REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI MILIMANI COMMERCIAL COURTS

CIVIL DIVISION

CIV CASE 1508 OF 99[1]

Moez Investments Limited v Guardian Bank Limited & Another
High Court Of Kenya At Nairobi October 27, 2000
Milimani Commercial Courts
T Mbaluto, Judge
October 27, 2000 T Mbaluto, Judge delivered the following ruling.

RULING

This application has been brought under Order VI Rule 13 (1) (b) (c) and (d) of the Civil Procedure Rules for an order to strike out the defendants defence and for judgment to be entered in favour of the plaintiff against the 2nd defendant/respondent (respondent) as prayed in the plaint. The application is supported by an affidavit sworn on October 2, 2000 by Jignesh Desai, the General Manager of the plaintiff/applicant (applicant).

No replying affidavit has been filed on behalf of the respondent and consequently what Mr. Desai states in his affidavit stands unchallenged and uncontroverted. The affidavit reveals that the applicant had a loan with the 2nd respondent which was secured by a charge over property Land Reference No. 214/407 Nairobi. Subsequent to obtaining the loan, the 1st respondent merged with the 2nd respondent upon which all the assets and liabilities of the 1st respondent were transferred to the 2nd respondent. Since then the applicant has fully repaid the loan advanced to him by the 1st respondent but despite his request for the release of its title documents, the 1st respondent has refused to release them.

As a result of the 1st respondent's failure and/or refusal to release the title documents, the applicant filed this suit seeking a declaration that the withholding of his title deed is illegal and unlawful; an order for the release of the document to the applicant within 7 days and general damages for breach of contract and for commission.

The 2nd respondent's defence contain averments which are clearly untenable. It denies the claim in the plaint that its business has been taken over by the 1st respondent and avers that some liabilities of the 2nd respondent were not taken over. In my view, the applicant has tendered sufficient evidence to show the averment is patently untrue. The evidence is to be found in annexures 'JD1' to Mr. Desai's affidavit which is a Kenya Gazette notice of an authorisation by the Minister for Finance of the acquisition of the 2nd respondent by the 1st respondent. The same annexure contains an announcement by both Chairman of the 1st and 2nd respondents of the merger. Annexure 'JD2' confirms the merger. In view of that evidence, the 2nd respondent's denial of the merger is a sham.

The 2nd respondent also avers in its defence that the applicant is still indebted to it in respect of a guarantee it gave at the request of the applicant. However no evidence of such guarantee was tendered and clearly there is no substance in the averment. In paragraph 10, 11, 12 and 13 of its defence, the 2nd respondent talks of its rights of compounding the applicant's liability and consolidating the accounts which it claims it has done and that the applicant has no claim against it.

As aforesaid, there are no facts upon which anything the 2nd respondent has said can be verified. In the face of the facts which the applicant has put before the court the 2nd respondent's averments cannot stand. The defence is therefore scandalous, frivolous and vexatious and an abuse of the process of this court.

Mr. Odek for the 2nd respondent sought to oppose the application on grounds which were very technical. His contention was that the application was substantively incompetent and should be struck out. He argued that prayer No. 2 of the Chamber Summons was not available because that was obviously under Rule 13 (a). Mr. Billing for the applicant readily conceded that the application was not under rule 13 (1) (a) of the Order VI of the Civil Procedure Rules and consequently nothing arises from the argument on that sub-rule. However as regards the rest of the sub-rules, it is plain that the application has been brought under rule 13(1) (b) (scandalous, frivolous or vexatious) as well as 13 (1) (d) (otherwise an abuse of the process of the court). In this respect, I do not accept the argument that if an application falls under more than 1 of the two grounds (b), (c) and (d), it cannot be made under those grounds. The argument is plainly frivolous. It is clear from prayer 2 of the Chamber Summons that the applicant has chosen grounds (b) and (c) as the basis of its application. It does not have to repeat the grounds in the prayer. All it needs to show is that the application falls under those grounds.

From what I have stated above, it is obvious that the defence filed by the defendant is scandalous, frivolous and vexatious and that it is an abuse of the process of the court. Accordingly, the application is allowed, the defence struck out and judgment entered in favour of the plaintiff against the 2nd respondent as prayed in the plaint. The 2nd respondent will bear the applicant’s costs of this application.