



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

HCCA 178 OF 2015

STURT TRANSPORT LIMITEDAPPELLANT

VERSUS

DAJACHANA MINING COMPANY LIMITED.....RESPONDENT

(Being an appeal from the Ruling and order of the Chief Magistrate's Court at Nairobi (Hon. I Gichobi, RM) delivered on 27th March 2015 MCC No. 401 of 2014)

JUDGMENT

1. On 27th March 2015 the Lower Court dismissed the Appellant's Application for summary judgment. The trial magistrate held that the Respondent had entered appearance and filed a defence within time.
2. The Appellant was aggrieved by the said decision and appealed to this court on grounds that can be summarized as follows:
 - a. That the trial magistrate erred in applying the provisions of Order 7 rule 1 Civil Procedure Rules when determining an application for summary judgment brought under Order 36 rule 1 Civil Procedure Rules.
 - b. That the trial magistrate failed to consider the grounds and the evidence in support of the application.
 - c. That the trial magistrate ignored the Appellant's submissions and failed to follow the doctrine of *stare decisis*
3. The background to this appeal is that the Appellant filed a plaint dated 16th December, 2013 claiming the sum of Kshs.895,065/= plus interest and costs from the Respondent. It was claimed in the plaint that the said amount was the unpaid balance for the transportation of a total of 511.9 tonnes of gypsum to the premises of National Cement company limited on behalf of the defendant at an agreed price of Kshs2,400/= per tonne plus VAT. That invoices were issued by the Appellant to the Respondent for a total sum of Kshs 1,228,560/= plus VAT for the services rendered but that the Respondent paid the sum of Kshs 530,064/= leaving a balance of Kshs.895,065/=. That the Respondent issued the Appellant with two cheques of Kshs 447,535/= for the settlement of the outstanding amount but the cheques were dishonoured upon presentation.

4. On 31st January, 2014 the Appellant filed suit. On 11th March, 2014 the Respondent filed a memorandum of appearance. On 13th March, 2014, the Appellant filed the Notice of motion dated 12th March, 2014 seeking orders for Summary judgment.

5. The application was premised on the grounds stated on it's body and was supported by the affidavit of Benson Nderi Iriga, a director of the Appellant company. The deliveries made on various dates and the amounts payable per each delivery were tabulated. The particulars of the invoices were also given. The Appellant further stated that the Respondent paid a sum of Kshs 530,064/= vide cheque No. 000069 but two cheques number 000086 and 000087 dated 8th October, 2013 and 8th November, 2013 respectively for Kshs.447,535/= each were dishonoured upon presentation after being countermanded by the Respondent. The Appellant exhibited the copies of the invoices and the images of the bounced cheques. It is further stated that after the demand letters elicited no response, the Appellant filed suit.

6. On 4th March 2014, the Respondent filed a defence. The defence denied the Appellant's claim. It was stated that if any goods were delivered by the Appellant to the premises of National Cement Company Limited on it's behalf and any money was owned to the plaintiff as a result, then the said money was paid.

7. On 9th June, 2014 the Respondent filed the grounds of opposition. The application was opposed on the following grounds:

1. THAT the Application is premature, misconceived, bad in law, frivolous and vexatious as the facts are in dispute and the defendant had made no admission to the plaintiff's claims whatsoever.

2. THAT the Respondent categorically denies entering into a contract with the Applicant or otherwise instructing the applicant to transport any minerals on its behalf and the Applicant has not produced any or any signed/stamped contract, quotation, local purchase order, or letter of instruction to prove its claim.

3. THAT the Respondent also denies receiving any invoices and those relied on by the Applicant are neither signed, stamped or otherwise acknowledged by the respondent.

4. THAT without prejudice to the foregoing, the Respondent denies owing any monies for delivery of goods by the Applicant on its behalf as any such delivery was promptly paid for in full. The Respondent is not indebted to the Applicant for the sum alleged or at all and the entire suit is aimed at unjust enrichment by the Applicant.

5. THAT the Applicant has further failed to prove that the Respondent is indebted to it as the Image Return Documents have not been certified as true copies of the original by the maker CFC bank Limited and cannot therefore be relied upon to be genuine.

6. THAT the letters of demand and notice of intention to sue have neither been signed by the Respondent in acknowledgement thereof nor has the Applicant attached a certificate of postage as proof of service in support of its claim.

7. THAT in view of the foregoing, the Respondent has a good defence to the Applicant's claim and there are triable issues for determination that warrant this case to proceed for full trial.

8. THAT the application is premature and brought in bad faith to delay the hearing and final disposal of the matter and it is in the interests of justice that both parties to this suit be accorded a fair trial as this is not a proper subject for summary judgment.

9. THAT in view of the foregoing grounds; the Application dated 12th March 2014 ought to be

dismissed with costs to the Defendant/Respondent.”

8. The appeal was canvassed by way of written submissions. I have considered the submissions and the authorities cited.

9. The principles which guide the courts in determining an application for Summary judgment are well settled. The Court of Appeal in the case of **Harit Sheth T/a Harit Sheth Advocates v Sharma Charania [2014] eKLR** posited as follows:

“This court stated that the purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgement where there is plainly no defence to the claims. To justify summary judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination (see also Continental Butchery Ltd v Ndhiwa (1989) KLR 573.

In Dhanjal Investment ltd v Shabaha Investments Ltd civil Appeal No. 232 of 1997, the court had earlier stated as follows regarding summary judgment.

“The law on summary judgement procedure has been settled for many years now. It was held as early as in 1952 in the case of Kandial Restaurant vs Devshi & Company (1952) EACA 77 and followed by the court of Appeal for Eastern Africa in the case of Souza Figuerido & Company Ltd vs Mooring Hotel Ltd. (1959) EA 425 that, if the defendant shows a bona fide triable issue, he must be allowed to defend without conditions....”

Regarding what constitutes triable issues, in Kenya Trade combine Ltd v Shah, civil Appeal No 193 of 1999, this court states as follows:

“In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed.”

10. Turning to the case at hand, there is no dispute that the Appellant’s claim is a liquidated one. The Respondent’s counsel argued that the time for filing a defence had not yet lapsed and that the filing of the application for summary judgment was premature. On the other hand, it was submitted by the Appellant’s side that the defence was filed irregularly after the application for summary judgment and without the leave of the court. Order 36 rule (1)(1) provides that where a defendant has appeared but not filed a defence, the plaintiff may apply for judgment. The application for summary judgment was therefore filed within the period provided by the rules. Order 7 rule 1 which provides for the filing of the defence and counterclaim is therefore not applicable in an application for Summary judgment.

11. Order 36 rule 2 provides that a defendant can show either by affidavit or by oral evidence, or otherwise that he should have leave to defend the suit. As stated by the court of Appeal in the **Harit Sheth** case (supra)

“The defendant is at liberty to show by whatever means he chooses, whether defence, oral evidence, affidavit or otherwise.....”

The court therefore has the discretion to look at the statement of defence filed and consider if it raises any triable issues.

12. The Appellant’s application for summary judgment was supported by an affidavit which depones the following:

- That the appellant was engaged by the Respondent to transport the goods.

- That all the deliveries were made on various dates and invoices raised for the amounts payable.
- The invoices paid were exhibited.
- The image return documents from CFC bank for the two bounced cheques were also exhibited.

13. On the other hand the Respondent filed its grounds of opposition which I have reproduced above. The said grounds deny the Appellant's claim and state that the image return documents have not been certified as true copies of the original by the maker, CFC Bank Ltd and cannot be relied upon as genuine. There was no replying affidavit filed by the Respondent. The Appellant's affidavit evidence remained uncontroverted.

14. The defence has essentially made bear denials to the Appellant's claim. In paragraph No. 6 of the defence, it is stated that the Appellant was promptly paid. This is a bear statement. There was no evidence of the payment in question having been made to the Appellant. There is also no explanation by way of evidence in respect of the bounced cheques. On whether there was a contract between the Appellant and the Respondent, the Appellant's evidence is that he was engaged by the Respondent and delivered the goods in question. This evidence is not controverted by any other evidence. In my view the defence failed to raise any triable issue.

15. On whether the failure to file a reply to the defence barred the Appellant from applying for summary judgment, I find no such requirement under the provisions of Order 36 Civil Procedure Rules. As stated by Havelock, J in **Commercial Bank of Africa Ltd V David Njau Nduati [2013] eKLR** while quoting Chesoni, J (as he then was) in the case of **Richard H Page & Associates Ltd v Kapoor (1976-80) 1KLR** :

“This, in my view, means that the law having expressly required that before a plaintiff can go for summary judgment the defendant must have entered an appearance, there can be no importation of a requirement that such application must be before the pleadings have closed or before the defence or the reply to the defence has been filed. I recognized this reasoning when I said in *Bhundia Properties Ltd v East African Airways Corporation (unreported)* that:

If the defendant has filed a written statement of defence the Court may, in its discretion, look at it and see if it discloses an arguable case for the defendant which raises prima facie triable issues.

(See also *Mugambi v Gatururu [1967] EA 196, 197*). I am aware that in both the *Bundia properties* and the *Mugambi Cases* it is not stated whether the pleadings had, or had not, closed and there was a joinder of issue, which has the effect of denying that the defendant has an arguable defence at all, and the closing of pleadings which leaves the plaintiff with the conviction either that the defendant has a defence to the suit and so there cannot be an application under order XXXV for summary judgment or that the defendant has no defence to the suit and so an application for summary judgment is likely to succeed, can operate as a bar to an application for summary judgment. Indeed, the purposes of a summary judgment order is to enable a plaintiff quickly to realize what is his, so the application should be made immediately the condition precedent is fulfilled, ie appearance has been entered, and any delay in making the application must be explained.”

16. With the foregoing, I am satisfied that the Appellant's Appeal has merits. Consequently, the ruling by the subordinate court delivered on 27th March, 2015 is hereby set aside and the Appellant's Notice of Motion dated 12th March, 2014 is allowed. The Respondent to bear both the costs of this Appeal and the costs in Lower Court.

Dated, signed and delivered at Nairobi this 11th October, 2016

B. THURANIRA JADEN

JUDGE