



REPUBLIC OF KENYA

High Court at Eldoret

Civil Suit 124 of 2002

SAVINGS & LOAN (K) LIMITEDPLAINTIFF

VERSUS

MARY AJWANG ODOCK.....DEFENDANT

RULING

The Plaintiff filed a Notice of Motion dated 4th March 2003 under Order XXXV rules 1 and 2, order VI Rules 9(3) and Order XII rule 6 seeking the following orders:

- a) The Defendant's defence be struck out and summary judgment be and is hereby entered in favour of the Plaintiff and against the Defendant as prayed in the Plaintiff.**
- b) In the alternative, judgment on admission be and is hereby entered in favour of the Plaintiff and against the Defendant as prayed in the Plaintiff.**
- c) Costs be in the cause.**

The application was founded on the grounds that the defence is a mere general denial and does not suffice as a reasonable defence to the Plaintiff's claim and it is scandalous, frivolous and vexatious and a total sham; the Plaintiff's claim is a liquidated demand; the Defendant is truly and justly indebted to the Plaintiff in the sum of Kshs. 4,223,761.25 as at 28th June 2002; that the Defendant has severally admitted being indebted to the Plaintiff and offered proposals on repayment which she failed to live to. The application was supported by the sworn affidavit of C.M. AJEVI. He depones that the Defendant was advanced a sum of Kshs. 1,600,000/= after securing the same through a legal charge dated 30th January 1997 over South Wanga/Lureko/1869. The charge document was exhibited as "CMA 1". That a further charge was registered on 28th August 1997 for Kshs. 300,000/=. That the Defendant defaulted in repayment of the loans advanced. That the Defendant was served with statutory notice and she has frustrated realization of the property. That the outstanding loan balance account was Kshs. 4,223,761.25 as at 28th June 2002. That the Defendant had previously filed Kakamega PMCC 609 of 1998 wherein she had admitted owing money to the Defendant. The proceedings were exhibited as "CMA7". Various proposals to repay were also exhibited as ".CMA8"

The Defendant filed grounds of opposition dated 5th October 2003. She contended that the application is bad in law, frivolous and an abuse of the process of court; that the defence raises triable issues which ought to be tried and finally determined; that the alleged charge annexed and marked as CMA 1 and CMA 3 were not signed by the Defendant; that the interest charged was excessive unreasonable and without basis; that the Plaintiff has not disclosed all material facts and or there is a case pending over the same subject matter between the parties in the High court at Kakamega C. No. 191/99; that the illegal charges were erroneously made which ought to be deducted.

On 8th March 2006 Justice Gacheche directed that Kakamega HCCC 191/1999 be called so that the court could make further directions. The file has now been brought and the court has not made any further directions as regards that file. I will revisit the Kakamega file after this ruling. The Notice of Motion of 4th March 2000 was fixed for hearing on 18th June 2008. On this date counsel for the Plaintiff attended but counsel for the Defendant did not attend. After perusing the affidavit of service I allowed counsel for the Plaintiff to proceed *ex parte*. Counsel submitted that the Plaintiff advanced a total of Kshs. 1,900,000/= to the Defendant. The said amount has accrued interest due to defaults. Attempts to realize the charged property were frustrated by the Defendant. That the totality of evidence is inconsistent with the defence. That the Defendant has only filed grounds of opposition in reply to the application and no replying affidavit. That matters of fact contained in the Grounds should be ignored. Counsel cited the case of **National Bank of Kenya Limited v Pipeplastic Samkolit (K) Ltd and anor CA 95 of 1999 (Nairobi)** where the Court of Appeal asserted that it is not the responsibility of courts to re-write contracts for the parties. He urged that the application be allowed.

The Defendant filed a defence dated 10th September 2002. In the defence the Defendant avers that the charges were defective for want of Land Board Consent and further that she did not sign. She also avers that the present suit is an abuse of the court process and brought to pre-empt the decision of Kak HCCC 191 of 1999. That she does not owe the sum of Kshs. 4,223,761/=. That the Plaintiff has been charging arbitrary sums which were not agreed hence bringing the figure inordinately high. The Defendant averred that the Plaintiff is estopped from agitating this suit and at the same time pressing for recovery of the charged property. The Defendant shall apply to the court for the Plaintiff to elect whether to proceed with case or exercise of statutory power.

The defence raises triable issues of law. Under the Registered Land Act before a chargee can proceed against a chargor based on a suit to recover money (otherwise known as suit based on personal covenant, certain requirements must be met. Section 74(3) of the Registered Land Act (as it then was) provides as follows:

“74 (3) The chargee shall be entitled to sue for the money secured by the charge in the following cases—

- a) Where the chargor is bound to repay the same.**
- b) Whereby any cause other than the wrongful act of the chargor or chargee the charge property is wholly or partially destroyed or the security is rendered insufficient and the chargee has given the chargor reasonable opportunity of providing further security which will render the whole security sufficient and the chargor has failed to provide such security.**
- c) Where the chargee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the chargor provided that**
 - (i) In the case specified in paragraph (a)**
 - a) A transferee from the chargor shall not be liable to be sued for the money unless he has agreed with the chargee to pay the same**
 - b) No action shall be commenced until a notice served in accordance with subsection (1) has expired.**
 - (ii) The court may at its discretion, stay a suit brought under paragraph (a) or paragraph (b) notwithstanding any agreement to the contrary until the chargee has exhausted all his other remedies against the charged property unless the chargee agrees to discharge the same.”**

The Plaintiff does not disclose the basis upon which the Plaintiff is proceeding and given that the Defendant has raised the question of election of chargee's remedies the defence raises a triable issue of law. Summary judgment cannot issue where the defence raises a triable issue.

On the ground of admission of debt, I have looked at the letters relied upon. They acknowledged generally indebtedness but not the sum demanded in the Plaint. Taking into account the provisions of section 74(3) an admission without showing compliance with the conditions precedent would be of no avail.

For these reasons I dismiss the Notice of Motion dated 4th March 2003. Costs in the cause.. In the exercise of this court's powers under section 1A, 1B and 3A of the Civil Procedure Act I direct that this suit be consolidated with Kakamega HCCC No. 191 of 1999 and that the files be transferred to Kakamega for trial and final determination. The suit property is situated in Kakamega and the Kakamega case was the first to be filed. It is so ordered.

Dated and SIGNED at Nairobi on this 23rd day of August 2012.

M. K. Ibrahim
Judge

DATED AND Delivered at Eldoret on this 10th day of October 2012.

F. AZANGALALA
Judge

In the presence of: Namiti h/b for Mokuu for the appellant