



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1829 OF 2002

KENYA POST OFFICE SAVINGS BANK.....PLAINTIFF

VERSUS

SULEIMAN MURUNGA AND ANOTHER.....DEFENDANT

RULING

This is the plaintiffs application for an order that summary judgment be entered against the defendants for shs 749,360.

The fact that the application is shown to have been brought under Order XXXL Rule 8 instead of Rule 1 Civil Procedure Rules cannot be a legal basis for rejecting the application.

The application for summary judgment. The application shows so on its body. The supporting affidavit leave no doubt that this is an application for summary judgment.

Defendant do not say that they have been misled or prejudiced. They have filed replying affidavits to the application.

The shs 749,360 is claimed on the basis of a tenancy agreement between Regent Management ltd as agents of the plaintiff and Simmers ltd. The agreement is dated 31.3.99.

Plaintiff sued Suleiman Murnga and Simmers ltd. A Defence of the first and second defendant was filed. In para 2 of the Defence it is avered that Kenfried limited the proprietors of simmers Restaurant denies the contents of para 3 of the plaint. Para 3 of the plaint states that the 2nd defendant (Simmers Limited) is a limited liability company. Arising from the defence an amended plaint was filed namely Kenfried ltd trading as Simmers Restaurant as the second defendant. The first defendant filed a reply to amend plaint reiterating the contents of the defence.

The second defendant filed a Defence which is a bare denial and which does not put forward any positive defence to plaintiffs claim.

Mr. Mohamed Kisahuli has filed a replying affidavit saying that he is a director of Kenfried ltd; that first defendant is not a director or shareholder that second defendant was not a tenant and does not owe any money. Suleiman Murunga the first defendant has also filed a replying affidavit. He denies that he is a director of the second defendant; that he has never been plaintiffs tenant and that he owes the money claimed.

Defendants counsel says that there are trial issues including the fact that the claim is based on a lease which is neither registered contrary to section 4 of Registration of Documents Act nor stamped contrary

to section 19 of the Stamp Duty Act. The agreement relied on by plaintiff is not contained in a formal lease. It is contained in a letter of offer dated 23.3.99 which directors of Simmers ltd accepted and signed signify acceptable of the terms. The issue of registration and stamping does not prima facie arise. In law the signed letter of offer operates as a contract between parties and a claim can lawfully be based on it.

On the merits the claim is denied because defendant say that they did not enter into any tenancy agreement with plaintiff or occupy the plaintiffs premises otherwise the sum claimed as owing is not challenged as such.

On the issue whether or not the second defendant the proper party it is clear from the original plaint that plaintiff did not sell Kenfried ltd. But defendant in the original plaint disclosed in the Defence filed on 22.1.2001 that Kenfnried is the proprietor of Simmers Restaurants and defendants proceeded in para 6 and 7 of that defence to deny the plaintiffs claim on behalf of the Kenfried ltd. By that time Kenfried ltd was not a party to the suit and the fact that defendant denied the claim on behalf of the Kenfried ltd shows that Kenfried ltd and Simmers Restaurant were in reality the same entity.

The two defendant were represented by M/S Otieno Okeyo and Company Advocates. The same firm of Advocates still represent the two defendants in the amended plaint.

Although both Mr. Mohammed Kisahuli and Suleiman Murunga say that Suleiman Murunga is not a director or shareholder of Kenfried ltd they have not annexed any documents to verify so. They have not also annexed any documents to show that Kenfried ltd is not the same entity as Simmers Restaurant or that Kenfried was not running the Simmers Restaurant.

Suleiman Murunga (first defendant) wrote a letter dated 5.1.2000 on the letter head of "Simmers" referring to the arrears if rent and promised to pay.

That letter refers to the same premises mentioned in the letter of offer dated 23.3.99.

Mr Suleiman Muruga says in paragraph 5 of his replying affidavit to this properties which had been attached. He does not elaborate. He does not show that he had any other dealing with plaintiff except as a tenant of the plaintiff.

The signature in that letter is similar to the first signature in the letter of offer and to the signature of Suleiman Murunga in the replying affidavit sworn on 5.10.2001.

The letter dated 5.1.2000 signed by first defendant is admission of the plaintiffs claim.

The first defence filed on 22.1.2001 is an admission that second defendant was the proprietor of Simmers or Simmers Restaurant. The fact that first defendant wrote the letter of 5.11.2000 on the letter head of "Simmers" when considered together with the defence filed on 22.1.2001 is a clear indication that second defendant was running Simmers.

From the foregoing I am not satisfied that defendants have shown any genuine triable issue which should go for trial.

Consequently, I allow the application with costs and enter Judgment for plaintiff against defendant jointly and severally for shs 749,360 plus interest and costs as prayed.

E. M. Githinji

Judge

26.9.2002

Mr. Bigwoli holding brief for Mr. Kinyanjui for plaintiff/Applicant present

Mr. Murage for Defendant present