REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL APPEAL 127 OF 2002

LACOTE LIMITED ……. APPELLANT

VERSUS

HENRY OULO NDEDE ……..…….. RESPONDENT

(An Appeal from the Ruling of Hon. J. R. Karanja, SRM
in Milimani Commercial Courts Civil Suit No. EJ 652 of 1999
delivered on 29th February, 2000).

JUDGMENT

The main issue in this appeal is whether the lower court was correct in entering summary judgment against the Appellant.

The procedure for summary judgment is found in Order XXXV Rule 1 of the Civil Procedure Rules. The relevant section for purposes of this application is Rule 1 (1) (a) which reads as follows:-

> ***"1(1) In all suits where a plaintiff seeks judgment for – (a) a liquidated demand with or without interest; … 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".***

This summary process must be exercised carefully and, as was stated in ***H D Hasmari vs Banque Du Congo Belge EACA Civil Application No 9 of 1938,*** should not be exercised where the defence raises even one triable issue. What does this really mean? In my view, it relates to a triable issue raised in answer to the Plaintiff's claim. A defence which raises an irrelevant or insubstantial issue cannot be allowed to delay the Plaintiff's claim. The ground for defence must be reasonable. As was said by Graham-Paul, V. P. in ***Churanjilal & Co. vs Adam EACA Civil Appeal No. 22 of 1950,*** "…there…(must be) a definite triable issue of law" (cited in ***Kundanlal Restaurant vs Devshi & Co. EACA Civil Appeal No. 76 of 1951)***. According to Sir Newnham Worley (V.P.) in the ***Kundanlal*** case, a defence raises a triable issue if the court cannot form any firm belief at the interlocutory stage that the defence put forward is a sham.

Summary procedure is a radical remedy and a court of law should be slow in resorting to this procedure which can only be applicable in plain, clear and obvious cases. In ***D T Dobie & Company (Kenya) Ltd vs Muchina (1982) KLR***. 1 at p. 9 Madan J A (As he then was) said:

> ***"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not***

to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way."

Although the above was in respect of an application for striking out a plaint, it would equally apply to an application for summary judgment as was the case in the present appeal.

Now, should this "radical remedy" have been applied in this case?

The genesis of the suit in the lower court was a contract for professional consultancy entered into between the Appellant and Respondent, whereby the Appellant agreed to pa the sum of Kshs.600,000/= for professional consultancy, in a manner outlined in paragraph 11.1 of their Agreement dated 6th May, 1999. According to the Respondent, he performed his part of the Agreement by delivering the final report, and was in fact paid in part, as per the Agreement. According to the Appellant, there were two events that happened that prevented them from paying the final instalment: first, that the Appellant's financiers had failed to provide "a satisfactory and favourable review" as per condition 11.1 (c) of the Agreement, and secondly, the Respondent was in breach of the "confidentiality" condition (No. 8 of the Agreement) which disentitled him to payment, and in respect of which the Appellant had raised a counter-claim.

Both these alleged breaches were articulated in the Appellant's defence filed before the lower court. Notwithstanding the same, the lower court entered summary judgment for the Respondent, and delivered itself, in part, as follows:

"It would be difficult to comprehend how the defendant made part payment of the fees and expenses if indeed the plaintiff had breached the terms and conditions of the agreement. The plaint viewed in with the facts contained in the supporting affidavit have the effect of showing that this is a very clear and straight forward case which ought not be delayed unnecessarily when it is evident and obvious that no valid triable issues are raised in the defence."

It is against that Ruling that this appeal has been preferred. In his submissions before this Court, Mr Opiyo, for the Appellant, argued that there were serious triable issues which ought to have gone for trial, and pointed that the amount awarded in the Judgment by the trial court did not take into account the pre-payment, resulting in an overpayment to the Respondent.

Mr Nyamunga relied on the cases of ***Gupta vs Continental Builders (1978) KLR, 83; Magunga General Stores vs Pepco Distributors Ltd (1987) 2 KAR 89; National Westminster Bank plc vs Daniel & Others (1994) 1 AII E R.156; Industrial and Commercial Development Corporation vs Daber Enterprises Ltd {Civil Appeal No. 41 of 2000,*** (unreported} and ***Royal Credit Limited vs Samuel Madoka & Another*** (unreported) ***(Nairobi High Court Civil Case No.6240 of 1992)*** for his proposition that this was a clear case where Summary Judgment was properly entered.

I am not at all convinced that this was a proper case for a summary procedure. As the Courts have indicated over and over again, summary procedure is drastic; it removes a litigant from the seat of justice without a hearing based on evidence that can be tested in cross-examination; and must be used sparingly in clear and straight forward cases where there are indeed no triable issues. Here there were actually two triable issues – both raised in the defence – relating to the failure of the Appellant's financiers to provide a satisfactory report, and breach of confidentiality. These issues were sufficient for the case to proceed to trial, and the lower court erred in not subjecting the case to full trial.

Accordingly, this appeal will succeed. I allow the same, and set aside the Ruling and decree of the lower court with costs to the Appellant both here and in the lower court.

Dated and delivered at Nairobi this 20th day of July, 2005.

ALNASHIR VISRAM

JUDGE