



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 86 OF 2011

KWACHA GROUP OF COMPANIES LIMITED. APPELLANT

VERSUS

ALMOND PRINT LIMITED. RESPONDENT

(Being an Appeal from the Ruling and Order of the Chief Magistrate's Court at Nairobi given on 24th February, 2011 (Hon. Okato) in CMCC NO. 8130 of 2009)

J U D G M E N T

By a plaint dated the 20th day of November, 2009 and filed in the Resident Magistrate's court at Nairobi on the 26th November, 2009, the Respondent Almond Print Limited lodged a claim against the Appellant Kwacha Group of Companies Limited for Ksh.180,670/- plus interest and costs.

The Respondent who was the Plaintiff in the trial court filed the Plaint against the Appellant in this Appeal and one Jimmy Wanjigi as the Defendants. The two Defendants filed two separate defences on 11th December, 2009. By way of a Chamber Summons filed on 28th January, 2010 the Appellant sought to amend the plaint and leave was granted by the court for the said amendment. The effect of the same was to strike out the name of Jimmy Wanjigi from the suit and also change the legal capacity of the Appellant from Kwacha Group of Companies to that of Kwacha Group of Companies Limited.

In its brief amended plaint, the Respondent claims against the Appellant is for a sum of Ksh.180,670/- on account of printing services rendered by the Respondent to the Appellant between the years 2008-2009, the full particulars whereof are well within the Appellant's knowledge.

In the Appellant's statement of defence, it denies that the Respondent rendered any services between the years 2008-2009 at the Appellant's instance or that it owes the Respondent the sum of Ksh.180,670/ as alleged in the plaint.

In its further defence and without prejudice, the Appellant states that sometime in the year 2008 the Respondent offered to print and sell customized Desk Calendars and purported to be specialized in printing works. It is further averred that the Appellant relied on the Respondent's experience, skill and judgment as the Respondent printed and sold the said calendars in the course of business and that it was an express and/or implied condition of the agreement between the Appellant and the Respondent that the calendars to be supplied would be of high quality.

The Appellant further pleaded that in breach of the agreement between them, the Respondent delivered calendars which did not fit the description, were not of merchantable quality and were poorly printed. The Appellant rejected the poor quality calendars and the property in the said goods did not pass to it but

remained with the Respondent and, therefore, the claim by Respondent for payment is misconceived and amounts to an abuse of the court process.

By a Notice of Motion dated 30th July, 2010 and filed in court on 9th August, 2010 the counsel for the Respondent sought orders for judgment to be entered for Respondent for the sum of Ksh.180,670/= plus interest thereon from the 20th January, 2009 till payment in full and costs as prayed for in the plaint. The said Application was based on the ground that the Appellant is truly indebted to the Respondent in the amount claimed and that the defence on record is a sham and does not raise any triable issues and its only meant to delay the early conclusion of the suit.

In the Affidavit in support of the said Application sworn by Alice Gathii - Muiruri the Managing Director of the Respondent, she depones that the amount claimed relates to the balance of unpaid amounts in respect of printing services rendered by the Respondent to the Appellant at its request and instance in the year 2008/2009 and several invoices were raised after the delivery of the goods to the Appellant. The said invoices are as hereunder: -

a) Invoice No. 2176 dated 8/12/2008	Ksh.24,650.00
b) Invoice No. 2186 Dated 16/12/2008	Ksh.10,440.00
c) Invoice No. 2187 Dated 16/12/2008	Ksh.87,000.00
d) Invoice No. 2202 Dated 23/12/2008	<u>Ksh.27,840.00</u>

Making a Total of **Ksh.149,930.00**

Less paid vide Cheque No. 00317 drawn from Chase Bank for Ksh.**134,560/-** leaving a balance of Ksh.**15,370/-**.

To this it was to be added

e) Invoice No. 2209 Dated 6/1/2009	Ksh.82,650.00
f) Invoice No. 2234 Dated 20/1/2009	<u>Ksh.82,650.00</u>

Making a grand total of **Ksh.180,670/-**

The said copies of delivery notes and invoices raised were annexed and marked AGM 1(A) – AGM 11.

According to her, the Appellant's defence filed in the trial court consists of mere denials and does not raise any triable issue as the only purported issue raised is self defeating as the Appellant never returned the calendars to the Respondent to date and cannot be heard to claim they were of a poor quality yet continue retaining them and that the goods were prepared as per the approvals by the Appellant and were calendars whose use and/or lifespan has now lapsed as they were to cover the year 2009.

The Application for summary judgment was opposed by the Appellant vide a Replying Affidavit sworn by Jimmy Richard Wanjigi on 1st September, 2010. In the said Affidavit, he admits that there was a contract between the Appellant and the Respondent for provision of printing services and that the Appellant has fully paid for the goods that were supplied in conformity with the order placed by it. With regard to the claim before the court, he avers that Respondent did not perform its part of the bargain as set out in the statement of defence.

He further avers that the defective calendars were rejected on delivery as they did not conform to the sample and the order placed by the Appellant and for that reason, the defence filed on behalf of the Appellant raises triable issues which should go for trial. According to him, the Application for summary

judgment is without any merit and should be disallowed with costs as the same is an abuse of the court process. He denies that the Appellant is indebted to the Respondent in the sum of Kshs.180,670/-.

The Application was heard and a ruling delivered on the 29th November, 2010 allowing the Application. The Appellant was dissatisfied with the outcome and filed a Notice of Motion dated 21st December, 2010 seeking among other prayers, a review and setting aside of the orders made on the 29th November, 2010, and that the summary judgment be disallowed and the Defendant be granted unconditional leave to defend the suit.

The main ground on which the Application was premised was that the court did not take into consideration the Appellant's written submissions and bundle of authorities which were missing from the court file. Though the same were filed on the 21st October, 2010 and a copy thereof handed to the court clerk to place in the court file, the said court clerk misplaced the same as a consequence of which the learned magistrate did not take into consideration the submissions and the authorities when he prepared his ruling that allowed the Application for summary judgment.

That according to him the inadvertent omission by the court clerk is a sufficient reason for grant of the orders sought for the review, the Application for review had been filed without undue delay and it's in the interest of justice that the Application is granted as prayed.

The Application was opposed by way of a replying affidavit sworn by Mrs. Sylvia Mathu on the 20th January, 2011. According to her, there is no sufficient reason that has been advanced in support of the Application and the same ought to be dismissed. She depones that the court file was in the custody of the trial court pending a ruling on the 29th November, 2010 and what the counsel for the Appellant ought to have done, was to forward the submissions through the Executive Officer of the court accompanied by the consent letter between the two Advocates extending time within which to file the submissions.

It was further deponed that the said consent has to date not been adopted as an order of the court due to the Appellants indolence and, therefore, the court was right in delivering the ruling as it did and in any event, the materials presented to the court in support of the Application for summary judgment were in the opinion of the court sufficient to warrant the granting of the orders. The Application for review was heard and it was dismissed on the 24th February, 2011 and hence the appeal herein.

The Appellant has filed an Appeal against the said ruling and has listed 6 grounds of Appeal as hereunder: -

- 1. That, the learned magistrate erred in law in dismissing the Appellant's application for Review and in declining and refusing to set aside the Ruling and Order of 29th November, 2010.*
- 2. That, the learned Magistrate erred in law in failing to appreciate that there was a sufficient reason to review and set aside his Ruling of 29th November, 2010 as the court had not taken into consideration the submissions and bundle of authorities filed by the Appellant but misplaced by the court clerk.*
- 3. That, in dismissing the Application for Review there is an Apparent injustice and the learned magistrate is duty bound to consider the submissions and authorities filed by the Appellant.*
- 4. That the learned magistrate erred in law and completely misdirected himself in assuming he had discretion in the Application for Summary judgment when as a matter of law he had no discretion to exercise and had to give unconditional leave to defend. The Application for Review was therefore not only merited but irresistible in law.*
- 5. That, the learned magistrate considered irrelevant issues in the application for Review, misdirected himself on the applicable principles and made a serious error of law.*

6. That the learned magistrate departed from the Pleadings and failed to consider the issues as pleaded by the parties and thereby arrived at a wrong decision.

The Application proceeded by way of oral submissions on the 2nd December, 2015 when the same came up for hearing.

I have carefully considered the submissions made by both counsels for the Appellant and the Respondent in support of and in opposition to the Appeal. The whole appeal revolves around whether the learned magistrate was right in dismissing the Application for review and refusing to set aside the ruling and order of 29th November, 2010 allowing the Application for summary judgment.

From what I am able to gather, the counsel for the Applicant filed submissions for the Application dated 1st October, 2010 late and the learned magistrate did not consider the same when he made his ruling as they were not in the court file. Though the learned counsels for the Appellant and the Respondent had agreed to extend time within which to file the submissions, the said consent was not adopted as an order of the court and according to the learned magistrate, even if the submissions had been placed in the court file, they would have been of no consequence as they had been filed out of time and there was no order to enlarge time within which to file the same and so he would not have considered them.

The learned magistrate goes further in his ruling to state and I quote: -

“Had he tendered excusable explanation I would have perhaps exercised my discretion in his favour but in view of the fact that I considered the depositions in the replying affidavit, I find that there is no mistake or error apparent on the face of the record and there is no other sufficient reason to review my orders of 29th November, 2010.”

And with that he dismissed the Application for review.

I have looked at the submissions by the Appellant and in my view they contain materials that would have been useful for the learned magistrate to consider. The same may have been filed late which was a mistake by counsel for the Appellant but as was pointed out in the case of **Belinda Murai & Others Vs Amos Wainaina (1978) LLR 2278.**

“A Mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by Senior Counsel. Though in the case of Junior Counsel, the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of law and adoption of a legal point of view which courts of appeal sometimes overrule....”

In the case of **Philip Chemowolo & Another -Vs- Augustine Kubede (1982-88) KAR 103 at 1040,** Apalo J. A (as he then was) poised: -

“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”

In that regard, the learned magistrate did not exercise his discretion fairly by failing to consider the submissions made by the Appellant notwithstanding that the same were filed out of time that he had given the parties.

On whether or not the learned magistrate misdirected himself when he allowed the Application for summary judgment: -

The principles which guide our courts in determining Applications for summary judgment are very clear. In the case of **Industrial and Commercial Development Corporation Vs Daber Enterprises Limited (2002) IEA 75** the court stated that the purpose of the proceedings in an application for summary judgment is to enable the Plaintiff to 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 his right to have his case tried by a proper trial.

In the case of **Dhanjal Investments Limited Vs Shabaha Investments Limited**, Civil Appeal No. 232 of 1997 the court had earlier stated as follows regarding summary judgment: -

“The law on summary judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of Kandnlal Restaurant v Devshi & Co (1952) EACA 77 and followed by the Court of Appeal for Eastern Africa in the case of Sonza Figuerido & Co Ltd v Mooring Hotel Limited [1952] EA 425 that, if the defendant shows a bona fide triable issue, he must be allowed to defend without conditions....”

Regarding what constitutes triable issues, in **Kenya Trade Combine Ltd Vs Shah** Civil Appeal No. 193/1999, the Court of Appeal 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.”

The Defendant is at liberty to show, by whatever means he chooses, whether by defence, oral evidence, affidavits or otherwise, that his defence raises bonafide triable issues. Where Bonafide issues have been disclosed, the court has no discretion to exercise in regard to the Defendant’s right to defend the suit, see **Momanyi Vs Hatimy and Another (2003) 2EA 600**. That is precisely the reason why the Defendant is entitled to unconditional leave to defend.

In this case and looking at the Appellant’s defence, can it be said that the same is plain and obvious that it discloses no triable issue? In my humble view, I think not. Paragraphs 6 and 7 of the defence, to me, raises some triable issues which can only be canvassed at the main hearing. Paragraph 6 of the Defence Reads: -

“In breach of the agreement between the Plaintiff and the 2nd Defendant the Plaintiff delivered calendars which did not fit the description were not of a merchantable quality and were poorly printed. The 2nd Defendant shall rely on the provisions of Section 6 of the Sale of Goods Act”.

While in Paragraph 7: -

“The second Defendant rejected the poor quality calendars and the property in the said goods did not pass to it but remained with the Plaintiff. The claim by the Plaintiff for payment is, therefore, misconceived and amounts to an abuse of the court process.”

From these two paragraphs the following issues would emerge: -

- 1) Were the calendars delivered to the Appellant fit the description?
- 2) Were they of merchantable quality and were they properly printed?
- 3) Did the property in the said calendars pass to the Appellant?

All these issues can only be properly dealt with at the hearing and not by a summary way.

In the premises aforesaid I am satisfied that the Appeal herein has merits and I allow the same in the following terms.

1. The Application for review before the Chief Magistrate's court dated 21st December, 2010 is hereby allowed.

2. The Ruling of the 29th November, 2010 by the Honourable Mr. Okato and the resultant decree be set aside and the Appellant be granted unconditional leave to defend the suit.

3. Each party to bear its own costs of the Appeal.

Dated, signed and delivered at Nairobi this 25th day of February, 2016.

.....

L. NJUGUNA

JUDGE

In the presence of

..... ***for the Appellant.***

..... ***for the Respondent.***