



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO. 342 OF 2015

CFC STANBIC BANK LIMITED.....PLAINTIFF

- VERSUS -

FLORENCE WAIRIMU MBUGUA.....DEFENDANT

RULING NO. 2

1. The application before me is premised upon Order 13 Rule 2 of the Civil Procedure Rules. Order 13 makes provision for “Admissions?”.
2. The plaintiff’s application is for Judgement on admission.
3. The defendant is said to have admitted that she owed the money being claimed against her, hence the application.
4. The admission is said to have been made in another case, being **FLORENCE WAIRIMU MBUGUA & ANOTHER Vs CFC STANBIC BANK LIMITED Hccc No. 394 of 2015**.
5. The plaintiff provided a copy of an affidavit sworn by the defendant, to demonstrate that she had admitted the fact that the plaintiff had advanced to her a loan amounting to Kshs. 35 Million.
6. In her replying affidavit, the defendant stated that she had a good defence to the claims in this case. The said defence is indicated to stem from the fact that the plaintiff herein had decided to take action against the person who had guaranteed the loan facility.
7. Therefore, the defendant contends that by pursuing this case against her, the plaintiff was undertaking 2 separate and parallel steps towards recovering the same debt.
8. By way of illustration of the steps being taken by the plaintiff, the defendant exhibited a demand letter from the plaintiff dated 24th December 2014. The said demand letter was addressed to the defendant, and it informed her that the plaintiff intended to sell the security it was holding.
9. The defendant also exhibited a 45 Days’ Redemption Notice dated 11th June 2015, which indicated that the plaintiff (*through LEAKEY’S AUCTIONEERS*) would sell the land which **FARMERS INDUSTRY LIMITED** had provided as security to the plaintiff, in respect to the loan advanced to the defendant.

- 10.** It is the defendant's contention that the conduct exhibited by the plaintiff, through the notices of its intention to realize the security, confirmed that the loan was secured.
- 11.** Therefore, the defendant contends that by filing this suit against her, whilst still holding the security, the plaintiff's actions constituted an abuse of the process of the court. The defendant perceives the 2 parallel procedures being carried out by the plaintiff, as an attempt to try and recover the same debt twice.
- 12.** The defendant asked the court to accord her an opportunity to put forward her defence to this suit.
- 13.** The reason proffered by the defendant for not yet having filed a defence was that the plaintiff had never served her with summons.
- 14.** The defendant also attributed the lack of a defence on record to the fact that the plaintiff had kept her busy fighting interlocutory applications.
- 15.** The plaintiff did not deny the fact that it had taken steps to try and realize the security. However, the plaintiff submitted that the fact that it was trying to realize the security cannot be a bar to this suit against the principal borrower.
- 16.** Mr. Ogunde, the learned advocate for the plaintiff, informed the court that the proprietor of the security had lodged a challenge to the security. As a result of the said legal challenge, there was an injunction to stop the bank from realizing the security.
- 17.** Meanwhile, as the debt was admitted, the plaintiff urged the court to grant it judgement against the defendant.
- 18.** On his part, Mr. Oigara, the learned advocate for the defendant told the court that his client admits the fact that the loan was advanced to her by the plaintiff.
- 19.** Nonetheless, the defendant insists that she has a good defence to the claim.
- 20.** Citing Order 5 Rule 6 of the Civil Procedure Rules, the defendant submitted that where no summons had been served, the suit abates. Therefore, I was urged to dismiss the application.
- 21.** In reply to the defendant's submissions, the plaintiff pointed out that this suit was not yet 12 months old. Therefore, the plaintiff was of the view that the suit cannot have abated.
- 22.** The court sought to know from the plaintiff if summons had been served upon the defendant, and the answer was in the negative.
- 23.** The court then sought to know from the defendant if the fact that she had not been served with summons was a bar to the filing of a defence: the answer was in the negative.
- 24.** Pursuant to Order 5 Rule 1 (5) of the Civil Procedure Rules, it is the responsibility of the plaintiff or his advocate to prepare the summons, and to file it with the court.
- 25.** The plaintiff is then expected to collect the summons within 30 days of issue or notification, whichever is later. If the summons are not collected within the time specified, the suit shall abate (*pursuant to Order 5 Rule 1 (6) of the Civil Procedure Rules*).
- 26.** In this case, there is no evidence about the date when the summons were issued, if at all. There is also no evidence that there was any notification to the plaintiff or its advocates, about the summons.
- 27.** Accordingly, I find that the suit has not abated.
- 28.** When the plaintiff made reference to the suit being less than 12 months old, that was correct, as at the

date when the application was argued before me.

29. Order 5 Rule 2 of the Civil Procedure Rules provides that in the first instance, a summons (*other than a concurrent summons*) shall be valid for 12 months.

30. In my considered view, there is a possible inconsistency between Order 5 Rule 1 (6), which says that a suit shall abate if summons are not collected within 30 days of issue or notification, and, on the other hand, Order 5 Rule 2 (1) which states that the summons shall in the first instance be valid for 12 months.

31. But that is not an issue before me in this case. It may therefore require to be interrogated in an appropriate case.

32. Order 6 Rule 1 of the Civil Procedure Rules provides that the defendant shall enter appearance within the time prescribed in the summons.

33. And Order 7 Rule 1 provides that the defendant shall file his defence within 14 days after entering appearance. However, that requirement would only kick in if the summons was served on the defendant.

34. Therefore as the defendant had not yet been served with summons, she was not obliged to either enter appearance or to file a defence.

35. Whilst the defendant who had not been served with summons was not barred from filing his defence, it is also acknowledged that he was not obliged to file his defence. In the circumstances, the defendant herein cannot be faulted for not yet having filed her defence.

36. It is true that in another suit, the defendant had acknowledged receipt of a loan from the plaintiff.

37. As the defendant's opportunity to file a defence had not expired or lapsed, it would be premature to conclude that the defendant did not have any grounds upon which triable issues could emerge.

38. I am alive to the fact that a defence or an admission can, in an application for judgement on admission, be discerned from sources other than the pleadings in court. Affidavits in other cases, letters or other documents can all be exhibited to show either the admission or the existence of triable issues.

39. Therefore, even in the absence of a formal Statement of Defence on record, it could have been possible for the defendant to demonstrate such defence as she had against the claim she was facing.

40. However, I nonetheless reiterate that the application before me is premature because it was brought before the lapse of the opportunity which is available to the defendant to lodge her statement of defence.

41. Accordingly, the application dated 23rd March 2016 is struck out. The plaintiff is ordered to pay to the defendant, the costs of the said application.

42. Finally, in order to move forward this case, the court directs the defendant to file and serve her statement of defence within the next 15 days.

DATED, SIGNED and DELIVERED at NAIROBI this 15th day of September 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

Ogunde for the Plaintiff

Oigara for the Defendant

Collins Odhiambo – Court clerk.