



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 53 OF 2013

MEHUL NANDALAL SHAH.....PLAINTIFF/APPLICANT

VS

GIDEON KIOKO MBUVI.....DEFENDANT/RESPONDENT

RULING

1. The application before me is by way of Notice of Motion dated 10th June, 2014, brought under Order 36 rule of 1 (1)(a) and Order 36 rule 2 of the Civil Procedure rules, Order 51 rule 1 of the Civil Procedure rules, Sections 1A, 1B, 2 and 3A of the Civil Procedure Act. The Applicant seeks the following orders:-

i) The court enters summary judgment against the defendant for the sum of Kshs.24,000,000/= as prayed for (sic) in the plaint;

ii) That this court upon the issuance of summary Judgment against the Defendant for the sum of Kshs.24,000,000/= do issue a Preliminary Decree for the same and leave to the Plaintiff to execute the same; and

iii) Costs of the application be provided for.

The application is anchored on the grounds on the face of the application and the undated supporting affidavit of Mehul Nandalal Shah.

APPLICANT'S SUBMISSIONS

2. Mr Gathuku, Learned Counsel, held brief for Dr. Khaminwa for the Plaintiff/Applicant (the Applicant). He submitted that the Applicant filed a suit on 9th May, 2013, after obtaining leave to file a suit out of time. Summons were served to the Defendant/Respondent (Respondent) by way of substituted service. The Court was informed that the basis of the application is to be found at paragraph 13 of the plaint in that an agreement was reached by the parties on the payment of Kshs.4 Million that arose out of a deal. It was submitted that the relationship between the Applicant and the Respondent turned sour and the two signed an agreement before an Advocate on 24th May, 1996, which the Respondent failed to comply with.

3. The Court was informed that the Respondent entered appearance on 9th May, 2014, and filed a defence on 18th June, 2014, after the present application was filed on 10th June, 2014.

4. It was submitted that annexure marked MM1 to the applicant's affidavit is clear that the agreement was not signed under duress as there is a certificate at the bottom of the agreement to the effect that the applicant signed the same out of his own free will and understood its contents.

5. The Court's attention was drawn to the Respondent's affidavit at paragraph 11 where he deposes that he was doing the best for the recovery of the money and the Court was referred to the annexures marked as GKM 8 and GKM 9.

6. Mr Gathuku further submitted that for the Respondent to challenge the application he has to show that he has a reasonable defence. He cited the case of **Gicem Construction Company vs Amalgamated Traders & Services** [1983] KLR 156, to support the foregoing submission.

7. The Court was referred to paragraph 4 (e) of the Defence where the Respondent avers that he was made to sign the agreement in issue by the way of force, threats and intimidation. Counsel cited the case of **Sammy Muhia & others vs KPLC Ltd**, [2006] eKLR to support the assertion that the Respondent was not forced to sign the said agreement. Mr. Gathuku prayed for the application to be allowed.

RESPONDENT'S SUBMISSIONS

8. The Respondent filed a replying affidavit on 14th July, 2014 and his written submissions on 8th August, 2014. Mr. Omollo, Learned Counsel, holding brief for Mr. Magolo for the Respondent submitted that where a Defendant raises any triable issue, summary judgment is never entered. He cited the case of **Shah vs Padamshi** [1984] KLR, 531, where the court stated that caution should be exercised in granting summary judgment. He also relied on the cases of **Provincial Insurance Co. of East Africa Ltd vs Kivuti** [1995 – 1998] 1 EA 283 and **Lalji t/a Vakkep Building Contractors vs Carousel Ltd** [1998] KLR, to emphasize the point that if a triable issue is found to have been raised in the Defence or if an issue is arguable, summary judgment should not be entered.

9. It was submitted that the Respondent was an agent of a 3rd party who purported to sell property to the Applicant who paid a deposit of Kshs.2.5 Million through an Advocate, but the sale fell through. The Respondent and the 3rd party were arrested and while in custody the Respondent was made to sign an agreement to pay money to the Applicant. Mr. Omollo added that the Respondent and the 3rd party were prosecuted whereby the 3rd party was convicted and the Respondent acquitted. This information, it was submitted was contained in the Respondent's affidavit and was not controverted.

10. Counsel submitted that orders of extension of time to institute the suit which were granted *ex parte* can only be challenged at the trial. The Court was referred to the case of **Mary Wambui Kabugu Legal Representative of the Kabugu Mutaa vs Kenya Bus Services Ltd** [1997] eKLR, where Shah JA (as he then was) stated that the only time a Defendant can challenge an order granting extension of time is at the time of trial either on the facts or by arguments.

11. Counsel argued that the Applicant was trying to avoid a full hearing of the case where the issue of extension of time can be challenged. The Court was informed that section 28 of the Limitation of Actions Act does not provide for extension of time in a case based on contract and that the present suit was filed eleven (11) years out of time.

12. Counsel further submitted that the Respondent at paragraph 12 of his replying affidavit admits having signed the agreement under duress with a pistol placed on his head. Paragraph 13 of the said affidavit asserts that the Respondent reported to the Police that he was forced to sign an agreement on being threatened with a pistol, yet the applicant did not controvert the said assertion. The Court was urged to consider if any triable issue has been raised. The Respondent prayed for the application to be dismissed and that they be granted leave to defend the suit.

APPLICANT'S REJOINDER

13. Mr. Gathuku submitted that in the case of **Mary Kabugu** (supra), Justice Bosire (as he then was) strongly disagreed and stated that the question of a Judge of the superior court sitting on appeal on the granting of an *ex parte* order under the Limitation of Actions Act by another judge of the superior court, does not in the particular circumstances, arise.

ANALYSIS AND DETERMINATION

The issues for identification are:-

- (i) If the Applicant has made out a case for summary judgment; and
- (ii) If the Respondent should be granted leave to defend main suit.

14. A perusal of the allegations contained in the plaint are to the effect that the Respondent misrepresented himself as an agent of a 3rd party and offered a beach plot for sale for which he was paid Kshs.2.5 Million. It thereafter turned out that the said 3rd party was not the true owner of the plot and that the Respondent had no authority from the true owner to offer the said land for sale. The Applicant in the plaint contends that on 24th May, 1996, an agreement was entered into and that the Respondent agreed to pay the Applicant Kshs.4 Million as compensation for the loss that he had incurred as a result of the fraud. The said agreement was however not met thus the filing of the suit wherein the Applicant prays for judgment against the Respondent for the sum of Kshs.24 Million which is inclusive of interest at the rate of 30% for default of making good the payment of 4 Million. The claim in the plaint includes damages of Kshs.228 Million for loss of expectation, any other relief that the Court may grant and costs and interest.

15. The Respondent in his Defence denies ever receiving any payment from the Applicant and states that the purported owner of the property signed the agreements and received payments. He states that while in police custody, the Applicant by the use of force, threats and intimidation forced him to sign the said agreement. The Defence further states that the sum being demanded is incredible, unfair and amounts to extortion. He also avers that the suit is time barred and an abuse of the court process.

16. In the instant case, the Respondent has raised the issue of signing of an agreement under duress, that requires him to pay Kshs.4 Million. He has also raised the issue of the extension of time to file the suit that was granted *ex parte*.

17. In the decision of **Nairobi Golf Hotel (Kenya) Ltd v Lalji Bhimji Sanghani Builders and Contractors**, Civil Appeal No. 5 of 1997, the Court of Appeal had this to say of applications for summary judgment:-

“It is trite law that in an application for summary judgment under Order XXXV rule 1 of the Civil Procedure Rules, the duty is cast on the defendant to demonstrate that he should have leave to defend the suit. His duty in the main is limited to showing, prima facie, existence of bonafide triable issues or that he has an arguable case. On the other hand, it follows, a plaintiff who is able to show that a defence raised by a defendant in an action falling within the purview of Order XXXV, is shadowy or a sham is entitled to summary judgment.”

18. In the case of **ICDC vs Daber Enterprises Ltd (2000) 1 EA 75**, the Court of Appeal 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 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.”

19. Having perused the application at hand, the response thereto, the Plaint, the Defence and submissions of the Counsel on record, it is my finding that the Respondent's Defence raises triable issues of law and fact. The Respondent claims that he signed the agreement that forms the backbone of the suit herein

under duress and that leave should not have been granted to the Applicant to file the current suit out of time.

20. In his judgment in the case of **Bernard Mutenga Mbithi vs Municipal Council of Mombasa and Another**, Civil Appeal No. 3 of 1992, (unreported) Kwach, J.A, (as he then was) albeit obiter dicta, set out the issue of grant of leave to file a suit out of time in the

following words:-

“..... the question whether or not the plaintiff was entitled to the extension can only be challenged in the proceedings. This is one of the exceptions to the general rule that a party against whom an exparte order has been made can only apply to the court which made the order to set it aside.”.

21. In the instant case, leave to file the suit out of time was granted *exparte* and there is nothing final about. This court notes that any objection that the Respondent has can only be raised during the hearing of the suit. As was held in the Mary Wambui Kabugu case (supra), a Judge who tries the case is the one who must rule finally whether the plaintiff has satisfied the conditions for overcoming the time bar. He/she is not bound by the view expressed by the Judge in chambers who granted leave. The circumstances of this case therefore calls for the full hearing of the case where the Respondent will have the opportunity to fully canvass his case.

22. For the foregoing reasons, I hereby make the following orders:-

(i) the application dated 10th June, 2014, is hereby dismissed;

(ii) The Defendant/Respondent is hereby granted leave to defend the suit and the defence filed on 18th June, 2014, is deemed to be properly on record; and

(iii) Costs to the Defendant/Respondent.

DELIVERED, DATED AND SIGNED at MOMBASA in open court

on this 31st day of August 2016.

NJOKI MWANGI

JUDGE

In the presence of:

.....**for the Applicant**

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

Rose EchorCourt Assistant