



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, SHAH & BOSIRE, J.J.A.)

CIVIL APPEAL NO. 232 OF 1997

BETWEEN

DHANJAL INVESTMENTS LIMITED.....APPELLANT

AND

SHABAHA INVESTMENTS LIMITED.....RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya

at Mombasa (Honourable M. Ang'awa J.)

dated 17th June, 1997 in

CIVIL CASE NO. 38 OF 1997)

JUDGMENT OF THE COURT

On 17th June, 1997 the superior court (Ang'awa, J.) in a somewhat incomprehensible ruling declined to enter summary judgment against the appellant (the defendant) but ordered as follows:

"I hereby give the following orders that the defendants deposits Kshs.38,700,000= in the joint names of the two advocates from (sic) each party in the name of the Mombasa Deputy Registrar of the High Court of Kenya within 7 days. Failing to make such deposit summary judgment be entered. I decline to grant a stay pending the hearing of the counter-claims. If payment is made leave to defend is given."

What the learned judge ordered amounted to a conditional leave to defend, the condition being that of depositing a sum of shs. 38,700,000/= in joint account in the names of the advocates for the respective parties and the Deputy Registrar of the High court of Kenya at Mombasa. The superior court did not say in which banking institution the deposit was to be made within the short space of seven (7) days which she allowed.

This appeal before us is limited to the issue of the said condition imposed by the learned judge. The appellant's counsel argued that when clear triable issues are raised a defendant ought to be given unconditional leave to defend.

The facts in issue before the learned judge turned on a contract for sale of land (and buildings thereon) entered into between the appellant and the respondent to whom we shall hereinafter refer to as the defendant and the plaintiff respectively.

The plaintiff's claim in the superior court was for:

- (a) A declaration that the Agreement for Sale between the plaintiff and the defendant in respect of the suit property is valid.
- (b) Kshs.38,700,000/= being the balance of the purchase price owed to the plaintiff by the defendant.
- (c) Interest on (b) at 30% per annum payable from the date the defendant took possession of the suit property to the date of

completion of this suit.

(d) Costs of this suit.

(e) Interest on (d) at court rates.

The agreement for sale of the plaintiff's property known as L.R. No. 1549/section 1, Mainland North, Mombasa (L.R. No. 13445), was entered into between the plaintiff and the defendant on 3rd April, 1995. On this property stood a hotel known as Piccolo Beach Hotel (hereinafter referred to as "the suit property"). The purchase price was shs.43,000,000/=, 10% whereof (shs.4,300,000/-) was paid by the defendant to the plaintiff's advocates who are holding the said sum as stakeholders. The completion date for the contract was 15th April, 1995, and time was of the essence of the contract.

A special condition was (amongst other conditions) inserted by the parties which reads

"7. The vendors (plaintiff) confirm that there is no litigation pending against the property and/or business".

The plaintiff is a limited liability company. The shareholders of the plaintiff company had agreed to sell all their shares in the plaintiff company to two gentlemen known as Dhiran Kotak and Aziz Tayabji who had, prior to the date of the agreement for sale dated 3rd April, 1995, filed a suit against the shareholders of the plaintiff company seeking specific performance of the agreement for sale of shares and other incidental claims. This was H.C.C.C. (Mombasa) No.289 of 1994, filed on 10th May, 1994. Messrs Kotak and Tayabji had lodged, on the 28th day of October, 1993, a caveat against the title of the suit property claiming interest in it as purchasers of the suit property.

The defendant's defence (amongst other defences) was that the plaintiff entered into the said agreement for sale, well knowing the existence of H.C.C.C. No. 289 of 1994 and that condition No. 7 subscribed to by the plaintiff was a material fact and ought to have been disclosed to the defendant and that if the defendant paid the balance of shs.38,700,000/= to the plaintiff during the pendency of H.C.C.C. No. 289 of 1994 and if Messrs Kotak & Tayabji succeeded in their claim against the shareholders of the plaintiff company, the defendant would have a useless contract in its hands.

Secondly there was, at the time the plaintiff filed the present suit, a suit filed by M/s Kotak and Tayabji, this time against the plaintiff company, its shareholders, the appellant and the Registrar of Titles, Mombasa, in which suit (H.C.C.C. No. 85 of 1996) M/s Kotak & Tayabji claim (inter alia) that as purchasers of the total shareholding of the plaintiff company they are entitled to the possession of the said Hotel. They also claim that the caveat lodged by them was unprocedurally and wrongfully removed and they seek reinstatement thereof. They claim also that the appellant in this appeal acquired the title to the suit property wrongfully.

M/s Kotak & Tayabji failed in their attempt to obtain an interim injunction to restrain the defendants in H.C.C.C. No. 85 of 1996 and they have lodged a notice of appeal against the ruling of Waki, J. dismissing their application. The ruling was delivered on 27th November, 1996. It so happened that the plaintiff's application to have the said notice of appeal filed by M/s Kotak & Tayabji struck out was dismissed by this court on 26th January, 1998.

The defendant argues that as matters stand now it had bought not the suit property but a "litigation". That may well be the case. The defendant is very much embroiled in H.C.C.C. No. 85 of 1996. Mr. Gautama for the defendant argued that if there are triable issues the court has no discretion and must grant unconditional leave to defend; that the issue of conditional leave to defend was not raised nor argued; that there were clear triable issues.

Mr. Kowade for the plaintiff urged that the defendant is registered as proprietor of the suit property; that the defendant has had possession and use of the suit property since January, 1997; that the defendant has changed the name Piccolo Beach Hotel to Travellers' Inn and that in the circumstances the defendant cannot have its cake and eat it. The defendant, Mr. Kowade argued, must pay the balance of shs.38,700,000/= to the plaintiff or at least deposit the same in a banking institution. Further, Mr. Kowade argued, M/s Kotak & Tayabji have no right to the suit land; that at most they may have a right to shares; that the doctrine of lis pendens does not apply to the parties to the present appeal as one suit is in respect of shares and the other is in respect of the suit land.

The points put forward by both the plaintiff's and the defendant's counsel, in our view raise substantial issues for determination and we are not prepared to say that there are no triable issues. There are valid triable issues and we would not comment more on the same lest the trial court may be hampered in its views at the time of the hearing of the suit.

The law on summary judgment procedure has been settled for many years now.

It was held, as early as in 1952 in the case of Kandanlal Restaurant v. Devshi & Co. [1952], 19 E.A.C.A. 77 and followed by the Court of Appeal for Eastern Africa in the case of Souza Figuerido & Co. Ltd vs. Moorings Hotel Limited [1959] E.A. 425 that if the defendant shows a bona fide triable issue he must be allowed to defend without conditions. The court, in the case of Souza Figuerido said at page 426:

"We are of the opinion that the extract from the Annual Practice of 1951 set out and adopted by this court at p.79 of the report of Kundanlal Restaurant case correctly stated the law. That extract reads:

The principle upon which the court acts is that where the defendant can show by affidavit that there is a bona fide triable issue, he is to be allowed to defend as to that issue without condition (Jacobs vs. Booth's Distillery Co. [1901] 85 L.T. 262 H.L.)-- A condition of payment into court ought not to be imposed where a reasonable ground of defence is set up..... Since Jacob's vs. Booth's Distillery Co. (supra) the condition of payment into court, or giving security, is seldom imposed, and only in cases where the defendant consents, or there is good ground in the evidence for believing that the defence set up is a sham defence and the master is prepared

nearly to give judgment for the plaintiff in which case only the discretionary power given by this rule may be exercised (Wing vs. Thurlow 10 T.L.R 53, 151). It should not be applied where there is a fair probability of a defence (Ward v. Plumley 6 T.L.R. 198., Bowes v. Caustic Soda Co. 9 T.L.R. 328) nor where the practical result of applying it would be unjustly to deprive the defendant of his defence."

As we have said, there are clearly triable issues. The learned judge did not say that those issues were sham. Nor are we prepared to say so.

The upshot of all this is that we allow the appeal, set aside the order of the superior court imposing upon the defendant the condition to deposit shs.38 million within seven days and give unconditional leave to the defendant to defend the suit and prosecute the counterclaim. The appellant will have the costs of this appeal which we do not certify for two counsel. The costs of the application in the superior court will be costs in the cause in that court. Mr. Gautama has confirmed that the title deed relating to the suit property remains in the custody of this court. It shall so remain until further orders.

Dated and delivered at Nairobi this 16th day of February, 1998.

R.S.C. OMOLO

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR