



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1525 OF 1999

KOBIL PETROLEUM LIMITEDPLAINTIFF

VERSUS

NAIROBI CITY COUNCILDEFENDANT

R U L I N G

The plaintiff, Kobil Petroleum Ltd, sued the Nairobi City Council, for a liquidated sum of Kshs.3,762,421/= together with costs and interests. The cause of action appears in para 4 of the plaint where the plaintiff states,

“During the years 1996, 1997 at the defendant’s express request, the plaintiff sold and delivered goods to the defendant amounting in aggregate to Kshs.3,762,421/=, full particulars of which are known to the defendant....”.

The defendant denied this claim in the defence dated 15th October, 1999.

Paragraph 2 of the defence reads,

“The defendant will contend that the plaintiff’s claim is vague and ambiguous and is unable to reply thereto and will seek leave to be supplied with particulars thereof”.

The plaintiff subsequently filed an application for summary judgement under Order XXXV R 1 of the Civil Procedure Rules and Sec. 3A of the Civil Procedure Act.

The grounds upon which the relief was sought was that:-

- 1. “The claim is liquidated”,***
- 2. “The defendant is truly and justly indebted to the plaintiff”,***
- 3. “The defence has no merit and is a mere denial”.***

The application was supported by the affidavit of Gil Strasbury, the Marketing Co-ordinator of the plaintiff company.

Paragraph 3 of his affidavit gives details of the plaintiff’s claim – i.e. the invoice number, the date of the invoice, the LPO number and the amount owing on the invoice. These were a total of 23 invoices adding up to the sum claimed of Kshs.3,762,421/=. Copies of all 23 invoices were annexed to the affidavit.

The defendant which was represented by Mr. Mugalla advocate did not file any replying affidavit, but there were grounds of objection filed. The court record shows several appearances in court by both advocates representing the parties herein, but on the day of the hearing of the application for summary judgement, Mr. Mugalla for the defendant failed to appear in court, though he had been served. I allowed counsel for the plaintiff to proceed with her application for summary judgement, which she argued as the record shows. She referred to the defence filed and discredited it for being a mere denial. She also recalled an oral application by Counsel for the defendant, Mr. Mugalla for time to file an application for further and better particulars. Time was given to him by Kuloba, J on 23rd February, 2000, but no such application was filed. By that time the application for summary judgement was already on record. The plaintiff's counsel thereafter took a date for the hearing of that application.

The date was served on the defendant's counsel, but as I have already stated, he did not appear in court to defend the application or argue the grounds of objection filed. The record shows that after the application was heard, the plaintiff's counsel asked for time to make submissions in court. Several dates were taken by her for this purpose. All dates taken were served on the defendant's counsel. I have found numerous documents headed "affidavit of service" on the court file. They bear different dates, showing that the defendant's counsel was served to appear in court for the mentions, but he failed to do so. The plaintiff's counsel submitted a list of authorities on the law relating to summary judgement. These were CORPORATE INSURANCE LTD vs NYALI BEACH HOTEL where it was held inter alia, "it is incumbent upon the defendant to show that it has a bona fide and genuine defence to the plaintiff's claim".

In this case, the defence filed merely denied the claim, but promised to seek leave to ask for further and better particulars. This was not done. There was also the case of MAGUNGA GENERAL STORES vs PEPCO DISTRIBUTORS, where it was held that "a mere denial is not a sufficient defence and a defendant has to show by affidavit or oral evidence or otherwise that there is a good defence...." As already stated, there was no replying affidavit, and also, no oral submissions made because the defendant's counsel did not appear in court. The defendant did not therefore show in any way that it had a good defence.

The plaintiff's claim is liquidated. I cannot see a defence to this claim whose particulars are given in para 3 of the plaint, and copies of invoices annexed. I think this is a case that clearly fits in the statement of Sir Charles Newbold, P when he said the following in ZOLA AND ANOTHER vs RALLI BROTHERS LTD AND ANOTHER,

"Order 35 is intended to enable a plaintiff with a liquidated claim to which there is clearly no good defence, to obtain a quick and summary judgement without being kept from what is due to him by the delaying tactics of the defendant.

Normally a defendant who wishes to resist the entry of summary judgement should place evidence by way of affidavit before the Judge showing some reasonable grounds of defence
".

When I consider the "ratio decidendi" of the authorities quoted, plus the submissions of the learned counsel for the plaintiff, and the pleadings on record, I come to the conclusion that the plaintiff has proved its claim on a balance of probabilities and there is clearly no defence to the claim. A mere defence of denial as put by the defendant cannot suffice, I must therefore enter judgement as prayed in the Notice of Motion dated 23rd November, 1999. I also award the plaintiff the costs of the suit with interest as well as the cost of the notice of motion for summary judgement.

Dated at Nairobi this 7th day of February, 2002.

JOYCE ALUOCH

HIGH COURT JUDGE