



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO 1795 OF 1987**

**PAN AFRICAN CREDIT & FINANCE LTD.....PLAINTIFF**

**VERSUS**

**FRICMILLS INTERNATIONAL LTD.....DEFENDANT**

**RULING**

January 11, 1989 **Pall J** delivered the following Ruling.

The plaintiff has filed this application for a summary judgment against the defendant in respect of the plaintiff's claim in the plaint for Kshs 1,795,595.85 together with interest thereon at 19% and costs.

The defendant had before the filing of the said application filed a defence in fact an amended defence in pursuance of an amended plaint. In the amended defence the defendant has alleged (*inter alia*) that:

- a. If any promissory notes were drawn in favour of the plaintiff, they were drawn without the defendant's authority;
- b. The plaintiff's claim on dishonoured bills is not maintainable as no notice of dishonour had been given; and
- c. Even if the promissory notes were drawn by the defendant which is expressly denied the same were never presented for payment.

The defendant has also filed a statement of grounds of opposition to the plaintiffs and application which I will.

The plaintiff claims Kshs 1,000,000.00 on the unpaid promissory notes, Kshs 1,500 as the stamp duty paid on the said promissory notes and the rest by way of interest at 19% on the unpaid promissory notes from the date of dishonour to the date of filing the suit namely April 20, 1987. There are 10 promissory notes all dated July 15, 1982 each for Kshs 100,000 by which the defendant is alleged to have promised to pay the said sum to Pan African Credit and Finance Limited for value received. Each promissory note carries the defendant's rubber stamp and is signed by D V Shah as Director of the defendant's company.

The very first defence defendant has offered for consideration is that the promissory notes were drawn without the defendant's authority, if at all they were drawn on behalf of the company. Section 35 of the Companies Act (cap 486) say;

“35 – A Bill of Exchange or Promissory Note shall be deemed to have been made ... on behalf of a company if made ... in the name of the company by any person acting under its authority, express or implied.”

Mr D V Shah has signed under the rubber stamp of the defendant as its director. Regulation 80 of Table A of the 1st schedule to the Companies Act says that the business of a company shall be managed by its directors. In the absence of any evidence that Mr Shah was not a director of the defendant's company I hold that he had express as well as implied authority to sign the promissory notes on its behalf.

Another possible argument can be that the promissory notes were not under seal of the defendant.

However, section 92(3) of the Bills of Exchange Act (cap 27) clearly says that a bill or a note of a corporation does not have to be under seal.

The defendant's next ground of defence is that no notice of dishonour was given. According to section 47(1) of the Bills of Exchange Act, a bill is dishonoured by non-payment when it is duly presented for payment and payment is refused or cannot be obtained, or when its presentment is excused and the bill is overdue and unpaid. Then section 48 of the Act says that “subject to the provision of Act” when a bill has been dishonoured by non-acceptance or by non-payment notice of dishonour must be given to the drawer.

However, in the case of a promissory note, part IV of the Act applies. Section 84 defines a promissory note as an unconditional promise in writing by one person to another engaging to pay on demand or at a fixed or determinable future time a certain sum of money to or to the order of a specified person or to bearer. Then section 90(1) makes the provisions of the Act relating to bills applicable to promissory notes but subject to the provisions relating to promissory notes, a maker of a promissory note shall be deemed to correspond with the acceptor of a bill. Section 52(3) says “In order to render an acceptor liable, it is not necessary to protest it or that notice of dishonour should be given to him.”

So I hold that the notice of dishonour is not necessary in the case of the maker of a promissory note. If any authority is needed it is to be found in *African Overseas Trading Company v Bhagwarji Harjiwan* [1960] EA 417.

The next defence offered for my consideration is that the promissory notes were never presented for payment by the plaintiffs. In this respect section 88 of the Act is material. It says:

88(1) “Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable, but in any other case, presentment for payment is not necessary in order to render the maker liable.”

None of the promissory notes in question contains anything to indicate that it was made payable at a particular place. As such I hold that no presentments were necessary.

Apart from the defence, the defendant has shown some additional grounds of opposition to the plaintiff's application for summary judgment. I now deal with all of them not covered in any judgment so far:- Ground No 2 is that the plaint does not disclose any cause of action. Mr Kowade has argued that no notice of dishonour has been pleaded. As I have already held that no notice of dishonour was necessary in this case. It did not, therefore, have to be pleaded. In the said case of *African Overseas Trading Co vs Bhagwanji Havjiwan* it was held that it was not necessary for the plaint to contain a negative averment that the notice of dishonour was not necessary.

The 3rd ground is that the cheque annexed to Mr Sonpal's affidavit is for Kshs 1,000,000 whereas the plaintiff's claim is for Kshs 1,795,595.85. One look at the plaint shows that the plaintiff's claim is not on a cheque but on the promissory notes.

Again in ground No 4 the defendant has objected that the said cheque being prior in time than the promissory notes, there are two separate and distinct transactions. That may or may not be so but I am

concerned with the promissory notes here and not the cheque.

Ground No 5 is that the promissory notes were not under seal and the plaintiff has not shown on what authority the agent has executed the same. I have already dealt with this matter at length.

Ground 6,7 and 10 relate to lack of consideration and state (*inter alia*) that consideration for the payment of 1.5 million shillings which the plaintiff has in the supporting affidavit said was advanced to Harcom Printers and Suppliers Limited at the defendant's request, has not been pleaded in the plaint. Mr Kowade has not addressed me on these grounds specifically. But he had made a general statement that all the grounds of opposition are in issue for the determination of the court. Firstly the plaintiff has not sued the for 1.5 million principal sum but for the principal sum of Kshs 1 million only. The rest of the claim is mainly for interest. Secondly, under section 30 of the Act, every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value. The defendant has not shown any evidence showing lack of consideration to satisfy me that there is genuine triable issue. Thirdly, the payment was made to Harcom Printers and Suppliers Limited upon the written instructions of the defendant's managing director Mr D V Shah. The said document is marked "6" in the exhibit j.s '1' annexed to the said affidavit of Mr Sonpal. The defendant has not challenged the said document.

The defendant's said director was authorized to give such instructions without a specific resolution of the defendant under regulation 80 of the aforesaid regulations.

Ground No 8 that the plaintiff's claim is based on the promissory notes and not the cheque in favour of the plaintiff, there is no dispute about it. The plaintiff has obviously produced the dishonoured cheque which is dated September 15, 1982 and marked No 8 in the said exhibits j.s '1' as an indirect proof of the defendant's indebtedness. The plaintiff's claim is based on of course the unpaid promissory notes.

I have already dealt with the remaining two grounds namely grounds No 9 and 112 which relate to notice of dishonour and whether the plaint discloses a cause of action.

I therefore come to the conclusion that having perused the pleadings, the affidavits and the grounds for and against the application and having heard both counsel, I am satisfied on balance of probabilities that the defendant is indebted to the plaintiff for the principal amount due on the unpaid promissory notes namely Kshs 1 million.

Subject to arithmetical correctness in the calculation of interest the plaintiff is entitled under section 57 of the Act to the interest claimed.

The plaintiff is also entitled to claim Kshs 1,500 on account of the stamp duty on the promissory notes disbursed by the plaintiff on behalf of the defendant.

I therefore hold that the defendant has not shown that it has any *bona fide* triable issues in this matter and accordingly I enter judgment in favour of the plaintiff against the defendant for Kshs 1,795,595.85 together with interest thereon from the date of filing the suit to June 11, 1987 at the agreed rate of 19% per annum and thereafter with effect from June 12, 1987 at the agreed rate of 18% per annum until payment in full. In also award costs of the suit including the costs of the application for summary judgment to the plaintiff.

**Dated and delivered at Nairobi this 11th day of January , 1989**

**G.S PALL**

**JUDGE**