



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION - MILIMANI

CIVIL SUIT NO. 25 OF 2014

BARBELL INVESTMENTS LTD.....PLAINTIFF

VERSUS

RAPID COMMUNICATION LIMITED.....DEFENDANT

RULING

1. The Application before the Court is dated 28th August 2014, and filed on 9th September 2014. It was listed for hearing on 11th December 2014 on which date the Parties agreed to proceed by Written Submissions. The Respondent filed its Submissions on 24th April 2015. The Applicant's Submissions do not appear on the Court file as at the date of drafting this Ruling.

2. The suit was begun by a Complaint filed on 22nd January 2014. The substance of the Claim is that the Defendant applied for a loan from the Plaintiff. It is alleged Loan of Kshs.9,000,000/- was made for a term of about 3 months between September 2012 and 31st December 2012. If the loan was not paid on the due date, the TBill rate of interest at 24% per annum was to apply. The loan was to be secured on the property known as LR.No. 209/11609/17. The loan amount was transferred on 8th October 2012. By 20th September 2013, the loan had not been repaid and the interest accrued was Kshs.467,506.85.

3. The Defence denies that there was an Application for a loan. It further denies there was a loan agreement. The Defence also raises various issues on authority in the absence of Board authorisation. It is averred that discussions (and by consequence correspondence) relating to L.R. NO. 209/11609/17 concerned the sale of that property by Albright Holdings Ltd. The Defendant denies the loan as well as any obligation and/or undertaking to the Plaintiff.

4. The Defendant avers at Paragraph 11 of the Defence that the Plaintiff deposited the sum of Kshs.9,000,000/- into the Defendant's account on behalf of a company called Magnifique Tours and Travel Ltd ("Magnifique"), relating to a lottery that Company was running. The Defendant claims to be the facilitator of that lottery. It is also averred that the Defendant used the sums advanced to make payment to the Betting Control and Licensing Board on behalf of Magnifique Tours and Travel.

5. The Plaintiff in its Reply to the Defence, denies all the allegations contained therein and makes allegations of fraud. The Plaintiff denies expressly that it is an associate of Magnifique Tours and Travels notwithstanding it has shareholders and directors in common. The Plaintiff uses the Reply to insert a prayer for the Defence to be struck out. Subsequently, on 9th September, 2014 the Plaintiff filed an application.

6. The Application seeks the following orders:-

1. *Judgment be and is hereby entered for the Plaintiff/Applicant (“the Applicant”) against the Defendant/Respondent in the sum of Kshs.9,000,000/- .*
2. *In the alternative this honourable court does order the Defendant/Respondent to deposit in this Court Kshs.9,000,000 pending hearing and determination of the suit filed herein.*
3. *The costs of this Application and of the entire suit be provided for.*

7. The Grounds relied upon are:

- a) *That the Applicant advanced a loan in the sum of Kshs.9,000,000/00 to the Respondent to facilitate an urgent business transaction that the Respondent wanted to undertake.*
- b) *That Respondent was to refund the said sums within three months and upon failure to pay the loaned amount, the Applicant was to apply TBill interest rate at 24% per annum on the loaned amount until payment in full.*
- c) *That the Respondent in its Statement of Defence dated 28th February 2014 and filed on 6th March 2014 admits to having received Kshs.9,000,000/- from the Applicant herein.*
- d) *That the Respondent failed and/or refused and/or neglected to honour its obligation and undertaking of paying the said amount due and owing to the Applicant of Kshs.9,000,000.00 hence the filing of this suit to recover the same.*
- e) *That the Respondent is well and truly indebted to the Applicant in the sum of 9,000,000.00 and was so indebted at the commencement of this suit.*
- f) *That the judgment sought by the Applicant herein is for a straight forward liquidated sum together with interest thereon*
- g) *That the defendant has severally expressly admitted the debt and undertaken to pay it with interest.*
- h) *That the Defendant expressly admitted the claim vide its statement of Defence dated 28th February 2014.*
- i) *That the matter need not proceed through the rigours of prosecution to claim that has been admitted by the Respondent (sic).*
- j) *That the further prosecution of the matter shall embarrass due process.*
- k) *That no prejudice shall be occasioned upon the Respondent if the orders sought are granted.*
- l) *That it is only fair and in the interest of justice for the orders sought to be granted.*

8. The Supporting Affidavit is sworn by one Norris Kibe who is a director of the Plaintiff. He exhibits the Board Resolution dated 4th October 2012 whereby the alleged loan was approved (*Exhibit “NK 2”*) he sets out the history as related in the *Plaint*. However at paragraph 9 he states:

9. *That the Respondent, through its director and chief executive Mr. Anwar Hussein, following a whole year of default in repayment of the loan together with interest and despite several promises to make good its indebtedness to the Applicant, indicated that the Respondent was at the final stages of clearing the loan of Kshs.9,000,000.00 and asked for the Applicant’s bank account details*

to facilitate the wiring of the said loan. Annexed hereto and marked "NK 6" is an email dated 20th September, 2013 requesting for bank account details from the Applicant and a response thereto on the same date giving the Applicant's bank account details.

The Deponent also states at paragraph 11 that in its Defence the Defendant admitted receiving the sum of KShs 9,000,000/= (Paragraph 14).

9. In Paragraphs 16-20 of the Supporting Affidavit, the Deponent states;

16. That I have been informed by the Applicant's Advocates on record which information I verily believe to be true that the Respondent expressly admitted the claim vide its Statement of Defence at paragraph 14.

17. That the matter need not proceed through the rigours of prosecution to a claim that has been admitted by the Respondent (sic).

18. That the further prosecution of the matter shall embarrass due process.

19. That no prejudice will be occasioned on the Respondent if the Orders sought are granted.

20. That in the circumstances, it is in the interest of justice that the Orders sought herein be granted.

10. The matter came before the Court for hearing on 11th December 2014. The Parties were directed to file and serve their Written Submissions within 14 days and 28 days respectively. The Plaintiffs submissions do not appear to have been filed. The Defendant's Submissions were filed on 24th April 2015.

11. On 6th October 2014 the Defendant filed an Affidavit sworn by one Anwar Hussein, incorrectly entitled "*Supporting Affidavit*". Mr. Hussein describes himself as "a Director and Chief Executive of the Defendant". The Affidavit repeats the facts contained in other documents before the Court and then goes on to argue points of law, more specifically;

1. That if the sum of Kshs.9,000,000/- was a loan, then there ought to have been a formal loan agreement between the parties particularizing the terms and conditions especially on the interest rate and the term of the loan. (paragraph 6)

2. That the Plaintiff had not at the outset deemed it fit to file any authorizing resolutions by its Board of Directors alongside the Plaintiff.

3. That the Plaintiff only awoke from its slumber when the Defendant raised the issue at paragraph 3 and 6 of the Defence ...

4. That in the demand letter, the issue of interest at the rate of 24% per annum was not specified (paragraph 14).

5. That clearly, there is no admission by the Defendant to having received a loan from the Plaintiff and that the Plaintiff is only intend at recouping its losses through the back door (paragraph 25).

12. The facts relied upon (and set out in paragraphs 16-20), although repetitious are:

1. That vide a letter dated 23rd October, 2013 the advocates of the Plaintiff wrote to S.Gichuki Waigwa & Associates as follows; "**In order to clarify to your client, our clients include MAGNIFIQUE TOURS AND TRAVEL LIMITED AND BARBELL INVESTMENTS LIMITED (Plaintiff) which he should be acquainted with and have common shareholders and directors, Mr.**

Gibson Karanja Wachaga and Mr. Norris Kibe.....” (Annexed herewith and marked “AH-4” is a copy of the letter dated 23rd October, 2013).

2. That is in the context of M/S MAGNIFIQUE TOURS AND TRAVEL LIMITED and the Plaintiff being associated and/or subsidiary companies of each other that the aspect of national lottery known as “DOSIKA NA CHAPAA” should be seen, particularly with regard to the Agreement dated 22nd August, 2012 and duly signed by Mr. Gibson Karanja Wachaga and Mr. Norris Kibe as directors of MAGNIFIQUE TOURS AND TRAVEL LIMITED. (Annexed herewith and marked “AH-5” is a copy of the Lottery Agreement dated 22nd August 2012).

3. That the contents of paragraph 1 (i) and (ii) provide for a bank guarantee of Kshs.9,500,000/- and a payment of Betting Control Licence Board (BCLB) fee of Kshs.1,500,000/- respectively (Totaling Kshs.11,000,000/-).

4. That paragraph 2 of the executed Lottery Agreement required an additional payment of Kshs. 1,000,000/- as consultation fees to the Defendant.

5. That paragraph 3 of the Lottery Agreement required the client (MAGNIFIQUE TOURS AND TRAVEL LIMITED) to pay the Defendant Kshs.25,000,000 i.e 15,000,000/- at the execution of the agreement and Kshs.10,000,000 within seven days (7) from the date of initial deposit.

13. The Defendant’s Submissions were filed on 24th April 2015, that is more than 14 months later than directed. It demonstrates that the Defendant filed a document incorrectly entitled “Supporting Affidavit” when it was intended to be a Replying Affidavit. The Submissions contain allegations of facts not alleged elsewhere in particular:

“It is apparent that even the Advocates on record for the Plaintiff have not been clear, from inception, as for whom the sums were being paid “ and

“The Honourable Court should note that the Plaintiff’s Directors resolution marked NK-2 purporting to allow the issuance of the loan to the Defendant only came into existence after the Defence was filed and its absence being pleaded by paragraph 6 (emphasis added).

“It can only be inferred that the resolution was not existence until after the Defence was filed and served on 6th March 2014”.

The Submissions do not explain why that is the only inference that can be drawn. There is also complaint that the document is “not certified as required by law”.

14. The arguments presented by the Defendants submissions that do have a bearing on the Application before the Court are as follows:-

1. The advance made was not a loan because there are no terms of repayment exhibited.;

2. The RTGS advices dated 27th March 2014 included in the Plaintiffs list indicated the transfer as an “investment”.

3. The Plaintiff’s documents and arguments are not clear “as for whom the sums were being paid”.

4. The Advocates act for other companies and directors and they have not been added as parties.

5. The same Advocates have sent a demand note on behalf of Gibson Karanja Wachaga & Norris Kibe AH-2 is referred to.

6. Although the purported Replying Affidavit raises the issues of authority the Submissions do not

argue that point.

7. The Defendant also received the sums of Kshs.10,000,000 (ten million) and Kshs.15,000,000/- (Fifteen million) yet those sums have not been demanded.

8. The documents produced by the Plaintiff are forgeries.

9. The Defendant relies on the following authorities:-

Cassman vs. Sacharia (1982) e KLR 19 and Choitram vs. Nazari (1984) e KLR 237.

10. The documents filed on behalf of the Defendant show that the alleged admission is not obvious and clear on the face of them.

15. The authorities cited are based on the Civil Procedure Rules pre-dating the current rules, ***The Civil Procedure Rules 2010***. They were based on ***Order XII rule 6***. The present equivalent is ***Order 13 rule 2***.

The working is the same however the legal landscape has changed. In addition to the above the Court has to take into account the requirements of the overriding objective and the ***Constitution of Kenya 2010*** more particularly ***Articles 50(1), 159(2) and 165(3) (a)***

16. The principal issue for determination is; has the Defendant made a clear express or clear implied admission? The arguments raised by the Defendant in its Replying Affidavit go to the weight and admissibility of evidence produced by the Plaintiff.

17. In taking the steps advised in the latter authority the Court must consider carefully the pleadings and supporting documentation in order to establish whether there are any express or implied admissions.

18. In the Plaintiff it is stated clearly that the Loan was made in the month of September 2012. At Paragraph 4 of the Statement of Defence, the Defendant denies applying for any loan whatsoever. The Defendant at paragraph 14 admits that the sum of Kshs 9,000,000/= (Nine Million Shillings Only) was paid into its Bank account. The date of receipt is omitted from that pleading. The details of the Bank account are said to be set out in clause 4 of the Agreement. This is account No. ending 0741 held at UBA Bank Ltd, Westlands. Earlier at paragraph 13 the Defence, the Defendant avers that there was an Agreement between the Defendant and a different Company, Magnifique Tours and Travel. (“*the Lottery Agreement*”). Clause 3 of that Agreement provided for Magnifique to pay to the Defendant the sums of Kshs.25,000,000/- Twenty Five Million shillings) made up of Kshs.15,000,000 (Fifteen Million shillings only) payable upon the signing of the agreement. The Agreement is dated 22nd August 2012. The Plaintiff admits that Kshs.9,000,000/- (Nine Million Shillings only) was paid as alleged but denies any connection to Magnifique or the Lottery Agreement. Instructing the same Advocates is not sufficient to pierce the corporate veil.

19. Therefore it is clear and unequivocal that the sum of Kshs.9,000,000/- was paid from the Plaintiff’s Bank account to the Defendant’s Bank account. The transfer was made on or about 8th October 2012. The monies were received by the Defendant.

20. The Plaintiff alleges a loan, the Defence seeks to link the payment to an agreement with a different corporate entity. The dates provide further guidance. The Lottery Agreement was signed on 22nd August 2012. At Clause (1) it required the provision of a Bank Guarantee to the Betting Control and Licencing Board. That Guarantee was provided by UBA Ltd on 28th August 2012, that is within 7 days of the Agreement. The Guarantee was valid for a period of 6 months from 28th August 2012 to 28th February, 2013. It was in the sum of Kshs.9,500,000/- (Nine Million Five Hundred Thousand Shillings Only).

21. The Defence is grounded on a connection between the amounts of Kshs.10,000,000 (Ten Million Shillings Only) and Kshs.15,000,000/= (Fifteen Million Shillings Only) to be paid in or around August

2012 and a payment of Kshs.9,000,000/- in October. There is no mathematic correlation between those two amounts. Further there is no correction between the dates. By 24th September the Defendant was already taking steps on behalf of Maginifique pursuant to the Lottery Agreement. The Defendant has failed to provide any evidence of one corporate entity acting on behalf of another as alleged. Further there is no correlation between the sums of Kshs.930,500 and Kshs.15,500,000 paid by it and the payment of Kshs.9,000,000. The dates those payments correlate to are the letter of 3rd October 2012 from the Ministry. What is referred to as “*the dues to the Betting Control and Licencing Board*” in the Witness Statement of Anwar Hussein had been paid by the Defendant on 3rd October 2012. If there was no loan, there is grounds for restitution.

22. The admission relating to the receipt of Kshs.9,000,000/- is repeated in the witness statement of Anwar Hussein. The explanations given are implausible. On the evidence before the Court at present neither party has fully demonstrated its version of events. The loan and repayment are set out in the email correspondence but where are the terms. Similarly with the Defendant. The Court is asked to accept that Magnifique simply abrogated on its contractual responsibilities and the Plaintiff stepped in. There is no explanation as to why those are matter for trial where all the evidence can be tested after the Parties have completed their disclosure. Under **Section 107 and 109 of the Evidence Act Cap 80**, the Burden of Proof lies on the party asserting a particular version of events.

23. In the circumstances and for the reasons set out above it is ordered that:

- (1) The Defendant to pay to the Plaintiff the sum of Kshs.9,000,000/- within 14 days.
- (2) The Parties to file and serve all the documents on which they seek to rely at trial within 28 days. Together with the witness statements on which it seeks relies to show that (a) there was a loan made and (b) the terms of that loan.
- (3) The Defendant shall file and serve copies of its Bank Statements for the Bank account No. 55010030000741 held at UBA Bank Kenya Ltd, Westlands Branch.
- (4) The Plaintiff to file and serve all documents and witness statements on which it relies on to show that (a) there was a loan made and (b) the terms of that loan.
- (5) List for Directions on the Issues to proceed to trial.
- (6) Parties to file an Agreed List of Issues at least 3 days before that Hearing for Directions.
- (7) Costs Reserved.

Orders accordingly,

FARAH S.M. AMIN

JUDGE

Dated, signed and Delivered this 1st day of September 2016.

In the presence of:

Otieno CC

Miss Mwasame HB for Mr Gitonga - For the Plaintiff

No Appearance for the Defendant but outdoor Clerk from S Gichuki Waigwa