

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

Civil Suit 376 of 2009

SARJU SHAH.....PLAINTIFF

VERSUS

TRACK IT LIMITED (IN RECEIVERSHIP).....DEFENDANT

RULING

The plaintiff files suit against the defendant seeking to be paid the sum of Ksh.1,870,000/- on account of payment of some cheques which were presented to the bank but were dishonoured. The plaintiff filed suit against the defendant after the defendant had placed under receivership by a debentureholder. The defendant filed defence denying owing the plaintiff the amount claimed in the suit. In the alternative, the defendant pleaded that the plaintiff's status, once the defendant was placed under receivership, was that of unsecured creditor and therefore his claim could not be considered to rank superior to the rights of the debentureholder.

On 22nd September, 2009 the plaintiff filed an application pursuant to the **Provisions of Order XXXV Rule 1(1)(a)** and **Order VI Rule 13(i)(c)** of the **Civil Procedure Rules** seeking the striking out of paragraphs **3** and **5 (a)** and **5(b)** of the defence. The plaintiff further prayed that consequent to the granting of the above prayer, summary judgment should be entered in favour of the plaintiff as prayed in the plaint. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of the plaintiff. The application is opposed. Mary Radido, the joint receiver and manager of the defendant company swore a replying affidavit in opposition to application. Counsel for the plaintiff and the defendant filed decided cases which they relied on during the hearing of the application. At the hearing of the application, I heard oral submissions made by Mr. Kabiru for the plaintiff and by Mr. Sarvia for the defendant.

Having considered the facts of this case and the submissions made by learned counsel, the issue for determination by this court is whether the plaintiff established a suitable case for this court to enter summary judgment in his favour. As was held by Visram J (as he was then) in Provincial Insurance Co. Ltd vs Dinners Club Africa Ltd & anor[2005] eKLR at page 2:

*“summary procedure is a radical remedy and a court of law should be slow in resorting to this procedure which can only be applicable in plain, clear and obvious cases. In **D. T. Dobie & Company (Kenya) Ltd vs Muchina (1982) KLR. 1 at page 9** Madan JA (as he then was) said:*

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way”.”

In the present application, this court can only grant the plaintiff's application for summary judgment if the plaintiff establishes that the defence filed by the defendant does not raise any triable issue and therefore should be struck out. In the present application, it was the defendant's contention that the defence that filed raised triable issues in that it challenges the entire substratum of the plaintiff's suit which seeks judgment to be entered against a company which has been placed under receivership by debenture holder. The second triable issue is that the defendant alleges that some of the cheques that the plaintiff seeks entry of summary judgment were issued to a person other than the plaintiff. On his part, the plaintiff reiterated that it had established a suitable case for the striking out of the defence filed by

the defendant. In particular, the plaintiff argued that the defendant had not given cogent answer to the thrust of the plaintiff's claim which was to the effect that the defendant had issued cheques to the plaintiff which upon presentation to the bank, were dishonoured. The plaintiff's case is predicated upon the application of the Bills of Exchange Act in regard to dishonoured cheques.

It was clear to this court that the fact that the defendant has been placed under receivership by the debenture holder is a triable issue. The placing of the defendant under receivership affects the ranking of the plaintiff as a creditor of the defendant company. The plaintiff's debt cannot rank higher than that of the debentureholder. It was apparent that the plaintiff is seeking to enforce a debt owed by the defendant to one Miloo Shah. That is a triable issue which can only be resolved in a full trial by the court. It is trite law that where a defendant establishes even one triable issue, such defendant should be granted unconditional leave to defend the suit. In the present application, the defendant has raised at least two triable issues which shall be determined in full trial.

The upshot of the above reasons is that the plaintiff's application for summary judgment cannot be allowed. It lacks merit. It is hereby dismissed with costs. The defendant is granted unconditional leave to defend the suit.

DATED AT NAIROBI THIS 28TH DAY OF MAY, 2010

L. KIMARU

JUDGE