



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 256 of 2003

PROLINE SUPAQUICK LIMITED.....
.....PLAINTIFF
VERSUS
KENYA OIL COMPANY LIMITED.....
.....DEFENDANT

R U L I N G

This is an application for summary judgement. It is premised on the ground that the defendant did not have any defence which would warrant a full trial. It is further premised on the plaintiff's feeling that the defence on record was filed solely for purposes of delaying the judgement to which the plaintiff is otherwise entitled.

It is the plaintiff's case that they are owed the sum of KShs. 2,098,777/85. Out of that sum, the defendant is said to have admitted owing KShs. 2,000,000/= as at October 2002. The said admission is said to be contained in the defence herein.

Thereafter, in May and July 2005 the defendant issued a certificate of tax deduction and a letter respectively, notifying the plaintiff that the defendant had credited the plaintiff's account with interest which had been earned by the plaintiff on the "**station security deposit.**" In the light of the fact that the defendant issued the certificate of tax deducted from interest which the plaintiff had earned from the deposit that was held by the defendant, it is the plaintiff's case that that constituted an implied admission that the defendant was still holding the "**station security deposit**".

It is to be noted that the Plaintiff herein was filed on 9th May 2003. Therefore, when the defendant wrote to the plaintiff on 22nd July 2003, the suit had already been in existence for two months. For that reason, the plaintiff submits that the defendant must be deemed to have acknowledged being indebted to the plaintiff even after the suit had been filed.

However, in the defence, it is only conceded that the defendant owed the plaintiff, the sum of KShs. 2,000,000/= in or around October 2002. It is then alleged that the two parties herein thereafter entered into an Agreement, pursuant to which the defendant transferred the credit to the plaintiff's associated company, Chief Petroleum Limited.

The plaintiff's submission is that the defence did not tally with the defendant's documents, thus rendering the defence to be shadowy. If anything, the plaintiff sees the only line of defence that was still remaining as being a point of law, as to whether or not a director of the plaintiff could enter into an Agreement without the authority of the company.

In any event, the plaintiff is of the view that the defendant had even failed to demonstrate that there was an agreement between the parties, pursuant to which the defendant was supposed to have credited the plaintiff's associated company. Therefore, the plaintiff submitted that it is entitled to summary

judgement, as the only conceivable line of defence was the point of law, which the plaintiff deems to be misconceived.

In opposition to the application, the defendant placed reliance on a replying affidavit which had been filed in answer to the plaintiff's earlier application, through which the plaintiff had sought judgement on admission.

By that affidavit of George Njoroge Mwangi, the defendant stated that there had been an agreement between the parties herein, that the defendant should transfer to Chief Petroleum Limited, the credit which the defendant had previously held for the plaintiff. Mr. Mwangi depones that the agreement was arrived at between himself and Mr. Azim Rajwani, who is a director of the plaintiff.

Faced with those depositions, Mr. Azim Rajwani swore a further affidavit, through which he expressly denied ever entering into an agreement with Mr. Mwangi, which authorised the defendant to transfer the plaintiff's credit to Chief Petroleum Limited. Mr. Rajwani emphasized that he was merely one of the plaintiff's directors and shareholder. Therefore, in his considered view, he had no authority to enter into any agreement on behalf of the plaintiff without the company passing an appropriate resolution. And, in this case, Mr. Rajwani was positive that the plaintiff had not ever passed any resolution that would have empowered him to enter into an agreement with Mr. Mwangi of the defendant company.

In my understanding of the plaintiff's submissions, the defence herein is said to be misconceived because the plaintiff believes that it had demonstrated the need for the defendant proving the alleged agreement between Mr. Rajwani and Mr. Mwangi. However, the plaintiff feels that the defendant had failed to adduce any evidence to prove the alleged agreement. That being the case, in the plaintiff's assessment, the misguided line of defence would have to fail.

However, in the defendant's mind, the plaintiff had failed to as much as provide verification that the defendant was indebted to the plaintiff at the commencement of the suit. That requirement is said to arise from the provisions of Order 35 rule 1 (2) and rule 9 of the Civil Procedure Rules.

Subrule (2) provides that **“the application shall be made by motion 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 any amount claimed.”**

In the Plaintiff herein, it was pleaded that the defendant owes the plaintiff KShs. 2,098,777/35. And in the supporting affidavit of Mr. Azim Rajwani the deponent sets out (at paragraph 12 thereof) calculations which show how the amount claimed was arrived at. Therefore, although the defendant submitted that the plaintiff did not even attempt to provide a valid verification of the defendant's indebtedness to the plaintiff, at the commencement of the suit, the truth is that the plaintiff definitely made efforts in that regard. For that reason, the defendant was not right to have dismissed the said efforts, as being less than an attempt at verification.

The other issue that was taken up by the defendant was in relation to delay. It was contended that the plaintiff had failed to justify the delay in bringing the application for summary judgement, and it therefore did not deserve the orders sought. The defendant cited the decision in **RICHARD H. PAGE & ASSOCIATES LTD V ASHOK KUMAR KAPOOR [1979] KLR 246**, as authority for the proposition that where a plaintiff unnecessarily delayed in making an application under Order 35, he ought not to be allowed to benefit by summary procedure unless he had explained the delay.

At page 249 of the Law Report, the HON. CHESONI J. (as he then was) is quoted as holding as follows:

“Of course, where the plaintiff unnecessarily delayed in making the application under Order XXXV whether or not the pleadings have closed and whether or not there is joinder of issue he ought not to be allowed to benefit by summary procedure unless he can explain the delay.”

But, it must also be recognised that the learned judge went on to hold, (at page 250) that;

“With respect, I agree with Mr. Frazer that once appearance has been entered there is no time limit as to when an application under Order XXXV may be filed; but any delay must be justified.”

In that regard, the defendant feels that the plaintiff had failed to explain the delay in bringing this application for summary judgement. But, the plaintiff believes that the delay, if any, was for no more than two months, from the date when the court dismissed its first application, which was for judgement on admission.

The facts are as follows; that the plaint was filed in court on 9th May 2003. Then, on 3rd June 2003, the Defence was filed. Three months later, on 19th September 2003, the plaintiff filed an application for judgement on admission. However, that application was dismissed on 12th March 2004. Thereafter, this application was filed on 11th May 2004.

In effect, the summary judgement application was filed some eleven months after the defendant had filed its Defence. A period of eleven months is by no means short. It is a definite sign of delay on the part of the plaintiff.

In the circumstances, the court must now ask itself whether or not the plaintiff has explained the said delay.

As far as the defendant was concerned, the delay had not been explained at all. However, I do not think that the defendant is right, in that respect. The fact is that upon receipt of the defence herein, the plaintiff formed the opinion that the defence constituted an admission of liability on the part of the defendant. Therefore, the plaintiff filed the application for judgement on admission. That application would account for the delay as between 19th September 2003 and 12th March 2004, when the application was dismissed. Thereafter, this application was made within two months. Accordingly, I hold the view that the plaintiff has explained the reasons why the application for summary judgement was brought seemingly late. Clearly, during the subsistence of the application for judgement on admission, the plaintiff could not file an application for summary judgement, or else it may have been deemed as abusing the process of the court.

Given the fact that this application was filed only some two months after the court dismissed the application for judgement on admission, I find that there was no unreasonable delay which might have necessitated a further explanation from the plaintiff.

However, arising from the dismissal of the application for judgement on admission, the plaintiff needed to re-evaluate its position carefully. The reason for saying so is that the material which was presented before the court for that application is largely the same as that now presented before me, for this application. The affidavit and the annexures used in both applications are essentially the same.

In his ruling on the application for judgement on admission, the HON. L. NJAGI J. expressed himself thus:

“Apart from interpreting the documents, a point of law has also arisen in this matter. Assuming that there was an agreement to the effect that the debt owed to the plaintiff be paid to a third party, did the plaintiff’s director who allegedly agreed to that arrangement have authority to bind the company.

The point is that this is a serious point of law which was raised by the plaintiff itself and which should be sorted out before judgement on admission can be justified.”

In my considered view, that serious point of law would similarly have to be sorted out before summary judgement could be justified.

In this case the respondent has sworn an affidavit in which it has been deposed that Mr. Azim Rajwani entered into an agreement with Mr. George Mwangi. However, Mr. Rajwani has sworn an affidavit denying the existence of an agreement pursuant to which the defendant was to credit Chief Petroleum Limited. In other words the two parties have given evidence on oath, but stating diametrically opposed “facts”. In the face of such inconsistencies on matters of fact, it would be wrong for the court to accept the contents of one affidavit, in preference to the other affidavit.

I have always understood it to be the law, that when faced with such inconsistent depositions by the protagonists in a legal battle, the most prudent action which the court can take is to give the said protagonists an opportunity to face-off at a trial. It is only through the process of a trial that the witnesses would not only say their bit, but would also go through the rigours of cross-examination, which is intended to give the court the opportunity to have a more complete assessment of the evidence as well as the witnesses.

In **NAIROBI GOLF HOTEL (KENYA) LTD V LALJI BHIMJI SANGHANI BUILDERS AND CONTRACTORS, CIVIL APPEAL NO. 5 of 1997**, the Court of Appeal had this to say of applications for summary judgement:

“It is trite law that in an application for summary judgement 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*, 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 judgement.”

Of course, that is what the plaintiff has asserted in this case: that the defence was shadowy and a sham. Indeed, it was submitted that the only line of defence raised was an unsustainable point of law. If that be the case, the following words of the Court of Appeal, in the case of **INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION V DABER ENTERPRISES, CIVIL APPEAL NO. 41 of 2000**, would support the plaintiff’s case:

“The purpose of proceedings in an application for summary judgement is to enable a plaintiff to obtain a quick judgement where there is plainly no defence to the claim. And where the defendant’s only suggested defence is a point of law and the court can see at once that the point is misconceived or, if arguable, can be shown shortly to be unsustainable, the plaintiff will be entitled to judgement. The summary nature of the proceedings should not, however, be allowed to become a means of obtaining, in effect, an immediate trial of the action, for it is only if an arguable question of law or construction is short and depends on few documents that the procedure is suitable.”

Insofar as it is suggested by the plaintiff that the only line of defence herein was a point of law, I am unable to agree. It is not the defendant who has raised the issue as to whether or not Mr. Azim Rajwani had authority to enter into an agreement with the defendant. The defendant only said that there was “**an agreement**

between the parties hereto (that) the said amount was transferred to the credit of the plaintiff’s associated Company Chief Petroleum Limited.”

That statement is one of fact, not law. Therefore, I hold the considered view that the plaintiff was not right to have described the defence as a point of law.

In the case of **ORBIT CHEMICAL INDUSTRIES LIMITED Vs MYTRADE LIMITED & ANOTHER, HCCC No. 631 of 1998**, the HON. RINGERA J. held as follows:

“Whether the defendants or the plaintiff are likely to succeed or not is not a pertinent matter in an application for a summary judgement. It is a matter for the trial court.”

Therefore, having come to the conclusion that there was, at least, one triable issue, it was not open to me to delve deeper into the said issue, at this stage, with a view to ascertaining whether it was the defendant or the plaintiff who was more likely than the other to succeed.

In **SHAH V PADAMSHI [1984] KLR 531 at 535**, the Court of Appeal said:

“Except in the clearest of cases, which this one is not, it is inadvisable for the court to prefer one affidavit to another in order to enter summary judgement. Summary judgement is a drastic remedy to grant, for inherent in it is a denial to the respondent of his right to defend the claim made against him. A trial must be ordered if a triable issue is found to exist, even if the court strongly 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 my considered view, those words are not only binding on me, but are an embodiment of the rationale for the grant or denial of summary judgement.

Applying the said rationale to the matter before me, it should by now be clear that the application herein is unsuccessful. It is therefore dismissed, with costs.

Dated and Delivered at Nairobi, this 21st day of September 2006.

FRED A. OCHIENG

JUDGE