



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 1760 OF 2000

LOUIS BOGLIOLI PLAINTIFF

VERSUS

JOSEPH MAINA WARUTERE DEFENDANT

RULING

This is an application for judgment to be entered in favour of the plaintiff against the defendant on admission. The application is made pursuant to the provisions of O. 12 Rule 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and is supported by an affidavit sworn on 30.8.2001 by the plaintiff.

The defendant contests the application and has filed an affidavit sworn by him explaining his position.

Briefly the facts of the case are that around 1998/99, both the plaintiff and the defendant entered into an agreement to set up a business of Taxi Operators and other transport services in this country. Part of the agreement required the plaintiff to inject capital into the proposed business. There is clear and uncontested evidence to show that the plaintiff in compliance with that requirement did remit from the U.S.A. into A/C No. 3548607 at Barclays Bank of Kenya Limited, Kenyatta Avenue Branch held in the joint names of both the plaintiff and the defendant a total sum of US Dollars 29,950. In the process of doing so he says he incurred an expense of US Dollars 420 by way of commission. His claim in this suit is therefore for US Dollar 30,370 being the total of the two sums mentioned above.

As stated above the remittance of the sum of US Dollars 29,950 is clear and cannot be denied. The annexures marked 'Exh. B' to the plaintiff's affidavit are sufficient proof of such remittances. But that aside, the defendant's purported denial of the remittances is not only vague and evasive but also contradictory for while in paragraph 4 of the defence he denies "that the plaintiff remitted the sums alleged in the plaint" in paragraph 6 of the same defence, he admits that "the plaintiff did send some monies". The defendant does not however state the exact amount.

Be that what it may, this is of course not an application for 'summary judgment under O. 35 Rule 1, but for judgment on admission' under O. 12 Rule 6 the admission being said to be contained in a consent document dated 7.2.2001 signed by both parties. That document is annexed to the plaintiff's affidavit and marked Exh. 5 and, besides other matters, it shows that the defendant agreed to:-

- (a) transfer ownership and possession of motor vehicle registration No. KAH 485K to the plaintiff or his nominee, (an act which the agreement acknowledges has already been effected); and
- (b) pay to the plaintiff the equivalent of US Dollars 9000 in local currency.

It is common ground that the defendant has not paid the said sum. Regarding the 'consent' he signed with the plaintiff, he contends that it was no consent at all but an agreement to wind up the partnership between him and the plaintiff. He also depones that prior to the signing of the consent he was picked up by the police following a complaint by the plaintiff and after several hours of questioning, harassment and intimidation was released on the understanding that he would come to some understanding with the plaintiff. He further states that he signed the consent at the offices of the plaintiff's advocate as instructed (by the police) and because he was advised by the advocate that the consent was in respect of a winding up cause for the partnership.

In my opinion what the defendant says in his replying affidavit does not add up and fails to explain away his signature of the consent document. Firstly it should be observed that whether or not the consent related to a winding up cause or for that matter another type of proceedings, is neither here nor there. What matters are the contents of the document. It is of course true that the 'consent' document dealt with several matters some of which cannot be made the subject matter of an application of this nature. One such matter was indeed the dissolution of the partnership. But in the same document the defendant agreed to pay to the plaintiff the sum of US Dollar 9,000. That much he cannot deny. Accordingly, his attempt to imply that he did not understand the nature of the document he signed is not credible. I would reject it.

As to the allegation that he was harassed and intimidated by the police, there is no convincing evidence to show that the alleged intimidation and/or harassment in fact occurred and I suspect that it exists only in the defendant's mind. And in any case, even if it had occurred, what the defendant states which is not very clear (he is deliberately vague as to exact dates) must have occurred several days before he signed the 'consent' and consequently it cannot be said that he was still under the influence of the instructions he allegedly received from the police when he signed the consent document. Accordingly I reject the defendant's denial of the document and find that he freely and willingly signed it.

Under O. 12 Rule 6 of the Civil Procedure Rules, this court has power to enter judgment on admission. The consent document having clearly admitted the defendant's indebtedness to the plaintiff in the sum of US Dollars 9,000, the plaintiff is entitled to judgment for that sum. As regards the balance of the claim, it will have to go for trial as I am unable to find any admission relating thereto. The defendant will bear the plaintiff's costs of this application. There will be orders in those terms.

Dated at Nairobi this 20th day of November, 2001.

T. MBALUTO

JUDGE