



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO 457 OF 2003

PETER THARAU NGURE PLAINTIFF

VERSUS

MARGARET WAIRIMU MAGUGU DEFENDANT

RULING

The Plaintiff by his Notice of Motion dated 27th October, 2003 expressed to be brought under Order 35 Rule 1 and 2 of the Civil Procedure Rules and all other enabling provisions of the Law seeks 2 prayers:-

- 1. That summary Judgment be entered in favour of the Plaintiff in the sum of Kshs.4,995,558/= together with interest as prayed in the Plaint***
- 2. That the defendant be ordered to pay the costs of this application together with the costs of this suit.***

The Notice is stated to be based on the grounds that (1) the defendant's defence consists of mere general denials, (2) the defendant's defence does not raise any triable issues and (3) the defendant has admitted owing the sum of Kshs,4,995,558/= in her defence and in various correspondences and documents prior to the filing of this suit. The Notice of Motion is supported by an affidavit sworn by one JANE WAIRIMU NGURE under Power of Attorney on 27th October, 2003.

The application was opposed. The defendant filed a replying affidavit sworn on 13th November, 2003. Mr Machira argued the application for the Plaintiff and Mr Ngala opposed the motion for the defendant.

The Respondent says in her replying affidavit that the affidavit of Jane Wairimu Ngure is bad in law because it is based on hearsay and alludes to matters which she cannot prove from her knowledge and does not disclose the sources or grounds thereof. Jane Wairimu Ngure's affidavit is further attacked on the ground that relying on a power of attorney she cannot allude to matters of facts. The complaint against Jane Wairimu Ngure's affidavit is not well founded. She holds a valid power of attorney. She in law stands in the shoes of her husband the Plaintiff. She is the best person to depone to the matters raised in her affidavit. The objection has no basis, it is misconceived and cannot be entertained.

At paragraph 3 of the said replying affidavit the defendant alludes to matters of law. Yet she is not an advocate. In any event her complaint in this paragraph is that the plaintiff does not reveal whether or not he met his part of the bargain and has not addressed matters raised in the defence at paragraphs 4 to 11.

At paragraph 4 of the said replying affidavit, the defendant sets out the conditions for the payment of the sum claimed of Kshs.4,955,558/=. In a nutshell the conditions are the release of certain documents and items to one Waititu.

At paragraph 5, the defendant repeats the averments in paragraph 4 of the same affidavit. At paragraph 6 of the replying affidavit the defendant avers that the Plaintiff completely went outside the memorandum of understanding breached the same and betrayed the overall spirit of the memorandum.

At paragraph 7 the defendant avers that she paid Kshs.1,000,000/= in the spirit of the memorandum of understanding in order to induce the Plaintiff to meet his part of the bargain. But where is the alleged memorandum of understanding? The same has not been exhibited by the defendant. In which document are the alleged conditions precedent to the payment of the sum claimed of Kshs.4,995,558/= ? None has been exhibited. One Waititu is alleged to be the person to be paid the said sum of Kshs.4,995,558/= on the Plaintiff meeting his part of the alleged bargain. Waititu has filed nothing to support the defendant's allegations.

The Plaintiff in his affidavit in support of his application for summary judgment has made a full disclosure. He has for instance exhibited the Agreement dated 30th August, 2000. The defendant does not deny this agreement. In this agreement at paragraph 4, it is provided:

***“Mrs Magugu to pay a sum of Kshs.5,995,558/= to Mr P Ngure
as full and final settlement of all his claims arising out of the
entire business relationship and transactions.”***

This provision is not made conditional on the doing of anything else. It is independent of the other provisions.

Paragraph 6 of the said agreement provides that the said sum be paid through the chairman – Waititu & Company Advocates.

The defendant in her letter dated 20th June, 2001 exhibited by the Plaintiff as JWN III acknowledged the Plaintiff's letter of 14th June, 2001 by which the Plaintiff demanded his money. The defendant in her said letter does not deny indebtedness to the Plaintiff. She indeed proposes a mode of settlement. The defendant does not set out any conditions precedent to the payment of her indebtedness to the Plaintiff.

The defendant's advocates KIBATIA & COMPANY in their letter dated 12th February, 2002 exhibited by the Plaintiff in the same bundle as “JWN III” admits indebtedness to the Plaintiff and again offers a mode of payment of the Plaintiff's claim. This letter was in response to the letter from the Plaintiff's advocates dated 6th February, 2002 which is exhibited in the bundle “JWN IV”. The Plaintiff's advocates had made a demand on behalf of the Plaintiff for Kshs.4,995,558/=. The defendant's advocate never mentioned any preconditions to the settlement of the Plaintiff's claim. The defendant could not have as on 14th December, 2001 by letter of even date the Plaintiff confirmed to the defendant that he had delivered all the documents regarding La Verne Icated etc to Mr Njuguna Waititu.

The sum claimed in the counter-claim is the same sum paid by the defendant pursuant to the agreement of 30th August, 2000.

I have considered the application, the pleadings, the affidavits both in support and in reply, the annexures and the submissions by learned counsel.

The law is very clear. It is that if the defendant shows either by affidavit or by oral evidence or otherwise that he should have leave to defend the suit he will be granted unconditional leave to defend the suit.

From what is stated above, the defendant has not shown that she has a bona fide triable issue. From

available material placed before me the Plaintiff's claim is a simple claim arising from the agreement of 30th August, 2000. The defendant has not paid the balance sum claimed in the plaint. She has as shown above no defence at all to this claim. Her counter-claim is introduced in an attempt to show a triable issue. The attempt has failed.

In the result, I strike out the defence and counter-claim. I enter judgment for the Plaintiff as prayed in the plaint. The Plaintiff will have the costs of this application.

Dated and delivered this 8th day of March, 2004.

F. AZANGALALA

JUDGE

8.3.2004