



IN THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI
CIVIL CASE NO.4290 OF 1991

SIMON NIVEN MURRAY WILSONPLAINTIFF

V E R S U S

KENYA SHELL LTD1ST DEFENDANT

BP KENYA LTD2ND DEFENDANT

CALTEX OIL KENYA LTD3RD DEFENDANT

KOBIL PETROLEUM LTD4TH DEFENDANT

TOTAL OIL PRODUCTS LTD5TH DEFENDANT

ESSO KENYA LTD6TH DEFENDANT

AGIP KENYA LTD.....7TH DEFENDANT

R U L I N G

This is an application for summary judgment under Order 35 rr 1, 2 and 5 of the Civil Procedure Rules and Order 12 r.6 of the Civil Procedure Rules and Section 3 & 3A of this Order or on the alternative that judgment or admission be entered against the defendant. In support is the affidavit of plaintiff Simon Niven Murray Wilson sworn on 29th March 1988 saying inter alia that the defendant and the plaintiff entered an agreement that fees would be paid after appeals determination in the High Court, and since appeals were heard and determined in April 1992 (appeals no.218 – 333 of 1985) using the plaintiff's valuation as per agreement payment must be due, but the defendant opposes this relying on grounds of objection dated 23rd December 2002 and filed on 6th January 2003 saying that the defence raises triable issues and so the application for summary judgment cannot be sustained.

I have looked at the pleadings and it would appear to me that there are issues of fact and of law that need to be adjudicated. First the terms of the contract the parties rely on are in contention. Was the contract repudiated by the plaintiff or by defendant? Was there a contract in any case?

The two procedural provisions relied on here being Order 35 rr 1, 2 and 5 and Order 12 r.6 are similar in effect but differ on application. Then scope both provisions are similar in that they offer speedy conclusion of cases under Order 35 the plaintiff is to obtain a quick judgment where there is plainly no defence to the claim. Where a defence raises triable issue then the order is not applicable. Unless the issue is such that even if tried it will not in the end be sustainable. The court's power is only to give judgment

where there is no reasonable doubt that plaintiff is entitled to it and where if leave to defend is allowed it will only to cause delay a defendant should not be sent out of judgment seat where he shows that there exists a triable issue to the claim.

In my view the defence raises issues which I believe should be resolved at hearing and leave is granted to defendant to defend. As for admission under Order 12 r 6 the rule as was said in Mulla "allows either party at any stage of the suit to obtain judgment or an appropriate order either on motion by him or by court acting suo motu on admission made by the other party." So as to clear the case of all other parts of the suit that is not in controversy but before a court can act under Order 12 r6 the admission must be clear, un-ambiguous, unconditional and unequivocal. A judgment in admission is not a right but is in the discretion of the court where the court feels that the case involves questions that cannot be conveniently disposed of under this rule then the court must reject the application.

It is my view that the issues raised do not make it convenient to enter judgment. I have read the various authorities referred to me by Mr. Gitonga and I am obliged to him for his industry however, I still am of the view that neither summary judgment nor one of admission can be entered. I dismiss the application. No order as to costs.

Delivered this 29th day of January 2003

A. I HAYANGA

J U D G E

Read to Mr. Githinji for respondent in absence of applicant

A.I. HAYANGA

J U D G E

29/1/2003