



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Suit 202 of 2007**

**ALBANY TAYLOR & ANOTHER.....PLAINTIFF**

**VERSUS**

**STELLA NAFULA KHISA & ANOTHER.....DEFENDANT**

**RULING**

The plaintiffs instituted this suit against the defendants seeking for judgment for a liquidated sum of Kshs.2, 720,000/= with interest and costs. The claim by the plaintiff arose from a sum allegedly advanced to the defendants in October, 2003 or thereabout, to enable the defendants purchase a property known as L.R. No.1/446/Ngong road/Kilimani. Both the first and the second defendants filed their defenses. The 1<sup>st</sup> defendant denied liability in general and very specific terms.

On 7<sup>th</sup> September, 2007, the plaintiffs filed a notice of motion under Order XXXV Rule 1 & 2 and Order VI Rule 13 of the Civil Procedure Rules, seeking for orders that the defence by the first and second defendants be struck out. Summary judgment be entered against the defendants. This application is premised on the grounds stipulated on the body thereto, and the supporting affidavit of Tony Waiguro Njuguna counsel for the plaintiffs.

According to the plaintiffs, they lent an equivalent of sterling pounds, twenty thousand or (Kshs.2, 720,000/=) to the defendants in order for the defendants to purchase a property known as L.R. No.1/446/Ngong road/Kilimani which property was jointly purchased by the defendants. It is alleged that the defendants have refused to repay the sum advanced. The plaintiffs relied on the contents of an e-mail purportedly written by the 1<sup>st</sup> defendant in which she has acknowledged that the plaintiffs had given them some loan to enable them buy a house.

This is followed by a foreign telegraphic transfer where a sum of sterling pounds twenty thousand was transmitted from their account. However the account to which the money was received is not indicated. Demand was made but the defendants refused to pay the money back. The second defendant does not deny the money was advanced. However, the first defendant claims that the money was given as a gift and the plaintiffs are now trying to recover the money because there is a matrimonial dispute between the first and second defendants.

This application was vigorously opposed by the first defendant. Firstly the application which is brought under the provisions of Order XXXV and also Order VI Rule 13 was challenged for being incompetent because an application under Order VI Rule 13 evidence, by way of affidavit is inadmissible. Secondly, the defence by the first defendant discloses triable issues. The court needs to establish how the sum of sterling pounds, twenty thousand was advanced to the first defendant in particular, whether it was a contract or a gift, and whether the loan was advanced to the first and second defendants jointly and severally. The claim by the plaintiffs is also challenged because the plaint was allegedly signed in Nairobi when the plaintiffs are based in England. The affidavit in support of the application which is sworn by the plaintiff's advocates in support of contentious issues is also faulted.

Further the court also needs to establish whether there is connivance between the plaintiffs and the second defendant who is their biological son and whether there is any connection between this claim and the matrimonial dispute between the two defendants. Whether the second defendant is using the plaintiffs to harass the first defendant is also a triable issue. The source of the e-mail relied upon by the plaintiffs is also another triable issue because it is not signed by the 1<sup>st</sup> defendant who denies any knowledge of it, it is most likely the 2<sup>nd</sup> defendant who knew the pass-word of the 1<sup>st</sup> defendant wrote the e-mail.

Counsel for the 1<sup>st</sup> defendant made reference to the case of **D.T. Dobbie & co. Ltd. versus Muchina 1982 KLR** in that case the Court of Appeal held as per Madan JA :-

**“The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by**

**amendment, it should not be struck out.”**

Having set out the background of the pleadings and rival submissions, this application is brought under provisions of both Order XXXV and Order VI Rule 13 of the Civil Procedure Rules. It is trite that an application brought under Order VI Rule 13 affidavit evidence is not necessary. However, since this application is also brought under Order XXXV I will consider its merit. Under Order XXXV a plaintiff with a liquidated claim to which there is clearly no defence can obtain a quick summary judgment without being unnecessarily kept from what is due to them by way of delaying tactics by the defendant. However if there is reasonable grounds raised by the defence, raising triable issues, the plaintiffs are not entitled to summary judgment.

The primary issue to determine in this application is whether the defence by the 1<sup>st</sup> defendant raises triable issues. Obviously there is admission by the 2<sup>nd</sup> defendant nothing arises; summary judgment can be entered against the 2<sup>nd</sup> defendant. The defence by the 1<sup>st</sup> defendant raises several issues which in my humble view are triable issues which can only be resolved by evidence and courtroom processes such as discovery, oral evidence and cross-examination. The issues such as the origin of the e-mail that the plaintiffs allege originated from the 1<sup>st</sup> defendant, it is noteworthy the 1<sup>st</sup> defendant vehemently denies having authored the e-mail. The second issue is whether the sum of \$.20, 000/= was given as a gift, if so, was it jointly given or severally. The issue of whether the 2<sup>nd</sup> defendant has colluded with the plaintiffs to harass the 1<sup>st</sup> defendant by demanding for this money is also another mystery.

Accordingly, the claim against the 1<sup>st</sup> defendant should proceed for trial but summary judgment is hereby entered against the 2<sup>nd</sup> defendant with costs and interest at court rates. The application against the 1<sup>st</sup> defendant is dismissed. Costs shall be in the cause.

Ruling read and signed at **NAIROBI** on 21<sup>st</sup> August, 2009.

**M. K. KOOME**

**JUDGE**