REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE 197 OF 2003

MISTRY JAVDA PARBAT & CO. LTD. …… PLAINTIFF

- Versus -

MAMBA DISCO LIMITED ……...…….. DEFENDANT

Coram: Before Hon. Justice L. Njagi

Kipkorir for Respondent

N/A for Applicant

Court clerk - Ibrahim

R U L I N G

In this application, the applicant/plaintiff prays for an order that judgment be entered against the defendant as prayed in the plaint herein and that costs of this application be provided for. The application is brought by a notice of motion dated 9th January, 2004, and made under Order XXXV rule 1(1)(a) of the Civil Procedure Rules. It is supported by the annexed affidavit of Shivji Javda Varsani, the managing director of the plaintiff company, sworn on 9th January, 2004.

The main ground upon which the application is premised is that the defendant is justly and truly indebted to the plaintiff in respect of the sum of money claimed on account of work done and materials provided by the plaintiff for the defendant at the latter's business premises.

Opposing the application, the defendant filed a replying affidavit sworn by Delphen Macharia Maina, the defendant's General Manager, on 30th January, 2004. In addition to the replying affidavit, the defendant also filed grounds of opposition stating that the application was frivolous, vexatious and scandalous; that there was no privity of contract between the plaintiff and the defendant; that the defence filed herein raises triable issues; and that the application lacked merit and the same ought to be dismissed.

At the hearing of the application, Mr. Master appeared for the applicant and Mr. Kipkorir for the respondent. Mr. Master submitted that the replying affidavit is based on information given to the deponent, and that it does not comply with the requirements of Order XVIII rule 3(1) since this is not an interlocutory application. He further submitted that the affidavit contained allegations of negligence thereby repeating the statements in the amended defence. He finally said that the defendant was merely employing tactics to delay payment and applied for the application to be allowed with costs.

Responding to the application, Mr. Kipkorir submitted that Order XXXV rule 2(1) allows a defendant to oppose an application by an affidavit. He also argued that the defence raised two main triable issues i.e. whether there was privity of contract, and whether there were any sums payable. He then submitted that where the defence raises even one triable issue, then summary judgment cannot be allowed. Mr. Kipkorir then referred to section 6 of the Oaths and Statutory Declarations Act, and more so the manner in which exhibits should be prepared. He submitted that the modalities attendant to the preparation and attachment of exhibits were not obeyed, and therefore the documents purporting to be exhibit 1 in support of the application for summary judgment were not properly before the court. He referred to some three authorities i.e. SHAH v. PASAMSHI [1984] KLR 531; D.T. DOBHIER & CO. (K) LTD. v. MUCHINA [1982] KLR 1; and PROLINE SUPA QUICK LTD. v. KENYA OIL COMPANY LTD. NAIROBI HCCC NO. 256 of 2003 (UR) and urged the court to dismiss the application.

In a short reply, Mr. Master said that the authorities referred to were not relevant to summary judgment, and asked the court to allow the application.

The law relating to the grant of summary judgment under Order XXXV of the Civil Procedure Rules is well documented. The thread that runs throughout the fabric of the decided cases makes it quite clear that if the defence raises even one triable issue, summary judgment will not be allowed. In GICIEM CONSTRUCTION CO. v. AMALGAMATED TRADE SERVICES [1983] KLR 156, it was stated that the power to grant summary judgment under Order XXXV should be exercised cautiously, bearing in mind that it is intended to apply only in cases where there is no reasonable doubt that a plaintiff is entitled to judgment and where therefore it is inexpedient to allow the defendant to defend for mere purposes of delay. And in the case of SHAH v. PADAMSHI [1984] KLR 531, Madan, JA, as he then was, said at p.535 –

"Summary judgment is a drastic remedy to grant, for inherent in it is a denial to the respondent of his right to defend the claim against him. A trial must be ordered if a triable issue is found to exist, even if the court feels that the defendant is unlikely to succeed at the trial. The court must not attempt to anticipate that the defendant will not succeed at the trial."

In NAIROBI GOLF HOTEL (K) LTD. v. LALJI BHIMJI SANGHANI BUILDERS & CONTRACTORS, Civil Appeal No.5 of 1997, the Court of Appeal made the following remarks about applications for summary judgment –

"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, 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."

From the above pronouncements, it seems that it is now well settled that the procedure for summary judgment will be resorted to in respect of liquidated demands only where it is plain and obvious that the defendant is truly indebted to the plaintiff, and there are no bona fide triable issues raised by the defence already filed. Applying these principles to the facts of the instant case, it is at once to be noticed that the plaintiff's claim against the defendant is for a liquidated sum of money being the balance allegedly due and owing by the defendant to the plaintiff in respect of work done and materials provided by the plaintiff for the defendant at the defendant's request at the latter's business premises. In its amended defence, the defendant denies that any contract was concluded between the parties, and further states that if there was such a contract, the plaintiff did not perform its part thereof, and if it did, then it performed it poorly and negligently. The defendant further states that if there was any contract, which is denied, then all the monies due to the plaintiff have been paid or set off.

The defendant's case is that if there was a contract, it was not between the plaintiff and the defendant, and that the payments made by the defendant to the plaintiff were only made upon a request by a third party, and on that party's behalf. It is the defendant's case, therefore, that there was no privity of contract

between the plaintiff and the defendant. The question as to whether there was privity of contract between the parties is a triable issue. It is also a triable issue whether the plaintiff performed its part of the contract, or whether it performed that part poorly and negligently. Whether the plaintiff has been paid its dues fully, or by set off, is a triable issue. In sum, the pleadings do raise, prima facie, some triable issues, which are quite weighty. And in the face of those issues, it would not be prudent for the court to grant summary judgment as prayed.

Learned counsel for the plaintiff submitted that the replying affidavit offended the provisions of Order XVIII rule 3(1). Since it is the defence case that there was a third party who has not been sued and who was the unhappy cause of the defendant's predicament, I don't think that the affidavit is misplaced.

For the foregoing reasons, the application for summary judgment fails and it is hereby dismissed with costs.

Dated and delivered at Mombasa this 2nd day of November, 2007.

L. NJAGI

JUDGE