REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE NO 690 OF 1988

SHAH T/A PRASUL'S……..APPLICANT

VERSUS

STEELCORD TYRES LTD…….. DEFENDANT

RULING

This is an application by the plaintiff for summary judgment under order 35 Civil Procedure Rules. The respondent Steelcord Tyres Limited, as the defendant in the suit did not file any grounds of opposition, or any affidavit in reply. They had however filed a defence denying the plaintiff's claim.

The claim herein is for a liquidated sum of Kshs 466,000. It is a claim on foot of a cheque PM Bauque Indosuez Nairobi dated 16.5.1988 which the defendant drew in favour of the plaintiff but which was returned unpaid upon presentation for payment. It was returned with remarks "Exceeds Arrangement". In the alternative the claim is described in the plaint as a friendly loan which the plaintiff had extended to the defendant at the latter's request in 1987.

In the defendant's written statement of defence the dishonour of the cheque is admitted. Their contention, however, is that the cheque was presented for payment before an orally agreed date for its presentation. That date was, however, not stated. It is also averred that the parties had agreed to reconcile accounts between them "due to a balance payable by the plaintiff to the defendant for goods sold and delivered by the defendant to the plaintiff".

The application came for hearing on 21st April, 1987. Mr Nanji appeared for the plaintiff/ applicant, while Mr Aboo appeared for the respondent/ defendant. The latter's application for adjournment to enable him to file grounds of opposition and an affidavit in reply to that in support of the application was refused for reasons which appear in an earlier ruling.

Upon application he was allowed to submit in opposition of the application on the basis of the pleadings and the law only.

In support of the application the plaintiff swore one affidavit. To it he attached several copies of documents. The first one is a copy of the dishonoured cheque. The second one is a copy of the letter of demand dated 30th August, 1988, which allowed the defendant 24 hours to pay in full the sum claimed herein. The third one is a letter by the applicant's advocates on record to those on record for the respondents notifying them of their intention to apply for judgment, either on admission, or summary, unless they consented to the entry of judgment against their clients within 7 days. The fourth document is a copy of a letter in reply requesting for extension of time for filing defence for a further 10 days. The

fifth one is a confirmation by the applicant's counsels that they had consented to the extension of time sought. In it they also acknowledge receipt of a copy of the written statement of defence. They also indicated their intention of filing in court an application for summary judgment. The sixth and 7th documents are correspondence exchanged between the applicant's advocates and himself on the defence which had been filed. The applicants denied they had bought any good from the defendant whatsoever. They also indicated that the subject cheque had been rebanked for the second time but was again returned unpaid. The 8th document is a copy of a letter dated 8th August, 1988, which the plaintiff had addressed to the defendant in which he stated, *inter alia*, that they had mutually agreed that the plaintiff would rebank the cheque. The last document is a copy of a letter the plaintiff's advocates addressed to those of the defendant enclosing copies of annextures six and seven above. They asked them to obtain their client's instructions respecting the defence filed in light of the contents of those documents. The respondents did not respond. This application was then rendered necessary.

Mr Aboo admitted he was served with this application on 30th March, 1989, but did not file grounds of opposition and affidavit(s) in reply for reasons which are not relevant here. The evidence rendered in support of the application, therefore, remains uncontroverted. The evidence was tendered to the respondents before this application was lodged. However, neither the respondents nor their counsel on record took steps to challenge it.

The respondents admit in the written statement of defence that they drew the cheque voluntarily apparently for due consideration. Their contention is that it was banked without due regard to an oral agreement between the parties. The alleged agreement related to the reconciliation of accounts between the parties. The agreement was denied on oath by the plaintiff. There was no rebuttal evidence. It then follows that the cheque was banked in the ordinary course but was improperly dishonoured. The defendants/ respondents do not deny the money is owing. Their contention was that the cheque was wrongly banked. I would have perhaps accepted that contention were it not for the fact that the plaintiff/applicant wrote to them notifying them of his intention to rebank the cheque. He also talked about a discussion on the matter having taken place in which it was agreed that the cheque be rebanked. It was rebanked but was for the second time dishonoured. The respondent cannot now make an about face to say there was an oral agreement reached not to bank the cheque. Their defence is clearly a sham defence.

Moreover, as rightly pointed out by Mr Nanji, there is no set off or counterclaim. The respondents have not raised it, to my mind, because it is not extant. As was stated by the Court of Appeal in the case of *Issa & Co v Jeraji Produce Store* [1967] EA 555, once a cheque has been given based upon some consideration,

"then in a suit upon that cheque the court cannot go into the question as to whether or not the consideration was sufficient……. if ….. there was admittedly some consideration then the fact that the parties had agreed to a sum and that agreement is manifested by the signing of the cheque shows that the plaintiff is entitled to recover that sum unless, as I say, there are some special considerations as fraud or duress."

The court was in effect saying that a cheque or any bill of exchange constitutes an agreement which may only be vitiated on grounds weighty enough to vitiate any ordinary contract, such as fraud, duress and misrepresentation. There is no plea of fraud, duress or misrepresentation leading to the signing of the subject cheque in the present case. In absence of those considerations in this matter I hold that the applicant is entitled to judgment.

Having come to the above conclusion I do not consider it necessary to consider the matters raised by Mr Aboo regarding the paragraphs of the plaint the written statement of defence related to.

Mr Aboo raised the question of inadequacy of time to pay which the respondent was allowed by the letter of demand. The letter of demand was dated 30th August, 1988. It allowed the respondent 24 hours to pay Kshs 466,000/-. Mr Aboo submits that the period allowed was unreasonably inadequate and disentitles the plaintiff to costs. I would have been prepared to uphold that submission if there had been tender of the

sum claimed. The respondent has to date not tendered the sum claimed. In fact it denies the money is owing. That being so the plaintiff is clearly entitled to full costs.

The upshot of the foregoing is that I grant summary judgment to the applicant / plaintiff as prayed in the plaint.

Costs of this application to the applicant assessed at Kshs 1200/-. Orders accordingly.

Dated and Delivered at Mombasa this 10th May, 1989

S.E.O.BOSIRE

……..…..

JUDGE