



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: OMOLO, TUNOI & LAKHA, J.J.A.)
CIVIL APPEAL NO. 207 OF 1998
BETWEEN

YUSUF K. SAYANI 1STAPPELLANT
THURAIYA A. MUHSEIN 2NDAPPELLANT
AND
BARCLAYS BANK OF KENYA LIMITEDRESPONDENT

(Appeal from the Ruling and Orders of the High Court of Kenya
at Nairobi delivered by (Hon. Justice Richard Kuloba) on 28th July, 1998
in
H.C.C.C. NO. 1911 OF 1997)

JUDGMENT OF THE COURT

This is an appeal by the unsuccessful defendants against the ruling of the superior court (Kuloba, J.) given on 28 July, 1998 whereby he entered judgment in favour of the plaintiff upon the latter's application for summary judgment.

At all material times the defendants were customers of the plaintiff at its Changanwe Road Branch, Nairobi. On or about 12 April, 1995 the defendants deposited with the plaintiff a cheque **No. 0560** drawn on Commerce Bank of Kansas City, Missouri, USA in favour of the first defendant for the sum of **US Dollars 62,500** for collection in the normal course.

In consideration of the said cheque the defendants were allowed to draw on account against the said cheque which was subsequently returned unpaid, whereupon the plaintiff claimed against the defendants for the value of the said cheque or the amount of Shs.2,698.025.50 obtained by them in consideration of the same.

By their defence the defendants denied the claim and, in the alternative, pleaded that the same had been repaid or serviced in full. There was no other worthwhile or relevant defence pleaded. No counterclaim was set up claiming refund of overpayment, if any, made. Nor was the interest claimed denied or alleged to have been excessive.

The plaintiff filed an application for summary judgment.

In his replying affidavit the first defendant raised as the only dispute the interest rates and the rate of exchange at which payment was to be made in Kenya currency. That notwithstanding, at the hearing of the application the defendants' advocate is recorded to have made the following two submissions:-

"Oppose the application.

There was arrangement on how to pay the amount claimed.

The proper amount to be paid has not been ascertained.

No summary judgment until the amount is ascertained."

The learned judge found in favour of the plaintiff and said:-

"So, while there may be a dispute as to currency in which the debt is to be paid and as to the interest rates, the sum of Shs.2,698,025/50 is clearly owed by the defendants to the plaintiff, and there can be no worthwhile defence to that.

The alleged frauds particularised in the defence can have nothing to do with the cheque which admittedly bounced or was dishonoured when due for payment.

In the circumstances, there is hereby entered summary judgment for the plaintiff against the defendants jointly and severally in the sum of Shs. 2,698,025/50. The rest of the claim shall go for trial. Costs to await the trial on the disputed sums. Orders accordingly."

With respect, we fully agree. There were no triable issues raised in the defence or replying affidavit. The only matters in dispute were reserved by the learned judge for trial. In our judgment, he did not err in principle or otherwise and he was plainly right. In the face of a clear admission (apart from those made in the correspondence) made at the hearing of the application for summary judgment by the defendants' advocate the learned judge had no alternative but to enter judgment (as he did) reserving the alleged matters of dispute for trial.

On the basis that the learned judge had a discretion, we are satisfied that he did not misdirect himself in any way so as to vitiate the exercise of his discretion or warrant an interference by this Court.

Upon a careful consideration of the matter as a whole, we are satisfied that this appeal has no merit whatsoever.

Accordingly, it is dismissed with costs.

Dated and delivered at Nairobi this 5th day of March, 1999.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR