



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO.427 OF 2001

KENYA SAFARIS LODGES & HOTELS PLAINTIFF

VERSUS

UNITED TOURING COMPANY LTD. DEFENDANT

RULING

In an amended Complaint dated 4th October 2001, the Plaintiff is claiming from the Defendant KSh.5,659,864/50 being the amount due from the Defendant to the Plaintiff on account of various services provided to the Defendant at the Defendant's request. The plaintiff runs two lodges namely Voi Safari Lodge and Ngulia Safari Lodges and the services were allegedly rendered at the two lodges. The amounts due on account of Voi Safari Lodge was KSh.4,394,116.50 and that covered the running period between August 1996 to August 2001. The services at Ngulia Safari Lodge attracted KSh.1,265,748/- which covered the period September 1996 to August 2001. The Defendant filed a defence to the same complaint. It admitted that that services were provided to it but denied that there was KSh.4,394,116/50 outstanding in respect of services at Voi Lodge and KSh.1,265,748/- outstanding for services at Ngulia Lodge and maintained that the services provided for were fully paid for. It further stated that the Plaintiff failed to meet its obligations as stipulated in the Contract with the defendant and that caused the defendant suffering, loss and damage for which it holds the Defendant liable.

At the close of the pleadings, the Plaintiff has filed this application in which it is seeking that judgment be entered for the Plaintiff against the Defendant for KSh.5,659,864.50 plus costs and interest as prayed for in the Complaint. It is also seeking that costs be awarded to it. There are two grounds for the application and these are first that the Defence filed is a hollow sham, devoid of any triable issue, and secondly that the Defendant since the debt was incurred and demanded have not disputed the same. There is an affidavit in support and many annexures. I will refer to some of them later in this ruling.

The Respondent opposed the Application and stated in its Affidavit sworn by its director Mr. Gary Thomas Balfour that it admits having been in Business relationship with the Plaintiff but it denies having had any meaningful discussion of the present indebtedness of the Defendant to the Plaintiff. It denied owing the amount claimed. It then stated further that the Plaintiff has not put into account certain payments made which amounts in total to KSh.39,781/- and that some invoices were overcharged and the over charge amounted to KSh.78,492.05. Thus it says a total of KSh.118,278.05 is claim that represents the amount already paid plus over charges on certain invoices and it states at paragraph 8 of the same Affidavit as follows:

“8. THAT it is clear from the foregoing that the sum claimed by the Plaintiff does not reflect the correct amount outstanding if any.”

And having stated at paragraphs 9 and 10 that on several occasions, the Applicant failed to meet its

obligations to the Defendant and landed the Defendant into massive losses it stated at paragraph 11 as follows:

“THAT if there are any amounts that are due, which is denied, the same represent the amount of disputed invoices which relate to the aforesaid breach of the contract.”

And at Paragraph 13 it says:

“THAT though demand was made, the Respondent has not made good the Plaintiff’s claim due to the aforesaid reason.”

The learned Counsel for the Respondent, Mr. Munyalo in his submissions stated that the Defence raises four triable issues namely whether there is an outstanding amount of KSh.5,659,864/- due to be paid to the Plaintiff by the Defendant, that the services were paid for; whether plaintiff failed to meet its obligations towards the Respondent and lastly whether the amount outstanding if any is the amount in the disputed invoices.

The principles of law to be applied in an application for summary judgment under Order 35 Rule 1 is now well settled and there are several well known authorities. The case of **Kundanlal Restaurant vs. Devshi & Company [1952] 19 EACA 77** where Graham’s statement in law in the case of Churanjal is quoted well settles it all. The sum total of the law is as is quoted in the case of **Dhanjal Investments Limited vs. Shabana Investments Limited Civil Appeal No.1232 of 1997** (unreported) where it was stated as follows:

“The Law in summary judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of Kundanlal Restaurant vs. Devshi & Company Limited 19 EACA 17 and followed by the Court of Appeal for Eastern Africa in the case of Souza Friguerido & Co vs. Moorings Hotel (1959) EA 425 that if the defendant shows a bona fide triable issue he must be allowed to defend without conditions.”

It is also now well established in law that the rule is only to be acted upon in plain and obvious cases and the jurisdiction must be exercised with extreme caution.

It is with the above legal principles in mind that I now proceed to consider this application and issues that the Respondent maintains are triable issues. In considering the same issues I will need to consider whether they are bona fide issues, for the law makes it clear that the triable issues which can enable the defendant to get leave to defend unconditionally must be only bonafide triable issues and not any issues that the Defendant raises will suffice if such issues are not bona fide triable issues.

First the Defendant says in its Defence that it has paid all the outstanding debts with the Plaintiff and denies that any money is due. Of course when one looks at the parts of the Respondent’s Affidavit I have quoted hereinabove, one readily sees that the Defendant is not firm on the denial. In any case it did write a letter to the Plaintiff dated 12th July 2001 in which it said inter alia as follows:

“I do appreciate we are far behind in reducing the large outstanding at your properties. You are certainly aware of how poor the low season was in Kenya. That coupled with the financial strains of the court issues has made it difficult to commit to a payment plan or offer a lump sum amount.

If possible, we can talk next week and discuss a course of action for bringing this account to a lower balance. We would ask that you consider Mombasa’s account as a separate account and allow them to continue on credit.”

That letter was written on 12th July 2001. On 23rd August 2001 this suit was filed. In that letter, the Respondents never disputed indebtedness to the Plaintiff. It is noteworthy that it was written after the Applicant’s letter demanding some payments was addressed to the Respondent. That was letter dated 19th

June 2001. The Respondents claim that it had paid the amount cannot stand on the face of that letter. However, has the Respondent made an attempt to show court how he has paid it? Yes, he has made the effort and has shown that he had sent cheques to cover an amount of KSh.39,781/-. Though it says those were only examples of payments it had made, he had all the invoices sent to it as Exhibits annexed to the Plaintiff's affidavit. It never alleged having made any more than the payment of KSh.39,781/-. It also says some invoices were overcharged and so represented inflated figures. The ones it identified as overcharged carried a total amount of KShs.78,492/05. Again, it had all the invoices and never showed any more invoices as overcharged. The plain and obvious figure not in dispute then is KSh.(5,659,864.50 less KSh.118,278/5) 5,541,586.45. However Defendant says that figure is not due and payable because the Defendant says that the Respondent flailed to meet its obligation to the Respondent and caused losses to the Respondent. First that allegation has only come in the Defence. It was not made anywhere else. Indeed the Respondent has not made any demands upon the Plaintiff in respect of the same allegations of breach of contract and even when it was raised, no copy of the same contract has been availed to show that the issue is bona fide. However, the most important answer to that allegation is that the allegations have been made in the Plaintiff no more than by way of complaints. The Respondent has not filed any counter-claim at all and is not asking the court for any orders or judgment against the Plaintiff. They remain no more than what I may call grumbling by the Defendant. Even if the suit was to go to trial with the Defence as it is, no court would make any orders for damages to be paid to Defendant on account of their complaints in the Statement of Defence because as a result of the same complaints they are not seeking anything by way of a counterclaim or a set off. In my humble opinion, that issue cannot be termed a bona fide triable issue.

The next issue was that some invoices were overcharged. I have dealt with that hereinabove when I dealt with the issue of the alleged payments.

In my mind, it is clear that the Defence filed herein and the allegations in the plaintiff do not raise any bona fide triable issues – not even a single triable issue as to the amount of KSh.5,541,586,145/-. This amount is plainly due to the Applicant.

I do enter summary judgment in favour of the Plaintiff against Respondent for the sum of KShs.5,541,586.45 plus interest at the court rates from the date of filing the suit to the date of full payment. Costs of this application to the Applicant. The claim will go for hearing in respect of the amount of KSh.118,278/05. Costs of the entire suit to await the determination of the court in that claim. Orders accordingly.

Dated and delivered this 4th Day of October 2002.

J.W. ONYANGO OTIENO

JUDGE