REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 59 of 2004

HELLEN NJERI KIARIE……...…… APPELLANT

VERSUS

MILLING CORPORATION KENYA LTD. ……1ST RESPONDENT

(Appeal from the Ruling of Hon. H. Wasilwa (Mrs) – Senior Resident Magistrate in Nakuru CMCC No.1265 of 2003 delivered on 7th April, 2004)

JUDGMENT

This appeal arises out of a short ruling of five words, with far reaching consequences. On 7th April, 2004, the parties herein appeared by their advocates, before the Hon. Senior Resident Magistrate Madam Hellen Wasilwa, at Nakuru to argue the Respondent's application for summary judgment brought, *inter alia*, under Order XXXV Rule 1(1)(a) of the Civil Procedure Rules.

The application was dated 15th August, 2003 and was supported by an affidavit sworn by one J.K. Langat, to which certified copies of the Respondent's records were attached but not themselves marked and/or endorsed as annextures as required under the Civil Procedure Rules. The appellant had not filed a Replying Affidavit and counsel sought an adjournment on the grounds that the Appellant had not presented herself to swear the same. The adjournment was refused for the reasons that, previously, the court had directed that no further adjournments would be sought. Despite the learned trial magistrate ruling and recording that the application proceeds, no hearing took place. Accepting the Respondent's submission that the application was "*not opposed*", the learned trial magistrate proceeded to rule as follows:

"It is granted as prayed."

The effect of the order was that summary judgment was accordingly entered for the plaintiff/Respondent against the Defendant/appellant in the sum of shs.108,940/= allegedly "*on account of goods supplied (to the plaintiff) at her own request*", plus interest at court rates. As the order stands, no provision was made for costs as prayed in the notice of motion.

Being dissatisfied with the order and its consequences, the appellant then filed this appeal raising 7 grounds of appeal as follows.

1. That the learned magistrate erred in law and fact in entering a summary judgment without affording the Appellant an opportunity to reply to the Respondent's application.

2. That the learned trial magistrate fatally misconceived the law in making a drastic decision of entering summary judgment against the appellant without considering the merits of the Respondent's application.

3. That the learned trial magistrate proceeded contrary to the provisions of order 1XB Rule 3(a) by not hearing the application.

4. That the learned trial magistrate made an error in law by allowing the Respondent's application when it was clear that the same ought to have been heard inter partes.

5. That the learned trial magistrate had neither territorial nor pecuniary jurisdiction to hear the suit as was stated in the appellant's defence.

6. That had the learned trial magistrate considered the Respondent's application on merits and perused the purported annextures to the supporting affidavit and also complied with the provisions of order XX Rule 4 of the Civil Procedure Rules, she would have formed a different view and not allowed the application.

7. That the trial magistrate erred in law in making a drastic decision in an interlocutory application without due recourse to the law.

[NB: For reasons of clarity, the grounds of appeal have been paraphrased by this court]

Substantive submissions were made at the hearing of the appeal and have been duly considered. No case law was cited.

Principally, Mr. Karanja Mbugua, for the appellant argued that the trial court ought to have taken submissions in the Notice of Motion of 15th August, 2003 and considered the evidence before it before allowing the same, as required under Order L Rule 16 where no grounds of opposition or a replying affidavit are filed by a party wishing to oppose a motion. Also that the prayer sought, being one for a judgment, the provisions of Order XX rule 4 ought to have been complied with and reasons for the court's decision properly recorded. Mr. Karanja submitted further that this court should look at the purported annextures and find that, the same, having not been endorsed as annextures ought to have been expunged. He concluded by stating that in an application such as was before the lower court, a defendant is ordinarily, allowed to show even orally that he ought to be granted leave to defend the suit.

For the above reasons, the appellant prays that the decision of the lower court be reversed and the application dated 15th August, 2004 be dismissed with costs and the plaintiff's suit be dismissed for want of jurisdiction.

Mr. Murimi for the Respondent submitted, firstly, that the appeal before this court ought to be struck out for want of leave, being an appeal from an order made under Order XXXV Rule 1 of the Civil Procedure Rules and not rules 5, 7 or 10, wherein appeals are allowed as of right. He also held the view that the appeal touched on the provisions of Order XVI Rule 1 of the Civil Procedure Rules, since it emanated from a refusal of an adjournment. The facts of this case clearly show that the said provisions do not apply herein and that the appeal is not against the denial of an adjournment.

Mr. Murimi submitted further that the issue of jurisdiction had been determined in a previous ruling of the lower court and since no appeal was preferred therefrom, the issue ought not to be raised now. Nonetheless, he urged this court to consider a supplementary affidavit which showed that the contract between the parties was entered in Nakuru and the plaintiff/Respondent was right in filing the suit in Nakuru, and not in Nanyuki despite having clearly stated in the plaint, that the Defendant/Appellant lived and worked for gain in Nanyuki. Mr. Murimi submitted further that order XX rule 4 did not apply in the present proceedings since according to him, the said provisions only apply to final judgments in

undefended suits and not in regard to an order made in an application for summary judgment as was the case herein. He urged the court to determine the matter with finality and further that, should the appeal be found meritorious, the court to proceed and examine the evidence before the lower court and thereafter make findings on merit. Principally, however, Mr. Murimi prayed that the appeal be dismissed.

I accept Mr. Karanja's submissions as regards the provisions of Order L Rule 16(3) that the normal procedure where neither a replying affidavit nor a statement of grounds of opposition is filed is to have an application heard ex-parte. Although the wording used is "*may be heard ex parte"*, I am of the view that considering the nature of the application before the lower court, the learned trial magistrate had no option but to take submissions as she had intimated in her direction/order when refusing the appellant an adjournment. As properly submitted by Mr. Karanja, and as supported by Order XXXV rule 2, summary judgment cannot be entered where the defendant is able to demonstrate either by affidavit or by oral evidence or otherwise that he should have leave to defend the suit. It is further provided under Order XXXV rule 6, that, if it appears to the court that the defendant has a good defence or ought to be permitted leave to defend the suit, the court may allow the defendant to defend. My understanding of this provision is that summary judgment cannot be entered without the court first examining the defence.

I am inclined to uphold the ground of appeal in regard to order XX rule 4. In the case of WAMUTU – VS- KIARIE [1982] KLR 480, where, in an application under order VI rule 13, the High Court had ruled only that:

"application granted with

Costs to the defendants . . . ",

the court of appeal held, *inter alia*, that:

"The judge also failed to observe the provisions of Order XX rule 4 which states that judgments in defended suits shall contain a concise statement of the case, the points for determination and the reasons for such decision."

Mr. Murimi's interpretation of the above provision, is, in the circumstances, clearly wrong.

The above notwithstanding however, I am of the view that the issue of leave to appeal is crucial to this appeal. Mr. Karanja's interpretation of order XLII Rule 1(1)(v) is that "*summary judgments are appealable as of right."* The said provision reads as follows:

"1(1) An appeal shall lie as of right from the following Orders and Rules under the provisions of section 75 (1) (h) of the Act _____ . . . . . .

(v) Order XXXV, rules 5, 7 and 10 (summary procedure cases).

Section 75 (1) (h) reads as follows:

"75 (1) An appeal shall lie as of right from the following orders and shall also lie from any other order with leave of the court making such order or of the court to which an appeal would lie if leave were granted ____ . . . . . .

(h) any order made under rules from which an appeal is expressly allowed by the rules."

Clearly the appeal herein is not against a judgment since none was written as required under the provisions of order XX rule 4, which I find to have been contravened. It is an appeal against an order made pursuant to order XXXV rule 1 of the Civil Procedure Rules which, given the above provisions is not one where an appeal lies as of right.

My understanding of the above provision is that the appeal, such as is before court can only be brought

with leave of the court first being sought and obtained either from the lower court or from this court. I am of the considered view, and therefore inclined to find, as I hereby do, that the Respondent's counsel is right in submitting that failure to obtain leave does a major blow to the appeal herein and the appeal ought therefore not to be allowed.

I have no option in the circumstances, but to find that the appeal as filed is improperly before court, and should be struck out. Accordingly the same is hereby struck out and dismissed with costs to the Respondents.

Dated and delivered at Nakuru this 13th day of November, 2008.

M. MUGO

JUDGE