



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT ELDORET

Civil Appeal 83 of 2005

**MATHEW K. BIRGEN ..... APPELLANT**

**VERSUS**

**EZEKIEL KOMEN ..... RESPONDENT**

**JUDGMENT**

Ezekiel Komen initially sued Mathew Birgen in the Chief Magistrate's Court in Eldoret and sought an order for Judgment in the sum of K. Shs. 102,000/-, costs and interest thereon.

He had based his claim on a contract allegedly entered into with the said Birgen during the year 2002, and by virtue of which, Birgen was to purchase his bar business in Kaburuwo in Eldoret, together with all relevant accessories at a consideration of K. Shs. 312,000/-. It was thus his case that Birgen who was supposed to have paid the purchase price in installments, had paid only him a sum of Shs. 210,000/- leaving a balance of Shs. 102,000/- which constituted the sum of his claim in the suit.

Komen moved the court successfully on 6/6/2005 in an application for summary judgment, and after the defence was struck off, he was awarded the sum of K. Shs. 102,000/- together with costs and interest, which decision has triggered this appeal, which is in turn based on the following grounds:

- “1. That the Honourable learned Magistrate erred both in law and fact in failing to dismiss the respondent's application for summary judgment.
2. The Honourable learned Magistrate erred both in law and in facts in failing to grant the appellant unconditional leave to defend the suit.
3. The Honourable learned Magistrate erred both in law and in fact in failing to find that the appellant's defence raised triable issues.
4. The Honourable learned Magistrate erred both in law and in fact in failing to find that there was insufficient evidence presented by the respondent to warrant summary procedure.
5. The Honourable learned Magistrate erred both in law and in fact in failing to find that the appellant sufficiently rebutted the affidavit to the respondent's application for summary judgment.
6. The Honourable learned Magistrate erred both in law and in fact in failing to find that the appellant made no admission of liability.”

Mr. Shivaji who appeared for Komen was of the view that the matter ought to have been referred to full trial, but Mr. Kathili, for Birgen urged the court to uphold the trial Magistrate's finding as the defence had contained mere denials.

I have as is expected of me, reviewed the pleadings and proceeding in the subordinate court with a view to establishing whether Komen, who I shall now refer to as ('the respondent'), had met the required standards for an application for summary judgment, and in this connection I would append hereto Order XXXV rules 1 (a) and 2 of the Civil Procedure Rules which provide that:

*"In all suits where a plaintiff seeks judgment*

*for-*

*(a) a liquidated demand with or without*

*interest; or*

*(b).....*

*where the defendant has appeared the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.*

*(2) 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."*

It is clear for the proceedings that the learned trial Magistrate was alive to the fact that if a triable issue was found to exist, she should have ordered a trial, for it is trite that *"summary judgment is granted subject to there being no bona fide triable issue entitling the defendant to leave to defend. If a bona fide triable issue is raised, the defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defence raised is a sham"* (**Commercial Advertising and General Agencies Limited v. Qureshi [1985] KLR 458**).

It is evident from the record that though the respondent had deponed clearly to the issues at hand the appellant however chose to file grounds of opposition, and it was his ground that the alleged contract or agreement was non-existent and that the application was premature, it lacked in merit and that he had raised triable issues in his defence. He did not depone to controvert the facts which the respondent had raised,

The learned trial Magistrate reviewed the evidence on record and arrived at the conclusion that the defence did not raise any triable issues but that it contained general denials.

Birgen ('the appellant') had filed his defence to the suit and denied having entered into the said agreement, or having committed himself to paying for the said purchase by installments. He also denied having paid the initial deposit, or that there was a balance out standing, but a look at the pleadings reveals that there was an agreement between the two; that he had committed himself to pay the balance of the purchase price, which in my humble opinion rendered his defence a mere denial.

The legal principle is that *"a liquidated claim is one that needs not further inquiry as to how much ought to be claimed..... An application for summary judgment cannot be allowed or applied in cases where a detailed defence has been filed, as the court cannot ignore the defence filed and proceed with the case by way of summary procedure"* (**Gurbaksh Singh & Sons Limited v. Njiiri Emporium Limited [1985] KLR 695**).

I have perused the pleadings in this matter and it is evident that the respondent's claim was a liquidated demand without interest. It was thus incumbent upon the appellant to show that he should have

been given leave to defend the suit, but he failed the test.

I find that the learned trial Magistrate weighed the evidence for both parties and that her conclusion was well merited and I would find no reason to interfere with it.

The upshot of all this is that this appeal which lacks in merit is hereby dismissed with costs.

Dated and delivered at Eldoret this 8<sup>th</sup> day of December 2006.

JEANNE GACHECHE

JUDGE

Delivered in the presence of:

Mr. Mwinamo for the appellant and No appearance for the respondent