



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Case 77 of 2006

HASSAN IBRAHIM.....PLAINTIFF

VERSUS

WARSAME OMAR FARAH..... DEFENDANT

RULING

The plaintiff herein, Hassan Ibrahim, took out a motion pursuant to order XXXV rules 1,2 and 3 of the Civil Procedure Rules in which he sought for summary judgment against Warsame Omar Farah, the defendant herein. The plaintiff swore an affidavit in support of the motion. The defendant on the other hand resisted the motion by filing a replying affidavit he swore on 29th March 2007.

The plaintiff is of the view that the defendant has no arguable defence hence he should not be allowed to delay the speedy trial of this matter. It is the view of the plaintiff that the defendant is truly and justly indebted to him in the sum of Ksh. 2,852,059/50 in respect of diesel sold and delivered to the defendant in the year 2005 at the defendant's behest. It is said the amount fell due on the 30th day of December 2005. Annexed to the affidavit of Hassan Ibrahim, are invoices nos. 256, 319, 358, 688 and 486 which show that the plaintiff supplied petroleum products between January and November 2005. The invoices also indicate that the defendants made part payments to settle the invoices leaving a balance of Ksh.2,836,009/50. These invoices also show that the transaction was handled by one Abdul Kadir Ali on behalf of the defendant as his manager.

In his replying affidavit the defendant has denied the plaintiff's claim. He has stated that the invoices annexed to the affidavit of Hassan Ibrahim are of no evidential value as they are not signed by anybody to acknowledge receipt of the amounts therein. The defendant has also denied dealing through Abdul Kadir Ali as his manager. The defendant is of the view that the documents were fabricated by the plaintiff. The defendant also accused Abdul Kadir Ali for committing perjury by making false averments in his affidavit filed in support of the motion. I have perused the defence filed by the defendant. The defendant claims that he has always paid for any diesel supplied to him by the plaintiff leaving no outstanding sum.

The law is well settled when it comes to applications for summary judgment. It suffices to refer to a few decisions by the court of Appeal. In the case of **Shah =vs= Padamshi [1984] K.L.R 531** the court of appeal held ***interalia***

(a) caution should be exercised in granting summary judgment as it is a drastic remedy involving the denial of the party against whom it is given his right to defend the claim made against him.

(b) In dealing with applications for summary judgment, if a triable issue is found to exist, the court must

order a trial even if the court strongly feels that the defendant is unlikely to succeed at the trial.

The court of Appeal also expressed itself in the case of **Sundaji =vs= Clyde House Co. Ltd [1984] K.L.R 500** in which it held ***interalia***:

(i) *An application for summary judgment under order XXXV of the Civil Procedure rules should not be allowed where pleadings and affidavits disclose bonafide triable issues of fact and law.*

(ii) *Where an issue is raised which requires reference to applicable case law in order to reach a decision, such an issue should be tried with full argument on the law and should not be dealt with summarily.*

I have considered the rival submissions made by learned counsels. I have also carefully perused the motion plus the affidavits filed for and against. I have further perused the pleadings. It is obvious from the defendant's arguments that he is denying having signed the invoices and or delivery notes to acknowledge receipt of the diesel. The defendant has also denied that Abdul Kadir Ali was his manager hence it is alleged that he could not have transacted on behalf of the defendant. It is not denied that the plaintiff heavily relied on the invoices attached to the affidavit he swore in support of the motion. I notice that the invoices are self generated documents. It was incumbent upon the plaintiff to show that those documents are documents usually kept in the course of business. This burden was not discharged. I find the invoices annexed to the plaintiff's affidavit may not be sufficient to prove the defendant's liability to the plaintiff. Worst still is that these invoices have not been signed by anybody leave alone the defendant nor his agents. I have also noted that Abdul Kadir Ali signed the agreement to purchase fuel from the plaintiff on behalf of the defendant in his capacity as the manager. It is also apparent that the aforesaid manager signed an acknowledgment of debt on behalf of the defendant. As to whether or not Abdul Kadir Ali had authority from the defendant to do what he did is an issue which must be tested in a trial. This is an issue which obviously arose from the affidavits hence it is a matter which this court must consider. Let me sound repetitive by stating that there is doubt as to the genuinity of the invoices annexed to the affidavit of Hassan Ibrahim. That doubt can only be cleared in a trial in view of the fact that they are not signed and on the basis that they are self-generated documents. I will adopt the view taken by the court of appeal in dealing with an issue relating to accounts analysis in the case of **Five Continents Ltd =vs= Mpata Investments Ltd [2003] 1 E.A 65** in which the court of appeal held ***interalia***:

That the accounts analysis relied on by the Respondents to show the Appellant's indebtedness was not a book of account regularly kept in the course of business, and even if it were, such a statement would not alone be sufficient evidence to charge the Appellant with liability.

I have already said that there is need on the part of the plaintiff to show that the invoices he attached to his affidavit form part of the books of accounts regularly kept in the course of business.

For the above reasons I dismiss the motion with costs to the defendant.

Dated and delivered at Mombasa this 18th day of February 2008.

J. K. SERGON

JUDGE

In open court in the presence of Miss Okumu for plaintiff and Miss Matara h/b Mr. Kadima for defendant.