



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 199 OF 2012

DIAMOND INDUSTRIES.....PLAINTIFF

VERSUS

MISS YAHANARA GULAMSTAFAMA MUSA.....1ST DEFENDANT

JAMAL ABDULKARIM MUSA.....2ND DEFENDANT

RULING

1. The plaintiff has by its application by Notice of Motion dated 19.10.2015 applied for orders that summary Judgment be entered for the plaintiff against the defendant(s) as prayed in the plaint and that costs be provided for.
2. The application is premised on the grounds that the defendant is truly indebted to the plaintiff and was so indebted at the commencement of the suit; that the defendants have no reasonable defence to the suit as the defence filed is illusory a shown and an abuse of the court process purposely intended to delay the plaintiff from obtaining judgment and escalate expenses.
3. The application is supported by the affidavit of **FANUEL CHAMWOMA WOPWOKO** the gist of which is that during the period 2009-2010 the defendants ordered goods from the plaintiff on credit which goods were duly received by the defendants and their agents that the goods were partly paid for by cheques some of which cheques were dishonored while others were not presented at the request of the defendants who thereafter filed bankruptcy proceedings but the proceedings were latter dismissed. Reliance was placed on the witness statement filed by the 2nd defendant to the effect that the dealing, the value of goods supplied and the debt are not denied.
4. The application was opposed by the defendants who filed a replying affidavit by the 2nd defendant the gist of which was that the defendant never signed any delivery notes which in any event do not bear the rubber stamp of the defendants business name as a sign that the defendant never ordered any goods from the plaintiff and that the defence filed raises triable issues which have remained unresolved.

Analysis of the law on summary Judgment

5. Order 36 Rule 1 Civil Procedure Act provides:-

“In all suits where a plaintiff seeks judgment for:-

(a) a liquidated demand with or without interest; or

(b) the recovery or land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or recovery of the land and rent or mesne profits”

6. On very plain reading there is impression created that an application for summary judgment can only be made prior to the filing of a statement of defence. But that must be taken for what it is, a procedural provision not the substantive and the foundation of the process of summary judgment as a civil litigation remedy. One has to endeavour to establish the rational and justification of the procedure in our statute books.
7. In **CONTINENTAL BUTCHERY -VS- SAMSON MUSILA NTHIYA, CACA NO. 35 OF 1977** Medan J A in underscoring the purpose of summary procedure said:

“With a view to eliminating delays in administration of justice, the court is empowered in an appropriate suit to enter judgment for the claim of the plaintiff under summary procedure subject to there being no bona fide triable issue which would entitle a defendant leave to defend.

If a bonafide triable issue is raised, the defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defences raised are a sham”.

8. Granted that decision was made prior to the promulgation of the Civil Procedure Rules, 2010, those words still apply with equal force even if the later rules have added the words 'where the defendant has not filed a defence'.
9. I say the principles still apply because after that decision and over and above the overhaul of the Civil Procedure Rules, we have also adopted the overriding objectives of the court which command courts to do justice proportionately, without undue delay and to ensure costs are not escalated; Furthermore, Kenyans in vesting judicial authority on the courts commanded that justice should not be delayed and administered without undue regard to technicalities.
10. In seeking to find out the purpose of summary procedure which is to allow the plaintiff get judgment quickly where there is, plainly no defence to the claim, the court investigates what the defendant plans or intends to say in resisting the plaintiff's claim.
11. The revamped Civil procedure rules in introducing proactive case management and fair trial without ambush, obligates parties to not only file the documents they intend to rely on at trial, but also the witness statements to be tendered then. The defendant having filed a defence and witness statement his line of resisting the plaintiff's claim must, be discovered from those document plaintiffs.
12. In **KENYA TRADE COMBINE -VS- SHAH, CACA NO. 193 OF 1999** (unreported) the court of appeal held that the defendant is at liberty to show by whatever means he chooses, whether by defence oral evidence affidavit or otherwise that his defence raised *bonafide* triable issue. The court set the rule:-

“Where a bonafide triable issue has been disclosed the court has no discretion to exercise in regard to the defendant's right to defend the suit”.

13. From these decision, I am in no doubt that the defendant has an obligation to demonstrate that he has a genuine resistance to merit being allowed to proceed to trial at the hearing of the case. In our current dispensation, the documents that are to be considered are the defence, witness statements and any affidavit even if filed in opposition to an application for summary judgment.
14. If one is to investigate the defendant's defence to the suit, can it be truthfully said that the Rules Committee intended to lock out applications for summary judgment the date a defence is filed? Can it be gain said that the court must shut its judicious eyes to any treachery or a sham provided it is filed as a defence and go the long rout at calling evidence even if there is no

bonafide defence (issue) to be considered? would that meet the overriding objective of the court and satisfy fully application of the inherent powers of the court to guard against abuse of its process by delay? Would it be that a plaintiff files an application for summary judgment but as soon as the defendant files a defence the application is lost?

15. My reading of the provision of order 36 in entirety and Rules 4 & 5 in particular lead me to conclude and find that there could not have been an intention to take away the courts discretion to consider an application summary judgment merely because any sort of defence has been filed. If that were the intention then it would have been totally unnecessary and indeed a glaring contradiction to give the court a discretion and a chance to consider the defence filed. I hold that the provisions in the rules under Order 36 must be read in harmony with the entire act and wholly to give it the intended purpose.
16. In this finding, I find support and convincing persuasion in the decision by Fred A. Ochieng J in **STARLINE GENERAL SUPPLIES LTD. -VS- DISCOUNT CASH & CARRY LTD [2006] eKLR** when he said;

“I therefore hold that an application for summary judgment need not be filed before the defendant files a defence. Even after a defence has been filed, the plaintiff may bring an application for summary judgment”

Determination:

17. In the matter before the court the plaintiff has sued on account of goods sold and delivered by the plaintiff at the request and instance of the defendant and delivery taken by the defendant on negotiated credit terms.
18. To the plaintiffs claim, the defendant filed a statement of defence and a witness statement which at material parts read as follows:

Defence.

“4: Paragraphs 5 6 & 7 are denied the defendant aver that they did not order any goods from the plaintiff through Tanzym the goods allegedly ordered by TANZYM STORES was done by Rising Star Limited through Tanzym stores for onward transmission to Rising Star Limited.”

and Witness Statement of 2nd Defendant states:

“Sometimes in the year 2009, MR.AMIN NATHOO, who is the effective partner of a company known as RISING STAR LIMITED requested me to sell to him assorted goods which I did not readily have in stock.

I then approached the plaintiffs who had the goods RISING STAR LIMITED needed and they agreed to supply the some to me for onward transmission to RISING STAR LTD.

We agreed with the Director of RISING STAR LTD. That he would take delivery of the goods from the plaintiff, after which they would inform me of the quantities and cost so that I could issue post dated cheques for the payment of the goods.

...I was never aware that the payments that were being made into our account were far less than the value of the goods that RISING STAR LIMITED was procuring for the plaintiff. Upon asking what I shall do given that the post dated cheque I had issued were already being returned unpaid, he told me to go to the receiver and filed for bankruptcy.

He gave me Kshs.50,000 to cover the exercise.

It is only fair that the said RISISNG STAR LIMITED should indemnify me for all claims

arising out of the delivery and sale of goods in question.”

19. Strictly speaking, the witness statement is a clear admission of the suit that the goods were ordered for by the defendants t/a Tanzym Stores, that the goods were then taken delivery of by one RISING STAR LTD on account of the defendants on the understanding they would pay the defendant who would in return pay the plaintiff. The statement from them concedes and admits indebtedness but contends that the defendants are entitled to indemnity from the said RISING STAR LTD. Of note, however, is the fact that the right to indemnity has not been effectively sought in this matter by initiation of the requisite proceedings.
20. To that extent the statement is a complete departure from the statement of defence filed and in contravention of Order 6 Rule 6 Civil Procedure Act. Had that departure been to prejudice the plaintiff, I would have rejected and ignored the statement but in this case it serves to explain the circumstances leading to the debt being incurred. I take it to be the true evidence the defendant would lead if this matter was to proceed to trial on the merits and hold that there is no triable issue to merit going for hearing.
21. I have equally read the replying affidavit which stresses the fact that the defendant never signed the delivery notes; the delivery notes do not bear the defendants stamp and that the sum claimed in the application is at variance with that in the plaint.
22. I have pointed out that what would convince the court to allow the defendant a chance to defend the suit is a *bonafide* trial issue. In the present case, and on the basis of the witness statement signed by 2nd defendant, I fail to find a *bonafide* triable issue to merit this matter proceeding to full trial. I would and hereby enter summary judgment against the defendants jointly and severally in the sum of Kshs.18,000,000 as prayed in the application dated 19.10.2015.
23. In making this order I take note that even in the plaint, there are two sums pleaded; kshs.18,000,000 at paragraph 5 and 18,420,795 at paragraphs 6 & 7 as well as prayer (a). The application under consideration is however supported by affidavit under oath and a specific sum of kshs. 18,000,000 is shown to be owing. That is the sum for which I enter judgment for the plaintiff against the defendant. I equally award to the plaintiff the costs of this suit as well as interest on the principal sum from the date of filing suit till payment in full.
24. It is so ordered.

Dated, signed and delivered at Mombasa this. 19th day of February 2016.

In the presence of:-

Mr. Akee for Aziz for the Applicant/plaintiff.

No appearance for the Defendant/Respondent.

P.J.O. OTIENO

JUDGE