



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL 181 OF 2011

KARTAR SINGH DHUPAR & COMPANY LIMITED APPELLANT

VERSUS

MAU WEST LIMITED.....RESPONDENT

**(Being an appeal from the Judgment of Honorable Senior Resident Magistrate P. Nditika in
CMCC. No. 5982 of 2009 delivered on 13th April, 2011)**

JUDGMENT

1. The appellant; **Kartaar Singh Dhupar & Company Limited** was sued by the respondent **Mau West Limited** where it sought a sum of kshs 299,264/= being a balance of the money payable to the respondent for services it rendered to the appellant. Upon hearing an application for summary judgment dated 12th April 2010, the Magistrate allowed the application and ordered the appellant to pay the respondent the sum of kshs 299,264/=.
2. The Appellant, being dissatisfied with the judgment filed this appeal on the following grounds:
 1. *That the Learned trial Magistrate erred in law and fact by granting an order of summary judgement in favour of the respondent by ordering that the appellant pays the respondent the sum of kshs 299,264/= plus interest and costs.*
 2. *The Learned trial Magistrate erred in law and fact in holding that the appellant's defence in CMCC No. 5982 of 2009 is a sham and does not raise triable issues.*
 3. *The Learned trial Magistrate erred in law and fact by finding that the appellant is indebted to the respondent for the sum of kshs 299,264/= without affording the respondent the opportunity to be heard on merit with respect to the defence it had filed on 26th October 2009 which defence is dated 23rd October 2009.*
 4. *That the learned trial Magistrate erred in law and fact by granting an order of summary judgement for kshs 299,264/= in addition to ordering interest and costs even though the plaintiff's claim for the said sums was unsubstantiated and services for which the respondent was required to pay this sum were not expressly pleaded in the plaint.*
 5. *That the learned trial Magistrate erred in law and fact by granting an order of summary judgement for Kshs 299,264/= in addition to ordering interests and costs even though the defence filed by the appellant raised triable issues. The appellants replying affidavit dated 12th May 2009 and the supplementary affidavit dated 30th November 2010 also raised substantial questions for trial which the Hon Magistrate chose to ignore in order to un-meritously find for the respondent.*
 6. *That the learned trial Magistrate erred in law and fact by presupposing that the appellant satisfactorily executed the works it had been contracted to construct and presumed erroneously*

- that the quantum of works entitled the respondent to a sum of kshs 299,264/- plus costs*
7. *That the learned trial Magistrate erred in law and fact by granting an order of summary judgement for kshs 299,264/= in addition to ordering interest and costs without receiving sufficient evidence to justify a finding in summary judgement.*
 8. *That the learned trial Magistrate erred in law and fact by granting an order of summary judgement for kshs 299,264/= in addition to ordering interest and costs finding erroneously that the appellant had unequivocally admitted the debt yet the appellant filed a defence to the suit denying indebtedness to the respondent for the sum of kshs 299,264/=.*

This being the first appeal, it is my duty to re-evaluate the evidence tendered before the trial court and arrive at an independent conclusion taking into account the fact that I did not have the advantage of hearing the parties. In the case of **Peters v Sunday Post Ltd (1958) EA 424**, a decision of Court of Appeal for Eastern Africa, Sir Kenneth O'Connor, P said at p 429:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness.

But the jurisdiction “(to review the evidence) should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion.

Accordingly only when the finding of fact challenged on appeal is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the finding he did, will this court interfere with it.”

3. The appellant's case is that the respondent filed a suit claiming kshs 299,264/= for construction works relating to a swimming pool. When the matter came up for hearing, the respondent filed a summary judgment application which was granted despite the fact that the appellant had filed a defence that raised triable issues which defence was ignored. The appellant claims that he was aggrieved by the judgment which was based on un substantiated averments in the plaint as the debt was inaccurate. It argued further that since the dispute between the parties was in relation to construction work, then the same should have been subjected to trial for purposes of adducing evidence such as certificate of completion of works. It added that there was need for proof vide oral evidence for purposes of substantiating the claim and the court should therefore set aside the summary judgment and it be granted leave to defend the suit.
4. The respondent's case is that according to the appellant's affidavits, they deducted that there existed a contractual relationship between the parties. It claimed that the actions of the appellant which included payment done almost two years after receiving the last invoice is clear acknowledgement that the appellant owed money. It further argued that the sum of kshs 299,264/= is a sum owed to it by the appellant arising from works done on water proofing to concrete swimming pool and water tank apartment developed on Kikambala Road Kileleshwa Nairobi. It added that it had filed affidavits to the effect that the part payment of kshs 354,364/= had been paid leaving a balance of kshs 299,264/=. It claimed further that the appellant did not adduce evidence to deny the debt. It concluded that the claim was a liquidated demand which necessitated a summary judgment.
5. Having set out the background of this appeal I now wish to consider the merits or otherwise of this appeal. All the grounds of the appeal are interrelated. Generally, the appellant has complained that learned magistrate erred by finding that the appellant was indebted to the respondent for the sum of kshs 299,264/= without considering the appellant's defence, in finding that the appellant had admitted to the debt, assuming that the respondent had satisfactorily executed works which were not pleaded and which works entitled the respondent to a sum of kshs 299,264/= plus costs and entering a summary judgment to that effect.
6. Firstly, I wish to state that Summary Judgment as provided under Order 36 Rule 1(a) is a judgment that is issued in all suits where a plaintiff seeks judgment for a liquidated demand with or without interest. A **Summary judgment should only be entered where the amount claimed has been specified, is due and payable or has been ascertained or is capable of being ascertained as a mere fact of arithmetic. It has been stated that summary judgment is a**

draconian measure and should be given in only the clearest of cases. For summary judgment to be entered, the defence filed should be one that does not raise triable issues. A triable issue can be defined as an issue which raises a prima facie defence and which should go to trial for adjudication. In the case of Postal Corporation of Kenya vs. Inamdar & 2 Others [2004] 1 KLR 359 at p. 365 the Court said:-

“However, we have accepted that the application that was before the learned Judge was an application for summary judgment under Order XXXV rule 1 and 2. We must now consider whether the principles of law that need to be satisfied before such a judgment is entered were indeed satisfied. The law is now well settled that if the defence filed by a Defendant raises even one bona fide triable issue, then the Defendant must be given leave to defend.”

7. I must therefore consider whether the principles of law that needed to be satisfied before such a judgment was entered in the lower court were indeed satisfied. I have perused the parties pleadings and affidavits as filed. Indeed as submitted by the appellant, the respondents' pleadings were not categorical on what services were rendered to the appellant. The respondent only claims that it rendered services for a certain period for which services he was not compensated. The affidavits on the other hand are very specific on the services rendered and the several quotations that were sent to the appellant for payment. The appellant in addition to its defence, responded with a replying affidavit claiming that it did not approve the quotations and averred that there is no proof that the respondent undertook the construction. I have also perused the defence. The defence does not put forward any issues. The appellant in its defence merely denies that it owes the respondent any amount of money. It further denies that there were any services rendered to it by the respondent. The question therefore is whether these denials raise triable issues or they are mere denials.
8. I find that the defence contains mere denials. However, the same arises from the scanty pleadings that also did not disclose the cause of action in a clear manner. The respondent here referred to services that were rendered but did not specify what manner of services they were and how he arrived at a total sum of KShs 299,264/=. It is a paramount for a party claiming a liquidated amount to categorically state how it arrived at such an amount of money. There were quotations that were raised by the applicant and some cheques paid by the appellant but it is not clear how much is owed and how much has been paid. This court is left combing the applications and the annexures to come up with the exact money owing to the respondent if any. The skeleton defence as drafted in my view was as a consequence of the skeleton claim as put in the pleadings.
9. In my view, there is already contention as to whether the services were rendered or not and what exact amount of money was payable to the respondent. It would be in the interest of justice for both parties, for the matter to proceed for a full trial.
10. Consequently, the order entering summary judgment is hereby set aside and is substituted with an order dismissing the application dated 12.4.2010.

11. Costs of the appeal and the application is given to the Appellant.

The suit to be determined on merits before the trial court.

Dated, Signed and Delivered in open court this 12th day of February, 2016.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant.

..... for the Respondent.