

Kinji Ltd & Another v Kogo & Another

High Court, at Mombasa March 31, 1992

Omolo J

Civil Case No. 938 of 1991

March 31, 1992, **Omolo J** delivered the following Ruling.

This application by way of notice of motion is brought to the Court Under Order XXXV Rules 1 and 2 of the Civil Procedure rules. When brought to the court it originally sought that judgment should be entered for the Plaintiffs against the Defendants jointly and severally, but, during its argument, Mr. Gikandi for the Plaintiffs abandoned the application as regards the 2nd Defendant, B.R. Patel. I accordingly dismiss the application against the 2nd Defendant, but as nothing was said before me on costs I make no orders on that issue.

That leaves the application as regards the 1st Defendant. The Plaintiff's claim against the 1st Defendant is for Shs.542,552/= as money had and received by the 1st Defendant from the Plaintiffs without the 1st Defendant having provided any consideration for that sum. According to the plaint, the Plaintiffs were buying from the 1st Defendant a piece of Land known as L.R. NO. M.N./1/5800 which land belonged to the 1st Defendant. It appears that the 2nd Defendant was acting as an advocate for the 1st Defendant. The Plaintiffs then sent to the 2nd Defendant the sum of Shs.542,552/= claimed in the plaint "to be paid to the Commissioner of Lands subject to your obtaining receipt in favour of our clients, Kinji Ltd." – See Exh. Y.D 2, attached to the supporting affidavit of Yusuf Dato. It appears from the available material before me that the 2nd Defendant handed over the two cheques to the 1st Defendant who did pay over the money to the Commissioner of Lands and obtained two receipts – see Exhibits B.P.R.3, attached to the replying affidavit of the 2nd Defendant. It appears it is being alleged that the two receipts were not fact obtained in the name of "Kinji Ltd." as they purport to show on their face but that they were obtained in the name of the 1st Defendant who subsequently sold the plot to the third party. In the defence filed by the 1st Defendant, the 1st Defendant averred that they have had no dealings with the Plaintiffs, that they did not receive any money from the Plaintiffs or the 2nd Defendant, that they never entered into any contract with the Plaintiffs and that if the 2nd Defendant received any money from the Plaintiffs, the 2nd Defendant did so on his account and not on the account of the 1st Defendant. These are substantial denials by the 1st Defendant and if they were all that the Court were to go by, I would have readily held that the 1st Defendant has raised substantial triable issues and that they should have the unconditional leave of the Court to defend the action. However, there is the replying affidavit, the 1st Defendant has taken a completely different turn from that in their defence. In that affidavit, it is alleged that the money received from the 2nd Defendant was refunded by the 1st Defendant to the 2nd Defendant, that for the refund the 2nd Defendant issued a cheque to the 1st Defendant as security and a copy of the cheque is attached to the affidavit (Exh. GV 1). That cheque is in the name, not of the 1st Defendant, but "Latex (EA) Ltd." and it is for the sum of shs.500,000/=, not Shs.552/=. There is no attempt at all to explain the connection, if any, between the 1st Defendant and Latex (EA) Ltd and there is also no explanation as to why the cheque is for less amount than the sum claimed in the plaint. But even more important, the 1st Defendant originally denied any dealings at all between it and the Plaintiffs and they also denied that the 2nd Defendant had received any money on their behalf or that they had received any money from the 2nd Defendant. If the position taken in the defence is correct, then the 1st Defendant was duty bound to explain why they refunded the money to the 2nd Defendant. There is absolutely no attempt at such an explanation. I am satisfied that the 1st Defendant is obviously lying on these points. There would be no reason why the 2nd Defendant would issue a cheque if he received cash from the 1st Defendant, the natural thing for the 2nd Defendant to have done would be to issue a receipt. Counsel who appeared on behalf of the 1st Defendant found it hard to support the position taken by the 1st Defendant. I am certain she was right. I have no doubt that the 1st Defendant owes the Plaintiffs Shs.542,552/= as claimed in plaint, and that the 1st

Defendant has no valid defence to the claim. I accordingly strike out the defence filed by the 1st Defendant, and now enter summary judgment for the Plaintiffs against the 1st Defendant as prayed in the plaint. I award to the Plaintiffs the costs of the suit and of the notice of motion.

These shall be my orders.