



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE 1541 OF 2001

AYAZ HUSSEIN MUKHI PLAINTIFF

VERSUS

**F.K. MOTORS (K) LTD MOHAMMED FAZAL KARMALI
.....DEFENDANTS**

R U L I N G

This Notice of Motion under Order 35 Rule 1, Order 6 Rule 13 (1) (a) (b) (c) and 13 (2) of the Civil Procedure Rules, dated 17/9/03 seeks the following orders:-

- 1. Judgment be entered in favour of the Plaintiff and against 1st Defendant as prayed in the Plaintiff.**
- 2. The defence filed herein be struck out as disclosing no reasonable defence, is a sham, an attempt to delay fair trial and is otherwise an abuse of the process of the court.**
- 3. Costs of the suit be awarded to the Plaintiff.**

The application is supported by an Affidavit by Ayaz Hussein Mukhi of even date and is on the grounds that: the defence is a mere denial, a sham and discloses no reasonable defence; the defence is vague and raises no substantive or factual matters.

In opposition to the application the Defendants aver, in their grounds of objection dated 10.2.04, that the application is frivolous and has no merit, it is an afterthought since the suit was filed on 9/10/01 and the defence filed on 7/11/01; that the Defendants have a good and strong defence on record which raises serious and weighty triable issues; and there is unreasonable and unexplained delay in bringing this application.

There is a Replying Affidavit of the Defendant/Respondent, dated 26/2/04, deponed by Mohammed Fazal Karmali, in which it is averred, **inter alia** that:-

(a) the sum of K.shs.6,309,070/32 was not credited into the 1st Defendant's account by Trust Bank as the said deposits were only to be credited to the 1st Defendant's account upon maturity and the deposits did not mature as Trust Bank went into liquidation.

(b) The whole arrangement for assignment was expressly to be effected upon maturity of the deposits held by the Plaintiff in the Trust Bank Ltd. Accordingly, it is misleading for Plaintiff/applicant to aver that it's deposits held in Trust Bank were credited in 1st Defendant's account while those deposits never matured.

(c) It is the Plaintiff who owes the 1st Defendant a sum of K.shs.1,700,000/= which it had received from 1st Defendant as Plaintiff's deposits in Trust Bank did not mature and accordingly, were not credited in the 1st Defendant's account.

(d) At no time did the 1st Defendant agree to have a Hyundai vehicle valued at K.shs.1,000,000/= to be off-set against the said deposit. The transaction involving a Hyundai vehicle was totally different and involved Hyundai Motors (K) Ltd. and not the 1st Defendant.

Having carefully perused through the pleadings and the submissions by Counsel for both sides – Mr. Sevany and Ndurumo – I have reached the following findings and conclusions:

The order under which this application is brought – Order 35 rule 1, - which deals with summary judgments specifically lays down what an applicant under those provisions must meet and establish before such judgment can be entered in his/its favour. The key factors are a liquidated and ascertained sum that is being claimed; and that there are no triable issues raised by the Defendants' defence.

My reading of the pleadings herein does not show that such requirements have been demonstrated by the applicant.

The sums claimed by the Plaintiff, and the basis upon which those claims or sums depended, are in my view disputable. For example, were any sums credited into the 1st Defendant's account by the Trust Bank on behalf of the Plaintiff/applicant? That depended on the maturity of the deposits, in that Bank, by the Plaintiff, and whether or not they were to mature and whether or not that was before Trust Bank Ltd. went under.

There is also what seems like a set off by the 1st Defendant of K.shs.1,700,000/=.

The guiding principle in summary judgments is that the sum must be certain and liquidated. If there is any triable issue raised by the Defendant, even if it is just one, then the defendant is entitled to defend and the case must go for a full trial to facilitate proof of those disputed issues by evidence and cross-examination.

In the end, I hold that there are triable issues raised by the Defendants' pleadings which warrant a full trial.

Accordingly, this application is hereby dismissed with costs to the Defendant and against the Plaintiff/applicant. The case should be disposed off in a full trial.

DATED and delivered at Nairobi this 6th day of May, 2005.

O.K. MUTUNGI

JUDGE