



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 264 OF 2008

JASON ONDABU T/A ONDABU & CO. ADVOCATES.....APPELLANT

VERSUS

DR. MOSES KINUTHIA.RESPONDENT

(An appeal from the ruling and decree of the Honourable A. Ileri (Mrs.) Resident Magistrate Milimani Commercial Courts delivered on 29th April, 2007 in CMCC No. 6546 of 2007)

J U D G M E N T

The appeal herein arises from the Ruling and decree of the Honourable A. Ileri (Mrs.) Resident Magistrate Milimani Commercial Courts which was delivered on the 29th April, 2007 in CMCC no. 6546 of 2007.

The said ruling was in respect to the application dated the 1st day of November, 2007 by way of Notice of Motion wherein the Applicant/Plaintiff sought orders for summary judgment in his favour as prayed for in the plaint plus the costs of the application.

The genesis of the matter before the lower court, as pleaded by the Plaintiff, was that in or about February, 2007, the Defendant sought the intervention of the Plaintiff in negotiating a settlement in Nairobi chief Magistrates' Court Civil suit No. 3208 of 2005 (**Daniel Orenge Vs Pentapharm Limited**) at a fee.

That the Plaintiff and the Defendant duly agreed on the Plaintiff's charges at Ksh.100,000/- in respect of which at the conclusion of the negotiations by the Plaintiff and the said Pentapharm Limited, two cheques were issued to the Defendant in settlement of the negotiated settlement, the Defendant issued to the Plaintiff undated cheque No. 000055 of Ksh.100,000/-

It was agreed between the Plaintiff and the Defendant that the Plaintiff would date and bank the cheque for payment to coincide with the payment of the first cheque issued by the said Pentapharm Limited to the Defendant on the 20th March, 2007.

Accordingly on the 20th March, 2003, the Plaintiff dated the cheque and advised the Defendant prior to banking the same for payment on the 21st March, 2007 but the said cheque was dishonoured and the Plaintiff duly gave the Defendant notice of dishonour. The Plaintiff claim was for the sum of Ksh.100,000/- as aforesaid or in the alternative, the sum of Ksh.100,000/- for the dishonoured cheque.

In the statement of defence, the Defendant denied having sought the intervention of the Plaintiff in negotiating a settlement in Nairobi CMCC No. 3208 of 2005 and averred that the Plaintiff lacks capacity,

ability and skills to engage in any meaningful negotiations in matters pending before the court. The Defendant admitted having issued the cheque but averred that it was meant to be security for the plaintiff's expert witness expenses which was to be banked upon fulfillment of the following conditions.

- a) If the Plaintiff attends court and testifies.
- b) Once the Defendant received payment on behalf of Mr. Daniel Orege and only
- c) When the Defendant advises the Plaintiff in writing.

It was further contended that civil suit No. 3208 of 2005 in which the Plaintiff was to attend court as a witness was compromised by the parties and therefore, no payment was due to the Plaintiff as none of the requirements for payment were met. That the Plaintiff was asked to return the cheque which he refused to do and the same was stopped and was not dishonoured as alleged by the Plaintiff.

A reply to defence was filed on the 13th September, 2007 wherein the Plaintiff has joined issues with the Defendant in its defence save so far as the same consists of admissions. The Plaintiff denies that he gave any prescription to Daniel Orege or that he confiscated the said prescription as alleged by the Defendant. He further denied that the said cheque was meant to be security for his expert witness expenses or that the cheque was issued subject to the conditions alleged by the Defendant or that he failed to meet the conditions for payment. He contended that having been an intermediary between the parties in the said suit, he could not have been a witness but in any event by 21st February, 2007 he had been successful in enabling the parties to the said suit arrive at a compromise.

On hearing the application for summary judgment, the learned magistrate allowed the same and the Defendant being dissatisfied with the ruling has appealed to this court and has listed the following grounds of appeal: -

- 1) That the learned magistrate erred both in law and fact in not considering the set down law as regards summary judgment applications.
- 2) That the Learned magistrate erred both in law and fact in finding that there was a valid contract between the Appellant and the Respondent.
- 3) That the learned magistrate erred in law and fact by refusing to appreciate and consider the cogent evidence adduced by the Appellant in opposition to the Respondent's application.
- 4) That the learned magistrate misdirected himself in law and fact by not considering the issues raised in the defence on record relating to the privity of contract.
- 5) That the learned magistrate misdirected himself in law and fact by not considering that the Plaintiff had filed a Reply to the Defence thereby effectively admitting that there were triable issues raised in the Appellant's statement of defence.

Parties agreed to dispose off the appeal by way of written submissions which they filed and which this court has duly considered together with the authorities cited.

After summarizing the case by the respective parties, the grounds of appeal can safely be collapsed into two which are: -

- 1) Whether the learned magistrate erred both in law and in fact in striking out the Appellant's statement of defence.
- 2) Whether the Appellant's statement of defence raises triable issues: -

“The principles which guide our courts in determining an application for summary

judgment are not in dispute. In Industrial Commercial Development Corporation Vs Daber Enterprises Limited (2000) IEA 75 the court stated that 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. 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 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 appeal herein revolves around the law on summary judgment. The same principles that guide the court when dealing with an application for summary judgment were laid down in the case of Nairobi HCCCC No. 556 of 2010 (**Kioko Mangeli & another Vs Murage & Mwangi Advocates**) in which Justice Aburili cited with approval the holding in the case of **Harit Sheth T/A Harith Sheth Advocates Vs Shamas Charama, Civil Appeal No 252 of 2008 (2014) eKLR**.

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 Vs Dewhi & Co. (1952) EACA and followed by the Court of Appeal for Eastern Africa in the case of Sonza Figuerido & Co. Ltd Vs 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 a triable issue, in the case of **Kenya Trade Combine Ltd Vs Shah**, Civil Appeal No. 193 of 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 court went on further to say, the Defendant is at liberty to show by whatever means he chooses, whether by defence, oral evidence, affidavits or otherwise, that his defence raises bona fide triable issues where bona fide 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 & Another (2003) E.A. 600**.

See also the case of **Dedan King’angii Thiongo Vs Mbai Gatuma**, Civil appeal No. 292 of 2000 and **Bangue Indosuez Vs DJ Lowe & Co. Limited**.

Looking at the case before the court, and in view of the above cases, can it be said that the defence filed in the lower court is plain and obvious and that it discloses no triable issues?

The subject matter of the original suit is cheque No. 000055 for Ksh.100,000/- that was issued to the Plaintiff/Respondent. In paragraph 7 of the defence, it has been averred that the said cheque was issued on certain conditions which have been set down therein. The cheque was supposed to be banked upon fulfillment of those conditions by the Respondent which conditions he failed to fulfill, following which, the Appellant stopped the payment of the cheque.

Further in paragraph 10, the Defendant has pleaded that the subject cheque was not dishonoured but to the contrary it was stopped by the drawer, the Appellant herein.

In the reply to defence, the Plaintiff in paragraph 4 has denied that the cheque was issued subject to the conditions stated by the Defendant/Appellant and he has put him to strict proof thereof. From the foregoing, the issue that arises is whether the subject cheque issued to the Plaintiff/Respondent was to be banked upon fulfillment of the said conditions or not.

The Appellant alleges that when the cheque was presented for payment, there were sufficient funds in the account and the reason why it was not paid was because he stopped the payment of the same.

The only way the court would establish the truth is by taking evidence from the parties which could only be done at full hearing. The learned magistrate erred in law and in fact in allowing the application for summary judgment. In my view, this is not a matter that can be said to be plain and obvious as to deprive the Defendant of his right to be heard.

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

1) The Ruling delivered on the 29th April, 2008 by Hon. A. Ireri is hereby set aside and the Appellant is hereby allowed to defend the suit in Milimani RMCC No. 6546 of 2007. The matter shall proceed to full hearing on merits.

2) Costs of the appeal are awarded to the appellant.

Dated, signed and delivered at Nairobi this 31th day of October, 2016.

.....

L NJUGUNA

JUDGE

In the presence of

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

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