



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 657 OF 2013

DIAMOND TRUST BANK KENYA LIMITED.....APPELLANT

VERSUS

ERIC BARASA NAKITARE.....RESPONDENT

(Being an appeal from the ruling delivered on 22nd November, 2013 by Hon. I. Gichobi (Resident Magistrate) at Chief Magistrate's Court at Milimani Commercial Courts Civil Case No. 1314 of 2013)

JUDGMENT

1. The Appellant who was the Plaintiff in the lower court sued the Respondent (Defendant) for the sum of Ksh.184,102.70 together with interest therein at the rate of Ksh.31% per annum from the 27th February, 2013 until payment in full. The claim is stated to have arisen pursuant to a loan agreement dated 5th November, 2009 wherein the Appellant as the employer of the Respondent advanced the sum of Ksh.270,000/= to the Respondent through a staff loan facility. It is contended that the Respondent left the Appellant's employment on 25th March, 2011 and that the staff loan started accruing interest at commercial rates. That the Respondent fell into arrears and has failed to pay the sum claimed.

2. The Appellant subsequently filed the application dated 16th May, 2013 seeking orders that the honourable court be pleased to summarily enter judgment against the Defendant (Respondent) herein for the sum of Ksh.184,103./= together with interest thereon at the rate of 31% per annum from 27th February, 2013 until payment in full. It was stated in the grounds and the two affidavits in support of the application that the Appellant's claim is a liquidated one and is founded on the staff loan application dated 7th October, 2009 between the Appellant and the Respondent as per the terms of the Agreement dated 5th November, 2009. That the repayment of the sum of Ksh.270,000/= was to be carried out in 48 months by payment of equal monthly installments until payment in full. That the interest rate was 7.5% for staff loan but that the same would be charged at the commercial rates of 21% and an additional 10% on the arrears. That the Respondent defaulted in the repayments and the interest at commercial rates started accruing on 25th March, 2011 when the Respondent left the Appellant's employment and an additional interest of 10% on the arrears, making the total interest rate 31%.

3. The Respondent filed his Statement of Defence dated 23rd May, 2013 and denied the Appellant's claim. The Respondent admitted having submitted the staff loan application form and the staff loan Agreement for the sum of Ksh.270,000/= but denied that the process was completed as he never received the counter part of the loan application form and the staff loan Agreement duly executed by the Appellant and therefore the contract was not concluded. That the Respondent made the application for the loan facility as a member of staff and the loan was advanced to him on the basis of the employment but after being forced out of employment he had no other income. That the terms and conditions of the Agreement were unconscionable and that he was forced to surrender his Ksh.70,000/= terminal dues contrary to the law. The Respondent further contended that he was not supplied with the Statements of Account and that the 70,000/= terminal dues were channeled towards the repayment of the monthly installments thereby increasing the interest payable.

4. The Respondent filed a replying affidavit in opposition to the application for summary judgment. It was stated that the Respondent had already filed his Statement of Defence before the application for summary judgment was brought. That an application for summary judgment can only be brought before the filing of the Defence. That the loan Agreement was not executed by the Appellant and therefore the Respondent had no contractual obligation with the Appellant. That the Defence filed raises triable issues which can only be investigated during the trial.

5. The Respondent also filed the grounds of objection dated 20th June, 2013 which state as follows:

“1.The application for summary judgment is premature. The application was filed after an Appearance has been filed and before expiry of fourteen days within which to file a defence under Order 7 Rule 1 of the Civil Procedure Rules;

2. The Defendant herein has filed Statement of Defence dated 23rd May, 2013 and is keen to defend the suit on the merits. Order 36 Rule 1 applies in situations of absolute failure of defence;

3. The interest of justice sections 1A,1B & 3A if the Civil Procedure Rules and Article 159(2)(d) of the Constitution of Kenya for substantive justice, shall be better served by granting the Defendant leave to defend the suit under Order 36 rule 2 of the Civil Procedure Rules.”

6. I have considered the application, the response to the same and the submissions made by counsel for the respective parties.

7. The principles which guide the courts in determining an application for Summary judgment are well settled. The Court of Appeal in the case of **Harit Sheth T/a Harit Sheth Advocates v Sharma Charania [2014] eKLR** posited as follows:

“This court stated that the purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgement where there is plainly no defence to the claims. To justify summary judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination (see also Continental Butchery Ltd v Ndhiwa (1989) KLR 573.

In Dhanjal Investment ltd v Shabaha Investments Ltd civil Appeal No. 232 of 1997, the court had earlier stated as follows regarding summary judgment.

“The law on summary judgement procedure has been settled for many years now. It was held as early as in 1952 in the case of Kandial Restaurant vs Devshi & Company (1952) EACA 77 and followed by the court of Appeal for Eastern Africa in the case of souza Figuerido & Company Ltd vs Mooring Hotel Ltd. (1959) EA 425 that, if the defendant shows a bona fide triable issue, he must be allowed to defend without conditions....”

Regarding what constitutes triable issues, in Kenya Trade combine Ltd v shah, civil Appeal No 193 of 1999, this court states as follows:

“In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed.”

8. Order 36 rule 1(1) provides for entry of summary judgment as follows:

“1.(1) In all suits where a plaintiff seeks judgment for-

(a) A liquidated demand with or without interest; or

(b) ...”

9. In the case at hand, the Appellant’s claim is for the sum of Ksh.184,102.70 interest and costs. This is a liquidated claim. As observed in the case of **Standard Chartered Bank Kenya Ltd v Arjan [2001] KLR 368:**

“A liquidated demand is in the nature of a debt; i.e. a specific sum of money due and payable under or by virtue of a contract. Its amount must be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a certain sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a debt or liquidated demand but constitutes damages.”

10. The Appellant filed suit on 18th March, 2013 through the plaint dated 11th March, 2013. The Respondent entered appearance on 13th May, 2013 and filed the Statement of Defence on 27th May, 2013. The application for summary judgment was filed on 17th May, 2013. Consequently, the application for summary judgment was filed before the filing of the Statement of Defence in accordance with the law. Under Order 36 rule rule 4, it was incumbent on the Respondent to seek the leave of the court to defend the suit. The trial magistrate therefore fell into error by observing that the Notice of Motion application was prematurely filed before the days for filing of the Statement of Defence had lapsed.

11. The Appellant’s claim is supported by the Staff Loan Application Form and the Staff Loan Agreement which documents are not denied. The contention by the Respondent is that the loan forms have not been executed by the Appellant. There is no denial that the sum of Ksh.270,000/= was received by the Respondent. The Respondent’s statement of Account exhibited herein by the Appellant reflects that the sum of Ksh.270,000/= was credited into the Respondent’s Account on 9th December, 2009 and that the Respondent initially regularly serviced the loan by payment of monthly installments of Ksh.6,574.31. This evidence remains uncontroverted. The Respondent by conduct therefore accepted the consideration. The terms of the contract were therefore completed in that there was offer, acceptance and consideration.

12. On the question of interest, what is disputed is the amount, over and above the rate of interest extended to the members of staff. The loan Agreement which was duly signed by the Applicant reflects that the loan was for Ksh.270,000/= interest chargeable was 7.5% per annum below the base lending rate of the lender which was 15.5% per annum at the material time. The arrears were to attract an interest rate of Ksh.10% per annum.

13. The contention regarding the termination of employment is not an issue herein. The Respondent accepted the terms and conditions of the offer which took cognizance of the possibility of the termination of the employment. The question of the loss of income is therefore not a bar to the Appellant's claim.

14. With the foregoing, I find the Appellant's liquidated claim for the outstanding principal sum of Ksh.184,102.70 and interest of 7.5% to be crystal clear without any need for going into a full trial. Consequently, under Order 36 Rule 5 Civil Procedure Rules, Judgment ought to have been entered for the Appellant for the said sum. I therefore set aside the ruling of the lower court delivered on 22nd November, 2013 and substitute the same with an order allowing the application for entry of judgment for the sum of Ksh.184,102.70 plus interest of 7.5% and costs with effect from 27th February, 2013 until payment in full. The Respondent has raised triable issues in the rest of the claim. The same to go to a full hearing.

Dated, signed and delivered at Nairobi this 4th day of Dec., 2019

B. THURANIRA JADEN

JUDGE