REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL APPEAL 892 OF 2003

MOHAMED NG'ANG'A T/A BIO-ZEQ KENYA ……..... APPELLANT

VERSUS

CHARLES MUNGA …….……. RESPONDENT

(An Appeal from the Ruling of E. N. Maina, SRM in Milimani CommercialCourts

Civil Suit No. 5446 of 2003 delivered on 1st September, 2003)

JUDGMENT

By a Plaint dated the 6th June, 2003, and filed in the lower court on 9th June, 2003, the Respondent (Plaintiff in the lower court) sued the Appellant as drawer of cheque No. 900087 for Kshs.200,000/= which was returned unpaid by his bankers.

The Appellant denied the claim putting the Respondent "to strict proof thereof". The Respondent applied for Summary Judgment, and was awarded the same by the lower court which found the defence to be a "sham". It is against that summary Judgment that the Appellant has filed this appeal. His main argument at appeal is that summary Judgment could not be awarded where there was a triable issue. He argued that his affidavit in Reply to the application for summary judgment, stated that the cheque in question had not been issued by him, and "if it was issued, the same was stolen." That, to him, was an issue sufficient to go to trial. The learned Magistrate indeed took that into account but held that the same had not been pleaded in the defence, and could not be relied upon.

In my view, the learned Magistrate was clearly right. Parties are bound by their pleadings, and facts that are not pleaded cannot be relied upon and cannot be introduced through affidavits. Here, the defence is a mere denial, and as the trial court found, is an absolute sham. If the cheque had been "stolen" or not "issued", there could have been nothing easier than to plead so in the Defence.

The Respondent, in his affidavit in support of the application for summary judgment, had exhibited the cheque issued by the Appellant, together with a letter from the advocates of the Respondent inviting him to call in their office "to settle the matter.

" I am of the view, as was the trial court, that the Respondent had established his case on a balance of probability, that the Defence herein was a sham, and that the Respondent was clearly entitled to summary judgment.

I recognize that summary procedure is a radical remedy that should be used sparingly and only in clear cases where the defence filed raises no triable issues (See ***Kundanlal Restaurant vs Devshi*** *(1952) EACA 77*.

In ***Churanjilal & Company vs Adams*** (Civil Appeal 22 of 1950) Graham Paul, V. P. said: "

> ***It is desirable and important that the time of creditors and of court should not be wasted by the investigation of bogus defences. That is one important matter but it is a matter of adjectival law only embodied in the Rules of Court and cannot be allowed to prevail over the fundamental principle of justice that a defendant who has a stateable and arguable defence must be given the opportunity to state it and argue it before the Court. All the***

Defendant has to show is that there is a definite triable issue of Law."

I am satisfied that this was a clear case where summary judgment was properly entered. I find that there is no basis to this appeal, and the same is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 16th day of September, 2005.

ALNASHIR VISRAM

JUDGE