



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1070 of 2003

KIPSIGIS TRADERS LIMITEDPLAINTIFF

VERSUS

TRUST BANK LIMITED (IN LIQUIDATION)DEFENDANT

JUDGMENT

This is the second time this suit by way of Originating Summons is being heard ex-parte. The first time this happened was on 1st February 2006.

That time Honourable *Judge Njagi* who heard the case observed that an affidavit of service sworn on 31st January 2006 showed that counsel for the defendant had been served with a hearing notice on 24th June 2005 which was six (6) months before the date of hearing and that since neither counsel nor the defendant turned up, the Judge opted to hear the case ex parte.

The Judge wrote his judgment on 24th February 2006 wherein he made the orders sought in that application.

However, on 31st May 2006 the defendant, through counsel, Messrs Manyarkiy & Company Advocates filed an application to have this ex-parte judgment set aside.

Though it is not very clear when this application was heard the Court order dated 12th June 2006, indicates that the parties counsel consented to have the Originating Summons heard on 17th October 2006 instead of the taxation of Bill of Costs scheduled to be heard on that day by order of Court dated 24th February 2006.

The Originating Summons was however, not heard on that day as there is no indication on the Court file as to what happened then.

It was placed before this Court for hearing on 30th October 2007 when again only counsel for the plaintiff appeared.

On this day too neither the defendant's Director nor counsel appeared. But on record appearances at the Court's registry on 29th May 2007 show that a hearing date was fixed by consent of counsel for both parties on 30th October 2007.

There being no explanation for the absence by counsel for the defendant, this Court allowed counsel for the plaintiff to present her submissions on the application as per the directions taken on 19th December 2003.

On her part the application sought the removal of a caveat lodged against **L.R. No. 209/11528** Nairobi on 30th December 1998 and that the defendant do release title documents of the property to the plaintiff.

The application was supported by an affidavit deposed to by one **Prakash B. Patel** dated 16th October 2003 the same date the application was filed in Court.

She repeated the same submission she made on the same application on 1st February 2006, namely:-

That the plaintiff had obtained a loan of **Seven million Kenya shillings** (Kshs.7,000,000/=) from the defendant and a caveat was lodged on the suit property on 30th December 1998.

That the amount of loan was paid in full as per the statement dated 31st December 2000 showing a credit balance of **Kshs.5,000/=**.

That the plaintiff requested the defendant to release the documents of title but that the defendant refused saying that the plaintiff's Sister Company – Steel Tubes Limited – owed it – the said defendant some money. That this is confirmed in the replying affidavit to this suit sworn by one Clement Kinuthia Nduru and on this basis the defendant denied that the loan had been repaid in full.

Counsel submitted that there is nothing in law like Sister Company and that there was no agreement of security in writing in accordance with Section 23 of the Law of Contract.

That this claim is against Sections 46 and 66 of the Registration of Titles Act. That there was no annexure on the replying affidavit as evidence of such an arrangement nor is there any evidence to show any indebtedness by Steel tubes Limited to the defendant; or any relationship between the said Steel tubes Limited and the defendant.

Counsel prayed that on these submissions, orders should be made in favour of the plaintiff in terms of the Originating Summons.

In the replying affidavit of **Kinuthia Nduru** he admitted in paragraph 4:

That the Defendant admits that it is holding the said title documents as security for the credit facilities obtained by the applicant herein and also for a different credit facility obtained by Steel Tubes Limited a Sister Company of the applicant herein whose directorship is the same. The plaintiff shall lead evidence to confirm the foregoing come the hearing hereof.

Paragraph 5

The defendant contents that the caveat is justified in the circumstances and ought to remain in place in view of the fact that the applicant Company herein voluntarily pledged the property herein as security for two debts in completely different accounts simultaneously of property on account of allegedly settling indebtedness in this one account only.

Paragraph 6

That the defendant denies that the applicant has settled all its indebtedness in the present account as alleged and shall at an appropriate time (all evidence to confirm that there is outstanding dues on account of alleged late payment penalty charges accrued interest and other related changes.

Paragraph 7

That the defendant contents that it has both a legal and equitable lien over the title documents herein on account of the unpaid debt owned by Steel Tubes Limited, the pledge of which was made by the same directors and as such the application to lift the caveat herein is mischievous and smarks of fraud at this point in time.

Underlining mine.

The case was heard exparte due to non-attendance of the counsel for the defendant hence there was no evidence called as stated in those paragraphs of the replying affidavit to confirm:-

- 1. the credit facility obtained by Steel Tubes Limited,***
- 2. Similar directorships between the plaintiff and Steel Tubes Limited***
- 3. The two debts in two accounts in completely different accounts simultaneously,***
- 4. Outstanding dues on alleged late payment penalty charges, accrued interest and other related charges.***

I am aware the directions taken in this case were that submissions would be made herein on the basis of the affidavits filed and if this be the position, it would be expected such documentary evidence would be annexed to the replying affidavit but this was not done.

Otherwise, annexed onto the supporting affidavit are amongst others, copy of the caveat over Plot **No. 209/11528** being the chargee's interest by virtue of sums advanced by way of overdraft; copy of the grant for **L.R. No. 209/11528**, copy of account number **0105-001186-0001** which shows a credit balance of **Kshs.5,490.05** – and copy of letters exchanged between the parties over the release of the title, the subject of this suit by the defendant to the plaintiff.

Though in one letter dated 22nd August 2003, from the defendant to the plaintiff on a “without prejudice basis” the defendant stated in paragraph 2 thereof that:-

“In our letter dated 16th May 2003 to your client we confirmed that we are holding the original title for the borrowing of M/s Steel Tubes & Pipes Limited who are still owing us”.

The said defendant has not been able to show the relationship between the two Companies or how the later Company's borrowing comes in to benefit from the caveat lodged on the suit property.

I am afraid to say but in this case, the kind of averments in the replying affidavit, tend to shift the burden of proof to the defendant to show how the loan Messrs Steel Tubes & Pipes Limited obtained from the defendant comes to be covered by the charge created upon the plaintiff's property by virtue of

the caveat on its **account No. 0105-001186-0001**.

By reason of the defendants counsel's failure to appear in Court to submit on this line of defence and/or attach relevant documents to confirm this position, the burden of proof shifted and placed upon them was not discharged.

In the circumstance, ***I enter judgment for the plaintiff*** and make orders in terms of the prayers sought in the Originating Summons dated and filed in Court on 16th October 2003.

Delivered, dated and signed at Nairobi this 8th day of November 2007

D. K. S. AGANYANYA

JUDGE



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