REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Suit 182 of 2008
ETS PALUKU KATALIKO……PLAINTIFF
-VERSUS-
1. SDV TRANSAMI (K) LTD……1ST DEFENDANT
2. PIL (KENYA) LIMITED……2ND DEFENDANT

RULING

The plaintiff came before the Court by Notice of Motion dated 25th August, 2008 and brought under Order **XXXV** rules 1 and 2 of the Civil Procedure Rules, and s. 3A of the Civil Procedure Act (Cap. 21, Laws of Kenya).

The plaintiff's main prayer was that this Court should enter summary judgment against the defendants for the sum of U.S. $ 82,836.

The application was founded on the grounds that: the plaintiff's container had been lost in circumstances unknown to the plaintiff; this loss was attributed to 1st and 2nd defendants; loss to the plaintiff is occasioned by delay on the part of the defendants in paying up the value of the lost goods, which value is well known to the defendants; the defendants have no defence, as there is "general admission that the container got lost and….the plaintiff never received it".

Ebale Kambale, a director of the plaintiff company, swore a supporting affidavit in which he deposed that the plaintiff had imported a container which was shipped by 2nd defendant and was to be cleared by 1st defendant – as shown in the bill of lading. The said container did not reach the plaintiff, and there was no explanation of the failure to clear and deliver. After much delay in delivery, the plaintiff inquired with 1st defendant, the clearing agent; and 1st defendant's legal officer responded by letter of 21st June, 2008 saying that the clearing agent was "unable to lodge the entry and take hold of the consignment since another party who is a stranger had taken delivery of the goods". The plaintiff later learned that 1st defendant had already taken up the matter with 2nd defendant and was demanding from 2nd defendant U.S. $ 82,836 – the value of the lost goods. On 15th July, 2008 the deponent wrote to 1st and 2nd defendants asking for expeditious compensation to plaintiff: but there was no response. The deponent, in the circumstances, expresses his belief that "the defendants have no defence…..since they admit that the consignment got lost".

Mwangi Gitau, the legal officer of 1st defendant, swore a replying affidavit which, rather than being a document of evidence, contended that "the bill of lading referred to is in itself inconclusive evidence of material facts to show that there [existed] a contract to clear the container from the port and the terms of the contract are not clearly laid out"; that "1st defendant wrote to 2nd defendant as regards theft of the subject container and it did not admit liability at all to the plaintiff herein"; that "1st defendant company has a strong defence to this claim, and triable issues which should only be tried in a full trial as opposed to a summary manner as sought by the plaintiff"; that "1st defendant herein has taken steps and has filed third-party proceedings against Kisa Freight Forwarders, the agents who allegedly cleared the goods from the Port and it will only be just that issues between the third party and the defendants herein be tried simultaneously with the issues between the plaintiff and the defendants and the third party".

The 2nd defendant's Traffic/Equipment Manager, ***Jim Mwangi***, swore a replying affidavit on 15th September, 2008 averring that 2nd defendant was only an agent for Pacific International Lines (Pte)Limited and had no direct or contractual relationship with the plaintiff; and so 2nd defendant was agent of a disclosed Principal and should not have been sued. The deponent deposed that 2nd defendant had written a letter indicating non-acceptance of the alleged value of the lost goods. The deponent deposed that: no allegation of theft or negligence had been made or proven against 2nd defendant; 2nd defendant's defence raises weighty issues on whether there was forgery or fraud by third parties.

Learned counsel ***Mr. oddiaga*** submitted that summary judgment should be entered because the defendants' pleadings do not show them deserving of leave to defend the suit; because the amount claimed had been specified; because the claimed amount is due and payable and has been ascertained; because there was no need for the court to conduct any further inquiry on the amount claimed.

Learned counsel stated the plaintiff's case (as stated in the amended plaint of 23rd July, 2008) to be that it contracted 1st defendant to clear for it container No. PCIU 2598864STC234 from the port of Mombasa and the services were duly paid for; but the consignment was never delivered to the plaintiff. Counsel notes that 1st defendant denies the plaintiff's allegations, but 2nd defendant who was a clearing agent confirms in its defence (para. 2) its involvement and the particulars of the container as given by the plaintiff. Counsel relies on a letter written to 2nd defendant by 1st defendant on 8th July, 2008 as confirming the loss of the cargo in question. Counsel submits that 1st defendant's affidavit contradicts the statement of defence, because the relevant deposition admits that loss had occurred, and that the obligation to clear the consignment rested with 1st defendant. It was urged that 2nd defendant's attempt, in the replying affidavit, to exonerate 2nd defendant, should fail because there is an admission that 2nd defendant was a clearing agent.

Counsel urged that the value of the lost goods was as given by the plaintiff, as the defendants did not prove otherwise. ***Mr. Oddiaga*** urged that this application for summary judgment was consistent with principles laid down in the Court of Appeal decision, ***Gurbaksh Singh & Sons Limited v, Njiri Emporium Ltd***. [1985] KLR 695. The guiding principle in that case is summarized in the head-note (p.695) as follows:

"Summary judgment for a plaintiff may be granted under Order XXXV ***rule 1(1) (a) for,*** inter alia***, a debt or liquidated demand with or without interest unless the defendant shows he should have leave to defend the suit as per Order*** XXXV ***rule 2(1).***

"Summary judgment should only be entered where the amount claimed has been specified, is due and payable or has been ascertained or is capable of being ascertained as a mere matter of arithmetic."

It was counsel's prayer, in the alternative, that any leave to the defendants to defend the suit should be conditional; and in this regard reliance was placed on the Court of Appeal decision in ***City Printing Works (Kenya) Ltd v. Bailey*** [1977] KLR 85 in which it was thus held:

"If on an application to sign summary judgment under the Civil Procedure Rules, Order XXXV***, rule 1, the defendant advances a defence which is reasonable, or plausible, and*** bona fide***, the judge must allow him unconditional leave to defend. Where, however, the judge regards the proposed grounds of defence as a sham, he has a discretion, if he grants leave to defend, to impose conditions on the defendant."***

For 1st defendant, learned counsel ***Mr. Oloo*** contested the case for summary judgment, citing the principle in the ***Gurbaksh Singh*** case, that (op.cit; p. 696):

"An application for summary judgment cannot be allowed or applied in cases where a detailed defence has been filed, as the court cannot ignore the defence filed and proceed with the case by way of summary procedure".

Counsel urged that 1st defendant has filed a detailed statement of defence and replying affidavit "which ought to see the light of day or else the defendant will be condemned unheard".

Counsel submitted that 1st defendant, indeed, had raised a triable issue in the statement of defence: that "the alleged loss was caused by [the] involvement of …third parties, that is Kisa Freighters and not 1st defendant", and so this question should be subjected to a full hearing. The call for such a hearing was based on the principle that "it is trite law that where there is a triable issue though it may appear that the defendant is not likely to succeed, the defendant should not be shut out from laying his defence before the Court. Counsel relied on the Court of Appeal decision in ***Gupta v. Continental Builders Ltd***. [1978] KLR 83 in which it was thus held (p.87):

"…this was an application for summary judgment. If a defendant is able to raise a *prima facie* ***triable issue he is entitled in law to unconditional leave to defend. On the other hand, if no*** *prima facie* ***triable issue is put forward to the claim of the plaintiff, it is the duty of the Court forthwith to enter summary judgment for it is as much against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a plaintiff out of his dues in a proper case.*** *Prima facie* ***triable issues ought to be allowed to go to trial, just as a sham or bogus defence ought to be rejected peremptorily."***

To the same effect, the Court of Appeal held in ***Gohil v. Wamai*** [1983] KLR 489 that (at p. 494):

"The respondent if he wants leave to defend may show he is entitled to it by affidavit or oral evidence or otherwise [Order XXXV rule 2]. So, if the applicant has set out in his affidavit(s) in support of his motion and exhibits facts which are probably true and sufficient to warrant the granting of his prayer for summary judgment the respondent must discharge the onus on him of showing his defence(s) raises triable or *bona fide* ***issues. They will be ones of law and fact. If they are of fact, then, bare denies by the respondent or his advocate in a pleading or a letter will not do because there must be a full and frank disclosure of the facts before the Court which will be proper and sufficient for it to rule that those issues are raised."***

Learned counsel submitted that the Notice of Motion of 25th August, 2008 should be dismissed, as the statement of defence raises triable issues which can only be determined at the full hearing.

The 2nd defendant, similarly, contested the plaintiff's application, relying on the content of their statement of defence and of their replying affidavit. Apart from adopting 1st defendant's position in this application, 2nd defendant's stand was that they had raised triable issues which should be given a hearing under the main suit; and these issues are:

(i) ***whether there was any contractual relationship between the plaintiff and 2nd defendant;***
(ii) ***whether 2nd defendant as an agent of a disclosed principal (Pacific International Lines (PIL) Ltd.) would be liable;***

(iii) ***whether a second third-party, the Kenya Ports Authority, is liable for having released the subject container to Kisa Freighters Ltd. (first third-party) on the basis of forged documents;***

(iv) ***whether there was fraud, forgery and/or collusion.***

Relying on the Court of Appeal decision in ***Five Continents Ltd. v. Mpata Investments Ltd*** [2000] LLR 3847 (CAK), learned counsel ***Mr. Omondi*** submitted that "even a single triable issue is sufficient to entitle a defendant to leave to defend". From that authority, the following passage may be noted:

"In our judgment this was not a plain and obvious case [in] which summary judgment could have been entered. There was a genuine dispute on the defendant's liability to the plaintiff which can only be resolved at the trial".

Counsel urged that the case in this instance is not a plain or obvious case: and so summary judgment should not be entered.

Counsel submitted that some of the issues raised in 2nd defendant's defence – fraud, forgery and/or collusion – were in their nature triable issues. The relevant Court of Appeal authority on this point is ***Westmont Power Kenya Ltd v. Frederick & Another*** [2003]LLR 3874 (CAK), and the following passage in the judgment may here be set out:

"It is quite unusual to enter summary judgment when serious allegations of fraud and other [wrong-doings] are made. Such issues can only be decided during a proper trial and not on conflicting affidavits."

Counsel submitted that it was a relevant matter, in respect of the plaintiff's application, that 2nd defendant had enjoined two third parties in the suit – by consent. The effect, it was urged, was that there is on record a consent order stating that the question of liability between 2nd defendant and 2nd third party be tried together with the question of liability between the plaintiff and the defendants. Counsel urged, in the circumstances, that "the application…cannot…conclusively address the issue of liability between [the] parties….." The effect of the ***consent***, too, it was urged, was that the question of liability can only be determined at the trial.

In the assertions made in the pleadings, the plaintiff states that 1st and 2nd defendants were liable for the loss of the container – and the plaintiff puts a value on the said container, a value which is disputed by the defendants. The 1st defendant denies the alleged joint liability, and contests the basis of the valuation of the lost container. The 2nd defendant denies liability on its part, and blames third parties who, indeed, were subsequently enjoined in consent orders involving the plaintiff and the two defendants.

On the foregoing facts alone, it is quite evident that the setting is for a ***trial***, and a technical resolution giving judgment on ***prima facie*** scenarios and without systematic trial, is unlikely to yield just results.

The consent order for the joinder of third parties is to be assumed to have been founded on the common perception that the lines of liability were so complex, that the third parties needed to be brought in. That by itself, is an acknowledgment of the intricacy of the case, and the need to resolve tangled issues; and informed by the authority of ***Gupta v. Continental Builders Ltd***. [1978] KLR 83; ***Gohil v. Wamai*** [1983] KLR 489; ***Five Continents Ltd. v. Mpata Investments Ltd.*** [2000] LLR 3847 (CAK) and ***Westmont Power Kenya Ltd. v. Frederick & Another*** [2003] LLR 3874 (CAK), I have to observe that the case-scenario emerging is too complex in relevant issues to lead to a "yes" or "no" answer – and so is ill-suited to summary judgment. A correct determination of the issues touching on liability can only be made after normal trial. I have considered the contents of the pleadings by each party, and I find them to be posing

questions that cannot be answered by merely looking at the face of the document, or taking submissions that rest only on affidavits and assessments of the relevant law; the evidence has to be taken in full, in normal trial.

The 2nd defendant clearly (paragraphs 4,5 of the statement of defence) attributes blame to acts of forgery and fraud which may touch on third parties: and claims of such a nature are so inherently contestable, that they are not to be disposed of by final judgments that rest on prima facie perception. Such controversial issues are also raised in 1st defendant's statement of defence (notably para. (6) of the statement of defence).

It is clear to me that this is not a matter for disposal by summary judgment. I therefore disallow the plaintiff's Notice of Motion of 25th August, 2008. The plaintiff/applicant shall bear the costs of 1st and 2nd defendants/respondents.

Orders accordingly.

DATED and **DELIVERED** at **MOMBASA** this 14th day of May, 2010.

J. B. OJWANG
JUDGE