

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 192 of 2007

ALFRED NDAMBIRI. APPELLANT

VERSUS

THE REGISTERED TRUSTEES OF THE LEGAL

RESOURCES FOUNDATION TRUSTS. RESPONDENT

(From the ruling and orders of E N Maina, Ag. Senior Principal Magistrate in Milimani CMCC No. 10578 of 2004)

J U D G M E N T

This appeal arose from a ruling dated 28th February, 2007 under an application dated 6th October, 2006. The application filed by the Plaintiff/Respondent herein, sought summary judgment against the Defendant/Appellant for a sum of Kshs.104,920/- with costs. The application was brought under Order XXXV rule 1(1) of the Civil Procedure Rules (now repealed).

In her short ruling the trial court found as a fact based an affidavit evidence that the Appellant had on 23rd July, 2001 received a sum of Ksh.109,920/- constituting court judgment settlement of a claim under RMCC No. 4871 of 1999 in favour of the Respondent herein (see Page 19 of Record of Appeal). The Appellant also had acknowledged receipt of the said amount on 24th July, 2001 and had promised to forward the amount to the Respondent (see page 20 of Record). Furthermore he surprisingly indicated in a letter dated 18th October, 2001 that what he had received was Kshs.90,000/-. The Appellant in the correspondence had even proposed to pay the amount to the Respondent by monthly instalments and had gone ahead and paid Ksh.5,000/- on 30th June, 2004. The trial court accordingly saw only a sham defence in the written defence the Appellant had already filed in court. She went ahead to enter a summary judgment thereby provoking this appeal.

The Appellants grounds of appeal fault the trial court in having entered the summary judgment on the ground of admission by the Defendant under a different rule of Civil Procedure. He also raised the grounds that his defence raised triable and legal issues and that the admissions relied on were made on a without-prejudice basis.

I have carefully perused the documents upon which the application for the summary judgment was based. I have perused and analyzed the trial magistrate's ruling that entered the summary judgment. I find that the Appellant admitted receiving the relevant sum of Kshs.109,920/- from Mwangi Murage & Co. under the former's letter dated 24th July, 2001 and promised to forward the money to Respondents. In his letter dated 18th October, 2002, to the Legal Resources Foundation, he proposed to pay the same amount to M/s Mwangi Murage & Co. Advocates by instalments from end of October, 2003 which he did not do. He again in a letter dated 30th June, 2004 to M/s Enonda, Makoloo, Makaori & Col. promised to settle the debt by monthly instalments of Ksh.10,000/- effective 1st January, 2005. He however, sent a cheque of Ksh.5000/- with his above proposal.

The Appellant did not deny the above admissions and part-settlement. With these facts, no court would entertain any doubts that the Appellant owed the sum claimed. The trial court was accordingly fully entitled to enter the judgment it did and I find no reasonable ground upon which to interfere with the

trial court's ruling.

The argument that the entry of summary judgment was in error because it was entered under the repealed O. XXXV rule 1(i) after a defence had been filed, is also not correct in law. Under the Original rule under the repealed rules, a summary judgment can be entered in proper circumstances notwithstanding the presence of a sham defence on the record. A good example of that is the decision in **Starline General Supplies Ltd Vs Discount Cash & Carry Ltd, eKLR** where my brother Ochieng, J stated thus: -

“From the foregoing, it is evidence that even where a defence had been set up, the court may entertain a summary judgment application, and then proceed to grant judgment to that part of the claim which is either not covered by the said defence or which is admitted in defence.”

I entirely agree with the court's reasoning above. In this case the whole sum claimed and upon which summary judgment was entered, had been admitted. It is only, very sad that this process of wasting court's and parties time by prolonged sham proceedings is being done by an honourable and learned counsel who is an officer of this court.

The final result is that this appeal has no merit at all. It is hereby dismissed with costs to the Respondent. Orders accordingly.

Dated and delivered at Nairobi this 8th day of March, 2013.

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D A ONYANCHA
JUDGE