REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 2870 OF 1988

BARCLAYS BANK OF KENYA LIMITED……. PLAINTIFF

VERSUS

WANANCHI SANITARY AND HARDWARE LIMITED

BAVAJIBHAI KHUSHALBHAI PATEL

ASHOK KUMAR AMBALAL PATEL……..….DEFENDANTS

RULING

The plaintiff, Barclays Bank of Kenya Limited, (hereafter referred to as "the plaintiff") has by way of Notice of Motion under order XXV rule 1 of the Civil Procedure Rules, applied for summary judgment against the defendants, namely, Wananchi Sanitary and Hardware Limited, Bavajibhai Khushalbhai Patel and Ashok Kumar Ambalal Patel (hereafter referred to as "the defendants") on the grounds that the defendants' defence filed in this suit discloses no genuine defence to the plaintiff's claim.

According to the affidavit filed in support of the application, the defendants were granted an overdraft of upto Shs 800,000/= by the plaintiff and that at the time of the filing of the said, they owed the sum of Shs 454,284.00 plus interest. It was also stated that the said overdraft was guaranteed personally by the second and third named defendants. The learned counsel for the plaintiffs Mrs Ngugi, at the hearing, submitted that a summary judgment should be entered as the defendants had not raised any triable issues in their defence.

The defendants did not file an affidavit in answer to the plaintiffs application. They however filed grounds of objection under order 50 rule 16 in which they state that there are triable issues and that the application "is frivolous, has no merit and is an abuse of the process of the court".

During the hearing, the learned counsel for the defendants, Mr Waweru in a brief submission merely stated that the application was improperly before the court in that there was no prayer for the striking out of the defence as provided by order VI rule 13 of the Civil Procedure Rules which rule had not been invoked by the plaintiff. Therefore, he submitted, a summary judgment could not be granted. No authorities were referred to by both learned counsels.

On account of the above submissions, I am now called upon to determine whether or not the defence discloses triable issues. Secondly whether the application is improper. I will start with the latter issue. Verbatim, order 35 rules 1 to 5 of the Civil Procedure Rules reads as follows:

SUMMARY PROCEDURE

“1. (1) In all suits where a plaintiff seeks judgment for

(a) a liquidated demand with or without interest; or

(b) (not applicable to this case) where the defendant has appeared, the plaintiff may

apply for judgment for the amount claimed, or part thereof, and interest.

2. (1) The defendant may show either by affidavit or by oral evidence, or otherwise that he should have leave to defend the suit.

3. (not applicable)

4. If a defendant who has not already filed his defence is granted leave to defend he shall file his defence within 14 days of the grant unless the court otherwise orders.

5. If it appears that the defence set up by the defendant applies only to a part of the plaintiff’s claim, or that any part of his claim is admitted, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted, subject to such terms, if any, as to suspending execution, or the payment of the amount realized or any part thereof in the court, the taxation of costs or otherwise as the court thinks fit, and the defendant may be allowed to defend as to the residue of the plaintiff’s claim”.

On the other hand, order VI rule 13 provides as follows:

“13 (1) At any stage of the proceedings the court may order to be struck out or amend any pleading on the ground that

(a) it discloses no reasonable cause of action or defence,

or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial ofthe action;
or

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

2. (Not applicable)

3. (Not applicable)”.

I must concede that on a first reading of the aforesaid provisions, it would appear that a plaintiff cannot have a summary judgment without first invoking the provisions of order 6 rule 13 of the Civil Procedure Rules, where a defence has been filed. However on examining rules 2, 4, 5 and 6 of order 35 of the Civil Procedure Rules, and in particular rule 5, thereof which states that “if it appears that the defence set up by the defendant applies only to a part of the claim” one is left in no doubt that order 35 rule 1 can be invoked even where the defendant has filed a defence, if such a defence is a mere sham. If it were not so, then rule 4 of the said order would not refer to a “defendant who has not filed a defence” nor would rule 5 thereof allude to a “defence set up” in the case. This point has always been taken to be as aforesaid and our courts are full of decided cases, both reported and unreported, in which our courts have proceeded on the basis that the said rule applies to where defences had infact been filed as well without any apparent

objections from the defendants therein on the basis advanced herein. The latest such case is Civil Appeal No 37 of 1986 between G*atukuyu Coffee Growers Co-op Society Ltd v NatGil Enterprises Ltd* (unreported) in which this court granted summary judgment although a defence had been filed before the application was made. The Court of Appeal however reversed this court's decision on account of the fact that a triable issue had been disclosed by the defence. However in case an authority may be required for the above conclusion, I would refer to the case of *Malardy vs Slatem* (1890) 24 QBD 504, in which the point was taken under an English rule which is similar to our current one, and the court held that a plaintiff could obtain summary judgment where a defendant had filed a defence which did not disclose a defence to the plaintiff's claim. Even if the aforesaid rule does not empower the court to grant a judgment, the court can nonetheless apply provisions of order 6 rule 13 at any time and arrive at the same conclusion as that intended by the current rule. I therefore find no merit in the defendant's submissions on this issue. This application is therefore not improperly before this court nor is it frivolous or an abuse of the process of this court as it is allowed by our Civil Procedure Rules. I will now therefore consider the remaining issue, namely whether the defence filed herein discloses a defence to the plaintiff's claim.

It is trite law of procedure that a defence must disclose the grounds on which the defendant relies and that mere denial of the facts alleged in a plaint is not sufficient. Thus, where a defendant relies on payment or non-payment of money, this fact must be specifically stated in the defence. Consequently, a defence which does not disclose facts on which a defendant relies in answer to a claim is deemed to be a mere sham and is not a defence at law.

In the present case, I wish to observe that the defendants entered their appearance to the plaintiff's claim on 29.9.1988. Consequently by virtue of the provisions of order VIII rule 1(2) of the Civil Procedure Rules, they were supposed to file their defence within 15 days from that date unless the court orders otherwise. The defendants however filed their defence without leave on the 27th October, 1988 long after the prescribed time had expired, and had the plaintiff been so minded, it would have obtained a judgment in default of the timely filing of the defence. However, in view of order IX rule 1 of our Civil Procedure Rules, the defence though out of time, is not improperly on record having been filed before judgment and it may be considered to see whether the defendants should be allowed to defend the suit.

It is also observed that the said defence merely denies the contents of the plaint. It does not set out the facts on which the defendants rely in saying that "they are not indebted" to the plaintiff. In my view therefore, it is a mere sham intended to delay the speedy conclusion of the plaintiff's claim. It is therefore scandalous, frivolous, vexatious and is an abuse of the process of this court. I would therefore strike it off under the provisions of order 6 rule 13 of the Civil Procedure Rules.

I also find that the claim is for a liquidated demand plus interest. It can therefore be speedily disposed of under the provisions of order 35 of the Civil Procedure Rules or under order 6 rule 13 thereof or both. In the result, I enter judgment against the defendants as prayed by the plaintiff with costs.

Dated and Delivered at Nairobi this 2nd day of June, 1989

G.P.MBITO

…….

JUDGE