REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 780 of 1995

ROMA TRADING CO. LTD..... PLAINTIFF

Versus

MR. PURSHOTAM H. PATHAK ..... DEFENDANT

RULING

MR. PURSHOTAM HARILAL PATHAK, a British citizen was trading in various businesses in Kilifi and Malindi before he died in a tragic road accident on 17.10.1995. He, his wife, son and two daughters were residing chiefly in Malindi. Some such businesses were Rafiki Supermarket in Kilifi, Rafiki Hardware in Kilifi, Rafiki Supermarket in Malindi, Starlight Hotel in Malindi and Rafiki Wholesalers in Kilifi.

During his lifetime, the deceased carried on business transactions with M/s ROMA TRADING CO. LTD. of Mombasa (ROMA). Roma say they had on various occasions sold and supplied assorted goods to Pathak's businesses at his request, for a total sum of Shs. 3,051,883. The deceased had paid Shs. 90,000 towards those goods and returned others worth Shs. 170,000 for which credit was given. That left a sum of Shs. 2,791,882 unpaid as at the time of Pathak's death.

Within 9 days of Pathak's death, Roma applied through M/s Aboo & Co. Advocates to have his wife Mrs. Purshotam Pathak appointed as the Administrator of her husband's estate limited to representing the estate in a suit intended to be filed for recovery of the unpaid debt. The order was granted by Mbogholi J. on 30.10.95 and the main suit was filed on the same day. The Administrator of the estate filed a defence on 21.11.95 through M/s Gikandi & Co. Advocates denying the indebtness and put Roma to strict proof thereof.

Before that defence was filed, Roma had applied exparte and obtained an order for attachment of the deceaseds' property as security pending the hearing of the suit. Some goods were attached pursuant to that order before the Administrator rushed to court to seek a stay of execution and the setting aside of the order for attachment before judgment. When the application for attachment before judgment came up for hearing inter partes, Mbogholi J. found that there was no basis disclosed in the affidavit that the defendant would leave the jurisdiction of the court, to warrant the grant of the order. He dismissed the application and lifted the attachment of the goods already made. That was on 2.11.1995.

Roma, the plaintiff returned to court on 21.12.95 and filed a Notice of Motion under Order 35 Rule 1 & 2 seeking summary judgment for the sum claimed in the plaint. That was the application that was argued before me and the subject matter of this Ruling.

I observe that when the application came up for hearing for the first time on 19.6.96 before Ang'awa J. Mr. Gikandi sought an adjournment on the ground that he had tried to contact his clients about. It is an argumentative affidavit which neither admits nor denies the factual matters stated in the Applicant's Affidavit. It appears to query the accuracy of the actual figures on the amount due while in the same breath there is a general denial in the defence that no single cent is due. The same goes for the cheques alleged to have been issued and dishonoured and a note by the deceased showing that some money would be transferred to the Applicant's Account in settlement of the debt. No reference has been made to these facts as Mr. Gikandi was not in a position to swear to the truth on the contrary. He does not say he was a partner in the business. He does not disclose where his client is. The Affidavit is simply incompetent. Mr. Aboo cited Caspair Ltd. -Vs- Gandy [1962] EA 414 for the proposition that such an Affidavit should not be acted upon.

In response to this aspect of the matter Mr. Gikandi chose to steer clear of the attacks made on his Affidavit and instead dwelt on the merits of the plaintiff's application.

I suspect that Mr. Gikandi steared clear of defending his Affidavit because he was aware that it was not defensible. There are clear and mandatory provisions under Order 18 Rule 3(1) that Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove. Mr. Gikandi did not purport to be in any position to prove facts relating to transactions made between the parties in this suit. The proviso that in interlocutory matters statement of information and belief may be stated is qualified by disclosure of sources of such information and the grounds of such belief. I have perused the Affidavit in reply sworn by Mr. Gikandi on 25.6.96 and I fully agree with the attacks levelled at it by Mr. Aboo. I also accept that the authority cited, Caspair Ltd. case applies to the Affidavit in this case and I accordingly decline to rely on any matters stated in Mr. Gikandi's Affidavit.

As for the merits of the application, Mr. Aboo relied on the supporting Affidavit sworn by Rukiya Ali Mohamed Gullied, the plaintiffs Director who had full knowledge of the transactions between the parties. He annexed copies of various invoices and delivery Notes addressed to the defendant's Firm between 5th August 1995 and 25th September 1995. Those were the two months preceding the death of the proprietor of the Firm. He further referred to and annexed a bundle of cheques issued by the deceased between 31.8.95 and 25.9.95 amounting to Shs. 2,595,383 towards payment for the goods supplied which cheques were dishonoured upon presentation for payment. The last annexure is a note dated 4.10.95 from the deceased to the deponent informing him that a sum of US $ 65,000 had been deposited in the deceaseds' account and the Bank Manager had been instructed to transfer the money to the plaintiff's Account once the amount was cleared. That amount translated at the time to approximately Kshs. 3.5 million. No transfer was ever made of that sum.

Mr. Aboo therefore submitted that with all such evidence, the defendant cannot be heard to file the defence as now filed denying any indebtness at all. Summary judgment should be entered but if the court was inclined to give conditional leave to defend them the principal sum should be deposited as security in court.

On the merits of the Application, Mr. Gikandi submitted that the onus is on the Applicant to show that there are no triable issues. It must also be shown that there is a plain and obvious case for summary judgment before orders are given. In his view there is no clear Account proved to show the balance due. All there is are copies of invoices supporting a claim of Shs. 1.5 million and copies of delivery notes which show deliveries to different Firms and some of the delivery notes are not signed. They do not show how the goods were delivered and who received them. Considering that the claim is a big one, these matters should not be taken lightly. Whether the goods were supplied and were properly receipted would be a triable issue, he submitted. He also submitted that it was apparent that the sum of US $ 65,000 was paid over to the plaintiffs and if so they cannot demand payment twice over. This would be a triable issue. As for the cheques, he submitted that they ought not to be introduced in this application as they never featured in the pleadings as required under the Bills of Exchange Act Section 27 - 28. The case should therefore go for full hearing to determine the many issues that it poses. The plaintiffs counsel had infact asked for two days of trial in the Summons for Directions and should not now be heard to request for summary judgment instead of proceeding with the hearing. He cited City Printing Works (K) Ltd. -Vs-

Bailey [1977] KAR 85 which followed Zolla -Vs- Ralli Brothers [1969] E.A. 69 on the principles applicable in applications for summary judgment. There is no plain and obvious case presented here and therefore the Application should not be granted.

Responding to these submissions Mr. Aboo pointed out that the delivery notes were directed at the Firms admitted in an earlier Affidavit of the deceaseds' son, one NAKASH PATHAK to have belonged to the deceased. There can be no submission of the goods having been delivered to other persons. In any event there is nowhere in these proceedings where the validity of the delivery notes is disputed.

Secondly it is admitted that the cheques exhibited were issued by the deceased and were dishonoured. If the note referring to US $ 65,000 was meant as a replacement for these cheques, then it was within the powers of the defendant to show that the money was transferred to the plaintiff's Account and not to expect the plaintiff to show that it was not transferred. The Current Account in which the US Dollars were deposited belonged to the deceased and not to the plaintiff.

Mr. Aboo further submitted that the bounced cheques were in issue long before the defence was filed but no comment has been made thereon. The suit is not based on those cheques but on goods sold and delivered. The cheques are only presented as evidence of attempted payment which failed, and therefore the Bills of Exchange Act does not apply.

There has been no attempt since the defence was filed to amend it or include a counter claim or set off and therefore there is as yet no challenge to the plaintiff's claim.

I have considered these submissions fully. I do not agree with Mr. Gikandi that the onus is on an applicant invoking Order 35 Civil Procedure Rules to show that there are no triable issues before an order for summary judgment is granted. The only onus I see imposed on the Applicant under Rule 1 (2) is to file a Notice of Motion and support it by an Affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed. Once that onus is discharged, then it is for the Defendant/Respondent to show either by Affidavit or by oral evidence or otherwise that he should have leave to defend the suit. That is the clear provision of Order 35 Rule 2(1) Civil Procedure Rules. As was stated by Madam J.A. in Gupta -Vs- Continental Builders Ltd. CA 33/77.

"If a defendant is able to raise a prima facie triable issue, he is entitled in law to unconditional leave to defend. On the other hand if no prima facie triable issue is put forward to the claim of the plaintiff it is the duty of the court forthwith to enter summary judgment for it is as much against natural justice to shut out without proper cause a litigant from defending himself as it the deceased who was trading in several business names in Kilifi and Malindi. There is no averment that those goods were paid for. On the contrary there is evidence which I accept that there was an attempt to pay for the goods through various cheques which were dishonoured and that there was a promise by the deceased to transfer US $ 65,000 to the plaintiffs subsequent to the dishonour of these cheques. There is no evidence that such promised transfer of funds was effected. I see no possible defence that goods were supplied to the deceased.

An issue may however arise as to the exact amount that is due to the plaintiff. That is because the plaintiff does not come out clearly to support a supply of goods worth Shs. 3,051,883, a payment of Shs. 90,000, a Credit Note of Shs. 170,000 for returned goods leaving a balance of Shs. 2,791,883 which is pleaded in the plaint. What emerges from the verifying Affidavit are invoices which in my calculation total Shs. 1,256,521 or Shs 1.5 as observed by Mr. Gikandi; Dishonoured cheques which amount to Shs. 2,595,383,; and a promised transfer of a payment of US $ 65,000 which translates to a sum in excess of Kshs. 3.5 million. Why it was not possible to verify the amount claimed in the plaint with exactitude may or may not be explicable. For my part I do not wish to resolve that uncertainty in this application.

That does not destract from my finding that goods were supplied to the defendant and there is no evidence that they were fully paid for. I am inclined to think that they were not and that the defense is far from genuine»Cheques amounting to Shs. 2,595,383 could not have been issued by the deceased for nothing. I accept as submitted that they are evidence of part payment for the goods supplied in the two months before the deceased died. I would in the circumstances enter judgment for that sum. I will nevertheless

give an opportunity to the defendant to interrogate the plaintiff on the balance of the amount claimed, a hearing date for which shall be taken in the Registry. To that extent the application succeeds with half the costs of the application to the plaintiff/applicant and the full costs of the successful claim in the main suit to the plaintiff.

Dated at Mombasa this day of 21ST January 1998.

P.N WAKI

JUDGE