



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 266 OF 1999

INTERGLOBE SERVICES LTD PLAINTIFF

V E R S U S

HAMA WARE HOUSING LTD DEFENDANT

RULING

1. This case was filed on 10th June 1999. Why it has taken so long to be concluded is not clear to me.
2. When the matter was listed before me it was for the hearing of the Notice of Motion dated 16th May 2001.
3. The Plaintiff's claim is for Kshs. 1,433,080.85 being the alleged balance of the amount due and payable by Defendant for services rendered by the Plaintiff to the Defendant. The plaintiff did not elaborate on what those services were.
4. The Defendant by his defence filed on 14th July 1999 denied Plaintiff's claim and further denied having received any services from the Plaintiff.
5. It is the Notice of Motion dated 16th May 2001 for summary judgment and the affidavit in support that elucidated the Plaintiff's claim. The Plaintiff claim is in respect of the alleged request by the Defendant for the Plaintiff to discharge and bag bulk wheat for the Defendant from the Port of Mombasa from Vessels MV Leros Spirit and MV Chios Harmony. Plaintiff annexed its invoices addressed to the Defendant for that service totaling Kshs. 31,691,948.70. Plaintiff further stated that it was charged Kshs. 103,854.65 by Kenya Port Authority because the Defendant delayed to collect the wheat. The Defendant paid Kshs. 17,600,000/- and Kshs. 12,662,722.50 and Kshs. 100,000/- which left the amount now claimed as owing. Plaintiff relied on various invoices entitled Misc Port Services which invoices were raised by the Kenya Port Authority. It is difficult to confirm that those invoices related to Defendant's services and it is also difficult to confirm the amount they represent because they are stated in US Dollars.
6. The defence also elucidated its defence in its replying affidavit. That replying affidavit poked holes into each and every document Plaintiff relied on in its application. Defendant drew the Court's attention to its letter dated 14th April 1994, which the Plaintiff relied on as proof of the request for services, and stated that the letter did not state the amount of tones Plaintiff was to bag for Defendant. Defendant denied it received the tones claimed by Plaintiff and further stated that

Defendant's invoices, annexed to the application accordingly had errors.

7. Having considered the application, the parties affidavits and submissions I form the view that this is not a suitable case for the entry of summary judgment. The principle that should guide the Court when considering such an application was discussed by the Court of Appeal in the case HARIT SHETH T/A HARIT SHETH ADVOCATES -Vs- SHAMAS CHARANIA (2014)eKLR-

“The principles which guide our courts in determining applications for summary judgment are not in dispute. In INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION -Vs- DABER ENTERPRISES LTD (2000)1 EA 75 this 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 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. (See also CONTINENTAL BUTCHERY LTD V NDHIWA (1989)KLR 573).

In DHANJAL INVESTMENTS LTD V SHABAHA INVESTMENTS LTD Civil Appeal No. 232 of 1997, the Court had earlier stated as follows regarding summary judgment:

“The law on summary judgement procedure has been settled for many years now. It was held as early as in 1952 in the case of Kandlal Restaurant vs Devshi & Company (1952) EACA 77 and followed by the Court of Appeal for Eastern Africa in the case of Souza Figuerido & Company Ltd vs Mooring Hotel Ltd (1959) 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 V SHAH, Civil Appeal No. 193 of 1999, this Court 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 bona fide triable issues. (See DEDAN KING'ANG'I THIONGO V MBAI GATUMA, Civil Appeal No. 292 of 2000 and BANQUE INDOSUEZ V D J LOWE & CO LTD, Civil Appeal No. 79 of 2002. Where bona fide triable issues have been disclosed, the Court has no discretion to exercise in regard to the Defendant's right to defend the suit. (See MOMANYI V HATIMY & ANOTHER (2003)2 EA 600). That is precisely the reason why the defendant is entitled to unconditional leave to defend.”

8. The Defendant has in its replying affidavit raised bona fide triable issues and this makes the Plaintiff's case not to be a plain and obvious one where summary judgment can be entered.
9. Too much time has been expended by the Plaintiff in having the application for summary judgment to be heard. This case as stated before was filed in 1999 and time is now ripe for it to be concluded. It is for the above reasons that I make the following orders-
- a. The Notice of Motion dated 16th May 2001 is dismissed and costs thereof shall be in the cause.
 - b. Due to the age of this case, at the reading of this Ruling parties will be given a hearing date

and direction of pre trial shall also be given.

DATED and DELIVERED at MOMBASA this 3RD day of APRIL, 2014.

MARY KASANGO

JUDGE