



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 40 OF 2004

KOBIL PETROLEUM LIMITED.....PLAINTIFF

VERSUS

MARSMAN & COMPANY LIMITED.....DEFENDANT

RULING

This is an application for summary judgment in terms of Order XXXV rules 1 and 2 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act, (Cap. 21, Laws of Kenya) in which the Plaintiff/applicant seeks orders for summary judgement be entered for the Plaintiff against the Defendant for Kshs. 2,016,095/50 together with interest and costs, and the costs of the application.

The application is supported by the Affidavit of one Daniel Segal, the Plaintiff's Head of Marketing and Business Development, sworn on 25.10.2005 and the grounds that:

- (a) the defence filed herein does not disclose a triable issue and is only calculated to delay the course of justice,
- (b) cheques issued by the Defendant in settlement of the debt were dishonoured on presentation for payment;
- (c) the claim is a liquidated claim,
- (d) the Defendant is truly indebted to the Plaintiff
- (e) the Defence has no merit and is a mere denial.

Reference to the affidavit of Gil Strassburg is I think in error, and inadvertent inclusion when the Affidavit was presumably intended to be sworn by Gil Strassburg but was in fact sworn by David Segal as already stated above.

The application is premised upon the provisions of Order XXXV rule 1(a) and (2) of the Civil procedure Rules. Rule 2 requires 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. The application has been brought by way of a Notice of Motion as is required by this rule. Rule 1(a) of the said order says:-

“1(1) In all suits where a Plaintiff seeks judgement for:-

- (a) a liquidated demand with or without interest, or

(b) (not applicable)

where the Defendant has appeared, the Plaintiff may apply for judgement for the amount claimed, or part thereof, and interest..... The Plaintiff's claim is for the sum of Ksh.2,016,095.50 together with interest and costs. Mrs Effendi, learned Counsel for the Plaintiff told the Court that the claim is based upon dishonoured cheques, and is therefore liquidated, the defence hereto is general. The cheques were dishonoured and the Plaintiff incurred bank charges. Notice of dishonour, and charges for payment was duly made to the Defendant by the Plaintiff's Counsel. No payment has been made. Counsel therefore concluded that there was no defence to this suit. Learned Counsel cited to the Court several authorities on this subject of summary judgement under Order XXXV to which I shall presently refer.

Without derogating from those authorities, in *COMMERCIAL ADVERTISING & GENERAL AGENCIES LTD VS. QURESHI* [1985] K.L.R. 458, Sachdeva J. held inter alia, "on an application for summary judgement, the Plaintiff, the defence, the counterclaim and the reply to defence, if any, and affidavits in support and in reply as well as all relevant issues and circumstances are all proper material for consideration. Nothing is immaterial which helps justice to be done"

The Defendant filed a defence dated 29.04.2004 on 3.05.2004 to the Plaintiff's action. In paragraph 3 thereof the Defendant avers that the sum of Kshs.3,389,464.00 was paid in full, and in paragraph 4 thereof, avers that "all the cheques alluded to in paragraph 6 of the Plaintiff were indeed written by the Defendant but not all the cheques were dishonoured and all those dishonoured were replaced accordingly, and that the Plaintiff received the replacements in full and final payment of the claim and is now estopped from bringing any claim based on them." This is the line of argument followed by Mr. Kangethe, learned Counsel for the Defendant. In total contradiction to the above captioned averment in the defence, the Replying Affidavit sworn on 1.03.2005 by one UDAY PATEL, a director of the Defendant Company, in paragraph 7 thereof on information from the Defendant's Advocates, (not from his knowledge), "that the cheques as annexed to the Affidavit do not appear to be drawn by the Company and this in my opinion also seeks clarification in a full trial".

It is hard to reconcile those pleadings. In the Defence, the Defendant clearly admits that it issued the cheques, and that those which were dishonoured were replaced and accepted in full and final settlement of the claim by the Plaintiff. In the Replying Affidavit, the Defendant purports to retract from the clear position expressed in the Defence. To use the Defendant's own words, the Defendant is estopped from contradicting itself. The only way to do so is by way of amendment of the Defence. The Defendant has not taken that option, and is bound by his pleading in the Defence that he issued the cheques, replaced the cheques enumerated by the Plaintiff in its Statement of Account referred to in paragraph 7 of the Supporting Affidavit of Daniel Segal. The Defendant does correctly acknowledge in paragraph 8 of the Replying Affidavit of UDAY PATEL "that striking out a pleading is a draconian measure, and that the Court ought to exercise its discretion only in clear instances, where for instance a pleading does not either show any reasonable cause of action or defence, is frivolous, and/or vexatious or is an abuse of the process of the Court, and that it would be improper to exercise such discretion here because there is a valid defence which raises triable issue".

Sir Charles Newbold P. laid down the purposes of Order XXXV in the case of *ZOLLA vs. RALLI BROS LTD* [1969] EA 692 at p. 694 – when he said:- "Order 35 is intended to enable a Plaintiff with a liquidated claim to which there is clearly no good defence, to obtain a quick and summary judgement without being unnecessarily kept from what is due to him by delaying tactics of the Defendant. If the Judge to whom the application is made considers there is any reasonable ground of defence to the claim the Plaintiff is not entitled to summary judgement..... Normally a defendant who wishes to resist the entry of judgement should place evidence by way of affidavit before the Judge showing some reasonable ground of defence."

The learned President of the Court then goes on to say that this is clear from the words of Order XXXV, r. 2 which state:-

"The Court may thereupon, unless the Defendant by affidavit, or by his viva voce evidence or otherwise,

shall satisfy it that he has a good defence on merits, or discloses such facts as may be deemed sufficient to entitle him to defence, pronounce judgement accordingly.”

In the instance case, the Plaintiff has made specific allegations, including the number of cheques, the amounts in them, the dates of presentation, and dishonour or nonpayment by the Defendant’s Bankers. The Defendant has not either in its Replying Affidavit or otherwise shown that the dishonoured cheques were replaced, and upon replacement the cheques duly paid. In a case where specific allegations are made, and also documented, it behoves the Defendant to specifically respond to these claims with evidence by Affidavit or otherwise to rebut those claims. The Defendant has failed to do so in this matter.

A mere denial is not a sufficient defence to very specific claims of the Plaintiff. See the case of *MAGUGA GENERAL STORES vs. PEPCO DISTRIBUTORS LTD* [1987] 2 KAR 89.

Indeed, unless the matter is plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial. Summary procedure must not be used for obtaining an immediate trial, the question must be short and dependent on few documents and a Defendant who can show by affidavit that there is a bona fide triable issue is to be allowed to defend that issue without condition. Where the defence is a point of law and the Court sees at once that the point is misconceived or, if arguable, plainly unsustainable, summary judgement will be given.

The defence in this case is that the Defendant made good the dishonoured cheques, and that the Plaintiff received the replacement cheques in full and final settlement and on the ground thereof, the Plaintiff is estopped from further claims. The Defendant has supplied no evidence by affidavit or otherwise – eg letters forwarding the cheques in replacement of the dishonoured ones, any acknowledgement of receipt, thereof, or a letter from the Defendant’s bankers that they paid out to the Plaintiff the proceeds of cheques issued by the Defendant. The Defendant thus fails all the tests for resisting an application for summary judgement. This is one of those cases where it is plain and obvious that the Defendant has no viable defence to the Plaintiff’s claim. The Defendant pleaded in the Affidavit that striking out a pleading is a draconian measure, summary judgement is not striking out a pleading,. It is a procedure where only the Court upon examining the application of the Plaintiff (it is not open to the Defendant unlike under Order VI, rule 13 which is open to both Plaintiff and Defendant) decides on the evidence placed before it by either affidavit or otherwise, that the defence, even if arguable, is not sustainable.

In the instant case, it is plainly obvious that the Defendant’s defence dated 29.04.2004 and filed on 3.05.2004 is not sustainable as there is no material in the Replying Affidavit or submissions of Counsel upon which it could stand even upon a trial, and is in my opinion one of those unhappy defences designed to keep the Plaintiff unnecessarily away from what is clearly due to him by the delaying tactics of the Defendant. Looking at the substance of the matter it seems to me to be plain and obvious in truth, that there is no merit in the defence and the Defendant is truly and justly indebted to the Plaintiff.

For these reasons, there shall be judgement entered for the Plaintiff for Kshs. 2,016,095/50, bank charges of Ksh. 47,289.30 together with interest and costs. The Plaintiff shall also have the costs of this application.

Dated and Delivered at Nairobi this 10th day of May 2005.

ANYARA EMUKULE

JUDGE