REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL DIVISION, MILIMANI

CIVIL CASE 563 OF 2003

JOSEPH KINUTHIA ……..PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED……1ST DEFENDANT

KILIFI MTWAPA DISTRIBUTORS LIMITED…..…2ND DEFENDANT

R U L I N G

The 1st defendant seeks that judgment be entered for it as against the plaintiff as prayed in the counter claim. The 1st defendant has come by way of Notice of Motion brought under Order 12 Rule 6 of the Civil Procedure Rules. The application is grounded on the following grounds; that the plaintiff's defence to the counter claims is a bare denial and there are no triable issues to go to trial; and that the plaintiff had admitted being indebted to the 1st defendant prior to filing of this suit.

Learned counsel for the 1st defendant, Mr. Kiragu argued in support of the application. He argued that Order 8 Rule 2 give the 1st defendant power to set out its own claim as a cross suit and that, accordingly, the rules of pleadings equally applied to counter claim. That in response to the 1st defendants claim that the plaintiff is liable under the guarantee, the plaintiff had failed to specifically deny that assertion. This failure counsel argued was contrary to Order 6 Rule 9 (3). This order provides.

"……every allegation of fact made in a plaint or counterclaim which the party on whom it is served does not intend to admit shall be specifically traversed by him in his defence or defence to counter-claim; and a general denial of such allegation, or a general statement of non-admission of them, shall not be sufficient traverse of them."

Counsel further argued that the dictates of Order 12 rule 6 require admission by pleadings or otherwise. In this regard counsel drew the court's attention to the guarantee, which was signed by the plaintiff in the presence of an advocate. Counsel then submitted that the plaintiff cannot therefore be heard to argue that, that guarantee was invalid.

That guarantee required the plaintiff to pay the guaranteed amount on demand. Counsel referred to paragraph (a) of the guarantee, which provides: -

"The guarantor, as primary obligor and not merely as surety, on demand will pay the bank all money and discharge all obligations and liabilities …….now or hereafter due, owing or incurred to the bank by the principal……."

Counsel referred to exhibit 'PO1' page 6 wherein was a letter written by 1st defendant's advocates addressed to the plaintiff, dated 20th June 2002. That letter is entitled **"DEMAND & STATUTORY NOTICE"**. The demand letter demanded payment by the plaintiff kshs 2 million with interest at the rate of 28.75% (revisable). Counsel pointed out that the amount of kshs 2 million was the guaranteed amount. Counsel then referred to the plaintiff's response to the said demand whereby the plaintiff through his counsel and personally admitted the amount demanded and indeed made an offer for settlement of the same and actually made some various payments.

1st defendant relied on the case of CHITRAM V NAZARI (1984) KLR 327. An apt quote is as follows: -

"For the purpose of Order 12 Rule 6 admission can be express or implied either on the pleadings or otherwise e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pike staff and clearly readable because they may result in judgment being entered."

Counsel submitted that even though the court on 5th December 2003 granted the plaintiff an injunction, that injunction did not preclude the 1st defendant from making the present application. For that proposition counsel relied on the case AGRICULTURAL FINANCE CORPORATION V KENYA NATIONAL ASSURANCE CO. LTD V ….

Counsel relied on the following quote: -

"Order XII Rule 6 empowers the court to pass judgment and decree in respect of admitted claims pending disposal of disputed claims in a suit."

Counsel further submitted that under Order 12 rule 6 the court can only enter judgment on admission when it is clear, unambiguous, unequivocal and sufficient, see case of CONSOLIDATED BANK OF KENYA LTD V MOMBASA DEVELOPMENT LTD and JIMBA CREDIT CORPORATION.

The other authority relied upon by the 1st defendant is the case of MOMANYI V HATIMY AND ANOTHER (2003) 2 EA 600 where it was stated in the judgment of the court that:

"For Order XII to apply there must be admission of facts, which entitle the plaintiff to apply for judgment without waiting or determination of any other question between the parties."

Counsel concluded by submitting that the guarantee was a valid contract between the parties.

Learned counsel for the plaintiff Mr. Wanjohi opposed the application. He began by stating that the power donated by Order 12 Rule 6 is discretionary. In exercise of that discretion counsel said that the court needs to be satisfied that the guarantee is enforceable. Counsel in that regard said that the guarantee was not supported by consideration, that the letter of offer of facility written by 1st defendant addressed to the 2nd defendant did not require the provision of a guarantee. That accordingly the plaintiff was not obligated to sign the guarantee and his signature was obtained by deception. He also drew attention of the court to the different accounts lent to the 2nd defendant which were not contemplated by the security documents and accordingly the guarantee was not valid and, therefore, no amount of letters, admitting the debt can cure that invalidity. Counsel finally argued that the claimed debt

was not payable by the plaintiff because the 1st defendant had failed to serve a demand. In support of this argument counsel relied on the case of KENYA COMMERCIAL FINANCE COMPANY LIMITED AND KIP NG'ENO ARAP NGENY AND ANOTHER CIVIL APPEAL NO. 100 OF 2001 OF 2001. Counsel relied on the judgment of E. Owour J.A. as follows: -

"…….it is equally true that no demand was made to the 1st respondent to pay up the money he had guaranteed…….The two letters addressed to the 1st and 2nd respondent ……..were clearly marked and did amount to "statutory notices" that the appellant's statutory right for sale in respect of the two properties in issue had arisen.

To this argument the 1st defendant counsel referred to the exhibit 'PO1' which clearly stated that the demand was both statutory notice and demand under guarantee. 1st defendant counsel said that, that demand sufficed since the court of appeal in the afore mentioned case did not set out a model of demand under the guarantee.

The above is the summary of the evidence presented before me. The 1st defendant's application is brought under Order 12 rule 6. This rule states:

"Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise apply to the court for such judgment or order as upon such admission he may be entitled to without waiting for the determination of any other question between the parties and the court may upon such application make such order, or given such judgment, as the court may think just."

The 1st defendant's counsel relies on the failure of the plaintiff to specifically traverse the counterclaim, and the admissions made in correspondence in bringing the present application.

1st defendant counsel submitted that the plaintiff did not deny signing the guarantee. That is indeed is correct, for all the plaintiff says in the plaint is that **"the plaintiff was not at any one time obliged to execute a deed of guarantee and the deed of guarantee…was executed gratuitously……that the said deed of guarantee was procured from him by deceit."** But what I find the plaintiff does not deny, is the indebtedness of kshs 2 million. Clearly the plaintiffs liability arises because of the liability that he guaranteed, of the principal debtor who happens to be the 2nd defendant. The word guarantee is defined in the Oxford Reference a dictionary of Law as: -

"A secondary agreement in which a person (the guarantor) is liable for the debt or default of another (the principal debtor)."

I find that a proper demand was made by the 1st defendant addressed to the plaintiff both serving as a statutory notice and a demand under the guarantee. The plaintiff's advocate responded to that demand in the following terms: -

"….our client intends to make proposals to settle the outstanding mount under the guarantee. To enable us do so; let us have a copy of the guarantee signed by our client. In the mean while we request you not to take any precipitate action as we try to have the matter sorted out."

The plaintiff, in person, wrote to the 1st defendant's advocate by a letter dated 27th October 2002 in the following terms.

"I refer to your letter dated 20th June demanding payment of kshs 2, 000, 000/- plus interest in

connection with the above referenced debt. My advocate Onesmus Githinji & Company replied to you on 9th September 2002 requesting the copy of the guarantee I signed with an aim of confirming the issue of interest in your demand letter. In the same communication we stated our intention to make payment proposal to settle the guarantee amount.

……..I repeat my willingness to pay the guarantee amount at monthly installment of kshs 50, 000 with immediate effect while you avail the copy of guarantee which I signed to my advocates for perusal."

The plaintiff sent another letter dated 6th November 2002 to the advocates for the 1st defendant which in part stated as follows: -

"……..However despite our written proposal to start settling the kshs 2, 000, 000 debt in equal monthly instalments of kshs 50, 000 of which you confirmed receipt and remittance through a banker's cheque I regret to inform you that your appointment agent Mwara Investment Auctioneers came on Wednesday……."

The plaintiff thereafter wrote to Barclays Bank and forwarded various sums of money.

From these correspondence the 1st defendant invites the court to find that there is admission, which suffices for judgment to be entered on the counterclaim. Order 12 Rule 6 requires that there be plain clear expressions, or clear implied admissions. Mullar on the code of Civil Procedure in explaining the rule similar of Rule 6 of Order 12 stated: -

"The rule secures that if there is no dispute between the parties, and if there is on the pleadings or otherwise such an admission as to make it plain that the plaintiff is entitled to a particular order or judgment he should be able to obtain it at once to the extent of the admission."

I have examined the correspondence relied upon by the 1st defendant. the plaintiff does admit indebtedness of the amount claimed in the demand under guarantee, that is ksh 2 million.

It is however clear that the plaintiff does not admit the rate of interest. Examining the correspondence reveals that the plaintiff admitted the amount claimed in the demand letter. In looking at these letters it is important to remember that the plaintiff was a guarantor and his liability arose as a consequence of the liability of the principal debtor. For the court to accept that the plaintiff was admitting to a debt that was in existence it was necessary for evidence to be placed before court that the principal debtor was indeed indebted to the 1st defendant. No such evidence is produced. Since no such evidence is produced and bearing in mind that the plaintiff admitted an amount stated in a letter of demand without anything else backing that demand and bearing in mind that the plaintiff repeatedly requested for a copy of the guarantee to confirm the interest claimed; I find that, in the exercise of in my discretion this would not be a fit and proper case for judgment to be entered on admission. I find that the admission made in the correspondence was equivocal.

Accordingly the 1st defendants application will fail. The order of the court is that the application dated 12th day of April 2005 is dismissed and the costs thereof shall be in the cause.

Dated and delivered on 9th June 2005.

MARY KASANGO

JUDGE