



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 144 of 2006

NEPTUNE CREDIT MANAGEMENT LIMITED.....PLAINTIFF

VERSUS

SANJAY PATEL.....1ST DEFENDANT

BETHLEHEM ENGINEERING

AND CONSTRUCTION LIMITED.....2ND DEFENDANT

R U L I N G

By a notice of motion dated 25th May 2006, Neptune Credit Management Limited the Plaintiff herein seeks summary judgment under Order 35 Rule 1 and Order 12 Rule 6 of the Civil Procedure Rules, against the 2nd Defendant, Bethlehem Engineering and Construction Limited for Kshs.4 Million together with costs and interest thereon.

The application is premised on the grounds that the 2nd Defendant is truly and justly indebted to the Plaintiff and was so indebted at the commencement of this suit, and that the 2nd Defendant has admitted its indebtedness to the Plaintiff and has no defence to the Plaintiff's claim and the purported defence filed is a sham. The application is supported by three affidavits, the first one sworn on 25th May 2006, by Bryan Yongo a director of the Plaintiff, a further affidavit sworn by the same person on 5th January 2007 and a supplementary affidavit sworn on 12th March 2007 by the same deponent.

In short the Plaintiff maintains that by a letter dated 15th February 2006 signed on behalf of 2nd Defendant by 1st Defendant (who is a director of 2nd Defendant), the 2nd Defendant admitted owing the sum of Kshs.4 Million to the Plaintiff and therefore the defence filed by the 2nd Defendant denying the Plaintiff's claim is a mere sham and does not raise any triable issues.

The 2nd Defendant on its part objects to the application for summary judgment through its defence on record and two replying affidavits, sworn by Charles Mwangi a director and Chief Accountant of 2nd Defendant on 16th June 2006 and 19th January 2007 respectively. The 2nd Defendant denies having admitted the Plaintiff's claim and maintains that the letter dated 15th February 2006 relied upon by the Plaintiff is a forgery and that the letter was written by the Plaintiff's director Bryan Yongo who procured

the signature of the 1st Defendant under duress. The 2nd Defendant maintains that there is no contractual or business relationship between the 2nd Defendant and the Plaintiff by which 2nd Defendant could be liable to the Plaintiff for the amount claimed.

Mr. Majanja who argued the application on behalf of the applicant submitted that the defence filed by the applicant is a mere denial and is clearly negated by the undertaking duly signed by the 1st Defendant who has the capacity to bind the 2nd Defendant. He urged the court to reject the allegations made by the 2nd Defendant concerning the signing of the undertaking as no affidavit has been sworn by the 1st Defendant confirming those allegations.

The authorities relied upon by the Plaintiff as per a list of authorities filed on 21st June 2006 included the following cases: -

- ***Agricultural Finance Corporation vs Kenya National Assurance Company Limited (In Receivership) Civil Appeal Number 271 of 1996 [unreported].***
- ***Gupta vs Continental Builders Limited [1978] K L R 83.***
- ***Nairobi Golf Hotels (Kenya) Limited vs Lalji Bhimji Sanghani Builders and Contractors Nairobi Civil Appeal Number 5 of 1997 [Unreported].***
- ***Bullion Bank Limited vs James Kinyanjui and Another Nairobi Milimani HCCC Number 1158 of 1999 [Unreported].***
- ***Reliance Bank Limited (In Liquidation) vs Prince Enterprises Limited and Two Others Nairobi HCCC Number 567 of 2003 [Unreported].***
- ***Datalogix Limited vs Kenya Pipeline Company Limited Nairobi Milimani HCCC Number 490 of 2004 [Unreported].***

Mr. Kayoko who appeared for the Defendant submitted that the 2nd Defendant had no direct independent relationship with the Plaintiff nor was there any conclusive agreement between the Plaintiff and the 2nd Defendant. Relying on the Rule in Turquands's case, Mr. Kayoko urged the court that the Plaintiff cannot rely on the letter purportedly signed by the 1st Defendant on behalf of the 2nd Defendant as the letter related to services in respect of recovery of a debt owed to the 1st Defendant by the 2nd Defendant.

Relying further on: -

- ***Spenco Kenya Limited vs Municipal Council of Kericho HCCC 727 OF 1999.***
- ***Lion of Kenya Insurance Company Limited vs Trinity Prime Investments Limited C A 120 of 1999.***

Mr. Kayoko submitted that this was not an appropriate case for summary judgment as it was not a plain and obvious case and that issues have been raised which ought to go to trial. In response Mr. Majanja submitted that the issues of fraud and duress now being raised were not properly pleaded.

I have carefully considered this application, the affidavit in support and in reply as well as the submissions of both counsels and the pleadings herein and have come to the conclusion that this is not a plain and obvious case as would justify summary judgment in favour of the Plaintiff. The 2nd Defendant has filed a detailed defence in which it has denied the Plaintiff's claim.

As was stated by the court of appeal in ***Nairobi Golf Hotels (Kenya) Limited vs Lalji Bhimji Sanghani Builders and Contractors Civil Appeal Number 5 of 1997.***

“It is trite law that in an application for summary judgment under Order XXXV rule 1 of the Civil Procedure Rules, the duty is cast on the defendant to demonstrate that he should have leave to defend the suit. His duty in the main is limited to showing prima facie, the existence of bona fide triable issues or that he has an arguable case. On the other hand, it follows, that a Plaintiff who is able to show that a defence raised by a defendant in an action falling within the purview of Order XXXV is shadowy or a sham is entitled to summary judgment.”

In this case the 2nd Defendant has demonstrate through its defence and the replying affidavit that there are triable issues, for instance, whether in signing the document relied upon by the Plaintiff the 1st Defendant acted on behalf of 2nd Defendant and whether He could lawfully bind the 2nd Defendant. Moreover the 1st Defendant has also filed a defence in which He has maintained that He signed the document relied upon by the Plaintiff under duress.

In my considered view, the defence raised by the 2nd Defendant is not a sham but one which ought to be ventilated at the trial and weighed against the Plaintiff’s evidence.

I therefore decline to grant summary judgment and order that the Plaintiff’s suit as against the 2nd Defendant should proceed to full trial.

I make no orders as to costs.

Dated, signed and delivered this 15th day of May 2007.

H. M. OKWENGU

JUDGE