



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPEAL NO. 304 OF 1996

BETWEEN

RASIK P. GADHIA..... APPELLANT

AND

DELPHIS BANK LIMITED..... RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Kisumu (Mr. Justice Wambiliangah) dated 14th June, 1996

IN

H. C. C. C. NO. 27 OF 1996)

JUDGMENT OF THE COURT

The appellant, Rasik P. Gadhia, challenges the exercise of judicial by discretion by the superior court (Wambiliangah, J.) under Order V1 rule 13 (1) (b) and (c) and Order X11 rule 6 of the Civil Procedure Rules. The learned Judge struck out the appellant's defence he filed in Kisumu High Court Civil Case No. 27 of 1996 in which he made a general denial of the respondent's claim. That provoked this appeal.

In its plaint the respondent made a liquidated demand of Kshs. 1,960,562/= The sum comprised of sums of money the respondent allegedly advanced to the appellant by way of overdraft on diverse dates and accrued interest. The appellant's written statement of defence, in pertinent part, denied not only that he owed the money claimed but also that he ever requested the respondent for any financial accommodation.

In its application to strike out the appellant's written statement of defence, the respondent exhibited copies of letters exchanged between itself and the appellant over the latter's indebtedness to it. We propose to refer to two of those letters. In its letter dated 25th October, 1995 the respondent stated what it considered to be the appellant's total indebtedness to it. The total sum due as at 18/9/95 was stated to be Kshs. 1,860, 061/=. The appellant replied to that letter by his letter dated 15th November, 1995. In pertinent part he stated as follows:

“Please refer to your letter of 25th October, 1995.

I regret the delay in replying.

I had explained my position to you both verbally and in my letter of 4. 10. 95.

I request you to clear my indebtedness in the following manner.”

The appellant then proceeded to make his proposal on how he intended to liquidate his indebtedness. The details are not necessary in this judgment. The appellant did not challenge the authenticity of the letters; nor did he challenge the correctness of the contents of any of them.

From the foregoing it is clear that the appellant fully admitted owing the respondent at least Kshs. 1,860,061/=. The appellant did not adduce any evidence before the Judge in the Court below to show that he had paid that sum or any part thereof, either as at the date of the suit or the date of the application which gave rise to the order appealed against. In light of that and considering that in his written statement of defence the appellant made a general denial of the respondent’s claim, we cannot see what issue was disclosed to go to trial. The defence, we think, was purposely filed merely to delay the course of justice. It was therefore, frivolous and was filed with the mischievous intention of annoying the respondent. We are of the view, therefore, that Wambiliyangah, J. was right when he said that the defence was not honest, and that it was a shame.

We also think that when the appellant filed this appeal he could not have possibly believed he had a meritorious appeal. Nor could his counsel have so believed. Counsel having filed the appeal on behalf of his client, as an officer of this court he knew or ought to have known that the appeal was bound to fail. We would like to sound a strong warning that advocates who file frivolous appeals, as the present one, may in the future be called upon to personally meet all the costs which may be ordered upon the dismissal of such appeals.

In the result and for the reasons above, we dismiss this appeal with costs to the respondent.

Dated and delivered at Kisumu this 20th day of June, 1997.

R. S. C. OMOLO

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

S. E. O. BOSIRE

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AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR