



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CIVIL CASE NO. 222 OF 2013

JULIUS GITHAIGA KIIRU.....1ST PLAINTIFF

ABERDARE BOOK MERCHANT COMPANY LTD.....2ND PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD.....DEFENDANT

RULING

[1] The application that is the subject of this Ruling is the Plaintiffs' Notice of Motion dated **13 September 2016**. It was filed pursuant to **Order 7 Rule 1** and **Order 36** of the **Civil Procedure Rules** for orders that:

[a] **Summary Judgment be entered for the Plaintiff against the Defendant as prayed for in the Plaintiff for failure to file and or serve the Plaintiffs/Applicants with a written Statement of Defence;**

[b] **The Plaintiff/Applicants be at liberty to apply for such further orders and/or directions as the Court may deem fit and just to grant; and**

[c] **That the Defendant/Respondent be ordered to pay the costs of the application and of the suit to the Plaintiffs/Applicants.**

[2] The grounds relied on by the Plaintiffs were that, sometime in 2006, the 2nd Plaintiff approached the Defendant for a loan in the sum of **Kshs. 3,500,000**; which borrowing was granted by the Defendant at an agreed interest rate of 14.9% per annum. The loan was to be repaid within a period of 36 months and the security given therefor were the **Title No. Loc. 14/KIRU/141**, **Title No. Loc. 14/KIRU/988** and Indenture LR 13511/82 (hereinafter, the Suit Property), all registered in the name of the 1st Plaintiff, who executed a guarantee as collateral for the borrowing.

[3] It was further the contention of the Plaintiffs that the loan was fully repaid with attendant interest, whereupon they prepared three sets of Discharge of Charge upon the Defendant's request which were delivered to the Defendant on **7 December 2012** for execution to facilitate the release of the three title documents but that the Defendant failed to release the titles in spite of various reminders. It was added by the Plaintiffs that although the Defendant purported to claim that custody charges for the titles had not

been paid, there was no agreement between the parties for the same; and that in total disregard of the Plaintiffs' interests, the Defendant continued to illegally hold onto the titles and to debit the 2nd Plaintiff's accounts with the alleged custody charges.

[4] The Plaintiffs further averred that they had been offered a financial facility by **Equity Bank Limited** to develop the properties, but that they lost the opportunity because of the Defendant's failure and/or refusal to discharge and release the titles. It was for the foregoing reasons that this suit was instituted and upon failure by the Defendant to file a Defence, the Plaintiffs moved the Court, vide the instant application for Summary Judgment, pursuant to **Order 7 Rule 1** of the **Civil Procedure Rules**. The application was supported on the affidavit of the 1st Plaintiff annexed thereto, to which the Plaintiffs annexed, *inter alia*, copies of the Defendant's Letter of Offer, Letter of Guarantee and Indemnity, copies of the Bank Statements evidencing payment of the loan as well as the impugned debits and a copy of a letter forwarding the Discharge Instrument to the Defendant.

[5] The Defendant opposed the application on the basis of the Replying Affidavit sworn on their behalf by **Win Kihumba**, Advocate on **25 October 2016** in which a chronology of the events pertaining to this suit was given. It was the contention of the Defendant that the matter was being handled by one **Pauline Kimunya, Advocate**, who has since left the firm of **Miller & Company Advocates**, who have the conduct of this matter. Thus it was averred that the failure by the Defendant to put in a Defence was not intentional as the current Counsel only got to notice on **12 September 2016** that the Defence had not been filed; whereupon she brought it to the attention of Counsel for the Plaintiff that she would be seeking leave to file the same out of time when the matter came up for hearing on **14 September 2016**. It is the Defendant's contention that it has an arguable Defence and caused a draft thereof to be exhibited to the Replying Affidavit as **Annexure WK6** and urged the Court to grant it leave to defend the suit; and that no prejudice would be suffered by the Plaintiffs that cannot be compensated by way of costs.

[6] Having perused and considered the Notice of Motion dated **13 September 2016**, the affidavits filed in respect thereof and the written submissions filed by Learned Counsel herein, and having perused the documents on the file and the proceedings to date, it is manifest that most of the facts are not in dispute. The parties are in agreement that the Defendant accorded the 2nd Plaintiff a loan and that the borrowing was secured by a Guarantee that was furnished by the 1st Plaintiff as owner of the Suit Property. There is no contestation that the 2nd Plaintiff fully repaid the loan with interest and thereupon requested the Defendant to release the three titles. The Defendant then purported to hold onto the titles because some **Kshs. 72,000/=** in the form of custody fees was still outstanding; thereby leaving the Plaintiffs with no alternative but to institute this suit.

[7] Although the Defendant has been participating in this matter all along, having been served with the initial application dated **31 May 2013**, no Defence has been filed by it to date as required by **Order 7 Rule 1** of the **Civil Procedure Rules**. Accordingly, the issue arising from that state of affairs is whether, in the circumstances, the Plaintiffs would be entitled to Summary Judgment under **Order 36 Rule 1(1)** of the Civil Procedure Rules. That provision reads:

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

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

(b) The recovery of land, with or without a claim for rent or *mesne* profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or *mesne* profits."

[8] The main thrust of the Plaintiffs' case appears to be the prayer for a Mandatory Injunction directing the Defendant to immediately execute the Discharge of Charge and release the original title documents for

the Suit Property. In addition thereto, they claimed Exemplary and Aggravated damages, loss of income from **1 March 2013** at the rate of **Kshs. 55,000/=** per month to the date of release of the title documents, and loss of expected income caused by delays on completion of its development project, as well as interest and costs. They also claimed a sum of **Kshs. 15,600/=** being reimbursement of the amounts wrongfully debited from the 2nd Plaintiff's account.

[9] The rationale for the summary procedure set out in **Order 36** of the Civil Procedure Rules was well articulated by **Madan, JA** in the case of **Continental Butchery Limited vs Nthiwa [1978] KLR** thus:

"With a view to eliminate delay in the administration of justice which would keep litigants out of their just dues or enjoyment of their property, the court is empowered in an appropriate suit to enter judgment for the claim from the plaintiff under summary procedure provided by Order 35 (now Order 36) subject to there being no triable issues which would entitle a defendant leave to defend."

[10] The question to pose therefore, is whether this is an appropriate case for Summary Judgment. **Rule 1** of **Order 36, Civil Procedure Rules**, stipulates that such an application be brought after appearance, but before the filing of Defence. From a perusal of the court file, it is doubtful as to whether the Defendant filed a Memorandum of Appearance, and if so when. It is also noteworthy that the Supporting Affidavit is silent as to whether or not the Summons to Enter Appearance which were issued herein on **5 November 2013** were served. But more importantly, and as pointed out herein above, the claim is for a Mandatory Injunction as well as Exemplary and Aggravated Damages. It is therefore, strictly speaking, not a liquidated claim within the strictures of **Order 36 Rule 1** of the Civil Procedure Rules. I say so because even the liquidated components of **Kshs. 15,600/=** and loss of income of **Kshs. 55,000/=** per month have been claimed as special damages, whose particulars have been set out at Paragraph 24 of the Plaint. Consequently, such claims being the subject to specific proof as they are, cannot be awarded as liquidated claims under Order 36 Rule 1, Civil Procedure Rules.

[11] It is not sufficient therefore just to specifically plead items of special damage. It is trite that special damages must also be specifically proved. The Court of Appeal was explicit in the case of **Hahn vs Singh 1985 Kenya Law Reports 716**, that:-

"...special damages ... must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves". (followed in **Total (Kenya) Limited (formerly Caltex Oil (Kenya) Limited) vs. Janevams Limited [2015 eKLR]**)

[12] Accordingly, where, as in this case, an application has been made for judgment in default of defence, the Court ought to have been moved for interlocutory judgment and formal proof pursuant to Order 10 Rule 6 of the Civil Procedure Rules instead, as opposed to summary judgment under Order 36, Civil Procedure Rules; and even then, the specific sums pleaded must be actively proved. This was restated by the Court of Appeal in **Douglas Odhiambo Apel & Another vs. Telkom Kenya Limited [2014] eKLR** thus:

"... at a formal proof requiring assessment of damages, a plaintiff is under a duty to present evidence to prove his claim. Such proof cannot be supplied by the pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court. The need for proof is not lessened by the fact that the claim is for special damage. Unless a consent is entered into for a specific sum, then it behooves the claiming party to produce evidence to prove the special damages claimed. It is not enough to merely point to the plaint or to repeat the claim in submissions. The law on special damages is that they must be specifically pleaded and strictly proved. See RATCLIFFE Vs. EVANS [1892] 2QB S24; KAMPALA CITY COUNCIL Vs. NAKAYE [1972] E.A 446 and HAHN Vs. SINGH [1985] KLR 716...The learned Judge cannot therefore be faulted for rejecting the receipts for legal fees placed before him as annexures to the plaintiffs' submissions. Submissions, as he correctly

observed, are not evidence. The only way the receipts would have been produced and acted upon by the court would have been by the plaintiffs taking the stand and producing them on oath or the parties agreeing expressly that they be the basis for special damages. This did not occur. The necessity of the rule becomes immediately clear where, as in this case, the respondent contends that receipts for legal fees in defence of the appellant's criminal case seem to have been issued prior to their arrest. Special damages were not proved and the claim for Kshs. 130,000 was properly rejected..."

[13] Accordingly, I would take the view, which I hereby do, that this is not a fit case for the entry of Summary Judgment within the purview of **Order 36 Rule 1** of the Civil Procedure Rules. Thus, I find it unnecessary to get into a consideration of whether the proposed Defence raises a triable issue. In the premises, I would dismiss the Plaintiff's Notice of Motion dated **13 September 2016** with an order that the costs thereof be costs in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE, 2017

OLGA SEWE

JUDGE