



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT OF KENYA
AT MALINDI
LAND CASE NO. 80 OF 2012

HAMISI MRAMBA THOYA.....PLAINTIFF/RESPONDENT

=VERSUS=

DAVID MWANGI MUIRURI.....1ST DEFENDANT/APPLICANT

ABDULHALIM MOHAMED SADIKI.....2ND DEFENDANT

R U L I N G

Introduction

- a. The 1st Defendant's Application before me is the one dated 26th August 2013. The Application is brought pursuant to the provisions of Section 1A, 1B and 3A of the Civil Procedure Act and Order 13 Rule 2, of the Civil Procedure Rules, 2010. The Application seeks for the following reliefs:
 - a. **That the Plaintiff be ordered to pay the 1st Defendant Kshs 925,000 (Kenya Shillings Nine Hundred and Twenty Five Thousand) being summary judgment for Kshs.645,000 and Kshs.280,000 as admitted by the Plaintiff in the Plaint to owe and due to the 1st Defendant. Or in the alternative:**
 - b. **That Judgment be entered in favour of the 1st Defendant and against the Plaintiff for Kshs.645,000 (Kenya Shillings Six Hundred and Forty Five Thousands). Or in the alternative:**
 - c. **That the Plaintiff be bound by the Court to pay annual interest at 12% per annum from the total amount claimed by the 1st Defendant from the very first date the Plaintiff defaulted payment.**
 - d. **Costs of this Application be in the cause.**
- b. The Application is premised on the grounds that the Plaintiff has admitted in his Plaint owing Kshs.280,000 to the 1st Defendant; that the 1st Defendant's counterclaim for Kshs.645,000 has not been denied and that the counterclaim amount of Kshs.925,000 being Kshs.645,000 as pleaded in the counterclaim and Kshs.280,000 as admitted by the Plaintiff has not been denied.

The 1st Defendant's/Applicant's case:

- c. The Application is supported by the affidavit of the 1st Defendant who has deponed that the

Plaintiff has admitted owing him Kshs.280,000; that his counterclaim for Kshs.645,000 has not been denied by the Plaintiff and that there is documentary evidence for the amount claimed in the counterclaim.

- d. It is the 1st Defendants' deposition that the Plaintiff borrowed from him Kshs.280,000, which amount he has refused to pay back.
- e. It is the 1st Defendant's assertion that other than the Kshs.280,000, the Plaintiff borrowed a further sum of Kshs.645,000 from him on diverse dates. The 1st Defendant is therefore claiming for a cumulative amount of Kshs.925,000 from the Plaintiff.

Plaintiff's/Respondent's case:

- f. The Respondent filed his Replying Affidavit on 18th November 2013 and stated that he never executed the documents annexed on the 1st Defendant's Affidavit marked as DMM1.
- g. The Plaintiff finally deponed that the signatures appearing on some of the Plaintiff's annexures are not his. The parties appeared before me on 18th November 2013 and made oral submissions which I have considered.

Analysis and findings:

- h. The 1st Defendant is seeking for summary judgment in respect to his counterclaim and judgment on admission. In the alternative, he is seeking for either summary judgment for Kshs.645,000 or for judgment on admission for Kshs.280,000.
- i. It is trite law that for an Applicant to succeed for a claim of Summary Judgment, he has to show that on the basis of the pleadings before the court, there is no single triable issue. If the Respondent satisfies the court that there is a triable issue, then such a suit can only be determined after a full trial and not summarily. Summary Judgment does not mean that the court is to determine which side would prevail at trial, nor does the court determine the credibility of witnesses. Rather, it is applied when no factual questions exist for the court to decide the suit. In the case of **Osodo Vs Barclays Bank International Limited (1981) KLR 30**, the Court of Appeal held as follows:

“Where there are triable issues raised in an application for summary judgment, there is no room for discretion and the court must grant leave to defend unconditionally.”

- j. For judgment to be entered on admission, the court must be satisfied that a party has unequivocally by his actions or pleadings admitted owing the opposite party the claimed amount. Admission may be in the form of letters or other forms of correspondence. The Court of Appeal in **Chitram Vs Nazari (1985) e KLR** laid down the parameters of what does or does not amount to admission as follows:

“In summary, an admission must be premised on the provisions of O. XII Rule 6 of the Civil Procedure Rules (now O. 13 Rule 2); that the proceedings presented by a party against whom the relief is sought must be those that do not contain specific denials and no definite refusals to admit allegations; demonstration that there are allegations of facts made by one party and not traversed by the other which are deemed to be admitted; demonstration that there has been implied admission of facts inferred from the pleadings in instances where the Defendant has specifically failed to deal with allegations of fact in the Plaint, the truth of which he does not admit or instances where a defendant has evasively denied an allegation in the Plaint; demonstration that there is admission of facts discerned from correspondences or documents which are admitted or that there is an oral admission as the rules use the words “or otherwise.”

- k. The Court of Appeal quoted the above case with approval in the case of **Agricultural Finance Corporation Vs Kenya National Assurance Company Ltd, Civil Appeal No. 271 of 1996** in the following words:

“Order 12, Rule 6 (now Order 13 Rule 2) empowers the court to pass judgment and decree in respect to admitted claims pending disposal of disputed claims in a suit. Final judgment ought not to be passed on admission unless they are clear, unambiguous and unconditional. A judgment on admission is not a matter of right; rather it is a matter of discretion of the court and where a Defendant has raised objections which go to the root of the case, it would not proper to exercise this discretion.”

- . Before Judgment can be entered on admission, the pleadings or documents amounting to admission must be construed as a whole to determine their effect. At paragraph 5 of the Plaintiff, the Plaintiff has averred that the 1st Defendant induced him to borrow a sum of Kshs.280,000 and had his house which was then valued at a sum of Kshs.5,000,000 given as surety.
- . The Plaintiff further averred in the Plaintiff that two months after the said money was given to him, the 1st Defendant forcefully entered into the suit premises and violently evicted him; that the 1st Defendant has since refused to accept the repayment of Kshs.280,000 and that on 14th January 2008, the 1st Defendant entered into a sale agreement with the 2nd Defendant in which he sold the Plaintiff's house for Kshs.1,200,000. Consequently, the Plaintiff is seeking for the order of the court to have the 1st Defendant accept the refund of Kshs.280,000 and for the Defendants to be restrained from trespassing into his house.
- . The 1st Defendant admitted at paragraph 4 and 5 of his defence that the Plaintiff approached him for a friendly loan of Kshs.280,000 and agreed (the Plaintiff) to furnish security in the form of his premises situated in Watamu for the said loan.
- . According to the 1st Defendant's defence, the Plaintiff later on approached him with an offer to sell to him the premises which he had offered as security at a consideration of Kshs.350,000; that a binding sale agreement in respect of the house was entered into without any influence or duress and that he has since sold the Plaintiff's house to the 2nd Defendant.
- . In addition to the Kshs.280,000, the 1st Defendant averred that he loaned to the Plaintiff a further sum of Kshs.645,000.
- . Although the Plaintiff has admitted in his Plaintiff that he borrowed from the 1st Defendant Kshs.280,000, the said admission is not unequivocal. An admission is unequivocal if it is made in a way that it is not subject to conditions or exceptions.
- . The Plaintiff has stated in his Plaintiff that he is ready and willing to refund the Kshs.280,000 that he borrowed from the 1st Defendant if the house that was supposedly taken by the 1st Defendant as security is returned to him. That is a conditional admission on the part of the Plaintiff and Judgment on admission cannot be entered in the circumstances. Whether the sum of Kshs.280,000 loaned to the Plaintiff is distinct from the house that the 1st Defendant claims to have bought from the Plaintiff can only be determined at trial and not on an Application.
- . In his Replying Affidavit, the Plaintiff has denied that the 1st Defendant loaned him a further sum of Kshs.645,000. The Plaintiff has also challenged the legality of the agreement that was entered into between the 1st Defendant and the 2nd Defendant in respect to his house.
- . The issue as to whether the 1st Defendant indeed loaned to the Plaintiff a further sum of Kshs.645,000 and the legality or otherwise of the Agreement of Sale with the 1st Defendant and the 2nd Defendant in respect to the Plaintiff's house are triable issues. The genuineness of the signatures on the payment vouchers annexed on the 1st Defendant's affidavit, which signatures the Plaintiff has denied, is another triable issue. Those issues can only be determined at trial. Considering that the Plaintiff's request for Judgment on his counter claim was rejected by the Deputy Registrar of this court, and for the reasons I have given above, the prayer for summary judgment is unmeritorious.
- . In the circumstances, I dismiss the 1st Defendant's Application dated 26th August, 2013 with costs.

Dated and Delivered in Malindi this **10th** Day of **February, 2014**

O. A. Angote

Judge