REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appeal 124 of 1996

EASTAFRICA PACKAGING INDUSTRIES LIMITED.....APPELLANT

AND

ZOEB ALIBHAI…….....……RESPONDENT

(Appeal from a decree of the High Court of Kenya at Nairobi (Justice Hayanga) dated the 16th day of January, 1996

IN

CIVIL CASE NO. 1171 OF 1995

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JUDGMENT OF KWACH, J.A.

This is an appeal from the decision of the superior court (Hayanga J) in which the learned Judge entered summary judgement against East African Packaging Industries Ltd. (the appellant), in a suit brought by Zoeb Alibhai (the respondent) against the appellant claiming damages for wrongful dismissal and defamation.

Prior to the events giving rise to the suit, the respondent was the appellants employee. He joined the appellant in August 1989 as a Sales Representative at a monthly salary of Shs. 13,400/-, which included an element of housing allowance. The job carried with it among other perks, a company car and a Medical aid scheme. He also joined the staff retirement benefits scheme. There is a clause relating to confidential matters which stated -

"You will not, without the consent of the Company disclose any of its secrets or other confidential matters to anyone not authorized to receive them".

By a letter dated 25th January, 1995, addressed to the appellant's Sales Manager, the respondent tendered his resignation by giving one month's notice. He said his last day of work would be 15th February, 1995, and the balance of 15 days would be covered by 15 days accrued leave which he would forfeit. He added, for good measure , that he was leaving in order to join a family business. On 2nd February, 1995, the appellant's General Manager, one M.E. Hales, wrote to the respondent accepting his resignation and

wishing him every success in his future career. That letter read in part -

"As per your request the company has agreed to release you before 15th February, 1995. This will allow you to start your new career earlier, or take a longer holiday before starting.

Attached is a cheque for Kshs. 308,886/90 being your final dues".

The appellant paid the respondent his full terminal benefits which included his salary for the month of February and a sum of Shs. 290,766/- in respect of pension benefits, made up of his own contributions and the contributions of the appellant. The respondent did not clear the cheque immediately, but when he presented it for payment on or about 17th February, 1995, it was dishonoured as the appellant had stopped payment. The reason for this is to be found in the letter dated 24th February, 1995, written to the respondent by the Managing Director of the appellant one J.C. Small in which he said -

"Dear Sir

SUMMARY DISMISSAL FROM OUR EMPLOYMENT

You left the premises of E.A. Packaging Industries Ltd on February 10th, and as per the request stated in your resignation letter were allowed to take 15 days leave as part of your required notice period. You were, therefore, paid up to February, 28th and are still in EAPI's employment to that date.

We now have clear evidence that you are in breach of the section headed CONFIDENTIAL MATTERS & STANDING ORDERS in your letter of appointment and we hereby summarily dismiss you for gross misconduct".

Having countermanded payment and purported to dismiss the respondent summarily, the appellant then calculated the respondent's terminal benefits a fresh and credited his account with Shs. 153,.183.40. All the appellant did was to withhold the employers contributions to the respondent's pension benefits amounting to Shs. 145,383/-. The salary for February was left intact in spite of the fact that the appellant claimed to have summarily dismissed the respondent for gross misconduct. The appellant also placed a notice in the local newspapers in the following terms -

"EAPI – PUBLIC NOTICE

This serves to inform all our esteemed and valued customers that the following individuals are no longer employed by E.A. Packaging Industries Ltd. and are not authorised to make any business transaction on behalf of the company.

Mr. Ino Dias

I.D NO. 1125844/64

Mr. Zoeb Alibhai

I.D. NO. 533584/65

For any clarification, please contact us on telephone numbers 530176 – 184 Nairobi".

The respondent felt that this public notice issued by the appellant was defamatory of him and when he filed a suit against the appellant on 30th March, 1995 he sought judgement for the balance of his terminal benefits (Shs. 155,703/50); Shs. 23,267.25 spent by the respondent to place a notice in the press in response to the one placed by the appellant; and general damages for defamation. The plaint was subsequently amended to delete the claim for general damages which Mrs. Dias, for the respondent, admits was done in order to make it easier for the respondent to obtain summary judgement.

The appellant filed a defence denying the respondent's claim. It averred that following the respondent's summary dismissal for gross misconduct, the respondent was not entitled to the appellant's contributions to the staff Retirement Benefits Scheme and payment of the cheque which had been released to the respondent had to be stopped to remove this element. The appellant also contended in its defence that the claim in respect of the staff retirement benefits scheme should have been made against the trustees of the scheme. According to the appellant, the respondent remained its employee until 28th February, 1995.

The misconduct alleged against the respondent by the appellant was that he had copied, retained and made improper and unauthorised use of confidential and secret information and documents belonging to the appellant and had used such documents and information to solicit orders for competitors of the appellant; and had failed to deliver quotations to a customer of the appellant resulting in loss and damage to the appellant.

Notwithstanding the defence filed by the appellant, the respondent applied for summary judgement under Order 35 rule 1 of the Civil Procedure Rules. The application was supported by an affidavit sworn by the respondent himself in which he deponed, inter alia, that the appellant was truly indebted to him in the sum of Shs. 23,276.25 in respect of the publication he placed in the press and Shs. 155,703.50 in respect of terminal benefits. In its grounds of opposition the appellant said among other things that the defence raised bona fide triable issues and that the claim for benefits under the retirement benefits scheme should have been made against the trustees of the scheme not against the appellant. A replying affidavit was sworn by the appellant's Managing Director explaining in detail the circumstances leading to the summary dismissal of the respondent.

After the filing of initial affidavits in the application for summary judgement, the matter came before Hayanga J on 8th May, 1995, and he recorded a consent order in the following terms -

"Application dated 27th April, 1995 be heard on 16th May, 1995. Both parties to have leave to file and exchange further affidavits before then".

In compliance with that order, both parties did indeed file further affidavits but these affidavits were disallowed by the judge at the hearing of the application on the ground that they were filed without leave. Counsel do not appear to have drawn the learned Judge's attention to his earlier order.

In a lengthy ruling, the Judge allowed the application for summary judgement and entered judgement for the respondent for Shs. 155,703.50 in respect of balance of terminal benefits, and Shs. 23,267.25 being the cost of publication of the notice placed by the respondent in the newspapers. The appellant has raised 11grounds of appeal in its memorandum of appeal but for the purposes of my decision I propose to deal only with grounds 1,2,7,8,9,10 and 11.

The complaint in grounds 1 & 2 relate to the rejection of further affidavits and striking out of a paragraph in the affidavit of John Small, the appellant's Managing Director dated 4th May, 1995. With regard to further affidavits generally, the judge was plainly wrong and I have already alluded to his own order in this regard made on 8th May, 1995. Having granted leave to the parties to file further affidavits, he had no basis for saying that these affidavits had been filed without leave. This ground of appeal therefore must succeed.

The affidavit sworn by John Small on 4th may in opposition to the respondent's application for summary judgement contained a paragraph in which he deponed as follows: -

"(7) Shortly after 10th February, 1995, I received information form the defendant's sales staff and from customers, which I verily believe to be true, that the plaintiff had approached some of the defendant's customers with photocopies of the defendants price quotations seeking orders for Packwell Industries a competitor of the defendant".

This paragraph was objected to by Mrs. Dias, for the respondent, on the ground that it did not contain the

same names of the persons who gave the information to Mr. Small. It was her submission that in that respect in contravened the mandatory provisions of Order 18ruled 3 (1) of the Civil Procedure Rules which requires that where an affidavit contains statements of information and belief the sources must be identified. Mr. Small stated in his affidavit that he obtained the information from the appellant's sales staff and customers. In my opinion that is a sufficient compliance with the requirement of the rule and if the respondent wanted to have further details it was open to him to obtain an order for the cross-examination of the deponent. I think in striking out that paragraph the Judge took too technical a view and at a stroke destroyed the anchor of the appellant's case. I would also allow this ground of appeal.

I now come to ground 7 of appeal which states that the judge erred in failing to hold that any claim by the respondent in respect of the staff Retirement Benefits Scheme could only lie against trustees of the scheme. This defence was pleaded in the defence and it was also deponed to by Mr. Small in his affidavit. It was also raised before the Judge by counsel who appeared for the appellant at the hearing of the application. In his lengthy ruling the Judge makes no reference at all to this important point. I have read the Trust Deed and Rules governing the East African Packaging Industries Ltd. Staff Retirement Benefits Scheme with great care and it seems to me, prima facie, at any rate, that the contention by the appellant that the respondent's claim for benefit under the scheme lies against the trustees, and not against the appellant, is a triable issue which cannot be determined in a summary manner. This is an important point but which, as I have already said, the judge failed to deal with. If the point is finally decided in the appellant's favour it will cover a substantial part of the respondent's claim. I would allow this ground of appeal as well.

Grounds 8,9 & 10 of appeal relate the award of Shs. 23,267.25 for the alleged defamatory publication. Since the claim for defamation had been withdrawn, it is open to doubt whether the amount was in law recoverable in the absence of proof of liability. Besides, a claim for defamation is not the sort of relief that can be dealt with summarily under Order 35 rule 1 of the Civil Procedure Rules. I would also allow this ground of appeal.

In the last ground of appeal the complaint is that the Judge should have held that the defence raised triable issues and should have given the appellant unconditional leave to enter and defend. From what I have said so far, it is evident that the two defences put forward by the appellant, namely, that the claim for benefits under the scheme did not lie, and that the notice to the public placed in the newspapers by the appellant was not defamatory, are triable issues and the appellant should have been given unconditional leave to enter and defend. It goes without saying that this complaint is well –founded and I have no doubt in my own mind that in entering summary judgement against the appellant the learned Judge was in error.

I would allow this appeal, set aside the ruling and decree of the superior court, restore the appellant's defence and grant the appellant unconditional leave to enter and defend. Since the respondent's Advocate knew, or ought to have known, that the application was not one falling under Order 35, and the appellant relied on a contention which would entitle it to unconditional leave to defend, this is an appropriate case for an order under rule 8 sub-rule (2). In his judgement in the case of Trikam Maganlal Gohil & Another v John Waweru Wamai (Civil Appeal No. 42 of 1982) (Unreported), Law JA said -

"I will only add a few words relating to the use of the summary procedure prescribed by Order XXXV of the Civil Procedure Rules. An application for summary judgement should only be dismissed if it falls within sub-rule (2) of rule 8, where there is an express finding either –

that the case was not one falling under Order XXXV, or

that the plaintiff knew that the defendant relied on a contention which would entitle him to unconditional leave to defend,

in which case the application may be dismissed with costs to be paid forthwith by the plaintiff".

I would dismiss the respondent's application for summary judgement with costs to be paid forthwith. I would also award the appellant the costs of this appeal.

As Judges of Appeal Pall and Bosire also agree, this appeal is allowed. The judgement and decree of the superior court is set aside, the appellant's defence is reinstated and the appellant is granted unconditional leave to enter and defend. The respondent's application for summary judgement is dismissed with costs to be paid forthwith. The appellant will also have the costs of the appeal.

Dated and delivered at Nairobi this 9th day of June, 1997.

R.O.KWACH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KWACH, PALL JJ.A & BOSIRE AG. J.A)

CIVIL APPEAL NO. 124 OF 1996

BETWEEN

EAST AFRICAN PACKAGING INDUSTRIES LIMITED.....APPELLANT

AND

ZOEB ALIBHAI.....RESPONDENT

(Appeal from a Decree of the High Court of Kenya at Nairobi (Mr. Justice Hayanga) dated 16th January, 1996

IN

H.C.C.C. NO.1171 OF 1995)

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JUDGMENT OF PALL J.A.

This is an appeal from the judgement and decree of the High Court (Hayanga J.) dated 16th January, 1996 in Civil Case No. 1171 of 1995.

on 30th March, 1995 Zoeb Alibhai (the respondent) sued East African Packaging Industries Ltd (the appellant) in the said suit for the recovery of Shs. 178,790.75. the plaint which was subsequently amended showed that the respondent had been employed by the appellant until by a letter dated 30th January, 1995 the respondent resigned from his employment. The said letter of resignation addressed to the Sales Manager of the appellant reads as follows paramateria: -

"With due respect, I regret to inform you that I will be resigning giving one month's notice effective from

1st February, 1995. My last day of work will be 15th February, 1995 and the remaining 15 days (it should be 13 days) will be forfeited by my leave which is due.....

I hereby am resigning due to joining in a family business".

By his letter dated 2.2.1995, M.E. Hales the General Manager of the appellant accepted the respondent's resignation. His said letter reads as follows in pertinent parts: -

"As per your request the company has agreed to release you before 15th February, 1995. This will allow you to start your new business earlier, or take a longer holiday before starting."

Attached is a cheque for Ksh. 308,886/90 being your final dues.

Before leaving, please submit to Mr. Robertson or myself your Barclay-Card, AAR card and any other company property".

The respondent having received the said cheque on 10.2.1995 banked it into his bank account on 16.2.1995. But on 17.2.1995 the appellant countermanded the payment of that cheque and instead credited a sum of Shs. 153,183,40 into the respondent's bank account thus deducting a sum of Shs. 155,703.40 which is a part of the sum claimed by the respondent by his amended plaint. Rest of the claim to wit Shs. 23,267.25 is alleged to be in respect of advertisement charges for publishing a notice to the public to which I shall allude later in my judgement.

The appellant denied liability by its defence and alleged that the respondent's last day of work was 10th February, 1995 whereafter he proceeded on his terminal leave. However on 25th February, 1995 the appellant dismissed the respondent for gross misconduct for improper and unauthorised use of certain confidential and secret information regarding the appellant's business. It was further alleged, and not denied by the respondent, that there was a staff Retirement Benefit Scheme (the scheme) for the employees of the appellant which was run by the trustees of the trust fund established under the scheme for the benefit of the employees. The appellant further pleaded that under the rules of the scheme where an employee of the appellant is dismissed for gross misconduct the employee is entitled to his own contribution to the scheme but forfeits any right to the appellant's contribution under the scheme. It is alleged that the respondent having been summarily dismissed was not entitled to the appellant's contribution to the scheme which amounted to the said sum of Shs. 155,703.50. It was further pleaded by the appellant that any claim in respect of the said staff retirement benefits should have been made against the trustees of the scheme and not against the appellant.

After the defence had been filed, the respondent applied by way of a notice of motion under order XXXV r. 1 of the Civil Procedure Rules for summary judgement.

By his affidavit Mr. John Charles Small sworn on 4th May, 1995 in opposition of the said application verified the contents of the appellant's defence. He also stated by paragraph 7 of his affidavit, that shortly after 10th February, 1995, he received information from his sales staff and from customers which he verily believed to be true that the respondent had approached some of the appellant's customers with photocopies of some confidential documents of the appellant seeking orders for Packwell Industries, a competitor of the appellant.

The learned trial Judge while entering judgement for the respondent as prayed struck out the above mentioned paragraph 7 saying: -

"In my view it is not sufficient identification of the information source to say "defendant's sales staff" because it makes it impossible to know whether all members of the sales staff gave information or one of them. Again it is not identifying any source to say "customers" as they are more than one which of them or if one who is he".

By ground No. 2 of the memorandum of appeal the appellant has said: -

"2- The judge erred in striking out paragraph 7 of J.C. Small's affidavit sworn on 4th May, 1995".

The proviso to r.3 of order 18 provides that in interlocutory proceedings an affidavit may contain statements of information and belief showing the source and grounds thereof. I think by saying that he had received information from his sales staff which he verily believed, Mr. Small had sufficiently complied with the proviso to rule 3 of order 18. He had disclosed the source of his information and belief. If the respondent was not satisfied with the accuracy and preciseness of that statement, Mr. Small could have been required to submit to cross- examination. As Sir clement De Lestang V.P. of the former Court of Appeal for Eastern Africa said in Life Insurance Corporation of India vs. Panesar (1967) E.A. 614 "the burden on a plaintiff seeking to obtain summary judgment is undoubtedly heavier than that on a defendant to disclose a good defence". A defendant has to satisfy the court no more than that he has an arguable defence or answer to the plaintiff's claim. I fully agree with what Ringera J. said in H.C.C.C. NO. 1625 of 1996 Kentainers Ltd vs. V.M. Assani and 4 others (unreported) namely that although highly desirable but it is not necessary that the source of information should be identified by name. I unhesitantly hold that the learned Judge erred in law in striking out paragraph 7 of the said affidavit of Mr. Small.

The first ground of appeal before us is that the learned Judge erred in rejecting some further affidavits. It is trite law that an application for summary judgement should be supported by an affidavit either of the plaintiff or some other person who can swear positively to the facts verifying the cause of action and any amount claimed. Then the defendant may show cause either by an affidavit or by oral evidence or otherwise that he should have leave to defend. No further affidavit can be filed by either side without leave of the court. In the instant case however the learned Judge seems to have forgotten that he himself had granted leave on 8.5.1995 to both parties to file and exchange further affidavits. I think, therefore, that the learned Judge erred in rejecting the further affidavits which had been filed in pursuance of his own order. The respondent had filed two further affidavits; one on 5th May, 1995 (at p. 63 of the record) and the order on 12th May, 1995 (at page 68). On behalf of the appellant Mr. Small filed his further affidavit on 18th May, 1995, which is at page 70 of the record. I shall take all these affidavits into my consideration in the determination of this appeal.

Grounds 3,4 and 5 revolve around the central issue in this appeal whether the appellant could have summarily dismissed the respondent on 24.2.1995. By his letter dated 30th January, 1995 the respondent served a months notice of resignation with effect from 1st February, 1995 and requested the appellant to accept his resignation with effect from 15th February, 1995. He further said that he would forfeit his salary for the remaining days of February, 1995 and offset it against his leave dues. He requested the appellant to release him and treat his services terminated as on 15th February, 1995.

By his letter dated 2.2.1995 Mr. Hales confirmed to the respondent that as per his request the appellant had agreed to release him (even) before 15.2.1995 in order to allow him to start his new career and forwarded a cheque, as herein above mentioned for Shs. 308,886.90. The respondent was further requested to hand over the appellant's property to his superior officers before leaving his employment. the respondent has stated, in his first further affidavit, and the appellant has not denied it, that the appellant took away the appellant's property from him on 10.2.1995 which was his last working day in the office. He has further stated that in fact the appellant turned down his request to be allowed to use his official car over the weekend beginning on the said 10th February, 1995. The respondent further stated that his resignation took effect on 15.2.95 and with effect from 16th February, 1995, he was no longer in the appellant's employment. He was however, paid full month's salary as his leave pay already earned by him was not paid to him and was adjusted against the remaining days of his termination notice.

The appellant has on the other hand stated that in the normal course the respondent was going to continue with his employment of the appellant until the 28th February, 1995 and proceeded on his terminal leave with effect from 16th February, 1995. While he was still on leave the appellant discovered the aforesaid evidence against the respondent and by its letter dated 24th February, 1995 summarily dismissed the respondent for gross misconduct.

Whether the respondent was still in the employment of the appellant and on leave after the 15th February, 1995 and whether in the circumstances of this case, the appellant could have dismissed him summarily or

not is an arguable issue. Again whether on the evidence discovered after the resignation of the respondent, the appellant could have dismissed the respondent for misconduct was another arguable point.

Ground No. 6 of the appeal is that the learned Judge erred in law in refusing to consider whether the respondent obtained his release from his employment by misrepresentation. It is trite law (Order VI r. 8) that misrepresentation should be specifically pleaded and particulars of misrepresentation on which the party pleading relies must be given. There is no allegation of any misrepresentation in the defence and of course there are no particulars of misrepresentation in the defence and of course there are no particulars of misrepresentation pleaded in the appellant's defence. The learned judge was therefore justified in rejecting misrepresentation on the part of the respondent as a triable issue.

The 7th ground of appeal is that the learned Judge failed to hold that any claim by the respondent in respect of the retirement scheme could only be against the trustees of the scheme. Unfortunately the learned Judge has not dealt with this prima facie issue. This issue had been pleaded in the appellant's defence. Mr. Khawaja had specifically argued that the matter required interpretation of the trust deed and that it was an issue whether the appellant's claim should be against the employer or the trustees. It was an important issue. The trial Judge was bound to consider it which he did not do. He failed to refer to it at all.

Mr. Khawaja also argued that under rule 23 of the rules of the scheme if a member is dismissed for misconduct etc. he forfeits any right to contribution paid on his behalf by the employer. Mrs Dias has argued that clause 23 could not have been applied by the appellant as the respondent having already left the employment could not have been thereafter dismissed for misconduct and that rule will apply only if the employee was still in the employment of the employer at the time of dismissal.

The only remaining material ground of appeal is ground No.9 which says that the learned Judge erred in awarding Kshs. 23,267.25 as special damages for the alleged defamatory publication by the appellant. The respondent had claimed special damages and applied by summary judgment for judgment in respect in respect of the said sum. The learned Judge could not have entertained this claim as there was no admission of liability for the alleged defamation. unless defamation has been established no claim for special damages arising out of it could have been subject of a summary judgement. Undoubtedly the learned judge erred in entering judgement on the account. The summary procedure under Order XXXV can only be adopted when it can be clearly seen that the defendant's defence is unsustainable. It is meant to be applied in plain and obvious cases when the court is satisfied beyond peradventure that the defence is sham or not maintainable in law and no legitimate amendment can save it. Also once a bona fide issue has been identified, the court should refrain from resolving it on affidavit evidence.

Finally, therefore I would allow the appeal, set aside the judgement and decree of the superior court dismiss the respondent's application for summary judgment and grant unconditional leave to the appellant to defend. I award the appellant costs of the appeal as well as the costs of the summary judgement application. I also order that all moneys paid by the appellant if at all in pursuance of the decree of the superior court be paid back by the respondent to the appellant.

Dated and delivered at Nairobi this 9th day of June, 1997

G.S. PALL

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KWACH, PALL JJ.A & BOSIRE AG. J.A)

CIVIL APPEAL NO. 124 OF 1996

BETWEEN

EAST AFRICAN PACKAGING INDUSTRIES LIMITED.....APPELLANT

AND

ZOEB ALIBHAI.....….....RESPONDENT

(Being an appeal from a decree of the High Court of Kenya at Nairobi (Justice Hayanga) dated 16th January, 1996

IN

H.C.C.C. NO.1171 OF 1995)

****

JUDGMENT OF BOSIRE AG. J.A.

This is an appeal from the decision of the superior court in its civil case No. 1171 of 1995 given on 16th January, 1996. The appellant, East African Packaging Industries Limited was the defendant in the suit with the respondent, Zoeb Alibhai as the plaintiff. The appellant was the respondent's employer between 14th August 1989 and February 1995.

Litigation between the parties started when, on 17th February, 1995, the appellant stopped the payment of a cheque for Ksh. 308,886.90, it had drawn in the respondent's favour to cover his pension, salary for that month among other terminal dues and later reissued another cheque for a lesser sum which excluded the appellant's contribution to the respondent's pension benefits.

In his amended plaint dated 20th April, 1995, the respondent has averred that he resigned from the appellant's employment with effect from 16th February, 1995; the latter agreed to pay him Kshs.308,886.90 as his terminal benefits; the payment was effected by cheque but respecting which the appellant stopped payment on 17th February, 1995; the stoppage was wrongful as it was unilaterally done; so was the subsequent deduction of the employer's contribution to his pension benefits amounting to Kshs. 155,703.50. in his original plaint the respondent had included a defamation claim based on a public notice the appellant published in a local daily that he was no longer its employee, and which notice ended with the following words:

"For any clarification, please contact us on telephone numbers 530176-184, Nairobi".

The respondent has, also, averred that the public notice contained among other innuendoes, one that he had been dismissed by the appellant; that a demand he made through his advocate for the appellant to publish in the same daily papers a correction notice was not heeded to with the result that he was constrained to publish one at a cost of Kshs.23,267.25, which sum together with the Kshs.155,703.50, above he claimed from the appellant. The claim for damages for defamation was omitted from the averments in the amended plaint.

The appellant was served with summons to enter appearance and the plaint, appeared by a firm of advocates and filed a written statement of defence in which it admitted, inter alia, that the respondent had been its employee and everred that by his letter dated 30th January, 1995, the respondents gave notice to terminate his employment with it with effect from 28th February, 1995; that the request was accepted and the acceptance communicated to him by its letter dated 2nd February, 1995; that by the same letter a cheque for Kshs.308,856.90 being his terminal benefits was forwarded to him; that his employment was due to terminate on 28th February, 1995, but that the respondent was permitted to proceed on his terminal leave with effect from 10th February, 1995; that before the leave ended the respondent was summarily dismissed, on 25th February 1995, for gross misconduct allegedly because he had copied, retained and made improper and unauthorised use of confidential and secret information and documents belonging to it to solicit orders for its competitors; that because of such dismissal the respondent lost his entitlement to its contribution to the Staff Retirement Benefits Scheme, and hence its action in deducting that amount from his terminal benefits, and that the fund under the scheme was run by trustees, with the result that the suit was improperly brought against it. The appellant admitted having published in the newspapers a notice about the respondent as alleged in the amended plaint but denied it was in any way defamatory of him.

After the above defence was filed the respondent moved the superior court by motion on notice, under Order XXXV rule 1 of the Civil procedures Rules, for summary judgement. His affidavit in support of the motion was more or less a rehash of the averments in the amended plaint except that, in addition, he exhibited a copy of the appellant's letter accepting his resignation and, also a copy of a computer statement from his bank to show that payment of the cheque for Kshs. 308,886.90 which he received from the appellant had been stopped, among other documents.

The appellant filed a replying affidavit, which was sworn by one John Charles Small, its Managing Director, in which he has deposed, inter alia, that the decision to release the respondent before 28th February, 1995 was reached after please by the respondent and after due internal consultations in that regard; that the respondent's resignation was to take effect from 28th February, 1995, not on the date of his release or any other date, and that the respondent was summarily dismissed on 25th February, 1995, during the currency of his employment, due to gross misconduct and was therefore disentitled to its contributions to his staff retirement benefits scheme. Several documents were exhibited, among them the respondent's letter of engagement with the appellant; a copy of the terms and conditions of service for the appellant's managerial staff; the copy of the letter accepting the respondent's resignation, his letter of resignation, and the Staff Retirement Benefits Trust Deed.

It should be noted that before the motion was heard both sides were improperly granted blanket leave to file further affidavits, which they did. However, when it came to writing the ruling the trial Judge (Hayanga, J.) rejected those additional affidavits that they had been filed without leave. To my mind, he was clearly wrong on that because he had earlier granted the leave. At the hearing of this appeal however, this court granted the parties leave to rely on them in urging their respective cases as clearly they were improperly not considered.

As I stated earlier, Hayanga J. heard the application. He looked at the pleadings and the affidavit evidence which was before him together with the annextures. He did not think that the appellant's defence and the replying affidavit raised any issues fit to go to trial. He also did not think paragraph 7 of Mr Small's affidavit which was sworn on information received, disclosed sufficiently the sources of his information. He, therefore, ordered it to be struck out on that ground. In the result he gave summary judgement as prayed. That provoked this appeal.

There are eleven grounds of appeal. However, Mr. Fraser who with Mr. Khawaja appeared for the appellant urged the appeal basically on four broad grounds. Firstly, that the trial Judge improperly excluded the further affidavits which had been filed with leave of the court. Secondly, that considering the fact that respondent had been paid his February 1995 salary and terminal benefits in full, the trial Judge erred when he ruled that as at the 25th February 1995, when he was served with a letter of summarily dismissal he was not in the appellant's employment. Mr. Fraser submitted that although the respondent had requested to forfeit his 15 days earned leave, the request having not been accepted by the

appellant, which decided to allow him to take the leave, he was still in its employment during that leave. That the documents which both sides relied upon were not explicit on the intention of the parties. Consequently, oral evidence was necessary to bring out that intention. Thirdly, Mr. Fraser submitted that the trial Judge improperly gave judgement for the Kshs. 23,267.25, which was in the nature of general damages and therefore outside the scope of 0.XXXV rule 1 of the Civil Procedure Rules.

The other aspect Mr Fraser submitted on was the appellant's contention that it was improperly sued. He submitted that under the retirement benefits scheme the funds contributed by the employees and the appellant were in the hands of trustees. Consequently any action respecting any part of the fund is maintainable against the trustees. It therefore meant that because the respondent's claim related to the appellant's contribution to the fund, the trustees, not the appellant, should have been named as defendants. Mr Fraser, concluded that this and the other issues raised showed his client had an arguable case which entitled it to leave to defend the suit.

Mrs Dias for the respondent opposed the appeal on several grounds. Firstly, that the appellant having repossessed, on or about 10th February, 1995, a car, Barclay Card, AAR card and other properties it had given the respondent for his use while in its employment, it meant that it had considered the respondent's services with it as having come to an end. Secondly, the appellant's notice in the daily papers between 22nd and 24th February 1995 both days inclusive clearly showed that it did not consider the respondent as its employee. Thirdly, the trust deed states in paragraph 19 thereof, that payment out of trust funds is only made to those who have ceased working for the appellant. Further that the respondent was served with the letter of summary dismissal to justify the publication in the daily papers of the notice notifying the general public that the respondent was not its employee, which notice was defamatory of the respondent. Finally, that had the respondent been summarily dismissed, the February 1995 salary should not have been paid in full.

In an application for summary judgement under Order XXXV rule1 of the Civil procedure Rules, the duty is on the defendant to show he should have leave to defend the suit. His duty is limited to showing, prima facie, the existence of triable issues or that he has an arguable case. On the other hand a plaintiff who is able to show that a defence raised by a defendant in an action falling within the purview of 0.XXXV, above, is shadowy or a sham is entitled to summary judgement. This court so held in the case of Continental Butchery Ltd vs Samson Musila Nthiwa, Civil Appeal No.35 of 1997 (CA) in which Madan JA (as he then was) stated the principle thus:

"With a view to eliminate delays in the administration of justice which would keep litigants out of their just dues or enjoyment of their property the court is empowered in an appropriate suit to enter judgment for the claim of the plaintiff under the summary procedure provided by 0.35 subject to there being no triable issue which would entitle defendant to leave to defend.

If a bona fide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defences raised are a sham".

The learned Judge of Appeal was reechoing the words of Lord Halsbury in the English case of Jacob vs Booths Distillery Co. 85 LTR at P. 262, in which he said:

"There are some things too plain for argument, and where there were pleas put in simply for the purpose of delay, which only added to the expense and where it was not in aid of justice that such things should continue 0.XIV was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights".

Determination of this appeal principally centres on the question whether or not the respondent's employment with the appellant determined on 16th February 1995 or at the end of that month. The respondent did not retire from the appellant's employment. He resigned. Clause 4 of the Terms and conditions of Service and Leave Regulations of the appellant's employees provides that employment may be terminated by either party giving 30 calender days notice expiring at any time. The clause has a

proviso that the appellant has the right to summarily dismiss an employee as provided in the Employment Act. The respondent's letter of 30th January 1995, giving notice of termination was written pursuant to that clause. At the time of writing the letter the respondent had to his credit 15 days earned leave but which he had not taken. He did not want to take it. So because he wanted to leave the appellant's employment almost immediately he requested that it be forfeited to cover half of the notice period so that instead of his services with the appellant terminating on 28th February 1995, they would terminate on 15th February 1995. The appellant responded, in pertinent part, as follows:

"As per your request the company has agreed to release you before the 15th February, 1995. This will allow you to start your new career earlier, or take a longer holiday before starting".

The respondent's letter of resignation did not request that he be released before 15th February, 1995, although it stated that the reason which made him tender his resignation was to join family business. So it means that apart from what was stated in his letter of resignation there were certain matters which were discussed between the parties but which neither the respondent nor the appellant put in writing. It is also noteworthy that the appellant's letter in reply is silent on the request the respondent made to forfeit his earned but not taken leave. It would appear to me that when the respondent requested to forfeit his earned leave he was in effect requesting that he pays to the appellant salary in lieu of notice for part of the requisite notice of termination. Such payment if accepted, serves as damages for breach of the contract of employment. The Court of Appeal in England said so in the case of Delaney v Staples [1991] 1 ALL ER 609 at P.616. Nicholls L.J had this to say about it:

"The phrase 'pay in lieu of notice' and similar phrases are loose expressions used indifferently to cover at least two situations which are, in law, recognisably distinct from each other. On the one hand there is the case where an employee's contract of employment has been terminated and he is asserting a claim for wrongful dismissal. He is not given notice of dismissal to which he is entitled under the contract… He is claiming 'pay' for the period of notice which he says he is entitled to be given… In such cases, and whatever label the employee or his advisers may use, the proper legal analysis of the employee's claim is that the claim is for damages for breach of the contract of employment. It is not a claim for payment in accordance with the terms of that contract although the claim arises from that contract in that the contract is the source of the employment obligation whose breach gave rise to the damages claim".

The remarks apply to a claim by an employee but they would, in my view, apply with equal force in a case where an employee wishes to be released without giving the requisite and appropriate notice of termination. The employer will be entitled to damages for loss of the employee's services during the period of the contractual notice of termination.

As I stated earlier, the appellant's letter accepting the respondent's resignation is silent on the latter's request to forfeit his 15 days earned nut not taken leave. The appellant's counsel's submission is that the request was not accepted. Instead the appellant allowed the respondent to take the leave. On the other hand it was submitted on behalf of the respondent that the appellant having accepted to release the respondent and paid him all his dues it meant that the contract of employment came to an end on the date of release; otherwise on the date the respondent had stated in his letter when he would cease working for the appellate.

Two issues are raised by the foregoing. Firstly, the appellant having not come out clearly on the issue of forfeiture of leave, one cannot say with certainty that the respondent forfeited his leave. Secondly, the appellant did not explain in the said letter why it paid the respondent his full salary for the month of February 1995. On that Mrs Dias urged the view that the payment was evidence that the respondent was not summarily dismissed. On the other hand, Mr. Fraser for the appellant argued that the payment was made because the respondent was permitted to take the leave he had earned but not taken. If the February, 1995, salary was paid to the respondent as an ex gratia payment as Mrs Dias seemed to imply then the respondent would be right that his services with the appellant terminated on or about 15th February, 1995. If however, the payment was made because the appellant had allowed the respondent to take his earned but not taken leave, then, in my view, the following words of Nicholls L.J., in the case I earlier cited,

would in pertinent part apply. Nicholls L.J., after the remarks earlier made, went on to say:

"Then type of claim which I have described so far is one where whether rightly or wrongly, the contract of employment has been terminated and the claim is in respect of post-termination period of time. This is to be contrasted with the different situation where, typically, an employer gives notice of termination to an employee but dispenses with the employee's services for the period of the notice. This is sometimes described as giving 'garden leave' to the employee. In such a case the contract of employment remains in existence until the expiry of the notice given by the employer. All that has happened is that the employer has relieved the employee from the need to carry out the work which under the contract, is normally the prerequisite to his entitlement to be paid his wages. In such a case a claim by the employee to be paid during the period of the notice is truly a claim to be paid his wages under and in accordance with the terms of his contract which in this case, remains in existence during the period of the notice. Thus the sums falling due for payment during the period of the notice in this second type of case are 'wages' within the statutory definition".

(Emphasis supplied).

In absence of clear documentary or other evidence to resolve the two issues raised by the respondent's suit it is my judgement that leave to defend the suit should have been granted so that the trial court could examine and cross examine witnesses on the two among other matters to determine the correct position. They are matters which require investigation.

In addition to the two aspects raised above there is the issue whether or not the appellant was properly made the defendant in the suit. Mr Fraser submitted that the trustees of the staff Retirement Benefits Fund and not the appellant should have been sued. The issue was raised by the appellant in its written statement of defence. Considering the conclusion I have come to above, the issue will need to be considered by the trial court. Consequently expressing a view, tentative or otherwise, may trespass on the jurisdiction of the trial court. I, therefore, refrain from expressing any view on it.

Regarding the judgement for Kshs. 23,267.25 which the respondent claimed as being expenses he incurred to publish a notice in the daily newspapers to correct what he said was an erroneous impression its notice, in the same papers, to the effect that the respondent was not its employee, I say this. The claim on that head was pegged to the respondent's claim for damages for alleged defamation, which claim he abandoned. In absence of that claim an issue presents itself as to whether or not the claim for those expenses could, properly, be pursued independently, and whether it can be justified. The issue could not be determined without oral evidence. It is my view, therefore, that summary judgement was improperly given on that head as well.

An issue I would wish to finally touch on, if only for purposes of completeness, concerns the striking out of paragraph 7 of Mr. Small's affidavit in reply to the one in support of the summary judgement application. The paragraph was worded thus:

"Shortly after 10th February 1995, I received information from the defendant's sales staff and from customers, which I verily believe to be true, that the plaintiff had approached some of the defendant's customers with photocopies of the defendant's price quotations seeking orders for Packwell Industries a competitor of the defendant".

The above paragraph was struck out because it did not disclose with particularity the sources of the information deposed to and grounds of belief thereof. Mr Fraser submitted, relying on the case of Life insurance Corporation of India v. Paneser [1967] EA 614 that in his view the sources of the information were adequately disclosed. Mrs Dias on the other hand submitted that the actual names of persons giving the information are essential. Otherwise the relevant paragraph will be incurably defective.

Order XVIII rule 3 of the Civil Procedure Rules states that affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove. The rule, however, has a proviso to the effect that in interlocutory applications a party may depose to information and belief provided he discloses the sources

and grounds of belief. To my mind the sources of the information and grounds of belief are primarily essential for purposes of veracity. Consequently a failure by a deponent to disclose with particularity the sources of the information he has deposed to has the effect of weakening the probative value of the information and may even render it worthless. It does not, in my view, render the relevant paragraph defective.

In the above circumstances and for the reasons I have endeavoured to give I come to the conclusion that summary judgement was improperly given. I would, therefore, allow the appeal, set aside the judgement of the superior court and in its place substitute an order granting the appellant unconditional leave to defend the suit. I would award the appellant the costs of the motion for summary judgement and the appeal.

Dated at Nairobi this 9th day of June 1997.

S.E.O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR