



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 62 OF 2011**

**1. ESTHER WAMAITHA NJIHIA,  
2. FIRST ASIAN SECURITIES LIMITED,  
3. SUSAN W. NJENGA .....**  
**PLAINTIFFS**  
**- VERSUS -**  
**SAFARICOM LIMITED .....**  
**DEFENDANT**

**RULING**

1. This is the plaintiffs’ notice of motion dated 22<sup>nd</sup> March 2011. The plaintiffs pray for summary judgment in the sum of Kshs 25,520,000 together with interest and costs. The primary foundation of the motion is that the defendant is truly indebted to the plaintiff as evidenced by copies of cheques in the annexure marked “SN” to the affidavit of Susan Njenga sworn on 22<sup>nd</sup> March 2011. That is the evidential matter sworn at paragraph 4 of that brief deposition.
2. The defendant contested the motion by a replying affidavit of John Muriuki, its manager, sworn on 3<sup>rd</sup> June 2011. The defendant averred that on various dates between 16<sup>th</sup> January 2007 and 16<sup>th</sup> August 2007, it did receive the sum of Kshs 25,520,000 but from an entity known as Nat Communication Limited. The defendant avers that the said company collected goods from it matching that consideration. It is averred that the plaintiffs are strangers to the defendant as at no time did the defendant run an investment club offering any interest to any person or the plaintiffs in particular. In a synopsis, the defendant denied indebtedness to the plaintiffs.
3. It would appear that in response to the above deposition, the plaintiffs, then filed a supplementary affidavit of Susan Njenga sworn on 16<sup>th</sup> June 2011. Although the defendant says this affidavit was filed without leave, I have noted that corresponding leave was granted by court on 26<sup>th</sup> May 2011. But the affidavit was to be filed within 3 days. It was filed out of time, but being on record I am enjoined to consider it. The latter affidavit is more detailed and states that the plaintiffs dealt with yet another company known as Phone World Limited. It is averred there that Phone World Limited was the agent of the defendant to whom the plaintiffs paid the sums claimed in the suit. It is averred in particular that those payments were made directly to the defendant’s account as per copies of the cheques, banking slips and statements of account annexed to the supplementary affidavit. The plaintiffs also question the veracity of the annexures marked “JM2” to “JM6” in the replying affidavit and the fact that Nat Communication Limited has not sworn an affidavit to verify the claims therein.

4. My view of the matter is this. The plaintiffs say they are owed Kshs 25,520,000 by the defendant being money had and received. No contract between the plaintiffs and the defendant is exhibited. The defendant says these monies were received from a third party known as Nat Communication Limited. The plaintiffs assert they dealt with Phone World Limited as an authorized agent of the defendant. No agency agreement is exhibited. The debt claimed is a substantial sum by any measure. Granted that set of facts, I am unable to say that clear and obvious evidence of the indebtedness of the defendant has been presented to the court.

5. The legal principles underpinning summary judgment are well settled. Summary judgment is to be granted only in the clearest cases and where there is no triable issue capable of going to trial. It is to be granted where the defence set up is a mere sham or a stratagem to delay trial.

6. Order 36 rule 1(1) (a) provides that in all suits where the plaintiff seeks judgment for a liquidated sum with or without interest he may apply for judgment. The burden then shifts to the defendant at rule 1(2) to demonstrate by affidavit or otherwise that he should be granted leave to defend. Such leave will be granted if the defendant demonstrates he has a good defence to the action. This position of the law is buttressed by the provisions of section 25 of the Civil Procedure Act.

7. If a defendant demonstrates there is a triable issue, the court has no recourse but to grant unconditional leave to defend. See the decision in *Osondo Vs Barclays Bank International Limited* [1981] KLR 30. The same principle is espoused by the Court of Appeal in *Momanyi Vs Hatimy* [2003] 2 E.A. 600. Again, the purpose of summary judgment is to expedite determination of cases but is an inappropriate procedure where the court is being invited to decide “difficult questions of law which call for detailed argument and mature considerations” and which would best be left to evidence at the trial. See *American Cyanamid Co. Vs Ethicon Limited* [1975] 1 ALL ER 504, [1975] AC 396.

8. This general principle can be again gleaned from the old case of *Churanjilal & Co Vs Adam* [1950] 17 E.A.C.A 92 where Sir Graham Paul V-P said of summary judgment application:

“ .. It is desirable and important that the time of creditors and of courts should not be wasted by the investigation of bogus defences. That is one important matter but it is a matter of adjectival law only, embodied in Rules of Court, and cannot be allowed to prevail over the fundamental principle of justice that a defendant who has a stateable and arguable defence must be given the opportunity to state it and argue it before the court. All the defendant has to show is that there is a definite triable issue of fact or law”

9. I am of the considered opinion that when the facts in the motion are reflected against the principles of law above, the defence herein cannot be said to be a sham or one that does not raise a triable issue. Some of those triable issues revolve around the identity of Nat Communication Limited; the existence or otherwise of a contract between the plaintiffs and defendant; its consideration; and whether Phone World Limited were authorized agents of the defendant. It would be hard to say that on the evidence now presented, the defendant is truly or justly indebted to the plaintiffs. It would call for detailed evidence and arguments that are the true province of the trial court. I thus find that the defendant has raised a stateable and arguable defence and should be granted unconditional leave to defend the suit. I grant that leave. It must then follow that the plaintiffs’ notice of motion dated 22<sup>nd</sup> March 2011 has no merit and the same is dismissed with costs to the defendant.

It is so ordered.

**DATED and DELIVERED at NAIROBI this 20<sup>th</sup> day of January 2012.**

**G.K. KIMONDO**  
**JUDGE**

***Ruling read in open court in the presence of***

Mr. Bahati for the Plaintiffs.

Mr. Kinoti for Simiyu for the Defendant.