



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 150 of 2007

ARSHAD UL HAQ PLAINTIFF

VERSUS

NATIONAL INDUSTRIAL CREDIT BANK..... 1ST DEFENDANT

JOSEPH GIKONYO *t/a*

GARAM INVESTMENT 2ND DEFENDANT

HEADING FOR PURPOSES OF COUNTERCLAIM

NATIONAL INDUSTRIAL CREDIT BANK LTD.

(NOW KNOWN AS NIC BANK LTD.)PLAINTIFF

VERSUS

ARSHAD UL HAQ 1ST DEFENDANT

AL HAQ HOLDINGS LTD. 2ND DEFENDANT

ASSAD ARSHAD NIAZ 3RD DEFENDANT

SANOBER LTD. 4TH DEFENDANT

AND

GICHERU KIRERU MATHENGE and WAWERU

GUANDARU MATHENGE *t/a* MATHENGE &

MUCHEMI ADVOCATES 3RD PARTIES

RULING

Application dated 3/4/2009 brought under **Order VI Rule 13 (1) (b) and (d)** and **Rule 10 of Civil Procedure Code** seeking orders that the counter-claim made by first defendant as against the first and third defendants in the counter-claim be struck out with costs. The application is based on grounds set out in the application.

The application is supported by affidavit sworn by Assad Arshad Niaz who is 3rd defendant in the counter-claim made by the 1st defendant bank. At the taking of loans the bank was obliged to take out an all asset debenture from the principal borrower AL HAQ HOLDINGS LTD. which was a principal security. But no such security was taken. The bank is without security against the principal debtor. The bank is now trying to enforce the guarantee signed by the third defendant.

At the time the third defendant issued a security he did not contemplate that his guarantee would be the principal security and that it was illegal for director to guarantee company's debts. The third defendant is discharged from liability on that guarantee it is submitted. The transaction offended the provisions of **Section 39 of Central Bank Amendment Act, No.4 of 2001**. The application is made against first defendant and 3rd defendant in the counter-claim against the applicant's affidavit. A replying affidavit is sworn on behalf of the bank by Henry Maina described as legal manager of Debt Recovery Unit of the bank in respect of the application dated 3/4/2009.

Mr. Maina refers to his supplementary affidavit dated 17/11/08 and relies on matters sworn therein. Furthermore, the guarantees signed by applicants speak for themselves, he swears. The second defendant was requested to provide guarantee signed in his capacity as shareholders. **Section 39 (3) (a) of Central Bank of Kenya Amendment Act** does not expressly forbid shareholder who double as directors to sign guarantees in their capacities as such shareholders.

It is the applicant who negotiated personally on behalf of second defendant for loan facilities, the subsequent variations and additional loan facilities. The bank also filed a Preliminary Objection which was signed together with application dated 3/4/09. The main issue on this application is that the guarantees signed by the applicant are said to have been invalid and therefore incapable of being enforced. There was illegality in the transaction being prohibited by the provisions of **Central Bank of Kenya Act**.

It is also alleged that the bank altered and varied terms of lending without informing the applicant guarantors. An examination of provisions of **Central Bank Amendment Act, Section 39 (3) (a)** provides:-

“(a) no loan or advance made by specified bank or specified financial institution shall be guaranteed by a director of such company. Such is a prohibited transaction by the statute. Under Section 39 (4) any bank which contravenes the provisions of that Section shall be guilty of an offence and liable to penalty.”

The authority of the treatise, **Cheshire, Fifoot & Furmston's Law of Contract** at page 434 deals with illegality:-

“The general rule is that a party cannot recover what he had given to the other under an illegal contract except where one party not in pari delicto so that the party can keep benefits of the transaction.”

Then there is Sir Rupert Cross & Others **“Statutory Interpretation”** where it is submitted a brief statement of the rules of English Statutory Interpretation thus:-

- 1. The judge must give effect to the grammatical and ordinary or technical meaning of words in the general context of the statute;***
- 2. If the judge considers that the application of words in their grammatical and ordinary sense would produce a result which is contrary to the purpose of the statute he may apply then in any secondary***

meaning which they are capable of bearing;

3. The judge may read in words which he considers to be necessarily implied by words which are already in statute and he made add to, alter or ignore statutory words in order to prevent a provision from being unintelligible, absurd or totally unreasonable.”

In the authority of the case of **Githunguri vs. Jimba Credit**

Corporation Ltd. also relied upon the dispute was the issue of rate of interest in a charge of property raised in contravention of **Banking Act Cap. 488**. The court held:-

“Where a contract on its performance is implicated with a breach of statute this does not entail that the contract be avoided. If the statute is silent on the civil rights of the parties but penalizes the making or performance of the contract, the court would consider whether the Act on its true construction was intended to avoid contracts of the class to which the contract belongs or whether it merely prohibited the doing of some act.”

That case fell into the category of contracts prohibited by the statute.

Holding 6: The object of **Banking Act** was the protection of the public or depositors. It would be inconsistent with the object and intention of the **Act** to construe it as allowing the plaintiff to retain money of depositors funds merely because and officer of the defendant inadvertently contravened the **Act**. In this case the amount was Kshs.90,000,000/=.

The applicants herein seek to strike out the counter-claim filed against them under **Order VI Rule 13 (1) (b)** and **(d)** which provide that at any stage of suit the court may order to be struck out or amended any pleading on the grounds that:-

“(b) it is scandalous, frivolous and vexatious;

(d) or it is otherwise an abuse of the process of court.”

The pleading sought to be struck out is a counter-claim filed by NIC Bank against the 1st, 2nd and 3rd guarantors to the tune of Kshs.88,971,235/92 plus interest at the rate of 26%. The matters raised in the supporting affidavit are not scandalous, frivolous or vexations and not an abuse of process of court. It is alleged that there were guarantees executed. It is also alleged that there is invalidity and the guarantors ought to be discharged.

It is my finding that these are serious matters have to be tried by court before judgment may be entered. To strike the counter-claim would amount to shutting the respondent the counter-claim plaintiff out of the seat of justice which is contrary to principles of justice.

The application is hereby dismissed as having no merit with costs to the respondent.

Orders accordingly.

DATED, SIGNED and DELIVERED at Nairobi this 5th day of October 2009.

JOYCE N. KHAMINWA

JUDGE