



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 559 of 2006

JAZIRA AGENCIES NAIROBI LTD PLAINTIFF

VERSUS

HASSAN AHMED ZUBEDI DEFENDANT

RULING

Coram Mwera J.

Taib for Applicant/Plaintiff

Kipngeno for Kiplagat for Respondent

By this old notice of motion dated 13.06.02 and amended on 21.1.10 the plaintiff company sought orders under Order 35 Rule (1), (8) Civil Procedure Rules in the main:

1) that summary judgment be entered in its favour for Sh. 7,997,500/= as per the plaint, against the defendant.

It was stated in the grounds that the defendant was well and truly indebted to the plaintiff in the said sum being either the money lent or money had and received by the defendant as per various bankers cheques; that there were no triable issues raised in the defence which was termed a sham, vexatious and an abuse of the process of court. The plaintiff's general manager and financial controller one, Igbal Kanji, swore the supporting affidavit on which Mr. Taib relied to argue the application. Mr Kipngeno held a contrary position on behalf of the defendant.

Mr Taib told the court that the plaintiff paid the sum claimed which the defendant received and all that was in the plaint. The court heard that the payment was by three banker's cheques drawn in favour of or for the benefit of the defendant. They were crossed and could only be paid to the defendant. The copies of the cheques were exhibited. That the first cheque no. 049255 drawn by the plaintiff's bank, First American was issued on 6.5.97 for Sh. 3,900,000/= and paid to Mashreq Bank Ltd on instructions of the defendant. On 3.4.2001 the plaintiff's bank confirmed that that

transaction went through.

That there were other 2 cheques. No. 050991 for sh. 2,737, 149/75 was drawn in the name of the defendant. It was cleared through his bank, Daima Bank. So was cheque no. 050922 similarly drawn and cleared – both on 23.07.97.

Counsel submitted that the defendant admitted in the replying affidavit receiving those 2 last cheques particularly, yet he attributed the payments to some 3rd parties – Mohamed and Abdallah Ali, with whom the plaintiff had no dealing. Then referring to the replying affidavit Mr Taib maintained that the documents the defendant exhibited eg. an uncaptioned document (HAZ -1) bearing Daima Bank, Bank of America International and Banque Francaise de L'Orient with the names of Hassan Hafedh, Abdalla Ali & Mohamed Ali had no bearing on the plaintiff's transactions with the defendant.

Finally, that if the defendant disputes the cheque drawn on Mashreq Bank, he had absolutely no defence, to the 2 other cheques and judgement at this stage should be pronounced in favour of the plaintiff.

Mr. Kipngeno's position was that in the light of his client's replying affidavit and the amended defence the plaintiff had not demonstrated that the defendant was justly and truly indebted to it either on account of money lent or money had and received. And it had not shown that there was no triable issue. In this regard the case of Continental Butchery Ltd Vs Samson Musila Nthiwa CIVIL APPEAL No. 35/77 was cited. The court heard that there was no deed placed before it with a covenant that the plaintiff lent money and the defendant received it for the latter to repay. Asked whether the defendant received any of the sums claimed, counsel repeated that the amounts received by the defendant were for the use of Mohammed and Abdullah Ali to purchase US dollars – and not for the use of the plaintiff. He stressed that the Mashreq Bank cheque was not for the defendant. That the plaintiff had not shown that the defendant received from it money which in equity belonged to it such that this court can grant the relief sought. The two had no business dealings and so if there was any lending and accepting money only a trial should unravel that – not by summary judgment. Mr Taib responded that a party who has received money can be compelled to pay it back in circumstances as these. Reasons for the exchange of the money cannot form a triable issue.

In what appears as an amended plaint dated 20/2/01 the plaintiff averred inter alia that as money had and received by the defendant to the use of the plaintiff through banker's cheques, the latter be ordered to satisfy the plaintiff's claim against him of sh. 7,997,500/=. In the alternative it was pleaded that that sum of money was lent to the defendant and he failed to pay it back.

In its re-amended defence of 21.4.05 the defendant denied that he received any money to the use of the plaintiff and thus the plaintiff would not be entitled to recover it. He did not receive any banker's cheques from the plaintiff in such alleged deal, since the two had no transactions between them.

Regarding the present motion the plaintiff reiterated/adopted the contents as per the amended plaint and the affidavit sworn on its behalf filed with the initial notice of motion that was later amended. In essence the 3 cheques by

which the defendant was paid Sh. 7,997,500/= as claimed, had been set out. All the time in the amended defence the defendant denied ever having received any bankers cheques from the plaintiff company. Specifically he singled cheque no. 049 235 for Sh. 3.9m which the plaintiff claimed that it had it drawn by its bank and paid to the defendant's bank on instructions of the defendant. He denied it all saying that Mashreq Bank was not him. This, however changed in the replying affidavit sworn on 4.2.10:

9. That as regards the other 2 cheques I have, checked with my bank and confirmed that – the said cheques were issued to me by Mr. Mohamed Ali and Abdallah Ali as the purchase price for Dollars the two were purchasing from me.”

These two cheques are numbers 050991 for Sh. 2,737,149/75 and 050992 for Sh. 1,360 -350/25. The documents said to have been received from the defendant's Daima Bank included a statement of one Hassan Ahmed Hafedh. On 24.7.97 there were 2 entries on the defendants account, if he is one and the same person as the defendant, two entries had similar/same or equal sums of money to the ones borne by the 2 cheques in question. The 2 entries were against same entry no. 69659. It was not clear what this entry stood for. Indeed there was also a similar entry no. 69659 of the same 24.7.97 for Sh. 1,402,500/=. This document did not in any way relate to the plaintiff company.

But be that as it may. At a stage like this, seeking summary judgement, the claim put forth ought to be so clear as not to require delving into evidence. Summary judgement proceedings are intended not to keep a claimant away from what he can quickly get judgment for without delay and undue costs and waste of time. Being mindful of the above and having gone over the relevant part of the pleadings, the affidavits and the annexures, this court is satisfied that the plaintiff is entitled to and it gets judgement for the total sums of the two cheques nos. 05 0991, 050992 drawn and crossed in favour of the defendant himself. He alone could lodge them for payment and he did so at his Daima Bank. Their clearance/payment was reflected and confirmed by the plaintiff's First American bank. If he had separate deals with Mohamed and Abdallah Ali, that is the defendant's own matter. He need not bring it here to muddy the waters. The sum due on those two cheques should be paid in the next 30 days considering the age of this case. In equity the defendant ought to pay this money to the plaintiff. The defendant has no reason to keep it.

As for cheque no. 049255 for sh. 3.9m, the defendant denies that it was paid to Mashreq bank on his instructions. Even as this court doubts the truthfulness of the defendant on this account, may that aspect of the claim go to trial to be set down as soon as the court diary allows.

In sum there is part judgement in favour of the plaintiff as sought by this motion. And because the rest of the claim is pending, an order for costs here will await that outcome.

Orders accordingly.

Delivered on 23.3.10.

J. W. MWERA

JUDGE