REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL SUIT NO 1425 OF 1999

J C RONO T/A BELAMY AGENCIES …… PLAINTIFF

VERSUS

JACKSON KIBOR ……..……. DEFENDANT

RULING

I have before me an application by way of motion on notice, for an order that the court be pleased to review its order made on 27th November, 2000 with a view to setting aside the same and granting the defendant unconditional leave to defend the suit. The application is brought under the provisions of Order XLIV Rule 1 of the Civil Procedure Rules (the Rules) and Sections 3, 3A and 80 of the Civil Procedure Act (the Act) and is supported by the annexed affidavit of the defendant and the following grounds set out on the face of the application:-

1. That there are err ors apparent on the face of the record particularly as regards: -

> ***(a) Finding that a replying affidavit ought to have been filed to resist the summary judgment application***
>
> ***(b) Failing to find that one triable issue earned the defendant unconditional leave to defend .***

2. That the oral agreement, if one existed was illegal in its contravention inter -alia of stamp duty Act, Cap 480, Value Added Tax Act, Cap 4762, Income Tax Act, Cap 476 and the sale of Goods Act, Cap 31, Laws of Kenya.

3. That on the face of the record the al legations of the Plaintiff for summary judgment were ambiguous, uncertain, contradictory and doubtful as to necessitate refusal to grant summary judgment and to warrant determination in a full trial where cross -examination could be entertained.

4. That there are adequate and sufficient reasons to review.

The Ruling sought to be reviewed was delivered by Onyango Otieno J on 27th November, 2000 but as he had been transferred from the station prior to the filing and hearing of this application, the same was heard by me pursuant to the provisions of Order XLIV Rule 4 (1) of the Rules. The applicant must show any of the following in order to be successful on an application such as the present one:

> **1. That he has discovered a new and important matter or evidence which after the**

exercise of due diligence was not within his knowledge or could not be produced at the time when the decree was passed or order made.

2. That there is a mistake or error apparent on the face of the record.

3. That there is any other sufficient reason, to

warrant a review of the ruling delivered on 27th November, 2000. He must also show that he has made the application without unreasonable delay. It is the defendant's case that the court found that a replying affidavit ought to have been filed to resist a summary judgment application, and further found that the issue of the rate of interest applicable was a triable one and deferred it for determination at a full trial instead of allowing the defendant unconditional leave to defend the entire suit. According to the defendant, these two findings constitute an error or mistake apparent on the face of the record. It is true that under Order XXXV Rule 2 of the Rules, a defendant may show, either by affidavit, or by oral evidence, or otherwise that he should have leave to defend a suit on the date of the hearing of an application for summary judgment. On the date when the Plaintiff's application was heard, the defendant's counsel was present. He had filed grounds of opposition and although the learned Judge found that the grounds of opposition were not required, following an amendment of Order L Rule 16 (1) of the Rules by L N 36 of 2000, he nevertheless allowed the said advocate to address the court on the application, not withstanding the fact that no replying affidavit had been filed. No doubt the learned Judge had in mind the provisions of Order XXXV Rule 2 of the Rules which allow a defendant in a summary judgment application, to resist the application either by affidavit, oral evidence or in any other manner, and that must be the reason why he allowed defence counsel to address the court in opposing the application. No replying affidavit was filed and the defendant was absent and could not therefore oppose the application by way of oral evidence to refute what was contained in the Plaintiff's affidavit in support of the application as well as the contents of the annexures to the said affidavit. Defence counsel then resisted the application under the third option available to the defendant, and that is, in any other manner, by addressing the court on the application. The said counsel could not give evidence in answer to the Plaintiff's affidavit and annexures, for the simple reason that he was not the defendant and as counsel, he could not give evidence in a case in which he was acting for the defendant. In the ruling that was delivered thereafter, the learned Judge found that the Plaintiff's affidavit and annexures raised matters which in his view could only be refuted by a replying affidavit. It was his view that a replying affidavit was necessary to refute the matters raised in the Plaintiff's affidavit together with the annexures thereto. That is not the same as saying that a summary judgment application can only be resisted by filing a replying affidavit.

If the Plaintiff's affidavit and annexures contained evidence, surely, that could only have been answered by another affidavit or by the defendant's oral evidence. In finding that the defendant's affidavit was necessary to answer that of the Plaintiff, I do not see any mistake or error in so finding. Perhaps that is an issue that should have been taken up on appeal.

There was one triable issue i.e the rate of interest applicable. He deferred that issue to be determined on evidence at a full trial. According to the defendant, that again is an error which calls for review because the court should have allowed the defendant leave to defend the entire suit. I have read through the cases referred to on this point and also on the issue of failure to file a replying affidavit. In the case of ***Elizabeth Edmea Camille vs Amin Mohamed E A Merali and Another 1966 E A 411*** , the court of appeal for Eastern Africa found that to entitle a defendant to an unconditional leave to defend a Plaint, he must show a triable issue which would or must result in the judgment in favour of the Plaintiff, being affected.

In the present case, there is no evidence that part of the money awarded to the Plaintiff in the court's ruling of 27th November, 2000 is towards the interest in dispute. I see no evidence that the issue of interest, which in any case was deferred to be heard at a full trial, would affect in any way the amount awarded in the judgment so as to grant the defendant unconditional leave to defend the entire suit. In any case, that ruling has since been reviewed after the Plaintiff abandoned the claim on interest and at the moment interest, is no longer an issue.

On the issue of the applicant not having been informed that the application for summary judgment was for hearing, or that the said applicant's counsel failed to ask the applicant to file a replying affidavit, all I can say is that the applicant was represented by counsel and that counsel took part in the hearing of the said application, and she did her best but lost the application. She was an agent of the applicant and if the court were to allow the application for review on the ground that the applicant's counsel failed to do one thing or the other, I can imagine the number of litigants who, on losing any case would file similar applications blaming it all on their lawyers. Such a decision will be very dangerous precedent. If the applicant is of the view that his counsel was negligent in failing to communicate with him, then he has the remedy of filing suit against the said lawyer for any injuries he may have suffered as a result. Review will not be the remedy.

The matters contained in the third ground set out on the face of the application i.e that the allegations of the Plaintiff for summary judgment were ambiguous, uncertain and contradictory, cannot be a ground for review. Even if I were to find that, that was so, then that simply means that I will have reached a different view and the fact that the judge hearing an application for review is of a different view does not entitle the applicant to review of the ruling in dispute.

There is then the second ground which challenges the legality of an oral agreement, if one existed. The issue of an oral agreement was contained in the affidavit in support of the summary judgment application. That application was heard in the presence of counsel for the applicant who, as I have pointed out elsewhere, participated in the hearing. If the issue of the oral agreement was not raised then, it cannot be raised now as a basis for review orders. In any case, this is not pleaded in the defence as an issue for consideration.

I do not see any other sufficient reason to warrant the orders sought. This application must fail. It is dismissed, with costs to the Respondent/Plaintiff.

Delivered at Nairobi this 15th day of May, 2003 in the presence of Mr Masika holding brief Mr Katwa for defendant. Mr Otolo holding brief Mwathi for Plaintiff/Respondent.

S. C. ONDEYO

JUDGE

15.5.2003