

REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU, TUNOI & SHAH, J.J.A.)

CIVIL APPEAL NO. 283 OF 1997

BETWEEN

REMESHCHANDRA JANTILAL SHETH

JANTILAL HANSRAJ SHETH

CHANDRAKANT JANTILAL SHETH

ALL T/A J. MAGANLAL & COMPANYAPPELLANTS

AND

V. J. RUPARALIA

T/A V. J. RUPARALIA & COMPANYRESPONDENT

**(An Appeal from the Order of Honourable Mr. Justice Juma
given at Nairobi on the 9th day of May, 1996**

in

H.C.C.C. NO. 1053 OF 1995)

JUDGMENT OF THE COURT

This is an appeal from the decision of the superior court (Juma, J.) in Nairobi High Court Civil Case No. 1053 of 1995 given on 9th May, 1996, by which the learned Judge struck out the defence of the appellants in a suit filed by the respondent against the appellants and entered summary judgment for the respondent against the appellants for the liquidated demand of Shs.1,000,000.00, costs and interest thereon.

Litigation between the parties arose as follows: The first, second and third appellants are all partners in the firm known as J. Maganlal & Company (the firm). On 5th March, 1994, the respondent paid Shs.1,000,000.00 to Ukwala Trading Company Limited in payment of goods supplied to and for the benefit of the firm on the understanding that the said sum would be refunded to him within 30 days after its payment. The contract, which is disputed by the appellants was, however, oral. Payment was not honoured on its due date and two demand letters went unanswered. Suit was then commenced.

In what, in our view, appears to be a straight forward plaintiff, the respondent sued the appellants for the sum of Shs.1,000,000.00, costs and interest thereon. The appellants

filed a written statement of defence which appeared on the face of it somewhat evasive and equivocal. It averred that the plaint is bad in law and does not show any or any reasonable cause of action against the appellants and hence should be struck out. In paragraph 4 of the defence the appellants contended that there was no privity of contract between the parties and in the subsequent three paragraphs they averred that they were total strangers to the transactions and denied being indebted to the respondent as alleged in the plaint.

After the defence was filed, the respondent moved the superior court by motion on notice for striking out the defence and consequentially for final judgment under Order VI r 13 (1) (a) and (d) and Order XXXV r 1 of the Civil Procedure Rules, respectively. The respondent to his affidavit in support of the motion annexed the copy of the cheque through which he made payment, correspondence between him and the appellants and a letter dated 30th November, 1996, by Ukwala Trading Company Limited to the effect that it had received the money from the respondent on account of the firm, being payment against Invoice No.5782 of 9th March, 1994, raised against it. The respondent tendered all these documents before the learned Judge. The appellants' affidavit in reply was more or less a rehash of the averments in the written statement of defence.

The learned Judge in a reserved ruling went on to strike out the defence and entered judgment as prayed. The appeal against this decision is principally that, all the essentials and ingredients of triable issues being present in the pleadings and affidavit evidence, the learned Judge misdirected his mind in not exercising his discretion judicially.

The appellants, in an affidavit deposed to by the first appellant, admitted having purchased goods worth Shs.2,594,485.00 from Ukwala Trading Company Limited but averred that out of the purchase price Shs.1,000,000.00 was paid on its behalf by one Devani, for his own purposes. The said Devani is now deceased. This does not, however, appear to be true because cheque No.683006 for Shs.1,000,000.00 drawn on Barclays Bank Ltd, Market Branch, was made by the respondent in favour of Ukwala Trading Company Limited which has, in fact, in two exhibited letters admitted receiving the same. It would, we think, appear that the name of Devani is being raised for the sake of convenience since he cannot tell tales.

In our view, the learned Judge in this application exercised extreme caution before striking out the defence. The defence presented by the appellants clearly and obviously disclosed no reasonable defence and did not raise any triable issues. It was indeed shadowy and a sham and the learned Judge therefore exercised his discretion properly in striking out the defence under Order VI r 13 (1).

We have no doubt that in entering summary judgment against the appellants the learned Judge acted correctly and cannot be faulted. This appeal is devoid of merit and is accordingly dismissed with costs.

Dated and delivered at Nairobi this 24th day of April, 1998.

J. E. GICHERU

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR