



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. E. 011 OF 2020

PETER MAINA KANAMBA KARIENYE.....PLANTIFF/APPLICANT

VERSUS

WAIYAKI WAY DEVELOPERS LTD.....1STDEFENDANT/RESPONDENT

VIRJI MEGHJI PATEL.....2NDDEFENDANT/RESPONDENT

RULING

SUMMARY JUDGMENT APPLICATION

The Applicant herein filed application dated 20th January 2020 brought under the provisions of **sections 1A ,1B, 3A of the CPA and Order 36 Rule (1) and (9), of the CPR**. The Applicant sought the following substantive orders:

- (a) That the court enters summary judgment in favour of the applicant against the 1st and 2nd Respondents, jointly and severally
- (b) The cost of the application

The Applicant's application is premised on the grounds; -

1. The 1st and 2nd Respondents are indebted to the Applicant in the sum of **Kshs.43,108,227.84 and USD 15, 225.43** as at 5th January 2020 and which amount continues to accrue interest at the rate of 14.5% per annum, as per the contract of transfer of shares and refund of money dated 6th February 2017, until payment is made in full.
2. The 1st and 2nd Respondents have failed and/or neglected to refund the monies owed to the Plaintiff despite several demands made
3. It is alleged that there is no defense to the suit filed herein and if any it would be illusory a mere blanket denial, a sham and aimed at delaying judgment.
4. The Applicant relies on the grounds on the face of the application, together with those in the Supporting Affidavit. It is their position that the Defense filed by the Respondent herein is a mere denial and a sham, and that there is high risk of non-compensation to the Applicant at the point of entry of judgment as the Respondent would have closed down.

REPLYING AFFIDAVIT

The Application is opposed vide a Replying Affidavit dated sworn by Virji Meghji Patel the 2nd Defendant and the director of the 1st Defendant. He stated that the Plaintiff is indebted to him in the sum of Kshs.739,500,000 arising from a claim by a third party against him from a contract signed between the third party and the Plaintiff prior to execution of the transfer of shares agreement with the Plaintiff.

Further, that it has come to his attention that before execution of transfer of shares agreement with the Plaintiff, the Plaintiff had executed

another contract namely the Shares Agreement in Waiyaki Way Developers Limited dated 30th December 2015, in which the 1st Defendant was condemned to cede to the said third parties.

He stated that the Plaintiff never revealed the existence of the said contract either before, during or after the execution of the contract for the transfer of shares. It was an implied term of the contract for transfer of shares that the same was executed with full disclosure having been made and without mischief from any party. However, the Plaintiff maliciously failed to disclose the existence of the said contract and it would be unjustified for him to demand any monies before settling the third parties claim

Further that the amounts stated by the Plaintiff is erroneous as there was no provision for compound interest in the contract and simple interest should be applied instead. The said sum if justified should be set off against Kshs.739, 500, 000 owed by the Plaintiff or in the alternative the Plaintiff to settle the third parties claim then demand his payment.

In addition, the Defendant avers that the Plaintiff never effected service of any court pleadings on the defendant and as such it would be premature and greatly prejudicial to the Defendants should summary judgment be entered in the matter.

SUPPLEMENTARY AFFIDAVIT

The Plaintiff replied by stating that if there is any claim between the Defendant and third parties (who are all current shareholders of the 2nd defendant) as per paragraphs 3.1 and 3.2 of the contract for transfer of shares and refund of money dated 6th February 2017. The Defendants indemnified the Plaintiff against all actions, liabilities and demands levied by any person regarding any business conducted by the 1st Defendant before and after the execution of the said contract.

That vide a letter dated 11th March 2019, the Defendants acknowledged debt of Kshs.38,229, 396 and USD 13, 502.27. The Defendants have no basis of raising the claim for Kshs.739,500,000 against the Plaintiff as he is no longer a shareholder of the 1st Defendant and any claim raised is between the Defendants and the third parties.

Further, that the Defendants were duly served on 13th February 2020 and after effecting service of both the Plaintiff and the Notice of Motion applications the Defendants immediately responded by filing a memorandum of appearance.

In response to the defendants Replying Affidavit the Plaintiff states that he responded to the Defendants demand and indicated that the said demand is misconceived and merely intended to delay the recovery of the outstanding sum due and owing to the Plaintiff

PLAINTIFF'S SUBMISSIONS

The Plaintiff's submissions are premised on two issues; -

- 1. Whether summary judgment may be entered on part only of the amount claimed**
- 2. Whether the Defendants defence raises triable issues**

Whether summary judgement can be entered on a portion of the claim?

The Defendants vide a letter dated 11th March 2019 acknowledged the outstanding debt of Kshs.38,229,396 due and owing to the Plaintiff. The Defendants admitted that they are indebted to the Plaintiff which admission is plain and clear.

Whether the Defendants defence raises triable issues?

The Defendants have neither disputed the existence of the contract nor the Plaintiff's performance of his obligations under the contract. It is also undisputed under the contract that the sum of Kshs.44,762,281 and USD 10, 000 together with interest was to be paid to the Plaintiff.

The Plaintiff is indemnified from any liability before and after exiting the contract. **Clause 3.2** of the contract for transfer of shares and refund of money provides as follows; -

“It is agreed by all parties from the date of execution of this contract the company and or remaining shareholders shall at all times undertake to indemnify the exiting shareholder against actions, proceedings, claims, liabilities and demands, damages and expenses which may be brought levied or made against the exiting shareholder by any person.”

The Plaintiff relied on the case of *Vehicle and Equipment Leasing Limited V Coca Cola Juices Kenya Limited [2017] eKLR* where the court held that the court should not shy away from allowing the claimant summary judgment on the reconciled amount and let any contested balance proceed to trial.

1ST AND 2ND DEFENDANTS SUBMISSIONS

The Defendants filed their submission dated 28th July 2020 and called upon the court to address the following issues; -

Whether the defendants' response to the Plaintiff's application raises triable issues for determination that make it necessary for the matter to proceed to full trial?

The Defendants submit that it has since come to their knowledge that the contract which the Plaintiff is laying claim on was entered into on the basis of concealment of facts on the part of the plaintiff. The Plaintiff entered into a contract namely '**Shareholders Agreement in Waiyaki Way Developers Limited**' dated 30th December 2015 which contract was never disclosed to the Defendants and only came to their attention when served with a claim from third parties.

As a consequence of the undisclosed agreement signed by the Plaintiff with the third party, the third parties thus have a claim of KShs.739,500, 000 against the Defendants. The defendants further submit that they filed a counterclaim for settlement of this figure which is way and above what the Plaintiff's claim.

The defendants highlighted the case of **Matex Kenya Ltd v East African Molasses Company Ltd[1993]** where Gicheru J. observed as follows; -

“The power to give summary judgmentis intended only to apply to cases where there is no reasonable doubt that a Plaintiff is entitled to judgment and where therefore it is expedient to allow a defendant to defend for mere purposes of delay (Jones v Stone 1894) as a general principle, where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence, he ought to have leave to defend.....”

In the case of **Yam V Bos [2019] eKLR** in dismissing an application for summary judgment Yano J. held as follows; -

“The purpose of the proceedings for summary judgment is to enable the plaintiff obtain a quick judgment where there is plainly no defence to the claim. To justify summary judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of its right to have his case tried by a proper trial where necessary there has been discovery and oral evidence subject to cross examination”

It's the defendant's submission that the defendants have raised triable issues and stand to suffer huge loss as a consequence of the plaintiff's non – disclosure and breach of contract. In any event, if both the defendant's counterclaim and the plaintiff's application were to succeed, then the Plaintiff's claim can be offset from the defendant's counterclaim. Further, the defendants have not admitted liability in this matter in any way and further they have been not served with any notices by the plaintiff before the filing of this matter.

ANALYSIS AND DETERMINATION.

The application was principally brought under **Oder 36 Rule 1(1) (a) and (2) CPR 2010** whether the application for summary judgment met the threshold or whether the defense set up by the Defendants raised triable issue(s).

The Applicant attached the following documents to prove its claim;

- a. The contract on Transfer of Shares and Refund of Money of 6th February 2017 between the Plaintiff and directors of 1st Defendant Company.
- b. **Clause 2.1** of the Agreement provided that the Exiting Shareholder shall transfer his shares in the 1st Defendant Company and will be refunded all the money he injected in the Company since its incorporation as Ksh 44,762,281 & USD 10,000
- c. 8 letters by Plaintiffs advocates to the Defendants advocates demanding settlement of the outstanding amount and confirmation of part payment to the Plaintiff.
- d. The Letter of 11th March 2019 by the Defendant's advocates admitting indebtedness on behalf of the Defendants to the Plaintiff and requesting the Plaintiff to be patient while the Defendants resolves the issue and settles the outstanding amount of Ksh 38, 229,396 & USD 13,502.27.

It would appear from the above outline, the Defendants owe the Plaintiff funds in return for sale of his shares to the Company and/or incoming Director/Shareholder.

The Defendants vide the Replying Affidavit claimed that the Plaintiff contracted the Transfer of Shares Agreement without disclosure of material facts. The 2nd Defendant claimed the Plaintiff failed to disclose the existence of a contract with 3rd Parties. The 2nd Defendant discovered the separate contract after a claim for 14 additional flats was made against Defendants by 3rd Parties. Later the claim spiraled upwards to 51 flats. The claim amounts to substantial amount of funds Ksh 739,500,000/- which claim the Plaintiff ought to settle first before pursuing his claim.

In **Harit Sheth T/a Harit Sheth Advocates v Sharma Charania [2014] eKLR** the Court held as follows:

“This court stated that the purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgement where there is plainly no defence to the claims. To justify summary judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-

examination (see also Continental Butchery Ltd v Ndihiwa (1989) KLR 573).

See also Dhanjal Investment Ltd v Shabaha Investments Ltd Civil Appeal No. 232 of 1997, the court had earlier stated as follows regarding summary judgment.

“The law on summary judgement procedure has been settled for many years now. It was held as early as in 1952 in the case of Kandial Restaurant vs Devshi & Company (1952) EACA 77 and followed by the court of Appeal for Eastern Africa in the case of Souza Figuerido & Company Ltd vs Mooring Hotel Ltd. (1959) EA 425 that, if the defendant shows a bona fide triable issue, he must be allowed to defend without conditions....”

The Defendants’ Defence is as follows;

- a. Paragraph 3- The Defendants admit the Contract of Transfer of Shares but contend that the contract was entered on concealment of material facts. The Plaintiff entered into a contract with 3rd Parties who have lodged a claim of 14 – 51 flats which would cause the Defendants to loose a colossal amount of Ksh 739,500,000/-.
- b. Paragraph 4- The Defendants allege that the Plaintiff was to indemnify the 2nd Defendant from claims, actions, proceedings demands damages and expenses. The Contract for transfer of shares Clause 3.2 it is the Defendants that shall indemnify the Plaintiff from all claims, demands etc and not the other way round.
- c. Paragraph 6- The Defendants raised Counter Claim /Setoff as follows; that the Plaintiff’s non-disclosure with 3rd parties who have now lodged a claim of additional Flats to be allocated to them would cost the defendants financial loss of Ksh 739,500,000/- which ought to be setoff from the Plaintiff’s claim against the Defendants.

Regarding what constitutes triable issues, in Kenya Trade Combine Ltd v Shah, Civil Appeal No 193 of 1999, the court stated as follows:

“In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed.”

Whereas, the Plaintiff’s claim for outstanding balance against the Defendant’s is fortified by the Contract of Transfer of Shares of 6th February 2017 duly executed by all parties in this matter, the correspondence between parties that confirms part payment all confirm a legitimate claim by the Plaintiff against the Defendants.

On the other hand, the Defendants vide their Defence and Replying Affidavit confirm that they also have a pending claim against the Plaintiff arising from undisclosed contract with 3rd Parties. Hence their Counterclaim and Setoff.

The Defendants in their Replying Affidavit aver that it was an implied term of the Contract for Transfer of Shares, with the Plaintiff, that the same was executed with full disclosure having been made and without mischief from any party.

However, the Plaintiff willfully failed to disclose the existence of a contract with a third party and therefore it is not prudent at this stage for the Plaintiff to demand any monies before trial in light of looming claims. The Plaintiff in response stated that it was the responsibility of the Defendants to conduct all due diligence before executing the contract for transfer of shares and refund of money.

Further, as a consequence of the undisclosed shareholders’ agreement which the Plaintiff signed with the third parties, the said third parties have now made a claim of **Kshs.739,500,000** against the Defendants. The Defendants have thus filed a counterclaim for the settlement of the figure. The Defendants aver that this figure is way above that claimed by the Plaintiffs and it would be prejudicial to the Defendants for the court to enter summary judgment against the Defendants while there is a pending counterclaim.

The Plaintiff annexed the said letters of demand by 2nd Defendant, dated 24th April 2020 & 24th March 2020 respectively to the Plaintiff which confirm the basis of the Counterclaim and Setoff. These assertions by parties confirm that Defence raises triable issues to be heard and determined at a full trial.

In Job Kilach vs Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono [2015] eKLR the Court observed:

“Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner. What then is a defence that raises no bona fide triable issue? A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black’s Law Dictionary defines the term “triable” as, “subject or liable to judicial examination and trial.” It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.”

See Also; Postal Corporation of Kenya vs. Inamdar & 2 Others [2004] 1 KLR 359 at p. 365

DISPOSITION

1. The Application for summary judgment is dismissed with Costs

2. The Defendants raised Counterclaim and Setoff in their Defence and these are triable issues to be heard and determined at Trial

3. Parties to pursue Case management within 60 days before Deputy Registrar and the matter be set down for hearing.

DELIVERED SIGNED & DATED IN OPEN COURT ON 26TH FEBRUARY 2021 (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

KIRUKI & KAYIKA ADVOCATES FOR PLAINTIFF/APPLICANT

N.K. MUGO & CO. ADVOCATES FOR DEFENDANT/RESPONDENT

COURT ASSISTANT: TUPET