



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO.87 OF 2013

BETWEEN

JOHN KENNEDY AGENGO T/A KENAGEN ENTERPRISES.....APPELLANT

AND

MOSES L. OCHANDA.....RESPONDENT

(Being an Appeal from the Ruling and Decree in Kisumu CMCC No. 395 'A' of 2012 by Hon. L. Gitari (CM) on 11th October, 2013)

JUDGMENT

Background

1. **MOSES L. OCHANDA** (*hereinafter referred to as Respondent*) and **JOHN KENNEDY AGENGO t/a KENAGEN ENTERPRISES** (*hereinafter referred to as Appellant*) entered into a sale agreement on 20th January, 2011 in which the Appellant offered to sell and the Respondent agreed to buy land parcel **EAST KISUMU/DAGO/644 (suit land)** for Kshs. 7,200,000/-.

2. The agreement appears to have fallen through as a result of which the Respondent filed suit in the lower court against the Appellant claiming:

(a) Kshs. 4,750,000/- being total purchase price paid

(b) Interest on Kshs. 2,000,000/- at 17% per annum from 17.07.12 until payment in full

(c) Interest on Kshs. 2,000,000/- at being penal interest for breach of contract

(d) Costs of the suit

(e) Any other relief the court may grant

3. The Defendant/Appellant acknowledged the existence of the sale agreement but faulted the Respondent for frustrating it for among other grounds allegedly making payments through third parties.

4. Subsequently, the Respondent brought an application dated 24.01.13 for summary judgment.

5. The application was heard interpartes and by a ruling dated 11.10.13, judgment was entered for the Appellant in the sum of Kshs. 4,750,000/- plus interest at court rates from date of filing and thereafter interest at 6% until the decree is satisfied.

The Appeal

6. The Appellant being dissatisfied with the lower court's decision filed the Memorandum of Appeal dated 15.10.13 which sets out 9 grounds mainly that the trial magistrate failed to appreciate that the statement of defence raised serious triable issues.

SUBMISSIONS BY THE PARTIES

7. When the appeal came before me for mention for directions on 30.07.19, I directed that the appeal be argued by way of written submissions which both parties dutifully filed.

Appellant's submissions

8. Appellant submitted that the statement of defence raised triable issues and that he ought to have been given a chance to defend the suit. In support thereof, Appellant placed reliance on:

i. Order 36 Rule 1(a)

ii. Olympic Escort International Co. Ltd & 2 Others Vs. Parminder Singh Sandhen & Another (2009) eKLR where the Court of Appeal stated this of a triable issue;

“It is trite that a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bonafide.”

iii. Moi University v Vishva Builders Limited [2010] eKLR where the Court of Appeal stated that:

“The law is now settled that if the defence raises even one bona fide triable issue, then the defendant must be given leave to defend.”

iv. Sultan Hardwares Limited v Steel Africa Limited [2011] eKLR the Court of Appeal stated the following:

We are aware that the suit in the superior court was not heard on its merits and what is at stake before us is whether the appellant should have been given an opportunity to be heard on its defence which had been filed. In the case of Lalji t/a Yakkep Building Contractors vs. Casousel Ltd. [1989] KLR. 386 the predecessors of this Court (Nyarangi, Platt, J.J.A. and Kwach, Ag. J.A.) held that:

“Summary judgment is a draconian measure and should be given in only the clearest of cases. A trial must be ordered if a triable issue is found or one which is fairly arguable is found to exist”.

Respondent's submissions

9. The Respondent submitted that its claim was liquidated and in support thereof relied on definition of a liquidated demand to mean:

A liquidated demand is in the nature of a debt, i.e a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a ‘debt or liquidated demand’ but constitutes ‘damages’...

10. The Respondent urged court to find that the terms of the sale agreement were not denied and that the Respondent had demonstrated that Appellant had received Kshs. 2,000,000/- at the time of execution of the sale agreement; that a similar amount was deposited to his account at NIC Bank-Kisumu whereas Kshs. 750,000/- was paid to Appellant through Ms. Olel & Company Advocates.

11. In support of its proposition, Respondent relied on:

i. Continental Butchery Limited vs. Samson Musila Ndura, Civil Appeal No. 35 of 1997 where the Court of Appeal stated:

With a view to eliminate delay in the administration of justice which would keep litigants out of their just dues or enjoyment of their property, the court is empowered in an appropriate suit to enter judgment for the claim from the plaintiff under summary procedure provided by Order 35 subject to there being no triable issues which would entitle a defendant leave to defend.

ii. Charles Githinji Muturi v Julius Nderitu Kabera [2009] eKLR where it was held:

..... as held in the case of **Gicien Construction Company v/s Amalgamated Trade Services (1983) KLR 156**, a party who opposes an application for summary judgment ought to place evidence by way of an affidavit showing some reasonable ground of defence.

iii. George Walter Shultz Vs - Gikandi Ngibuini T/A Gikandi & Co. Advocates [2004] eKLR where the court held that:

The power to enter summary judgment is however to be exercised when there is plainly no defence. Lord Halsbury in Jacobs Vs Booths Distillery Company 85 L.T. Reports at page 262 stated when such occasion arises in the following words:- “There are some things too plain for argument; and where there were pleas put in simply for the purpose of delay, which only added to the expense, and where it was not in aid of justice that such things should continue, Order XIV [equivalent to our order 35] was intended to put an end to that state of things, and to prevent sham defences

from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who are endeavouring to enforce their rights”.

But where the matter is not plain and obvious, a party is not to be deprived of his right to be heard. The Court of Appeal in *Industrial and Commercial Development Corporation Vs Daber Enterprises Ltd.* [2000] E.A. 75 at page 76 stated: - “Unless the matter is 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. ... The purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. And where the defendant’s only suggested defence is a point of law and the court can see at once that the point is misconceived or, if arguable, can be shown shortly to be plainly unsustainable, the plaintiff will be entitled to judgment.

iv. *Alfred Ndambiri V Registered Trustees Of The Legal Resources Foundation Trusts* [2013] eKLR where the court held that:

“a summary judgment can be entered in proper circumstances notwithstanding the presence of a sham defence on the record. A good example of that is the decision in *Starline General Supplies Ltd Vs Discount Cash & Carry Ltd.* eKLR where my brother Ochieng, J stated thus: -

“From the foregoing, it is evidence that even where a defence had been set up, the court may entertain a summary judgment application, and then proceed to grant judgment to that part of the claim which is either not covered by the said defence or which is admitted in defence.”

Analysis and Determination

12. I have considered the appeal in the light of the evidence on record, the submissions and the cited authorities.

13. The Appellant neither denied that he entered into a sale agreement with the Respondent nor did he deny the contents of the sale agreement.

14. The trial court after considering the sale agreement, funds transfer form and petty cash vouchers found as a fact that the Appellant acknowledged receipt of Kshs. 2,000,000/- at the time of execution of the sale agreement; that a similar amount was deposited to his account at NIC Bank-Kisumu and that he had acknowledged receipt of a further Kshs. 750,000/- that was paid to him through the firm of Ms. Olel & Company Advocates.

15. From the numerous authorities cited by the parties, Appellant was required to demonstrate by affidavit that he had a defence that raises a triable issue. Such a defence is not one that must succeed, but one that raises a prima facie defence and which should go to trial for adjudication.

16. I have considered the Appellant’s statement of defence and the grounds of opposition to the application dated 24.01.13, for summary judgment and I do not find it difficult in agreeing with the trial court that the Appellant did not demonstrate that the defence raised even one bona fide triable issue that entitled him to defend the suit.

17. Whereas I acknowledge that summary judgment is a draconian measure, the case advanced by the Respondent is too plain for argument. The defence was in my considered view a sham put in simply for the purpose of delaying the Respondent’s endeavour to enforce his rights.

18. In conclusion, I find that this is a plain and obvious matter that summary judgment was entered against the Appellant and I find no fault in the trial court’s decision in favour of the Respondent.

19. From the foregoing analysis, I am not persuaded that this appeal has merit. Consequently, the appeal is disallowed with costs to the Respondent.

DATED AND DATED IN KISUMU THIS 31ST DAY OF October, 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Amondi/Okodoi

For the Appellant - N/A

For the Respondent - Ms. Onyango