



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 25 OF 2011

GEOFFREY MUKOTO OWEKI.....PLAINTIFF

- VERSUS -

KENYA GOOD NEIGHBORS.....1ST DEFENDANT
PARK YOUNG WON.....2ND DEFENDANT

RULING

1. There is before me a notice of motion by the plaintiff dated 25th March 2011 seeking summary judgment for the sum of Kshs 2,700,000 together with interest and costs. The plaintiff has sworn a brief affidavit in support on even date.
2. The plaintiff's principal grounds are that by a settlement agreement dated 28th March 2008 executed by the parties, the defendants agreed to pay the plaintiff a sum of Kshs 3,500,000 as damages for breach of his copyright in a musical composition titled *nipe haki zangu*. The defendants, in part payment, paid Kshs 800,000 in two installments on 9th April 2008 and 23rd July 2008 leaving a balance of Kshs 2,700,000 now claimed. According to the plaintiff, there is then no feasible defence to the suit and judgment should be entered as prayed.
3. The application is contested by a replying affidavit filed in court on 25th May 2011. The replying affidavit denies the averments at paragraphs 6,7,8 and 9 of the plaint. The defendants aver that the present notice of motion is at variance with the prayers in the plaint. The defendants deny they are indebted to the plaintiff or that they have admitted the indebtedness by part payment. One key argument in the defence is that the defendants signatures were obtained by misrepresentation that the plaintiff is the composer of the song and by coercion through Buruburu police station by causing the defendant's employees to be arrested. They also state that the agreement the subject matter of the suit has not been stamped and should not be admitted in evidence. In summary, the defendants aver they have a good defence that should go to trial.
4. I am of the following considered opinion. The document titled settlement agreement dated 28th March 2008 is simple and straight forward. It is executed by all the parties and required the defendants to pay the plaintiff the sum of Kshs 3,500,000 for infringement on his copyright in the song *nipe haki zangu*. The defendants, had recorded the song or performed it through Jirani children choir without the consent of the plaintiff. The defendants have made part payment as aforesaid of Kshs 800,000 leaving the balance now claimed. I hold and find that the part payment constituted an admission for the debt. I also

find that this is a liquidated claim that falls within the ambit of order 36 rule 1 of the Civil Procedure Rules.

5. To my mind, the defendants averments in the replying affidavit and the defence are a red herring. I have not seen cogent evidence of the misrepresentation, fraud or that the plaintiff was not truly the composer of the said song. If the defendants were so coerced, why did they pay the initial two installments of Kshs 800,000? And why did the defendants execute the settlement agreement that is so clear about their obligations to pay the plaintiff Kshs 3,500,000? I am of the view that parties to commercial agreements must be held to their bargain. See Morris & Company Limited Vs Kenya Commercial Bank Limited [2003] 2 E.A 605. This court should not rewrite contracts for the parties unless it was so unconscionable as to be against public policy. I also note there is no counterclaim by the defendants.

6. 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.

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.

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.

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”

7. For all the above reasons, I find the defence set up by the defendant to be hollow and a sham and one that does not traverse the plaintiff’s claim adequately or raise a triable issue. I find in the result that on a balance of probability, the plaintiff has proved his claim and is entitled to summary judgment.

8. I thus allow the notice of motion by the plaintiff dated 25th March 2011. I enter judgment in favour of the plaintiff against the defendants jointly and severally for Kshs 2,700,000. Interest is awarded at court rates from the date of the suit (2nd February 2011) till full payment. I also award the plaintiff costs of the motion.

It is so ordered.

DATED and DELIVERED at NAIROBI this 25th day of November, 2011.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of
Ms Omboko for Bahati for the Plaintiff.

Mr. Ndolo for the Defendants.