



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO 1700 OF 2001

BOSLEY FREDRICK and MOHAMMED ALI T/A

CONTINENTAL TRADERS & MARKETINGPLAINTIFFS

VERSUS

WESTMONT POWER (KENYA) LIMITEDDEFENDANT

RULING

This is an application for summary judgment under Order 35, rule 1, of the Civil Procedure Rules, for a sum of shs76,000,000 with interest thereon of shs60,000,000, sought and prayed in the plaint, in dollars of 950,000 and 750,000 respectively.

The plaintiff alleged that on June 30, 1999 the parties agreed that the plaintiff would provide the defendant consultancy services for which the defendant would pay the plaintiff a sum of US dollars 1,450,000; that the plaintiff rendered the said services as agreed; that the defendant paid for the services by instalments as agreed, and the defendant paid a total sum of US dollars 700,000 leaving a balance of US dollars 750,000 unpaid, which was to be paid by post-dated cheques given to the plaintiff by the defendant, but payment of which was later stopped by the defendant, and so, the plaintiff has not presented them for payment because of the defendant's stop of payment instructions to the bankers; and that there was a further balance unpaid of US dollars 200,000 for further consultancy fees.

The defendant filed a statement of defence and counter-claim, saying that it has neither knowledge of the existence of the plaintiffs' name of Continental Traders & Marketing, nor any agreement with the plaintiffs; that the parties' relationship is illegal, corrupt, unlawful, ultra vires the defendant and incapable of enforcement by reason of illegality and fraud, particulars of which are set out under paragraph 4 of the defendant's pleading. Those particulars are so important in this application, that I proceed to set them out in *ipsisima verba*:

“PARTICULARS OF FRAUD AND ILLEGALITY

- (a) the transaction forming the basis of this claim was originated by Harjit Singh and Dato Joseph Chong with the sole intention of defrauding the Defendant in concert with the Plaintiffs herein;
- (b) no consideration was provided and the monies claimed cannot, perforce, be due or owing;
- (c) the purported work done relates to illegal transactions;
- (d) the claim herein is tantamount to extortion and blackmail;
- (e) the Plaintiffs' co-conspirators have threatened the lives of employees of the Respondent

in order to secure the compliance of the said employees in this fraudulent scheme;

(f) the Plaintiffs' co-conspirators have threatened employees of the defendant with dire consequences unless documents and evidence are altered to conceal the fraud herein;

(g) the Defendant has confirmed that material aspects of the details respecting the Plaintiffs are untrue including, but not limited to PIN numbers and VAT registration number;

(h) employees of the Defendant were coerced into signing blank cheques which were subsequently paid out to the Plaintiffs' co-conspirators;

(i) the Plaintiffs' co-conspirators obtained from the Defendant monies which the Defendant now finds out were eventually received by the Plaintiffs herein;

(j) upon changes being effected on the management of the Defendant the said Harjit Singh telephoned an employee of the Defendant threatening the said employee that unless the said employee assisted the said Harjit Singh, Harjit Singh and Dato Joseph Chong would 'pour acid and kill anyone who did not follow orders';

(k) the said Harjit Singh and Dato Joseph Chong are outside the jurisdiction of this Honourable and the Kenyan Police have alerted Interpol with regard to the fraud herein and if and when the said Harjit Singh and Dato Joseph Chong are brought into the jurisdiction of this Honourable Court, third party and indemnity proceedings will be initiated."

The defendant continues to aver in its said pleadings, that it has on several occasions asked the plaintiffs to provide proof of the claim but the plaintiffs have at all times refused to prove their bona fides; that the plaintiffs procured through "*the above fraud cheques from the defendant*" and so they are estopped from relying on the said instruments to lodge a claim against the defendant; that no claim can be maintained on the said cheques in law; that the aforesaid cheques could not be presented for payment at the time the suit was instituted; that no notice of dishonour was ever issued to the defendant in respect of the cheques herein; that the plaintiffs' advocates were at the material time employed by the defendant as its advocate and did in actual fact handle matters material to this claim on behalf of the defendant; that the defendant's investigations have revealed that the plaintiffs are not persons of means and their business name is of no repute and the defendant will, at the earliest possible moment, seek security for costs to be posted by the plaintiffs; that the plaintiffs and their advocate have committed a fraud upon this court, particulars of which are set out as follows:-

"PARTICULARS OF FRAUD UPON THIS HONOURABLE COURT

a) causing a false and fraudulent affidavit of service to be filed herein;

b) sending by registered post blank purporting the said pieces of paper to be summons and plaint;

c) failing to make disclosures of the Plaintiff's fraud to this Honourable Court and obtaining illegal and fraudulent orders to the prejudice of the proper administration of law".

After these particulars, the defendant avers that on account of the fraud practiced upon the court the entire claim of the plaintiffs be struck out; and in its counter-claim, the defendant avers that by reason of the plaintiffs' fraud aforesaid, the plaintiffs have illegally and corruptly obtained from the defendant the sum of US\$700,000 which the defendant now seeks to recover from the plaintiffs as money had and received by the plaintiffs and owing to the defendant, together with interest. Apart from asking for that money, the defendant also claims interest, damages and prejudgment attachment, and costs.

The services said to have been rendered by the plaintiffs to the defendant are more particularly set out in the affidavit of Mohamed Ali, sworn on March 27th, 2002, to which are annexed various

documents, including copies of various cheques, a written agreement of 22nd June 2000 between the defendant and the plaintiffs, and a notification of appointment of corporate representative, dated 20th December, 2000. Basing itself on two affidavits, the defendant opposed the application, and said that the defendant has a full defence to the plaintiffs' claim, and that the matter herein is not one suitable for summary judgment.

In relation to summary judgments, courts in this country have frequently relied on an approach which has its ancestry in the English case of *Jacobs v Booth's Distillery Co*, (1901) 85 LT 262, House of Lords. It put down a rule that as soon as you see "a triable issue" raised, do not grant a judgment summarily. That rule was justified on the facts of that case. The facts of that case were complex, and, indeed, there was a serious conflict of evidence. For this reason alone, the House of Lords for good reason allowed the defendant to defend, without any condition. Clearly, therefore, the value of that case as an authority for the propositions to which our courts have subsequently given a parrotwww. cry is not as great as has been portrayed in this country. See Lord Diplock in *M V Yorke Motors (A Firm) v Edwards* [1982] 1WLR 444 at p450; [1982]1 All ER 1024 at 1028. Indeed, in England where the approach came from and was swallowed here hook, line and sinker, the strictures of *Jacobs v Booth's Distillery* that where a defendant shows a triable issue he should be allowed unconditional leave to defend, are these days relaxed: see *Fieldrank Ltd v E Stein*, [1961] WLR 1287; [1961]3 All ER 681.

It goes without saying that a bad person determined to postpone pay-day for as long as the process of the court can be abused will very easily concoct any amount of "triable issues" even where there is nothing to drag everyone to a plenary trial. You need only say the opposite of what your adversary propounds, and there you create a trial situation. In the administration of civil justice, the concern of the court must be an inquiry as to whether there is bad faith, or something to show that the defence raised (and the "triable issue") is a sham, or whether there are suspicious circumstances about the raising of the question. A pragmatic, and not a legalistic, approach to these cases is what will do justice to the parties.

That is the approach with regard to cheques and bills of exchange generally. There, the mere assertion by the defendant of fraud or illegality affecting a cheque or bill of exchange is not in itself enough to entitle him to leave to defend: the defendant, in order to escape summary judgment in such actions, has to set out facts supporting a case of fraud or illegality affecting the bill, or the cheque.

In proceedings for summary judgment the defendant is not required to establish his defence. He needs only to show that he has some legitimate grounds which would constitute a defence if what he alleges were proved at the trial. It follows, therefore, that in a suit on a bill of exchange he is entitled to leave to defend if he sets up a case of fraud affecting the bill, unless the plaintiff in his turn can establish that the bill was taken in good faith and for value. I emphasize, that the defendant must first set up a case of fraud and not merely say without pointers, that there was fraud.

Setting up one's case or defence is to compose, propound, posit, or begin to develop and show the structure of the case of defence. One is required to place in view the line of case or defence intended to be pursued.

According, in proceedings for summary judgment if from what the defendant has posited or propounded and outlined in a structure a real issue arises as to whether a cheque was taken in good faith and for value, that issue cannot be resolved at that stage and leave to defend must be given. But if there is clear evidence of value given in good faith, and no ground shown on which that evidence can be challenged, then the defendant's allegation of fraud does not constitute material which would afford a defence.

The point being made here is this, that the defendant must build a structure showing that there was fraud, on those defences at the trial. He must construct a prima facie case of fraud or illegality. The court acts on it and gives leave to defend only after a defendant has presented a prima facie case of fraud or illegality.

Experience in the civil courts has shown that many a defendant hope to get away with it by merely

pleading fraud or illegality or a bare denial. Let it be understood clearly, that a general allegation or a bare denial is not sufficient. The mere assertion of fraud or illegality can no more entitle a defendant to have leave to defend than can a mere assertion that he gave value entitle a plaintiff to judgment. There must be particularity in the defendant's allegations. A general allegation of fraud or illegality is not sufficient to infer liability on the part of those who are said to have committed it. The terms of Order 35 of the Civil Procedure Rules require the parties to state a very explicit case of fraud or illegality, or rather of facts suggesting fraud or illegality, and a mere statement that fraud or illegality had been committed, is not any compliance with the words of Order 35 which requires the defendant to state facts entitling him to defend. The provisions of that Order require not only a general and vague or evasive allegation but some actual fact or circumstances which take together imply, or at least very strongly suggest, that a fraud or illegality must have been committed, those facts being assumed to be true: Lord Watson, in *Wallingford v Mutual Society*, (1880), 5 App Cas 685, at p 709 (House of Lords).

In the instant case, the plaintiffs' claim is for sums of monies which were part of a larger sums of consultancy fees. A large sum was paid, leaving a balance now being claimed. The consultancy services were the consideration rendered by the plaintiffs. In consideration for those services rendered by the plaintiffs, the defendant was to pay the agreed sums of money as consultancy agreement between the parties is there and a copy of it was annexed in the present application.

The defendant sought to answer the claim for the balance in a variety of ways. But its fundamental position is that the arrangements between the parties was as a result of fraud and illegality. It seems that the defendant concedes that part-payment was made, and that the unpaid cheques exhibited were indeed issued under the contract; but the defendant seeks to free itself from liability on those cheques by alleging extortion, blackmail, and coercion. These assertions are what from what the defendant calls the particulars of fraud and illegality which are pleaded in the statement of defence and the counter-claim.

In the particulars of fraud and illegality, the defendant refers to one Harjit Singh and a Dato Joseph Chong, as having originated the sole intention of defrauding the defendant. These persons are not parties to this suit, and there is no attempt to join them in these proceedings; and there is no affidavit by them, or about them to explain their scheme to defraud the defendant, in concert with the plaintiffs. The alleged lack of consideration is answered by the provision of consultancy services by the plaintiffs (the work done is acknowledged, but only alleged to have related to illegal transactions). The alleged **"illegal transactions"** are not disclosed; and the aspects in which they were illegal are not stated or otherwise particularized. It is not stated why the defendant considers that the claim is tantamount to extortion and blackmail. The acts of extortion or blackmail must be disclosed. It is not for a defendant to merely allege extortion and blackmail; it is the duty of the defendant to set out facts from which the court can see extortion or blackmail or both. The alleged threats to the lives of the employees of the defendant remain bare assertions – not a name of an employee; not a single act or incident of threats; not an affidavit by an employee in that regard or at all; not a copy of a report of any threat, obtained from any authority to whom such threats might have been reported; there is just nothing to back up allegation. Nor is there any disclosure of any documents and evidence which are said to be a subject of threats by the plaintiffs' conspirators to the defendant's employees. For the purposes of this suit, **"the details respecting the plaintiffs"** including their PIN number and VAT registration number, are not shown to be relevant.

It is important for the defendant to disclose its employees who were allegedly coerced into signing blank cheques. On the present application affidavits from such employees in this connection would have been important to the defendant's position. It is not shown in outline the basis of the defendant's assertion that the plaintiffs' coconspirators obtained from the defendant monies which the defendant has found out to have eventually been received by the plaintiffs. Which monies were these? When were they obtained? Who were the **"co-conspirators"**? When were they received by the plaintiffs? Why? No clue; no answer is provided.

Then there is this purported particulars at (j), alleging that upon changes being effected in the management of the defendant one Harjit Singh telephoned an undisclosed employee of the defendant allegedly threatening him with killing anyone with an acid if undisclosed orders were not followed. There is no specification of what changes in the management took place, when they were made, on what lines,

which employee was telephoned, when the alleged telephone was made, and what led to such threats. And, as if to prepare to avoid being required to bring into the case either as parties or witnesses the persons adversely named, at particulars (k) the defendant alleges that Harjit Singh and Dato Joseph Chong, are outside the jurisdiction of the court. Their whereabouts is not stated, and the defendant does not say that it does not know where these people are, and for how long they will be outside our jurisdiction. Nor is any fact alleged to show or suggest that those people are outside the jurisdiction of the court in order to avoid litigation, process or otherwise to evade justice.

On a fair assessment, one cannot find fraud and illegality pleaded with proper particularity, and the plea of estoppel alleged is left unsupported. In addition, without attempting to explain on facts, there is the bold averments that no claim can be maintained on the cheques; and that the said cheques could not be presented for payment at the time of filing suit. Why? No answer is provided. It is also said that no notice of dishonour was ever issued to the defendant in respect of the cheques. But the cheques are brought into this case merely as evidence of what had been happening between the parties. The suit is not necessarily founded on the cheques. The suit is on a debt said to be owing after an attempt to pay it by cheques did not succeed. These cheques are presented as evidence of acknowledgement of indebtedness to the plaintiff by the defendant and the defendant's steps taken to pay the debt. You do not require a notice to dishonour in such a case. The allegation that the plaintiffs' advocate had previously handled for the defendant in matters material to the claim, is a matter going to the propriety or otherwise of legal representation, and does not concern the claim of the plaintiffs.

It is alleged that the defendant's investigations have revealed that the plaintiffs are not persons of means and that their business name is of no repute. The court does not regard this assertion as constituting a defence or a matter raising a triable issue. The poor and others of no means, too, have a right to sue. The law has never turned away the indigent from the halls of justice. Poverty and lack of means per se, is no bar to access to justice. In this case, however, the kind of investigations alleged to have been carried out by the defendant, or over what period of time, and what prompted them, and by whom in particular, and the results thereof, are not disclosed. You do not raise a triable issue by indulging in a wild-goose chase, which this defendant is attempting.

Then there is an allegation that the plaintiffs and their advocate have committed a fraud upon the court, purported particulars of which are set out as I have already quoted above, namely causing a false and fraudulent affidavit of service to be filed. In this respect, the alleged falsehood and fraud with regard to the affidavit in themselves required to be particularized, but they were not. It is not correct to plead fraud generally as a particular of another allegation of fraud; or to allege falsehood without disclosing what made a thing false, as a particular of fraud. Facts which go to form fraud or falsity, must be set out, and it is then the court to conclude from the asserted facts whether they constitute falsehood or fraud.

It is not clear what the defendant meant by giving as particulars or fraud upon the court, **“sending by registered post blank pieces of paper to the defendant purporting the said piece of paper to be summons and plaint”**. As it has turned out the defendant has entered an appearance and filed this very defence in the suit against it. No confusion or prejudice is alleged at all. The service and process have not been challenged. So, one fails to see how this aspect is a fraud upon the court, or a problem for the defendant.

Similar difficulties attend the allegation of the plaintiffs failing to make disclosures of their fraud to the court by which they obtained **“illegal and fraudulent orders to the prejudice of the proper administration of law”**. It is another purported particularization of fraud by alleging another unparticularised fraud and illegality; and not indicating in which way the administration of law is prejudiced.

Taking all these things together, what the defendant has sought to do is to build a sham, a counterfeit presentation and have it for a defence and counter-claim. It is full of bare denials, evasive pleas, unparticularised legal concepts of fraud, illegality prejudice, and estoppel, all of which were set up without any good faith. They fail to raise a single triable issue as the courts know what should be a trial issue in civil litigation. I find that this defence and counter-claim lacks in bona fides.

For these reasons, the defendant is not to have leave to defend at all, and summary judgment s hereby entered for the plaintiffs against the defendant in the sum of shs76,000,000 with costs, and interest on those sums at the usual court rates. Decree to issue accordingly.

Signed and dated by me at Nairobi this 3rd day of April, 2003.

R KULOBA

JUDGE

3.4.2003

Coram R Kuloba

Mr Owino for plaintiff/applicant

Served, no appearance for respondent

COURT:

This Ruling was read out and delivered by me in open court in the presence of counsel for the applicant, and in the absence of respondent's counsel who had been duly notified of to-day, this 3rd day of April, 2003.

R KULOBA

JUDGE

3.4.2003