



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO 490 OF 2002

MILTON MUGAMBI IMANYARA APPELLANT

VERSUS

NATIONAL BANK OF KENYA LIMITED RESPONDENT

JUDGMENT

The Respondent filed an action in the lower court against the Appellant seeking Judgment for Kshs.137,400.55 together with interest thereon at the rate of 7% per month from 1st August, 1998 until payment in full. The claim was based on an agreement dated 16th December, 1996. The Plaintiff stated in its Complaint that it agreed to give the Defendant and the Defendant agreed to take a visa credit card and to pay all transactions made by him on the card on receipt of a statement of transactions. It was also stated in the Complaint that the Defendant also agreed to pay interest on the sum utilized with the card at the rate of 7% per month. The Defendant did not admit the claim in his defence. Faced with that situation, the Plaintiff's Advocates filed an application for summary Judgment under Order XXXV Rule 1 of the Civil Procedure Rules in which it was sought that Judgment be entered against the Plaintiff as sought in the Complaint. That application was allowed by the lower court.

The Appellant was aggrieved by the decision of the lower court and filed this appeal. The appeal is based on 7 grounds of appeal, namely:

- “1. That the learned trial Magistrate erred both in law and in fact and seriously misdirected herself in finding that the Defence filed by the Appellant in the lower court raises (sic) no triable issues, and/or that the Appellant had no valid Defence to the claim raised by the Respondent.**
- 2. The learned trial Magistrate erred in law and fact and also misdirected herself in finding that the Respondent was entitled to judgment and in granting judgment to the Respondent as prayed in the Complaint.**
- 3. The learned trial Magistrate erred in fact and law in finding that the Respondent's application dated 24th January, 2002 should succeed when the said application and Affidavit in support thereof and the exhibits thereto did not prove the orders sought on the (sic) balance of probabilities.**
- 4. The learned trial Magistrate seriously erred and/or misdirected herself in fact in failing to consider sufficiently and to appreciate the issues raised in the Appellant's Replying Affidavit which clearly proved that the Appellant had good and valid defences and that the suit in the lower court deserved being heard on merit in the normal manner by calling viva voce evidence from the witnesses.**

5. That the learned trial Magistrate also erred and/or misdirected herself both in law and in fact in failing to make a formal finding as to whether the debt claimed by the Respondent was actually due when the same was expressed in the Plaintiff to be due only on receipt by the Appellant of the statements of transactions which the Appellant proved he did not receive, and which the trial court did not formally find as having been delivered.

6. The learned trial Magistrate erred in fact (sic) in finding that the Respondent was entitled to Judgment for Kshs.137,400.35 being the amount due from the Appellant to the Respondent on or from the use of Visa Credit Card plus interest at 7% per annum when there was no proof in the Respondent's application whether in the Affidavit or in the exhibits attached thereto that the interest alleged in the Plaintiff was agreed and in the face of the Appellant's denial of that fact; and particularly in failing to appreciate that it was the duty of the Respondent at that stage to prove on balance, which the Respondent failed to do, that the claimed sum was due.

7. That the various errors and misdirections have occasioned a serious miscarriage of justice which deserve to be corrected by the order being set aside and the suit in the lower court being heard on merit."

The principles which guide our courts when dealing with applications for summary judgment are well settled. I accept that, as was stated in Lalji t/a Vakkep Building Contractors vs Carousel Ltd (1989) KLR 386, summary judgment is a draconian measure which should be given only in the clearest cases. The reason for this warning is not hard to find. It is because that procedure has the effect of shutting the Defendant from the trial of the case (See Cow vs Casey (1949) 1 KB 474 cited in Lalji case supra). However that does not mean that a court is precluded, in a proper case, from entering judgment in favour of the Plaintiff by the summary process. In Zola vs Ralli Brothers Limited (1969) E A 691 SIR CHARLES NEWBOLD, P in the leading judgment of the court said as follows at page 694:

"Order 35 (of the Civil Procedure Rules) is intended to enable a Plaintiff with a liquidated claim, to which there is clearly no good 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. If the judge to whom the application is made considers that there is any reasonable ground of defence to the claim the Plaintiff is not entitled to summary judgment." (quoted in Lalji case).

GRAHAM PAUL, V P on his part had the following to say on summary judgment in Churanjilal & Company vs Adams, Civil Appeal No 22 of 1950 :

"It is desirable and important that the time of the creditors and of the 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 the 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." (quoted in National Bank of Kenya Ltd vs Lilian Atieno Adhaya Milimani HCCC No 595 of 1998).

Now, did the Appellant raise a triable issue which entitled him to be allowed leave to defend the action at a full trial?

Some of the matters raised by the Appellant in his defence and his Replying Affidavit to the application were that no Statement of Accounts were sent to him as agreed and that there was no agreement that he was to pay interest on the sum due at 6% (in the Plaintiff it was said to be 7%) per month. From the wording of the Plaintiff, it is plain and obvious that the Appellant depended on the Respondent sending to him statements of Account. Were these sent? There was no evidence in the affidavit in support of the application that that was done. Another question is, what was the rate of interest to be levied on the

moneys due? Again, there is no clear basis to show that the Respondent was entitled to claim interest from the Appellant at the rate of 7% per month. These were serious issues which did not entitle the lower court to enter judgment in favour of the Respondent summarily as it did. These were serious issues which entitled the Defendant to defend the action.

In fairness to the Respondent's Counsel, and for conclusiveness of record, I must say that I have read the authorities cited by her and although the same correctly state the law as understood by the court, the said authorities would not alter the decision that I have come to.

In the result, I allow the appeal and set aside the decision of the lower court entering judgment for the Plaintiff as prayed in the Plaint and direct that the matter be set down for full trial, and I grant the Appellant unconditional leave to defend the action. I award costs of this appeal to the Appellant.

Dated and delivered at Nairobi this 8th day of December, 2004.

ALNASHIR VISRAM

JUDGE