



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 293 OF 2003

GEORGE WALTER SHULTZ PLAINTIFF

- Versus -

GIKANDI NGIBUINI t/a

GIKANDI & CO. ADVOCATES DEFENDANT

RULING

The plaintiff's claim in this suit is for a liquidated sum of Sh. 5,450,000/= plus interest thereon and costs at court rates. Appearance has been entered and a defence filed. The plaintiff has now applied for summary judgment under Order 35 Rule 1 arguing that the defence filed is a sham and that it does not raise any issue worthy going to trial. In an application like this it is incumbent on the court to consider not only what is stated in the application together with the supporting affidavit as well as the replying affidavit and or grounds of opposition if there are any filed but also the plaint and the defence. In this case I would therefore like to start with what is pleaded in the plaint and defence. The plaintiff claims in his plaint that in a period of about three months he paid a total sum of Sh. 2,950,000/= to the defendant, an advocate, to act for him in various matters as follows:-

1. To scout for and assist in the purchase of a house for the residence of the plaintiff Sh. 500,000/00
2. To payments made for adoption of Tina Sh. 500,000/00
3. To legal fees to defend the plaintiff in HCCC No. 237 of 2001 - Lucy Momanyi Vs the plaintiff Sh. 500,000/00
4. To charges requested for filing fees in in HCCC No. 237 of 2001 - Lucy Momanyi Vs the plaintiff Sh. 350,000/00
5. To charges requested by the defendant for registration and insurance of plaintiff's Mercedes Benz and Audi Motor vehicle Sh. 500,000/00
6. To charges asked by the defendant to further make clearance of the plaintiff's Audi Motor vehicle Sh. 500,000/00
- 7 To charges asked by the defendant to further make arrangements to clear the Plaintiff's Audi Motor vehicle Sh. 100,000/00

Total Sh. 2,950,000/00

The plaintiff claims that the defendant failed to act for him in all these matters and therefore claims

a refund as payments made for consideration which completely failed. In respect of HCCC No. 237 of 2001 the plaintiff claims that as a result of the defendant's failure to file a defence default judgment was entered against the plaintiff for Sh. 1,599,264/=. The plaintiff also claims that the defendant failed to clear his Audi motor vehicle and as a result the Customs and Excise Department of Kenya Revenue Authority auctioned it. The plaintiff therefore claims its value in the sum of Sh. 2,500,000/= from the defendant. The defendant's defence is a short one. In paragraph 2 he stated that all the moneys paid to him were agreed fees and that he "ably and skillfully represented the plaintiff in the matters referred and the matters have been on-going." In respect of the Audi vehicle the defendant stated that he was "always ready, willing and capable to fully deal with the matter" but it is the plaintiff who failed to provide requisite documents, I suppose for its clearance. The defendant also denied that the value of that vehicle was Sh. 1.5 million. This I think is a typographical error as the amount the plaintiff claimed as the value of the vehicle was Sh. 2.5 million.

The defendant further stated in his defence that on the 7th November 2003 the plaintiff collected all his files from him and stated that he had no claim or complaint against the defendant and signed a document to that effect. Consequently, the defendant further averred, this suit is not maintainable it is brought in bad faith and it is an abuse of the process of court. In paragraph 4 of the defence the defendant stated that the plaintiff's complaint to the police against the defendant was found to have no basis. Finally in paragraph 5 the defendant stated that he will before the hearing of this case be applying for the plaintiff to provide security for costs as the plaintiff is not lawfully in Kenya and has no gainful employment.

In the plaintiff's affidavit in support of this application he repeated basically what is in the plaint save that he annexed copies of documents some of which are letters from the defendant calling for the payments stated here in-above and the cheques therefor. I do not need to go into the details of those documents as the defendant does not deny having received the said sum of Sh. 2,950,000/=. He says that was agreed fees paid to him.

The defendant's replying affidavit is also short. He deposed that the plaintiff's claim is based on alleged negligence and "excessive billing" which matters cannot be summarily decided but should be fully heard. He further stated that the plaintiff having taken his files he cannot recall what he did in each matter but what he believes is that the services he rendered were of high quality and that the defendant has no reason to complain. He added that he travelled to Kwale and Kilifi courts on behalf of the plaintiff and held many meetings with the Kenya Ports Authority personnel leading to the release on a duty free basis of the plaintiff's Mercedes Benz and personal goods. He annexed to that affidavit a copy of the acknowledgement signed by the plaintiff when he took his files which "indicated very clearly that that he had no complaint and for that matter no claim against" ... him. He concluded that there are many triable issues in this case and summary judgment should therefore not be entered.

Counsel for the parties presented their respective client's cases on the basis of what I have stated above. In respect of the value of the Audi vehicle, Mr. Akanga for the plaintiff urged me to accept a copy of a letter written by one Njoroge giving its value as Sh. 2.5 million. I shall revert to that letter later.

Before I analyse the facts in this case I would like to set out the law on summary judgment as I understand it. The purpose of Order 35 was stated by Newbold, P in the case of Zola and Another Vs Ralli Brothers Ltd. and Another [1967] EA 691 at page 694 in the following words:- "Order 35 is intended to enable a plaintiff with a liquidated claim, to which there is clearly no defence to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by the delaying tactics of the defendant".

Delay even by the very nature of the administration of justice may enable a plaintiff to obtain summary judgment. Madan J.A. stated in Continental Butchery Ltd. Vs Samson Musila Nthiwa Civil Appeal No. 35 of 1997 (unreported) that:- "With a view to eliminate delays in the administration of justice which would keep litigants out of their just dues or enjoyment of their property the court is empowered in an appropriate suit to enter judgment for the ... plaintiff under the summary procedure provided by Order 35 subject to there being no bona fide triable issue which would entitle a defendant to leave to defend".

The power to enter summary judgment is however to be exercised when there is plainly no defence. Lord Halsbury in *Jacobs Vs Booths Distillery Company* 85 L.T. Reports at page 262 stated when such occasion arises in the following words:- “There are some things too plain for argument; and where there were pleas put in simply for the purpose of delay, which only added to the expense, and where it was not in aid of justice that such things should continue, Order XIV [equivalent to our order 35] was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who are endeavouring to enforce their rights”.

But where the matter is not plain and obvious, a party is not to be deprived of his right to be heard. The Court of Appeal in *Industrial and Commercial Development Corporation Vs Daber Enterprises Ltd.* [2000] E.A. 75 at page 76 stated:- “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 where, if necessary, there has been discovery and oral evidence subject to cross-examination. ... The purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. And where the defendant’s only suggested defence is a point of law and the court can see at once that the point is misconceived or, if arguable, can be shown shortly to be plainly unsustainable, the plaintiff will be entitled to judgment.

The summary nature of the proceedings should not, however, be allowed to become a means of obtaining, in effect, an immediate trial of the action, for it is only if an arguable question of law or construction is short and depends on few documents that the procedure is suitable”. It has also been stated that where the matter is plain and obvious the court is under duty to enter judgment for the plaintiff. In *Anglo Italian Bank Vs Wells*, 38 L.T. at page 201 Jessel, M.R. stated that:- “When the judge is satisfied that not only there is no defence but no fairly arguable point to be argued on behalf of the defendant it is his duty to give judgment for the plaintiff”. Where, however, the defence is “reasonable or plausible, and bona fide , the judge has no discretion; the defendant is entitled to unconditional leave to defend”. - ***City Printing Works (Kenya) Ltd. Vs Bailey [1977] KLR 85 at page 88. Spry J.A. stated this same principle in Camille Vs Pravin Mohamed Merali [1966] E.A. 411, 419*** in the following words:-

“The general rule is, that leave to defend should be given unconditionally unless there is good ground for thinking that the defences put forward are no more than a sham; and it must be more than mere suspicion”.

Having set out the law applicable I now wish to turn to the facts of this case and see whether or not the plaintiff is entitled to summary judgment.

When the defendant realised that his matters were not being handled properly he went for his files. He was given his files and he signed an acknowledgement note. The note stated:

- “I George Shultz, have collected all my files from Gikandi & Co. Advocates and I have no complaint against them”.

What does this mean? Counsel for the plaintiff said that this is no waiver of the plaintiff’s claim for a refund of the amount paid for failed consideration. The defendant on the other hand contends that that is a complete defence. It means, according to him as stated in the replying affidavit, that the plaintiff “had no complaint and for that matter no claim against ... him”

. I do not think that the meaning of the note can be stretched to cover the plaintiff’s claims for refund of the amount paid for failed consideration or claims for the loss that the plaintiff may have suffered as a result of the defendant’s failure to act. In my view the note would cover complaints in situations where the defendant failed to act and the plaintiff did not suffer any direct loss. These include for instance where the defendant failed to scout and assist the plaintiff to purchase a house and the defendant’s failure to file adoption proceedings. The plaintiff can always instruct another lawyer to act for him in those matters. The note does not therefore afford the defendant a defence against the plaintiff’s claim for refund or loss suffered.

That being the view I hold I now wish to consider whether or not there are any triable issues in respect of the plaintiff's whole claim for Sh. 5,450,000/=.

The defendant does not deny that he was paid a total sum of Sh. 2,950,000/=. As I have already stated in this ruling his contention is that the payments were made for the professional services to be rendered in various matters. I will deal with each of them separately.

On the 6th April 2001 the plaintiff paid the defendant a sum of Sh. 500,000/= to scout and assist him purchase a house for his residence. The defendant has not said that he rendered any services in this respect. There is therefore no triable issue raised here. The same is the case in respect of the sum of Sh. 500,000/= made to the defendant on 18th April 2001 for the adoption of Tina. Neither the defence nor the replying affidavit has made any mention of anything having been done in these two matters.

On 18th May 2001 a sum of Sh. 500,000/= was paid by the plaintiff to the defendant to defend him in HCCC No. 237 of 2001 - Lucy Momanyi Vs the plaintiff. The copies of the documents annexed to the plaintiff's supporting affidavit show that an application was filed by the defendant on 7th August 2003 seeking to set aside the ex-parte judgment that had been entered against the plaintiff in that case. One of those documents is a draft copy of the defence and counterclaim that was drawn in 2001. It appears that the same was not filed with the consequence that default judgment was entered against the plaintiff in that case. Again there is nothing in the defence or in the replying affidavit to say why that defence and counterclaim was not filed and yet a further sum of Sh. 350,000/= had been paid to the defendant on 31st August 2001 for that purpose. There is also no triable issue raised in this regard.

On 11th June 2001 a sum of Sh. 500,000/= was paid to the defendant to clear the plaintiff's Mercedes Benz and Audi Motor vehicles. In respect of this payment the defendant stated in paragraph 8 of the replying affidavit that he endeavoured and got the plaintiff's Mercedes Benz vehicle as well as the plaintiff's personal goods cleared duty free. I find that there is a triable issue raised in this regard.

On 28th and 29th June 2001 the plaintiff paid to the defendant a total sum of Sh. 600,000/= for the clearance of the plaintiff's Audi motor vehicle. That vehicle was not cleared. It was auctioned by the Kenya Ports Authority and that is not in dispute. The defendant says that he was not able to clear it because the plaintiff failed to give him the requisite documents. That cannot be correct as the defendant's letter dated the 25th September 2001 to the Assistant Commissioner of Custom implies that all had been done and what remained was payment of duty to have the vehicle cleared. There is nothing to show that the defendant requested for any documents from the plaintiff if indeed they had not been given to him. The mere allegation by the defendant that the requisite documents were not availed is not enough. I find that to be a sham defence in respect of the claim for the refund of Sh. 600,000/=

As regards the claim for the value of the Audi motor vehicle, I am not satisfied that the same is as clear and plain as the plaintiff would want the court to believe. The copy of the letter from one Njoroge annexed to the plaintiff's affidavit and marked "J" is in my view not enough. It does not say who that Njoroge is. As of now I do not know whether or not that Njoroge was a person qualified to assess a vehicle and give its value. The defendant has also disputed the value given. In the circumstances I find that this claim raises a triable issue that has to go to hearing

. In the result I am satisfied that in respect of the claims for Sh. 500,000/= paid for scouting and assisting in the purchase of a house, Sh. 500,000/= paid for the adoption of Tina, Sh. 850,000/= paid for the defence and counter claim in HCCC No. 237 of 2001 and Sh. 600,000/= paid for the clearance of the Audi motor vehicle no triable issues are raised. I accordingly enter judgment for the plaintiff against the defendants for these sums (which total to Sh. 2,450,000/=) with costs and interest. The plaintiff's other claims have to go to full trial. As the plaintiff has partly succeeded in this application I award him half the costs of the application. Orders accordingly.

DATED this 29th day of March 2004.

D.K. Maraga

Ag. JUDGE