matter and paragraph 13 is based on matters of law and not on facts and paragraph 16 is dealing with a prayer no longer being considered. In short no prejudice has been caused to the respondent as the defendant has not deponed on matters of fact on those parts being challenged except in respect of paragraph 16 which is now irrelevant.

Back to the case before me. The defence filed by the first respondent is in my humble opinion, a complete denial except at paragraph 10 thereof. It is now well established that a mere denial is not enough to sustain a defence. In the case of *Raghbir Singh Chatte vs National Bank of Kenya Limited* Court of Appeal Civil Appeal No 50 of 1996, Omolo JA had this to say:

"If a general traverse like the one I have set out above were to be held to be sufficient and effectual, that would render meaningless provisions such as order VI rule 9 (3) of the Civil Procedure Rules and even the decisions of this Court such as *Magunga General Stores vs Pepco Distributors Limited* [1988-92] 2 KAR 89. The position in law as I have always understood it 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."

In this case, the application for striking out the defence and for entry of summary judgment is made against the first defendant only. The first defendant's defence appears at paragraphs 1, 2, 3, 4, 5 (a) (b) and (c), 9 and 10 and all these are denials. Paragraph 10 states in the alternative that whatever facilities were accorded first defendant by the applicant (which is denied) has been regularized and a liability thereon fully paid and discharged. In the replying affidavit sworn by the second defendant who is a director of the first defendant, the same director at paragraph 4 admits that the same overdraft facilities were extended to the first defendant and that he (the second respondent) executed a personal guarantee in favour of the first defendant. The affidavit however goes on to raise two main matters namely that the interest charged is harsh and unconscionable, and that statement of accounts have not been supplied.

First, the question of interest rate being harsh and unconscionable has not been raised in the statement of defence. Secondly, in the document annexed as MM3 called Credit Agreement executed by H S Amin, the second defendant and a director of the first defendant it is stated at paragraph 1 (b) that the first defendant agreed to pay;

"interest on all moneys and liabilities from time to time due or payable as aforesaid at such rate or rates per annum (not exceeding any maximum rate permitted by law) as you may in your absolute and sole discretion from time to time decide with full power and authority to you to charge different rates for

different accounts....."

This was freely signed by Mr Amin as second defendant and Director of the first defendant. This would explain the reason why the question of the rate of interest charged was not raised in the defence. Further even in the replying affidavit and even during submissions, I was not told the interest rate complained of. I was not told the agreed rate and the increase complained of. I find that this is not a genuine defence and is meant in my humble opinion, to delay the fair trial of the case. The respondent further states that the applicant has not furnished it with proper statement of accounts. This again was not raised in the statement of defence. Further having seen what he calls temporary statement of account, the first defendant does not point at its deficiency and does not challenge the same. It merely contends itself by saying that he needs proper statement of account but does not state any entries in the statement supplied which he challenges, neither does it state what, according to its accounts would be the proper position of its accounts as opposed to what is supplied in the statement of accounts served upon it. I do find again that this defence is frivolous and is meant to delay the fair trial of the case.

In a letter addressed to H S Amin dated 4th November 1998 by the then advocate for Central Bank which was then the appointed Manager of Trust Bank (plaintiff) Mr R K Somaia, payment of this money was demanded. Again a demand was made on 16th March 1999. The suit was filed into the Court on 28th July 1999 and on 7th October 1999 one day after the defence was filed, the defendants wrote a letter to the applicant as follows:

"7th October 1999

Trust Bank Limited

PO Box 1420

Kisumu

Attention Mr M O Monari

Dear sir,

Re: Our Account No 7676-0

Outstanding Kshs 2,507,238, as

at 30th September 1999

We kindly request you consider our proposal of settling the above issue which is now before the Court by giving you two cheques each Kshs 750,000/- that totals to Kshs 1.5 million in full settlement of the claim. The difference in balance you can waive. It had accrued as a result of massive interest charged.

We suggest that we could jointly save time and money sorting the matter if not before the Court.

We thank you.

Yours faithfully,'

H S Amin & Co Ltd.

Signature

H S Amin."

This was substantially an admission of debt. It did not even challenge the interest charged, but rather

merely pleaded for it to be waived.

Mr Agimba referred me to *D T Dobie's* case. It is true that that case says extra care is required before striking out a pleading and as I have stated above, I do agree that extra care is required. I must however, point out that that case *D T Dobie & Company (Kenya) Limited vs Joseph Mbaria Muchina & another* Court of Appeal Civil Appeal No 37 of 1978 was dealing with an application under order VI rule 13 (1) (a) where striking out of a plaint is sought on grounds that it discloses no reasonable cause of action. (See top of page 4 of the typed copy).

Having considered the first defendant's defence carefully, I do find that the defence in my humble opinion, does not raise any triable issues and I further find that even the affidavit and grounds of opposition do not take me away from this finding. I find that it is meant to delay the fair hearing of this suit. I do as I must strike it out and I enter judgment for the applicant against the first defendant as prayed for in the plaint.

Costs to the applicant.

Dated and Delivered in Nairobi this 10th day of April 2000.

ONYANGO OTIENO

JUDGE