



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE. NO. 419 OF 2015

ECOBANK (K) LIMITED.....PLAINTIFF

VERSUS

DEFTECH KENYA LIMITED.....1ST DEFENDANT

ASHRAF ANITA ANAIDA.....2ND DEFENDANT

ABDULLAN KHATIB ASHRAF.....3RD DEFENDANT

RULING

Introductory narrative

1. This is an application for summary judgment by the Plaintiff against all the Defendants
2. The Plaintiff sued the Defendants, two of whom are guarantors for the sum of € 99,452.67 (or the Kenya shilling equivalent at the conversion rate of Kshs 102.5069 to the Euro as at 27 February 2015) as money lent to the 1st Defendant. The 1st Defendant is the principal debtor.
3. Briefly, the facts may be stated as follows.
4. The Plaintiff is a licensed bank. It undertakes its business in Kenya. The 1st Defendant is the Plaintiff's customer. The 1st Defendant operates a bank account number 0111015022612701 with the Plaintiff. In or about June 2014, the Plaintiff at the Defendants' request agreed to extend to the 1st Defendant a banking facility. The facility was in the form of an Advance Payment Guarantee for the principal sum of € 2,066,000=. There was to be levied a non-refundable 1% commitment fees on the facility. The 1st Defendant paid the 1% commitment fees in acceptance of the facility. The facility was to be available for a period of 60 days effective 13 June 2014 when it was issued by the Plaintiff to the beneficiary, Kenya Police Service.
5. Subsequently, in July 2014 the Plaintiff allowed the 1st Defendant to access funds from the 1st Defendant's bank account number 0111015022612701 by way of overdraft. The Plaintiff asserts, and it is not contested, that the 1st Defendant made two drawings. The amounts were € 66,100= drawn on 1 July 2014 and € 20,889.67 drawn on 14 July 2014. Formal demand was made for repayment of these amounts

on 30 January 2015 but the Defendants did not heed the demand. The Plaintiff now claims the aggregate amount together with interest.

Arguments in court

6. Summary procedure applications under Order 36 of the Civil Procedure Rules ought to be filed expeditiously and indeed prior to the defence being filed, if only to help achieve expedition. The application also ought to be prosecuted expeditiously.

7. In the instant case, the application was filed before but argued after the defence was filed. It is unfortunate that the application is being prosecuted nearly one and a half years after the suit was filed.

Plaintiff's submissions

8. Mr. Shah urged the Plaintiff's case and relied on the Plaintiff as well as the supporting affidavit of Elizabeth Hinga sworn on 4th February 2016.

9. Mr. Shah's brief submissions were to the effect that the Defendants were justly and truly indebted to the Plaintiff as claimed in the Plaintiff by reason of the 1st Defendant's overdrawn current account number 0111015022612701 and that the defence statement exhibited no triable issue. Mr. Shah contended that the Defendants' complaints about certain debits on the account had never previously been raised by the Defendants. Additionally, Mr. Shah submitted that the alleged issue of breach of contract with the government was a non issue as the Plaintiff had been requested to issue a two month and not six month guarantee and that is exactly what it did.

10. Counsel for the Plaintiff relied on the 10th edition of Mark Hapgood's treatise Paget's Law of Banking for the proposition that an overdraft constitutes money lent by the bank and which is repayable on demand.

Defendants' Submissions

11. Mr. Omuganda argued the Defendants' case in opposition. He advanced his arguments based on the Replying affidavit of the 3rd Defendant as well as the Defense Statement filed herein.

12. While admitting that the Plaintiff and the 1st Defendant had a subsisting banker-customer relationship, Mr. Omuganda pointed out that the Defendants had a genuine and good defence to the Plaintiff's claim to warrant a full trial.

13. Firstly, Mr. Omuganda submitted that the Plaintiff had in breach of a contractual agreement issued a two-month Advance Payment Guarantee instead of one for six months. The breach had resulted in the guarantee issued by the Plaintiff being rejected and the rejection meant that the 1st Defendant suffered financial loss as it had to pay more on the collateral contract and also in securing an acceptable Guarantee from another bank.

14. Secondly, counsel pointed out that the 1st Defendant's bank account with the Plaintiff was also irregularly and unlawfully debited. The debits which the Defendants contended were colossal included one for Kes.2,485,870/ 73 on 24 June 2014. This debit, counsel conceded, was however reversed on 14 July 2014 but not before it had fetched interest.

15. The Defendants, thirdly, contended that the Plaintiff had levied capricious interest and that there had been a failure of consideration as the guarantee had been rejected. In Mr. Omuganda's view, the claim was "not obvious" and it would be unjust to grant summary judgment without giving the Defendants the benefit of a trial.

16. The Defendants relied on the case of **Abok James Odera t/a A.J.Odera & Associates vs. John**

Patrick Machira t/a Machira & Company Advocate [2013]eKLR for the proposition that where there is a single triable issue shown in an application for summary judgment, the court had no discretion but to grant leave to the defendant to contest the claim unconditionally. According to counsel, there were triable issues raised by the defence statement and the Defendants were entitled to defend the claim unconditionally. Counsel also relied on the case of **Mercy Karimi Njeru & Another vs. Kisima Real Estate Ltd [2015]eKLR** for the proposition that summary judgment has the impact of taking away a party's constitutional right to fair hearing.

Discussion and Determination

The test

17. The object of summary procedure under Order 36 of the Civil Procedure Rules, in my view, is to ensure that a defendant who only has an unreal defence does not unnecessarily prolong litigation and delay or prevent the plaintiff from obtaining a decree early: see **Zola & Another vs. Ralli Brothers Limited & Another [1969] 1 EA 691**. It is not intended to deprive a defendant of the right to defence, if he has a good defence. Summary judgment process provides the court with an occasion to ensure that only cases with a real prospect of a defence meriting an investigation and trial actually go forward to hearing.

18. The court consequently has a salutary power to be exercised in favour of either the defendant or the plaintiff under Order 36 of the Civil Procedure Rules. A claim will be disposed of summarily if the defence has no real prospect of succeeding. It is therefore for the defendant to identify bona fide triable issues once the plaintiff has established his cause of action and claim. Where the defendant shows by either his defence or replying affidavit a genuine and bona fide issue of law or fact, then he must have an unconditional leave to defend the claim. This is the broad principle established more than a century ago: see **Jacobs vs Booth's Distillery Co [1901] 85 LT 262** and the local decisions in **Industrial and Commercial Development Corporation vs. Daber Enterprises Ltd [2000] 1 EA 75 (CAK)** as well as **Osodo vs. Barclays Bank International Limited [1981] KLR 31(CAK)**.

19. It need not be an issue which must succeed. It only needs to be a genuine and real issue. This needs no further amplification, and the only question then is how does the court determine that it is a genuine and real issue of law or fact?

20. A court will ordinarily decide and settle for summary judgment, if it considers that the defendant has no prospect of successfully defending the claim or even the issue identified. The prospect of the defence succeeding consequently ought to be arguable but not fanciful, false or imaginary. The court may closely look at the facts and the circumstances as well as the law but the court must not engage in or conduct a mini trial. As Lord Hobhouse of Woodborough stated in the case of **Three Rivers DC vs. Bank of England (No. 3) [2001]2 All E R 523**:

“ The criterion to be applied by the judge is not one of probability but absence of reality”

21. If the issue is not real then the defence must fail. A real issue is a triable one. In my view, it is a plea which is plausible when one looks at the facts and circumstances of the claim and what is stated in support of the issue. Some things are too plain for argument and thus pleas which appear to raise issues but are only intended to delay the case and add expense must not be allowed as they would not aid justice. Summary judgment brings an end to such pleas.

The points of defence

22. I will now examine whether with respect to the defence put forward, the Defendants can be said to have raised a bona fide triable issue.

23. It is firstly stated that the Plaintiff was in breach of a contractual arrangement. It is contended that the Plaintiff issued a two-month advance payment guarantee instead of a six month one. That this led to the

1st Defendant suffering massive losses and even missed out on a lucrative contract.

24. From the pleadings as well as the affidavit in support of the motion, it is clear that the claim is not pegged on the indemnity for any monies paid by the Plaintiff on the basis of or under the Advance Payment Guarantee issued by the Plaintiff on 13 June 2014. The claim is based on an overdrawn account as a result of an overdraft extended to the 1st Defendant.

25. Additionally, the defendants have not lodged a counterclaim for breach of a contractual arrangement involving the Advance payment Guarantee. A counterclaim would have particularized the financial loss alleged. It would also have detailed the court on whether the Defendants can rely on it to contest any summary procedure on the basis that the facts are so closely connected to those relied on in the claim to demand a simultaneous trial of both. In such a case the counterclaim may be deemed to disclose an equitable set-off which may constitute a good defence to a claim.

26. The second issue pointed out by the Defendants, as raised by the defence statement, is that of irregular debits to the 1st Defendant's bank account. The Defendants however only pointed out one irregular debit but quickly also conceded that the debit had been reversed long before the Plaintiff demanded payment. It was a debit of Kes.2,485,870.73. The debit does not thus constitute part of the Plaintiff's claim and I would not consider the issue of irregular and unlawful debits as a real issue.

27. The third line of defence is on the interest levied or charged by the Plaintiff. This involves the period after the overdraft drawings. The Defendants claim that the Plaintiff has charged interest at the rate of 1% every two months instead of 1% per annum. The Plaintiff on the other hand claims to have charged only the alleged contractual rate of 19% per annum previously but now asks the court for interest at court rates. On this point, I view it that the Defendant has raised a real issue worthy of further investigation at trial. There appears to be a lack of clarity on the contractual rate that the Plaintiff was charging on the overdrawn account. There is not a document which points to 19% per annum. The Plaintiff may be entitled to interest but the rate may have to be determined at trial.

28. The Defendants do not however deny that the 1st Defendant was at all material times a customer of the Plaintiff and that it operated a foreign currency bank account. The 1st Defendant does not also deny that its account was twice debited with overdrafts of € 66,100= and € 20,889.67 on 1 July 2014 and 14 July 2014 respectively. I see no reason why this principal amount should await trial. It may be severed from the rest of the without doing violence to the remainder of the claim. It constitutes the authorized overdraft. Where a bank allows a customer to make drawings on an account where there are no funds, the bank thereby loans the customer any amount drawn and the customer is bound to repay on demand: see **Coutts & Co vs. Stock [2000] 2 All ER 56**.

29. The Plaintiff has shown what it needed to show with regard to these two principal amounts; that is; that at the 1st Defendant's request the Plaintiff allowed the 1st Defendant to overdraw its account. I have no reasonable doubt that the Plaintiff is entitled to judgment on this amount and it may be inexpedient to allow the 1st Defendant to defend the same.

30. On the other hand I also take the view that neither the 2nd nor the 3rd Defendant should be made liable at this stage for the unpaid overdraft amount. True, the two defendants executed a guarantee document. It is a guarantee by indemnity. It guaranteed payment to the Plaintiff for any amounts the Plaintiff would have paid to a third party on behalf of the 1st Defendant on the basis of the Advance Payment Guarantee. It does not appear to have guaranteed amounts extended to the 1st Defendant by way of overdraft.

31. Secondly, it is also not very clear whether the guarantee is a corporate guarantee issued by the 1st Defendant or an individual personal guarantee issued jointly and severally by the other two Defendants. It should not be assumed that the two defendants as directors of the 1st defendant also assumed responsibility for the 1st Defendant's liabilities. It would be better to decide the issue as to the 2nd and 3rd Defendants' liability on real rather than assumed facts and only a trial may clarify the position before the

2nd and 3rd Defendants are held liable.

Conclusion and disposal

32. I have the discretion under Order 36 Rule 5 of the Civil Procedure Rules to enter judgment against one of many defendants. I also have the discretion where appropriate to enter judgment under Order 36 Rule 6 for only part of the amount claimed.

33. I would exercise that discretion in favour of the Plaintiff as against the 1st Defendant only and enter judgment in the sum of €86,989.67 being the principal amounts extended to the 1st Defendant by way of overdraft. Judgment is so entered. The conversion rate shall be Kshs. 102.5069 to the Euro, being the rate which was obtaining at the date the demand was made.

34. The Plaintiff will also have costs on this judgment amount but an assessment of the costs, absent any agreement between the parties, will be conducted only after trial of the pending issue as to the 2nd and 3rd Defendants' liability and also the issue as to the interest payable, if any.

35. Each party shall however bear its own costs of the application.

36. Orders accordingly.

Dated, signed and delivered at Nairobi this 13th day of March, 2017.

J.L.ONGUTO

JUDGE