IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi, Masime & Kwach JJ A)

CIVIL APPEAL NO 114 OF 1985

Between

DOUGLAS KANURE WAMBUGU.....APPELLANT

AND

DHANJI VELJI PATEL.....RESPONDENT

(Appeal from a Decree of the High Court of Kenya at Nairobi (Platt, J) dated 20th July 1984

in

HCCC No 3990 of 1979)

JUDGMENT

Kwach JA. In 1975, Dhanji Velji Patel (the respondent) was the owner of an industrial building on plot LR No 209/8606, Lunga Lunga Road, Nairobi where he carried on the business of marble stone crushing. In that year, he entered into an agreement with Douglas Kanure Wambugu (the appellant), to sell the building and the entire industrial undertaking including the stock in trade to the appellant at Shs 344,700/-. Of this amount Shs 325,000/-, represented the value of the building, and Shs 19,700/- was the price of moveables. The appellant went into possession before the full purchase price was paid, and on the 10th December 1979, the respondent filed a suit against the appellant seeking to recover Shs 350,447/- in respect of occupation rent with interest for the period from 1st November, 1975, to 24th July, 1978; Shs 156,647/15 being the balance of the purchase price together with interest. The respondent also sought a declaration that he was entitled to a statutory charge on the suit property for the balance of the purchase price and interest and asked for an order that the suit property be sold free of all claims and encumbrances to realize the said statutory charge and that he be at liberty to bid and become the purchaser at any such sale in default of payment of the sum found to be due under the statutory charge.

The plaint also contained an avernment that the said sale was subject to the provisions of section 55 (4) (a) and (b) of the Transfer of Property Act as regards the rights and liabilities of seller and buyer. The appellant filed a defence on 31st January 1980, in which he denied the respondent's claim in its entirety.

On 25th June 1980, Khanna and Company, Advocates, on behalf of the respondent took out a Notice of Motion under order 35 r 1 of the Civil Procedure Rules asking for summary judgment for a total of Shs 507,094/15 together with interest and costs. The application was supported by two affidavits one sworn by the respondent and the other sworn by Mohamed Munir Chaudhri, an advocate, who claimed to have acted for the respondent in connection with the sale. In both these affidavits, the deponents asserted that

the sale was subject to section 55 (4) (a) and (b) of the Transfer of Property Act and also that the appellant went into possession on 1st November 1975. For good measure, the respondent added his belief that the appellant had no defence to his claim. The appellant filed a detailed replying affidavit refuting most of the allegations contained in the affidavits of the respondent and Chaudhri. He also denied being responsible for the delay in completing the transaction and the applicability of section 55 (4) (a) and (b) of the Transfer of Property Act to the sale. He deponed that he had a valid defence to the claim and that he was entitled to an unconditional leave to enter and defend the claim.

Before the application was heard, but after the appellant's affidavit the respondent swore a second affidavit and a third one containing some 31 paragraphs in a determined effort to show that the appellant had indeed no defence to claim that he was entitled to judgment. There was also a second affidavit from Chaudhri dated 11th April 1983. The hearing opened before Platt J (as he then was) on 26th April, 1983 but was not concluded until 26th July, 1984, when the Judge made the final order on the application. So a simple application for summary judgment took the Judge some 15 months to deal with! No wonder at the end of it all, he made a totally confused order including what he called "an interlocutory judgment for rent" without even specifying the rate. Naturally, the appellant felt aggrieved by the decision and appealed against it to this Court.

The memorandum of appeal contains some 12 grounds of appeal but for the purposes of this appeal I need only refer to ground 1, 4 and 6 which state:

> "(1) The learned Judge erred in law in granting summary judgment when substantial triable issues of law and fact were clearly raised in the pleadings, affidavits and submissions before him.
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> (4) The learned Judge erred in law in holding that section 55 (4) (b) of the Indian Transfer of Property Act applied to the contract between the appellant and the respondent.
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> (6) The learned Judge erred in law in holding that section 55 (4) (a) of the Indian Transfer of Property Act applied to the contract between the appellant and the respondent."

Mr D N Khanna who appeared for the respondent in this appeal, strongly argued in defence of the judgment of Platt J (as he then was) but with respect, the judgment, in my considered view, is plainly indefensible. Looking at the pleadings and the numerous affidavits filed in the application, a number of triable issues were raised. Among these were whether section 55(4) (a) & (b) of the Transfer of Property Act applied to the transaction; who as between the appellant and the respondent was responsible for the delay in completion; whether the appellant had paid the purchase price in full as he claimed or whether there was a balance still owing as alleged by the respondent. And there was also a dispute as to the date on which the appellant took possession and the understanding, if any, on which he did so.

As a general principle, where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a *bona fide* defence, he ought to have leave to defend. In the case of *Jones v Stone* [1894] AC 122, which was an appeal from the Supreme Court of Western Australia, the Judicial Committee of the Privy Council said:

> "The proceeding established by order 14 is a peculiar proceeding, intended only to apply to cases where there can be no reasonable doubt that a plaintiff is entitled to judgment, and where, therefore, it is inexpedient to allow a defendant to defend for mere purposes of delay."

The Court of Appeal for East Africa stated the principles in the case of *Zola v Ralli Brothers Ltd* [1969] EA 691, where Sir Charles Newbold, P, said at page 694:

> "Order 35 is intended to enable a plaintiff with a liquidated claim, to which there is clearly no good defence, to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by the delaying tactics of the defendant. If the Judge to whom the application is made considers that there is any reasonable ground of defence to the claim the plaintiff is not entitled to summary judgment. Normally a defendant who wishes to resist the entry of summary

judgment should place evidence by way of affidavit before the judge showing some reasonable ground of defence."

Madan J A (as he then was) said in the course of his judgment in the case of *Javantilal Shah v Hussein Nanji Padamshi & Others* (Civil Appeal No 5 of 1982) (unreported):

> "Except in the clearest of cases, which this one was not it is inadvisable for the Court to prefer one affidavit to another in order to enter summary judgment. Summary judgment is a drastic remedy to grant, for inherent in it is a denial to the respondent of his right to defend the claim made against him. A trial must be ordered if a triable issue is found to exist, even if the Court strongly feels that the defendant is unlikely to succeed at the trial. The Court must not attempt to anticipate that the defendant will not succeed at the trial."

Applying the principles enunciated in all these cases, how does the matter stand in the present case? It is the duty of this Court on appeal to examine the decision of the judge in the Court below together with the material before him to see if there really was an arguable defence or triable issues raised. I am satisfied that the defence raised triable issues and the respondent should never have been allowed to obtain summary judgment against the appellant. In the result, I would allow this appeal, set aside the order and decree of the High Court and substitute therefore an order dismissing the respondent's application for summary judgment with costs and grant the appellant unconditional leave to enter and defend. I would also order the sum of Shs 299,920/- paid by the appellant to the respondent under the decree to be refunded to him with interest at court rates within thirty (30) days from the date of this judgment. I would grant the appellant the costs of this appeal.

Masime JA. This interlocutory appeal arises from the ruling of Platt J (as he then was) made following a protracted hearing of an application for summary judgment under order 35 r 1 of the Civil Procedure Rules. The ruling itself is some 30 typed foolscap pages long. It is contended by the appellant *inter alia*, that the learned Judge erred in attempting and purporting to resolve serious conflicts of law and fact when in the face of them he ought to have rejected the application and granted to the appellant unconditional leave to defend and ordered the suit to proceed to trial.

The plaint which was filed in the Superior Court on 10th December 1979 contains a total of fifteen paragraphs loaded with allegations of fact, statement of law and purported application thereof to alleged conduct or actions of the defendant in proof of the respondent's claims against the appellant. In view of the result of this appeal I propose to say no more about the plaint except that all these averments were categorically denied in the written statement of defence which was filed in Court on 31st January 1980 and which for its part contains some 14 paragraphs.

Undaunted by the averments in the written statement of defence the respondent still filed the application for summary judgment and in the affidavit in support thereof purported to adduce detailed evidence to prove matters which the pleadings had joined issue on. And when the appellant filed a replying affidavit to contradict the matters deponed to by the respondent's affidavit and despite the fact that necessary leave to do so was neither sought nor obtained three further affidavits in support of the application were filed and considered by the trial Judge.

The record of proceedings shows that the hearing of the application for summary judgment first opened before the Superior Court on 17th July 1980 when it was adjourned. Thereafter the hearing went on on 26th April 1983 (whole day), 19th July 1983, 11th August 1983, (whole day) 18th July 1984 when it was conducted and "judgment" (sic) reserved for delivery on 20th July 1984. It is on this latter date that the 30 page "order" was made but despite that a further order made that "order to be worked out later." The matter was next in Court on 24th July 1984 when it was ordered adjourned to the following day; it resumed with arguments on rent and interest thereon. The arguments appear to have been concluded on 26th July 1984 with the following remarks:

> " I should re-emphasise that this is a part judgment as allowed under order 35 and the remainder of the claim, if any, will go for trial and the final orders, for costs will of course be made at the

trial. But if for instance costs are paid under 3….the amount to be paid will be less than at the trial…."

Having carefully and anxiously considered the pleadings and the proceedings on the hearing of the application for summary judgment I am, with the greatest respect, unable to see how in all the circumstances the learned Judge could have even contemplated entertaining the application. So many issues were joined in the pleadings and the affidavits sworn in the application were bristling with so much conflict that, for myself, I could see no hope of resolving them without a trial.

It is for the above reasons that I agree with Kwach JA, whose judgment I have read in draft, that this appeal must succeed. I would therefore allow this appeal and concur in the orders proposed by Kwach JA.

Gachuhi JA. I have read the draft judgments prepared by Masime and Kwach JJ A and I entirely agree with them that the appeal should be allowed with costs.

The order of the Court is therefore that the interlocutory judgment by the Superior Court is hereby set aside and substituted with an order dismissing the Notice of Motion with costs. The appellant (defendant) is hereby granted unconditional leave to defend the action. The amount paid under the summary judgment Shs 299,920/- is hereby ordered to be refunded to the defendant together with interest thereon at court rates within thirty (30) days from the date hereof.

Dated and delivered at Nairobi this 17th day of July, 1992

J.M GACHUHI

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JUDGE OF APPEAL

J.R.O MASIME

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JUDGE OF APPEAL

R.O KWACH

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR