



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 77 of 2007**

**SAMUEL KAMAU MUHINDI..... PLAINTIFF**

**VERSUS**

**UNITED INSURANCE COMPANY LIMITED.....DEFENDANT**

**RULING**

By his plaint filed on 14.9.2004, the plaintiff sought the following orders:-

**(a) A declaration that the defendant's loan to the plaintiff secured by a charge over the plaintiff's property L.R. No.330/1221 Nairobi be declared to be fully repaid by the set off from the plaintiff's emoluments which were due and payable to the plaintiff upon termination of his contract of employment dated 1.1.2001.**

**(b) An order that the defendant do execute a discharge of charge or mortgage to discharge the charge or mortgage created over the said L. R. No.330/1221, Nairobi by the plaintiff in favour of the defendant and in default thereof the Deputy Registrar of this court do execute the said discharge.**

**(c) The defendant do deliver to the plaintiff the documents of title of the said L.R. No.330/1221, Nairobi.**

**(d) KShs.9,100,643.00 being the balance of the said emoluments after the said set off.**

**(e) ALTERNATIVELY KShs.12,625,759.00.**

**(f) Costs.**

**(g) Interest.**

The foundation of the plaintiff's suit is a contract of employment dated 1.1.2001 made between the plaintiff and the defendant under which the plaintiff averred that he was entitled to various sums when the said contract was terminated in April, 2003. The plaintiff further averred that the defendant was in breach of the terms of the said contract which was terminated by the defendant without notice and without payment of three months salary in lieu of notice.

The plaintiff also pleaded that during his employment with the defendant he borrowed KShs.7,500,000.00 from the defendant on the security of his property LR No.330/1221 Nairobi and at the time of the termination aforesaid a sum of KShs.3,655,116.00 was due and owing to the defendant of which sum the plaintiff paid KShs.130,000.00 in April and May, 2003 leaving a balance of KShs.3,525,116.00.

It is then averred that in breach of the contract of employment and the loan contract the defendant has refused to discharge the charge or mortgage over the suit property and to pay the plaintiff the said balance of his emoluments under the employment contract.

On 29.10.2004, the defendant filed its defence and raised a counterclaim against the plaintiff. In the defence it admitted the contract of employment but denied breach of the same. All the sums claimed were also denied specifically. The defendant further pleaded that the said employment contract was terminated by the plaintiff by a notice which was far less than that stated in the employment contract and failed to pay to the defendant the amount equivalent to salary in lieu of notice.

With regard to the prayer for discharge of the charge over the plaintiff's property, the defendant pleaded that it could only do so on settlement of the principal loan plus interest accrued thereon.

In the Counterclaim, the defendant pleaded inter alia that as at 23.8.2004 the sum of KShs.2,209,610.00 was due and owing to the defendant by the plaintiff and the said sum attracted interest at the rate of 24% p.a. from 26.4.2003 until payment in full.

The defendant further claimed from the plaintiff KShs.150,000.00 being the sum irregularly paid to the plaintiff and fraudulently received by him on account of refund of medical expenses not covered by the employment contract. The defendant further claimed KShs.13,165,900.00 from the plaintiff on account of the plaintiff's failure to discharge his duties faithfully, diligently or honestly. The defendant further averred that the plaintiff paid the said sum to himself illegally, fraudulently and improperly. In the premises, the defendant claimed the said sum and an order for a set off against sums that were to be found due and lawfully owing to the plaintiff. The defendant further claimed amount representing salary in lieu of notice and all additional sums found due after audit together with interest at the rate of KShs.24% p.a.

The defendant in the alternative claimed a declaration that the termination of employment be revised and be substituted with summary dismissal of the plaintiff with all benefits.

On 16.11.2004, the plaintiff filed his reply and defence to counterclaim. He joined issue with the defendant upon its defence and averred further that by its deeds the defendant had admitted the plaintiff's claim. In his defence to the counterclaim the plaintiff denied the claims made by the defendant on the basis inter alia that no particulars had been pleaded. He specifically denied that he failed to discharge his duties faithfully, diligently or honestly during his employment but he instead saved the defendant from collapse.

The pleadings were in that state when the plaintiff lodged his Notice of Motion on 19.1.2005. By that motion, the plaintiff sought two primary orders:

**1) That summary judgment be entered for KShs.9,100,643.00 or alternatively for KShs.12,625,750.00 plus costs and interest thereon.**

**2) That paragraphs 24 and 29 of the counterclaim be struck out and the counterclaim be dismissed with costs.**

The Notice of Motion was brought under the provisions of Order XXXV Rules 1, 2 and 5 of the Civil Procedure Rules. The application is predicated upon 4 grounds on the face of the application which are as follows:-

**(a) That the defence filed does not raise serious triable issues in relation to the claim for the**

**said sums of money.**

**(b) That the defendant admits owing the said sums to the plaintiff.**

**(c) Alternatively the defendant admits owing a substantial portion of the said sums. That the counterclaim is not sustainable.**

The application is supported by an affidavit of the plaintiff. Annexed to the affidavit are 4 exhibits. Annexure "SKM1" is a copy of the employment contract. Annexure "SKM2" is a copy of the resignation letter from the plaintiff addressed to the defendant's Chairman of the Board of Directors. The letter is dated 7.4.2003. Annexure "SKM 3" is a copy of a letter dated 3.4.2003 from the Chairman of the Board of Directors of the defendant to the plaintiff and annexure "SKM 4" is a bundle of documents bearing the defendant's company name, correspondence exchanged between the plaintiff and staff/director of the defendant.

The application is opposed and there is a replying affidavit sworn by one Winnie Kariuki the defendant's Assistant Human Resources Manager. To that affidavit are annexed 6 exhibits including a copy of a letter dated 16.8.2004 from the plaintiff's advocates in which the plaintiff claimed only KShs.3,433,046.00 from the defendant, a copy of a letter of demand dated 23.8.2004 from the defendant to the plaintiff demanding that the plaintiff accounts for KShs.13,015,900.00 and a copy of a letter dated 3.4.2003 from the plaintiff to P.J. Mwangi the defendant's company director.

The application was canvassed before me on 22.10.2007 by Mr. Oyatsi Learned counsel for the plaintiff and Mr. Munge, Learned counsel for the defendant. The said advocates had prior to the said date agreed to file written skeleton submissions which submissions had duly been filed. Counsel therefore merely highlighted the said skeleton submissions when they appeared before me on 22.10.2007.

I have considered the pleadings, the application, the affidavits filed in support and in opposition to the application, the submissions of counsel and the cases relied upon. Having done so, I take the following view of the matter. Under Order XXXV Rule 1 of the Civil Procedure Rules, in all suits where a plaintiff seeks judgment for inter alia a liquidated demand with or without interest, where the defendant has appeared the plaintiff may apply for judgment for the amount claimed or part thereof plus interest. The application must be supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and the amount claimed. If the plaintiff or such other person does so verify the cause of action by the supporting affidavit, the onus shifts to the defendant who by dint of rule 2 of the same Order may show either by affidavit or by oral evidence or otherwise that he should have leave to defend the suit. Any set-off or counterclaim may entitle a defendant to defend to the extent of such set off or counterclaim.

A defendant who has already filed his defence may demonstrate that his defence raises bona fide triable issue or issues. Where a written statement of defence has not been delivered, the defendant will discharge the burden if he demonstrates that the intended defence raises bonafide triable issue or issues.

There is now a plethora of authorities on when the procedure of summary judgment may be resorted to. The ratio however is that it must be plain and obvious that the defendant is truly and justly indebted to the plaintiff and no bonafide triable issue is raised by the defence or the proposed defence. So, has the plaintiff established such a case or has the defendant demonstrated that it should have leave to defend the suit?

The plaintiff has predicated his claim on the contract of employment dated 1.1.2001. Yet he seems to rely upon documents that suggest that part of his claim relates to an earlier period. Annexure "SKM 4" comprise documents laying claim to benefits for the period between 1999 and 2001. The plaintiff has not explained the basis for those claims in view of the contract of employment dated 1.1.2001.

The plaintiff has further claimed 3 months salary in lieu of notice. The claim has been made under Clause 14.1.b of the said employment contract which provided that the employment of the plaintiff would

be terminated by either party upon giving to the other not less than 3 months notice in writing or payment of 3 months salary in lieu of notice. The plaintiff has made that claim notwithstanding his letter of resignation dated 7.4.2003 exhibited as "SKM 2". In that letter, the plaintiff gave notice of his intention to terminate his employment with the defendant with immediate effect. The plaintiff's contention was that the resignation was not accepted by the defendant. Following the nonacceptance he rendered his services until the 25.4.2003 when he was verbally requested to leave his office by the defendant. In his view, the termination was by the defendant and was without notice hence his claim. The defendant on its part contended that the termination of employment was by the plaintiff himself which termination, it accepted. It denied verbally requesting the plaintiff to leave as contended by the plaintiff.

In my view, the issue as to who is liable for the termination of the plaintiff's employment cannot conclusively be resolved on the material availed to the court. In the circumstances, the issue must be tried by tested evidence.

The plaintiff has further claimed a bonus payment. That claim was no doubt made under Clause 7 of the said employment contract. The defendant's response was that such payment was subject to a resolution of the Board and no such resolution was made and none had been exhibited. The said Clause reads:-

**"The company shall pay such bonus to the employee based upon the annual turnover as the Board, in consultation with the employee, may determine for the year 2001 and 2002. From year 2003, the bonus will be based on net profit at the rate of between 5% to 10%."**

It is plain that under that Clause the bonus payable for the years 2001 and 2002 would require a determination of the same by the defendant's Board in consultation with the plaintiff. For the year 2003 and the years after 2003, the bonus payable would be based on net profit at the rate of between 5% to 10%. The defendant is right that the bonus issue cannot be resolved at this stage. It is in my view a bonafide triable issue. In any event, it is doubtful that in view of the said Clause, the claim for bonus can be described as a liquidated demand within the meaning of Order XXXV Rule 1.

With regard to the plaintiff's claim for pension, the defendant contended that the plaintiff could not be entitled to the same while still in the defendant's employment and that the scheme was managed by a third party who would be liable if the plaintiff were to prove his claim. Besides, the defendant further contended that the plaintiff did not make his contribution to the scheme and could not be entitled to the same. In my view, the defendant's concerns are bonafide and raise triable issues.

The above are not the only issues raised by the defendant but are a sufficient demonstration that indeed there are serious issues that require investigation in a full trial.

The last question is whether the defendant has admitted the plaintiff's claim or part thereof. There is in my view nothing in the defence filed that comes anywhere near an admission of the plaintiff's claim. The documents annexed by the plaintiff upon which the alleged admission is based are discredited by the defendant and some are denied out rightly. The defendant alleged that the said documents are fraudulent and borne of deceit by the plaintiff of one of the defendant's directors. At this stage, the documents do not resolve the dispute between the plaintiff and the defendant. The documents must be investigated in a full trial in order for the trial court to determine whether they are genuine. They do not therefore in my view constitute an admission by the defendant of the plaintiff's claim or part thereof. The authorities agree that a judgment on admission is not to be entered save where there is a clear, complete, unambiguous and unqualified admission of the plaintiff's claim. I have not been persuaded that the defendant in this case has made such an admission.

In any event, the plaintiff did not invoke the provisions of Order 12 Rule 6 of the Civil Procedure Rules which deals with judgment on admission. In my view, even if the said provision had been invoked, the plaintiff would not be entitled to judgment on admission.

In the end, the plaintiff's application by Notice of Motion dated 19.1.2005 is without merit and is

hereby dismissed with costs to the defendant.

Order accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF NOVEMBER, 2007.**

**F. AZANGALALA**

**JUDGE**

**DELIVERED THIS DAY OF 2007** in the presence of: No appearance for either party.

**F. AZANGALALA**

**JUDGE**

**14/11/07**