



REPUBLIC OF KENYA
High Court Of Kenya At Nairobi November 3, 2000
Milimani Commercial Courts

civ case 757 of 00

Management House Limited v Joseph Wanyoike Mwendia

T Mbaluto, Judge

RULING

November 3, 2000 T Mbaluto, Judge delivered the following ruling. This is an application for summary judgment under Order XXXV rule 1 and 2 of the Civil Procedure Rules. The application is supported by an affidavit sworn by Charles Reuben Gitau a director of the plaintiff company.

The defendant was a director of the plaintiff up to April 30, 1999 when he resigned. Upon his resignation, the plaintiff demanded the repayment of certain sums of money which it claimed the defendant owed it in respect of money borrowed from it by the defendant. On the defendant failing to pay the sum demanded, the plaintiff filed this suit initially seeking the recovery of Kshs 649,206.45. In an amended plaint the amount claimed was reduced to Kshs 548,367.

In a defence and counter claim filed in court on May 22, 2000, the defendant denies the claim and claims that he was induced to make various acknowledgements of the debt under duress on the part of the plaintiff. The counter-claim is for Kshs 294,287 in respect of mileage allowance for the years 1997, 1998 and 1999.

Annexed to Mr Gitau's affidavit is a document headed "Debt Repayment Agreement" executed on October 18, 1999 by both the plaintiff and the defendant. The document states

"It is agreed between Management House Limited of P O Box 74748 Nairobi and Mr Joseph Wanyoike Mwendia of P O Box 319 Uthiru that an amount of Kshs. 48,367 owed to Management House Limited by Mr Joseph Wanyoike Mwendia will be repaid over a period of four years commencing 1 September 1999 at monthly instalments of at least Kshs 5,000 subject to a minimum repayment of Kshs138,000 per year.

Signed and sealed on this October 18, 1999."

It is plain from the document that the defendant acknowledges the debt of Kshs 548,367 and agrees to repay it by monthly instalments of Kshs 5,000 subject to a minimum repayment of Kshs 138,000 per year. That document is the foundation of the plaintiff's claim as prayed in the amended plaint. Without it, I doubt whether this application would have been made. The defendant has however sworn that the document was signed by him under duress and as evidence of such duress, the defendant has alleged a campaign of terror carried on by Mr Gitau against him at his new place of employment namely Minet ICDC. The terror is said to have comprised threats to speak to the defendant's new employers with a view to getting in trouble which said terror the defendant alleges was used to get him to sign a re-written document. Although the defendant admits having signed the document, he claims that he signed on

certain conditions.

The defendant further claims that the conditions he gave for signing the document so infuriated Mr Gitau that he caused him to exert more pressure on the defendant. The defendant states that as he was still on probation, he felt threatened and agreed to sign the document headed “Debt Repayment Agreement”.

In Chitty on Contracts 21st Edition Vol 1 at paragraph 1055, the word duress is defined in the following terms:-

“Duress of the person may consist in violence to the person, or threats of violence, or in the abuse of legal proceedings. How serious threats must be in order to constitute duress depends on the physical and mental condition of the person threatened.”

Later in paragraph 1056 of the same work, the learned author states:-

“doing or threatening to do an action which there is a legal right to do cannot constitute duress, although there may be other circumstances which will invalidate or render voidable an agreement obtained by such means.”

Apart from what the defendant states in his affidavit, there are two letters {annexures 1 and 3(a)} which indicate that Mr Gitau did attempt to apply some indirect pressure upon the defendant by making or threatening to make unjustified and unnecessary accusations against him to his employer. Despite that, Miss Ngugi for the plaintiff sought to show that no duress was in fact applied to the defendant before signing the document dated October 18, 1999. That may well be so, but considering the significance of the document to the plaintiff’s case, it being the only evidence so far available in support of the plaintiff’s case, it is my opinion, that the question whether or not the defendant’s signature thereto was secured through duress is so crucial that it cannot be resolved through affidavit evidence. Obviously if there was duress, the agreement becomes vitiated and voidable and the plaintiff cannot claim under it. In this respect it is worth noting that the plaintiff has made no attempt whatsoever to show, apart from the document which is challenged, under what circumstances the debt sought to be recovered arose. That being the case the issue of duress and the agreement of October 18, 1999 becomes live issues. The law on the summary judgment procedure has been stated by the courts in numerous cases. In *Souza Figuerido & Co Ltd v Moorings Hotel Co Ltd* 1959) E A 425, the Court of Appeal held:-

“if the defendant shows a bona fide triable issue, he should be allowed to defend without conditions.”

In my opinion, the defence filed herein by the defendant discloses a triable issue regarding the validity of the agreement on which the plaintiff bases his claim; the question of duress is therefore not a sham and cannot be resolved through summary procedure.

For the above reasons, the application is dismissed with costs.

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TOM MBALUTO

JUDGE