IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi, Kwach & Lakha JJ A)

CIVIL APPEAL NO 86 OF 1990

Between

VALLABHDAS R. JETHWA.....APPELLANT

AND

SHASHIKANT Z. V. SHAH.....RESPONDENT

(Appeal from a judgment/ruling of the High Court of Kenya at Nairobi (Mr Justice G S Pall) dated the 22nd November, 1988

in

HCCC No 1943 of 1988)

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JUDGMENT OF THE COURT

This is an appeal by the defendant against the ruling of the superior court (Pall, J) delivered on 22nd November, 1988 whereby he entered judgment for the plaintiff for a part of his claim under order 35 of the Civil Procedure Rules.

The plaintiff's claim was for Shs 175,000/- being the balance of the amount of the agreed price of goods sold and "supplied by the plaintiff to for an behalf and at the request of the defendant at Nairobi during the year 1987". By his defence the only issue the defendant raised was that the goods had never been delivered. This was followed by an application for summary judgment by the plaintiff when both parties filed their respective affidavits. The defendant specifically raised the issue of non-delivery. In a considered ruling the superior court held that the defendant had set up his defence to delay the plaintiff's claim and except for the sum of Shs 34,637.70 he did not find any *prima facie* triable issue and entered judgment on the balance of the claim amounting to Shs 140,362.50.

At the hearing before this Court, the main thrust of the argument of Mr Khanna for the appellant was that since the defendant had raised an issue as to the delivery of the goods the judge erred in entering judgment on contradictory affidavits without the benefit of a cross-examination or of hearing the witnesses.

Such and similar fairly basic question concerning the summary judgment jurisdiction under order 35 of the Civil Procedure Rules has troubled the Courts for some time now: what course is a judge to take when

faced with contradictory affidavits? Should he try to determine their relative reliability by allowing cross-examination of the deponents and resolve the dispute at that stage or should he give leave to defend? The dilemma was explained by Webster J in *Paclantic Financing Co Inc v Moscow Narodny Bank Ltd* [1983] 1 WLR 1063 at 1067 (referred to in 1993 Annual Practice at p 151 cited by Mr Khanna). If leave to defend is given, the plaintiff may be kept out of his entitlement for years. If, on the other hand, summary judgment is given, the defendant may be deprived of a legitimate defence without trial. Webster J felt that examination of the defendant upon his affidavit would not provide a solution because, if the matter were complicated, the preparation and the hearing of cross-examination could involve almost as much time and expense as the trial itself. If, by contrast, the resolution of the contradictions were straightforward, a speedy trial could be ordered and again there would be little to be gained from examination on affidavits. He therefore concluded that it would be right to reject a defendant's affidavit only if it was inherently contradictory, or if it was contradicted by evidence that was unchallenged by the defendant. On appeal from Webster J's decision the Court of Appeal declined to express a view on the matter ([1984]) 1 WLR 930) and that view also failed to get support from later Court of Appeal decisions. In *Banque de Paris et des Pays-Bas (Suisse) SA v de Naray* [1984] 1 Lloyd's Rep 21 at 23 Ackner LJ said:

> "It is of course trite law that o 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, *ipso facto*, provide leave to defend; the Court must look at the whole of the situation and ask itself whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendants having a real or *bona fide* defence."

A few years later, in *Bhogal v Punjab National Bank, Basna v Punjab National Bank* [1988] 2 All ER 296 at 303 Bingham LJ said that the correctness of factual assertions cannot be decided on affidavits 'unless the assertions are shown to be manifestly false either because of their inherent implausibility or because of their inconsistency with the contemporary documents or other compelling evidence'. In *Standard Chartered Bank v Yaacoub* [1990] CA Transcript, Lloyd LJ said that when faced with an affidavit he would ask himself 'whether it is credible'.

Last year, in *National Westminister Bank plc v Daniel* [1994] 1 All ER 156 Glidewell LJ was of the opinion that Ackner LJ's view in the *Banque de Paris* case should be followed. The test boiled down, he suggested, to whether there was 'a fair and reasonable probability' of the defendants having a real *bona fide* defence, or whether what the defendant said was credible.

Applying these principles to the present case, we are satisfied that there was no real or *bona fide* defence on the issue of delivery as was urged upon us on behalf of the appellant. The learned judge, in other judgment, applied the correct test when he stated:

> "But in every such case the Court has to be satisfied that the issue involved is a genuine and *bona-fide* triable issue. If the Court is so satisfied, the defendant must have unconditional leave to defend. According to Annual Practice 1963 edition (p 250) "the Court would be failing in its duty if on being faced with divergent versions of facts it should automatically give leave to defend and should abrogate its responsibility of enquiring further to see if a *bona-fide* triable issue has been disclosed".
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> "It is the duty of the Court to investigate the issues to decide whether leave should be granted. "Sometime the *prima facie* issues which are preferred are rejected as unfit to go to trial being, by their very nature as disclosed to the Court incapable of effectively resisting the claim (Madan J in *Gupta vs Continental Builder;* [1978] KLR 83 at page 87)."

The material before the learned judge relating to the alleged non-delivery of the goods left no doubt that what the defendant was saying was incredible, to use the words of Lloyd LJ. If there was non-delivery, this fact was not mentioned in the agreement between the parties which was drawn by the defendant. Nor was there any explanation why he did not do so. Then there is a note at the foot of each invoice to say that the goods are neither exchangeable nor returnable. What is perhaps more significant is that the defendant appended his signature at the foot of each invoice. Finally, the defendant had paid Shs 100,000/- in cash

although no goods had been delivered to him. Yet he did not sue for recovery of this amount. It was the plaintiff who initiated the proceedings.

Looking at the whole situation and considering the material before the learned judge which is now before this Court we conclude that there was no fair or reasonable probability of the defendant having a real or *bona fide* defence.

Accordingly, in our judgment, the judge was plainly right in the decision to which he came on the material before him. For that reason we dismiss the appeal with costs.

Dated and delivered at Nairobi this 4th day of October 1995 .

J.M GACHUHI

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JUDGE OF APPEAL

R.O KWACH

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JUDGE OF APPEAL

A.A LAKHA

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JUDGE OF APPEAL

I certify that this is a true copy of theoriginal.

DEPUTY REGISTRAR