



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 1493 of 2002

MPAKA ROAD DEVELOPMENT

COMPANY LIMITEDPLAINTIFF

VERSUS

BHARAT RACH & ANOTHER DEFENDANT

RULING

By its Notice of Motion of the 6th June, 2003 the Applicant seeks the following orders:-

- (1) **THAT** summary Judgment be entered for the Plaintiff as prayed in the Plaint
- (2) **THAT** paragraph 30,31,32, and 33 of the Counterclaim be struck out
- (3) **THAT** the Counterclaim be dismissed with costs to the Plaintiff
- (4) **THAT** the costs of this application be provided for The grounds on which it is brought are as follows:-
 - (a) The Plaintiff's claim is for a liquidated sum of money
 - (b) The said claim is based on written admission of liability and quantum
 - (c) The said claim is further based on cheque drawn by the Defendants payable to the Plaintiff which cheques have been dishonoured and/or unpaid to-date
 - (d) In the premises, the Defence filed by the Defendants disputing the said claim does not raise a serious triable issue.
 - (e) The counterclaim which is based on the same grounds as pleaded in the Defence is not sustainable

The Application is supported by the Affidavit of F.R.S. De Souza to which are annexed various documents which I shall refer to in this Ruling. The facts are that the Plaintiff entered into a lease with a company called Shoppers Paradise Ltd (now in liquidation) Joined in the lease were the 1st and 2nd Defendants as guarantors. Subsequently the said lease was surrendered and a new lease was entered into with a company known as Innscor Kenya Ltd. Firstly a Memorandum of Understanding was entered into between the 1st and 2nd Defendant, a Mrs. Avni Rach, the Plaintiff and Innscor Ltd.

This Memorandum acknowledges that Shoppers Paradise Ltd owed the Plaintiff (referred to as the

nominee) Shs.6,102,389-80. In the memorandum the 1st and 2nd Defendants agreed to liquidate the debt by monthly instalments of Kshs.200,000/- in respect of which the 1st and 2nd Defendant issued post dated cheques making up the total of the sums due.

In paragraph 6 of the plaint it is alleged that the Plaintiff would consent to the said surrender of lease and forbear from commencing legal action against Shoppers Paradise Ltd.

This consideration is not however stated in the memorandum. The Defence raises a number of issues, which do not raise any substantial issues but rely on technical arguments as to the validity of the various documents annexed to the supporting affidavit. In paragraph 12 and 17 of the Defence and counterclaim the Defendants reply to the claim on the post dated cheques as follows:

“12. Alternatively and without prejudice to the foregoing, the Defendants state that if any cheques (postdated or otherwise) were furnished to the Plaintiff by the Defendants (which is all denied), the same was only because Shoppers, the Plaintiff’s tenant, could not meet its obligations. And the Defendants state that to the Plaintiff’s knowledge, Shoppers had at the times prior to the surrender of the lease/offer letter been placed under Receivership.

17 In future alternative and also without prejudice to all the foregoing, the Defendants admit the matters pleaded in paragraph 7 and 8 of the plaint save and except to state that the postdated cheques furnished to the Plaintiff by the Defendants were furnished without any or any sustainable consideration.”

The Plaintiff alleged that the cheques presented for payment were dishonoured and 1st and 2nd Defendants requested the Plaintiff not to present the balance of the cheque. Neither of these allegations are denied.

The counterclaim merely seeks declaration that the documents furnished by the 1st and 2nd Defendants are void irregular and unenforceable as is the Memorandum of Understanding.

Mr. Oyatsi for the Applicant relied only on the dishonoured cheques. The grounds refer inter alia to a written admission. This I presume refers to the letter written by the 1st and 2nd Defendant to the Plaintiff on the 14th June, 1999 which is in the following terms: -

“ We will be grateful if you would consent to our surrender of the lease dated 22nd January 1999 in respect to the above property. We confirm that we are now in arrears in rent amounting to Kshs.6,102,389,80/=. We undertake to pay the said sum to you on terms and conditions to be mutually agreed upon. Although the said sum is payable forthwith we regret we are unable to effect payment because of financial constraints. In consideration of your forbearing to take legal action to enforce you rights against us and guarantors we promise to liquidate subject to the above debt monthly instalments of Kshs.200,000/= with effect from 1st December, 1999.

We further confirm that the guarantors remain liable to you for full payment of the above debt

Thanking you

Yours faithfully

Shoppers paradise Ltd

BHARAT RACH”

Mr. Oyatsi faced two problems firstly none of the documents were stamped with stamp duty and the original cheques had been lost. Mr. Mwangi in reply attacked the documents in evidence as unstamped and in the case of the lease in favour of Innscor Kenya Ltd as unsigned and in the Memorandum signed but not witnessed.

He relied on *Kenya Commercial Finance Company Ltd versus Kipngen'o Arap Ng'eny & Another C.A100 of .2001* in which Mr. Justice of Appeal Lakha found that a guarantor was not liable on his guarantee as no demand had been made. He further submitted that notice of dishonour had not been given in respect of the cheques.

So far as the lease in favour of Shopper Paradise Ltd, the surrender and Memorandum of Understanding are concerned I order that the Applicant do stamp the same including penalties within 14 days from today failing which this application is dismissed. Subject thereto I find that there is no reasonable defence to the sums due on the dishonoured cheques and that Notice of Dishonour is not necessary under the Bills of Exchange Act.

I also find that the letter of the 10th June, 1999 was a clear admission of liability on the part of the 1st and 2nd Defendant and was supported by consideration as stated in the penultimate paragraph of the letter. So far as the lost cheques are concerned there are Photostats and I allow them to be produced by way of secondary evidence. In the result I find that the 1st and 2nd Defendants are liable to pay the sum of kshs.6,102,389 10 cents as claimed together with interest therein at court rate from the date of filing the plaint.

I strike out the counterclaim as being a sham with no substance. Costs to the Applicant on the sum claimed and in respect of the dismissal of the counterclaim.

Dated and delivered at Nairobi this 12th day of July, 2005

P.J. RANSLEY

JUDGE