REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1135 of 1998

CANELAND LIMITED..... PLAINTIFF

VERSUS

DOLPHIN HOLDINGS LIMITED..... ,. 1ST DEFENDANT

DELPHIS BANK LIMITED..... 2ND DEFENDANT

RULING

The plaintiff has filed this application under O. VI r. 13 (1), (b), (c) and (d)**of the *Civil* Procedure Rules for the following orders:-**

1. **That the defendants' defence as filed herein be struck out; and**

2. **That judgment be entered as prayed in the plaint.**

The grounds upon which the application is made are inter alia:-

(a) That the defendants' defences are otherwise an abuse of the court process;

(b) That the defences are spurious, evasive and offend the rules and lawgoverning pleadings;

(c) That the defences do not raise any issue or any triable issue in law;

(d) That the defences do not deal specifically with every material allegationcontained in the Plaint as required by law;

(e) That the 1st defendant is seeking to rely on an Agreement whoseenforceability the said defendant is simultaneously denying;

(f) That the defendants having entered appearance and filed a defence to theplaintiffs suit cannot be heard to allege that the suit is premature;

(g) That the defendants in filing the said defences have admitted and subjectedthemselves to

the jurisdiction of this court and cannot be heard to seek a stayof the plaintiff's suit;

(h) That the defendants purported defences are merely aimed at delaying the fair trial and determination of the suit.

Each of the parties to these proceedings has filed an affidavit in support of itscase. The facts disclosed by those affidavits are clear and straight forward and donot give rise to any dispute.

They are that by an agreement in writing dated 12.7.1995 entered intobetween the plaintiff of the first part and the 1st defendant as beneficial owner of allthe issued share capital of a company known as Vanessa Associates Inc. which saidcompany is incorporated in Panama and which also as at that time owned 51% ofthe paid up equity of Miwani Sugar Company (1989) Limited, offered to sell its share holding in Vanessa Associates Inc. to the plaintiff. The legal effect of that would be to transfer the majority shareholding in Miwani Sugar Company (1989)Limited to the plaintiff.

The agreement dated 12.7.1995 (herein after called the "1st agreement") isannexed to an affidavit sworn by Surjit Singh, one of the directors ofthe plaintiff company and filed in court on 16.4.1999 in support of this application.It shows that the consideration for the shares was to be Shs.379 million and was tobe paid as more particularly specified in the 1st agreement. Also under theagreement the plaintiff was to take over the running of Miwani sugar Company (1989) Limited.

Mr. Surjit Singh's affidavit further reveals that pursuant to the agreement, theplaintiff paid a total of Shs.72,900,000/= to the 1st defendant through the 2nddefendant as follows :-

Date;	**Amount in Shs.**
(i) 18.7.95	**37,900,000.00**
(ii) 13.10.95	**10,000,000.00**
(iii) 29.12.95	**25,000,000.00**
Total;	**72, 900, 000, 00**

However, after the above payments had been effected, the parties wereunable to complete the transaction as anticipated by both and consequently by afurther agreement dated 13.5.1997 (a copy of which is annexed to Mr. Singh's affidavit and marked "SS3"), *it* was mutually agreed between the plaintiff and the1st defendant that the principal sum of Shs.72,900,000.00 paid by the plaintiff tothe 1st defendant would be refunded to the plaintiff on terms to be agreed upon onor before 31.5.1997. According to the evidence tendered on behalf of the plaintiffin support of this application, the 1st defendant has refused and/or neglected tomeet the plaintiff in his offices to discuss the repayments despite numerous calls bythe plaintiff to the defendants to do so. Notwithstanding that, the 1st defendant hashowever refunded to the plaintiff Shs. 15,000,000.00. That has been done despitethe 1st defendant's inconsistent and evasive stand that the entire sums are not yetpayable. That is in short the plaintiff's case against the two defendants.

I turn now to consider the two defendants separate defences as well as theirrespective positions regarding the plaintiff's claim. i start with the 1st defendant.

As I see it, the 1st defendant has raised a two pronged defence to theplaintiff's claim. Firstly in paragraph 3 of its defence, the 1st defendant contendsthat the plaintiff's claim is premature because the agreement to repay the principalsum was subject to an arbitration mechanism which the plaintiff had failed toinvoke before instituting the suit. That defence was however dropped by thedefendants' learned counsel and is not now available to either of the defendants.

However, with regard to the 2nd agreement, the 1st defendant concedes that there was such an agreement but then goes on to allege that repayment of the sum of Shs. 72,900,000/- which it agreed to refund to the plaintiff was dependent on theparties agreeing other side issues which as it has emerged involve other parties. The1st defendant avers in its defence that pursuant to those conditions, it requested theplaintiff to attend a meeting in order to discuss the matters set out in the agreementbut, for reasons allegedly only known to the plaintiff, the latter refused to attendsuch a meeting. That claim by the 1st defendant is clearly self serving and . In advancement of the same argument, the affidavit in replyfiled on behalf of the 1st defendant, the same defences are repeated. The deponent,a Mr. Kish Bandopadyay, who designates himself as the 1st defendant's corporatedirector also claims that it had been mutually agreed between the plaintiff and the1st defendant that a draft report would be prepared in respect of the plaintiff'smanagement of Miwani Sugar Company (1989) Limited and that once the reportwas prepared, the parties would thereafter hold a meeting in order to discusspayments either due from the plaintiff to Miwani or vice versa. Mr.Bandopadyayclaims that a draft report was indeed subsequently prepared, revealing that due tovarious frauds and or omissions or acts of mismanagement by the plaintiff, Miwanihad incurred substantial losses. He states that as a result of the revelations, there isongoing litigation between the plaintiff and its related companies on the one partand Miwani on the other. He goes on to give the numbers of the cases instituted allegedly in connection therewith. Mr. Bandopadyay does not however *tender* any evidence whatsoever to substantiate his claims regarding the matters he depones to in particular no evidence is tendered regarding the alleged mutual agreement to prepare a draft report as is alleged or of any attempt on the part of the 1st defendant to call or attend a meeting. Indeed looking at the facts as a whole, the claim that the plaintiff refused to attend meetings scheduled to arrange repayment of its moneys.sounds hollow and lacks credence

There is on the contrary very clear evidence through three letters written by the plaintiff's directors to Ketan Somaia (who appears to be the individual *in* control of both defendants), (see annexture SS4 to the affidavit of Surjit Singh) that it is the 1st defendant which was not only refusing to hold meetings but also neglecting to pay the agreed sum. In this respect, I wish to observe that in face of all this evidence, it is quite reprehensible for this so called corporate director Mr. Bandopadyay to bring into court statements on oath which is patently false.

In my judgment, the evidence available is clear and straight forward. It establishes without any shadow of doubt that the plaintiff not only paid Shs. 72,900,000/= under an agreement which failed but also in respect of which payment the 1st defendant agreed to refund the money. / It is also clear that the agreement to repay was not conditional upon payment of any further sums by the plaintiff to the 1st defendant and in any event, the 1st defendant did not lodge any counter claim to the plaintiff's suit; neither did it seek to join other parties in the suit. Consequently, its reference to other parties and other conditions for the repayment of the monies is a clear attempt to introduce a red herring into the matter in its endeavour to furtherdelay the plaintiff's recovery of its money.

As for the 2nd defendant, it was not as innocent and as uninvolved in thetransactions giving rise to this suit as it would, through its defence and replyingaffidavit, have us believe. The 2nd

defendant claims that *it* has never been paid anymoney by the plaintiff and that its involvement in the matter was that of a collectingand clearing bank. It also adds that it is a complete stranger to the transactionsbetween the plaintiff and the 1st defendant. That claim, we may observe, is alsorepeated in the affidavit of Mr. John Barnes, the Executive Director of the 2nddefendant. But the position taken by the 2nd defendant is, as observed by learnedcounsel for the plaintiff, less than candid. As will be clear from the correspondencebetween the real persons behind these companies (see annexures SS4 to theaffidavit of Surjit Singh) the parties made no distinction between the 1st defendantand the 2nd defendant. Thus when the plaintiff is writing about the sums due tothem under the transactions, they do not write to the 1st defendant but to K. S.(obviously meaning Ketan Somaia) without in any way attempting to indicate inwhat role they are addressing him. And when Mr. Ketan Somaia writes to Mr.Rumi Singh about the money due to the plaintiff, he does not use the letter heads of the 1st defendant but those of "Dolphin" which in the circumstances must mean the 2nd defendant.

Even the defence that the 2nd defendant was acting as a collecting and clearing bank appears untrue when viewed against the fact that in all the cheques involved in the transaction, the payee was not the 1st defendant as one would have thought, if the 2nd defendant's defence is credible but the 2nd defendant itself. Is it not generally accepted that payments through clearing banks are not made to the banks themselves" Given those facts, it cannot surely be correct or even true that the 2nd defendant only acted as a collecting and clearing bank.

The fact of the matter is that the second defendant received all the moneys, the subject of this suit. Accordingly, when the 2nd defendant claims, in the face of that clear evidence that it was never paid any money by the plaintiff and that it is a stranger to the transactions between the plaintiff and the 1st defendant, there can be no doubt that the 2nd defendant is not stating the truth .In my view, there is the clearest evidence that the money in question was paid to the 2nd defendant. Indeed there is no way it could have reached the 1st defendant without the 2nd defendant in turn paying it over to the 1st defendant. Given all that the question that obviously begs an answer in the circumstances of this matter is, if the 2nd defendant was not a party o the transaction, how come that it, in turn, decided to trasnsfer the moneys to the st defendant. The answer to the question is clear the 2nd defendant's denial of receipt of the money is not only baseless but also ashameless attempt to mislead this court.

On 8.1.1998, the 1st defendant's advocates wrote to the plaintiff in responseto a notice served upon the 1st defendant by the plaintiff under S. 220 of theCompanies Act. The contents of the letter and also its tenor is illustrative of the 1stdefendant's disregard for the truth and indeed duplicity, if I may say so, with regard to the transactions giving rise to this suit. In the letter, Mr. Salim Damji states, inter alia:-"Our clients deny liability. They have never had any dealings with your firm."

Given that categorical denial by the 1st defendant, which incidentally, he was subsequently to change without as much as batting an eyelid, the plaintiff had no alternative but to join the 2nd defendant as a party and claim the moneys paid to it as money had and received by the 2nd defendant to the use of the plaintiff . I say so because in the face of the 1st defendant's denial of any dealings with the plaintiff which implied that the money paid by the plaintiff to the 2nd defendant had not reached the 1st defendant, the plaintiff had to go for the party to whom payment had been made. And given the circumstances of the matter, the claim against the 2nd defendant had to be in the alternative. For that reason, it is baseless for the defendants to contend that the framing of the claims in the alternative was caused by the plaintiff's uncertainly as to the validity of the relief's it sought .on the contrary, the plaint clearly demonstrates that the

plaintiff knew what he wantedand cleanly went for it.

A large number of authorities were cited by both learned counsel for bothsides in the course of their submissions before me but with due respect to both, thevolume of authorities cited appears to have been inversely proportional to the complexity of the matterindeedthebasic facts as reflected in the documentary evidence dduced herein is separated from the unsubstantiated allegations, then the matter ecomes fairly simple.

In this respect, I wish to repeat that the claim by the 2nddefendant that its involvement in the transaction was only as collecting andclearing bank, has no basis in fact; as observed above it was the payee of thecheques that comprised the sum of Shs.72, 900,000/= clearly therefore the two defendants was not a clearing bank for the 1st defendant in the transaction if it was the cheques in question would have been made in favour of the 1st defendant.

All what the above means is that the 2nd defendant has refused and orneglected to explain what it did with the money. Instead of doing so, it hasattempted to take cover in some unsubstantiated legal argument which in the enddoes not assist in covering its role in the matter. The 2nd defendant defence is clearly a sham. That also means that all the discourse rendered to this court during the hearing of the application regarding the position of a clearing bank in relation to this sort of claim becomes irrelevant.

As for the 1st defendant, the position is even, simpler. It admits having received the sum of Shs.72,900,000/- which said sum it agreed to refund. In furtherance of the agreement, it actually refunded some Shs.l5,000,000/=, thereafter for a period of over two years it refused to make any further refunds despite the plaintiffs numerous pleas to it to honour the agreement to repay. The allegation that it was the plaintiff who refused to cooperate in making arrangements for the repayment lacks substance particularly considering the amount of money involved. Also the fact that it was the plaintiff and not the 1st defendant who is institution of the suit. But be that as it may, the claim by the 1st defendant that there were other conditions precedent to the refund of the money cannot simply be true because the 1st defendant *did* actually proceed to refund some of the money namely Shs. 15,000,000/= therefore, the 1st defendant is being inconsistent by putting forward such a defence after refunding a substantial part of the *money.* Doesn't all this show the plaintiff is trying to approbate and at the same time reprobate.

As stated at the beginning of this ruling, this application seeks to strike out the two defendants' defence and to enter judgment in favour of the plaintiff as prayed in the plaint. The application is made under O. VI rule 13 (1) (h), (c), (d) of the *Civil* Procedure Rules. The rule empowers this court to strike out a pleadingsif:-

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

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

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

In those circumstances are satisfied, the court may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

Mr. Danji for the defendants went into considerable length during hissubmissions to show that non of the three sub-rules quoted above apply to thecircumstances of this case; in

attempting to do so, I think he fell into error. In myjudgment, a sham defence which ignores the facts of a matter as they exist andattempts to put forward a misleading and false interpretation of the actual position,as both defendants have been shown to have done in this matter, is not onlyscandalous and embarrassing but also an abuse of the process of the court. Such adefence is also likely to embarrass or delay the fair trial of the action.

Mr. Danji also submitted that an application to strike out a pleading should be made promptly, and as a rule before the close of the pleadings. That is of course correct and one would have no quarrel with the statement *as* a general principal of the law. However each case must depend and be decided on its own peculiar facts. On the special facts of this case, no purpose would be served by holding a trial where the defence is based on false factual statements and in any event no prejudicewill be occasioned to the defendant, if the proceedings are terminated forthwith.Pleadings which are an obvious sham should be terminated promptly.

The principals upon which the court acts when dealing with applicationsunder O. VI rule 13 were very ably considered by the late Madan J. A. (as he thenwas) in the now famous case of D. T. Dobie & Company (Kenya) Ltd. Vs. JosephMbaria Muchina & another (Court of Appeal, Civil Appeal No. 37 of 1978) and itis not necessary *to* repeat them in detail in this matter. It will, I think, suffice, if Irefer to one or more of the cases cited by the learned judge in his decision.

In Moore V. Lawson and another, Swinfen Eady, L. J. stated:-

"It has been said more than once that the rule is only to beacted upon in plain and obvious cases, and, in my opinion,the jurisdiction should be exercised with extreme caution."

And in Kellaway V. Bury Lindley L. J. said:-

"That is a very strong power, and should only be exercised in cases which are clear and beyond all doubt..... the court must see that the plaintiff has got no case *at* all,either as disclosed in the statement of claim, or in suchaffidavits as he may file with a view *to* amendments."

The same principle is stated in Halsbury's Laws of England 4th Ed. Vol. 36 paragraph 74 as follows:-

"The power to make an order striking out a pleading isdiscretionary, and should be exercised only in plain andobvious cases, but *it* is the court's duty to make an orderin a suitable case, since a party is entitled to have thecase against him presented in an intelligible manner."

Also in the case of Johnson Joshua Kinyanjui & another Vs. Racheal Wahito Thande and another (Court of Appeal, Civil Appeal No. 284 of 1997) the Court of Appeal stated:-

"It was held by this court in the case of Choitram V. Nazari(1982-88) 1 KAR 437 that in a plain and obvious case, even ifestablished after substantial argument on analysis of documents,entitles a plaintiff to judgment on admissions."

From the foregoing authorities it becomes clear that the power to strike outpleadings is a strong one which should only be exercised in plain and obvious cases.On the other hand, when the position is clear and obvious, the court should nothesitate to act. As far as the instant case is concerned, having gone through thepleadings and the affidavits of all the parties herein together

with the annexures, theposition is clear and straightforward. It is as follows:-

The two defendants were paid Shs.72, 900,000/= by the plaintiff under atransaction which failed to materialize. The 1st defendant agreed to refund themoney and actually refunded a substantial part of it. It however refused to pay thebalance, and when pressed to pay, *it* adamantly refused, initially by stating that *it* had no dealings with the plaintiff, but later after matter was brought to court, bychanging feet and saying that it received the money after all but claiming the repayment was conditional on some other matters which to my mind lack substance. That defence clearly raises no trial issue.

As for the 2nd defendant, it denies receipt of the money in its defenceclaiming that all it did was to act as a collecting and clearing bank. I haveendeavored to show that the 2nd defendant's defence is on the facts of this matterfalse and is therefore no defence.

In my view therefore, this is a plain and obvious case where both defendantsare jointly and severally liable to the plaintiff to refund to it the balance of themoney still remaining unrefunded. Instead of doing so, the defendants have raisedwhat on the facts of this case are clearly untenable and bogus defences solelyintended to delay the recovery of the money. The defences are clearly not onlyscandalous and frivolous but also an abuse of the process of this court.

For the above reasons, the application is allowed, the defences filed herein bythe two defendants struck out and judgment entered in favour of the plaintiff against the two defendants jointly and severally as prayed in the plaint. Thedefendants will jointly and severally bear the plaintiff's costs of this application.

Dated at Nairobi this 24th day of November, 1999.

T. MBALUTO

JUDGE