REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT 45 OF 2006

CHASE FOREX BUREAU DE CHANGE LIMITED…….…..PLAINTIFF

VERSUS

SATISH GAUTAMA T/A SATISH GAUTAMA ADVOCATE……DEFENDANT

RULING

Before me is an application by way of Notice of Motion by the plaintiff lodged on 20.3.2006 pursuant to the provisions of Order XXXV Rules 1 and 2 of the Civil Procedure Rules and all other enabling provisions of the Law seeking summary judgment against the defendant for the liquidated sum of KShs.3,870,500.00. The grounds for the application are as follows that:-

a) The defendant is justly and truly indebted to the plaintiff in the sum of KShs.3,870,500.00.

b) The defendant in purported settlement of the plaintiff's claim has issued 7 NO cheques for the said amount of KShs.3,870,500.00 which have all been dishonoured/returned unpaid.

(c) There is no valid defence to the suit.

The application is supported by an affidavit sworn on 20.3.20006 by one Ramesh Poojari the plaintiff's Manager.

The application is opposed and there is a replying affidavit sworn by the defendant on 5.4.2006 and Grounds of Opposition. The plaintiff's claim is pleaded in its amended plaint filed on 13.3.2006. In paragraph 3 of the said amended plaint, it is pleaded that the plaintiff offered forex services to the defendant through a disclosed agent on the basis of which services the defendant is indebted to the plaintiff in the said sum of KShs.3,870,500.00. It is then further pleaded in paragraph 4 that the defendant issued several cheques towards the settlement of the said sum which cheques were all returned unpaid upon presentation to the bank for payment.

In his defence filed on 27.2.2006, the defendant denied owing to the plaintiff the said sum or any part thereof as alleged or at all. He further denied in the alternative that the plaintiff offered any services to the defendant as alleged or at all nor did the defendant ever request the plaintiff to render any services as alleged. It was then pleaded in paragraph 5 of the defence that the cheques referred to in the plaint were not issued in settlement of any alleged services offered by the plaintiff as alleged or at all. In paragraph 6 the defendant pleaded that the said cheques were misused and or used without the defendant's knowledge or consent by one Jitan Mandalia in whose custody they had been left by the defendant; the said Jitan Mandalia forged the defendant's signature on letters (allegedly from the defendant) under the cover of

which the said cheques were fraudulently forwarded by Jitan Mandalia to the plaintiff. It was further averred in paragraph 7 in the alternative that there had been total failure of consideration in respect of cheques referred to in paragraph 4 of the plaint as the consideration for which the said cheques were allegedly issued by the defendant was never tendered nor delivered by the plaintiff.

Having considered the pleadings, the affidavit, evidence, the submissions of counsel and the cases cited, I take the following view of this matter. In support of its application, the plaintiff annexed correspondence exhibited as "RP (a) to (i)" to the supporting affidavit. Also annexed are copies of cheques allegedly issued by the defendant to the plaintiff. They are marked as "RPC" to "RP1". Finally, the plaintiff further exhibited "RP2" which was a letter from the defendant to the plaintiff offering to pay the plaintiff's claim. On the basis of those documents the plaintiff argued that its case was water tight and the defence filed was not an answer to its claim. Several authorities were cited to me in support of the plaintiff's position. I have considered those cases and will refer to some of them where relevant.

The defendant's response to the plaintiff's application was multiburrelled. He generally denied indebtedness to the plaintiff in the sum claimed or any part thereof or at all. More specifically, the defendant denied ever dealing with the plaintiff or purchasing any foreign currency from the plaintiff at all. Indeed the defendant denied being even aware of the plaintiff's existence and its whereabouts or its business. He denied ever discussing with any one in the plaintiff's office regarding any foreign currency or ever receiving any foreign currency or other form of consideration from the plaintiff. He adopted all the averments in his defence and denied ever requesting the plaintiff to render any service to him of any kind or the plaintiff rendering any services to him at all. He also argued that there was no time the said Jiten Vithal Shamji Mandalia who was his employee before being sacked had any authority whatsoever to purchase foreign currency on his behalf from the plaintiff. He contended that the said Jitan Vithal Shamji Mandalia was not his agent disclosed or otherwise or in any way authorized by him to purchase any foreign currency for himself using the plaintiff's cheques. He maintained that the said Mandalia fraudulently without his knowledge, authority, or consent and during the plaintiff's absence from Kenya used the plaintiff's printed letter heads concocted the contents thereof and under cover of such forged letters apparently forwarded them to the plaintiff with the defendant's cheques. It was further submitted on behalf of the defendant that the said Mandalia utilized the defendant's cheques fraudulently and the defendant received no consideration in respect of the fraudulent use of the said cheques and further that the defendant never gave any replacement cheques to the said Mandalia. According to the defendant, Mandalia has defrauded him of substantial sums and is being investigated by the CID and the Banking Fraud Unit to whom the matter has been reported.

So, from the rival positions taken by the plaintiff and the defendant has the defendant shown any bona fide triable issues to go to trial? I think he has. Firstly the plaintiff's claim is founded on the defendant's failure to pay for services rendered by it and that in payment of those services the defendant issued cheques which cheques were all returned unpaid upon presentation to the bank for payment. The defendant's answer to that claim is that he never requested the plaintiff to render any service let alone purchase of foreign exchange and that the plaintiff indeed never rendered any sort of service to him. With respect to correspondence indicating existence of the alleged transaction, the defendant's response is that the same was without his consent, knowledge or authority and his former employee whom he has since sacked used his printed letter heads concocted the contents thereof and forged the letters and the cheques.

In the premises, the cheques issued to the plaintiff were not only forged but the defendant received no consideration in respect of the fraudulent use of the same. Indeed, during the entire fraudulent transaction, the defendant was away in London. In my humble opinion the issues raised by the defendant are serious bonafide issues that may only be resolved in a trial. The very basis of the plaintiff's claim has been brought into question. For example, did the defendant request for any services of the plaintiff? Did the plaintiff in fact render any services to the defendant? What would be the defendant's liability or lack of it on the cheques alleged to have been forged? Is it is in the course of business of the defendant as an advocate to deal in foreign exchange? In the premises and in view of the transaction was there any agency relationship between the defendant and the said Mandalia? Was consideration furnished for the cheques or cheques? In my view from the material placed before the court, it cannot be said that the plaintiff's case is an open and shut case. Under Order XXXV Rule 2 of the Civil Procedure Rules the

defendant need only show one bonafide triable issue to be allowed to defend the suit. In this case as adumbrated above, the defendant has shown several bonafide triable issues and must have leave to defend.

The authorities cited by the plaintiff in my view enunciated the correct principles of law but the facts in this case are clearly distinguishable from the facts in those cases. In **Hambro – vs – Burnand and Others [1904] 2 KB 10** the agent therein acted within the terms of a written authority given to him by the principal. That is not the position in this case. In **Keighley Maxsted & Company – vs – Durant 1901 AC 210** the agent again was acting in the course of the business he had been entrusted to conduct. The defendant in this case states that he had not entrusted his clerk to conduct the business of dealing in foreign exchange. In **Navarro – vs – Moregrand Limited and Another [1951] 2 KR Times LR** October 12, 1951 674 the agent although he exceeded his authority acted within his actual or ostensible authority which is not the position in this case. In **Lloyd – vs – Grace, Smith & Company [1912] A.C. 716**, the agent acted within the scope of his authority. In the end all the authorities cited by the plaintiff did not advance its case as they all involved an agent acting within the course of employment, authority, or conduct of the business of the principal.

The upshot of my consideration of the plaintiff's application is that the same is without merit and is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JUNE 2007.

F. AZANGALALA

JUDGE

Read in the presence of:-

Karanja holding brief for Esmal and Waki holding brief for Kahonge for the plaintiff.

F. AZANGALALA

JUDGE

14/6/07