



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO 3782 OF 1987

BETWEEN

WELRODS LIMITED..... APPELLANT

AND

DASS T/A WELD-ON SUPPLIES.....RESPONDENT

JUDGMENT

June 28, 1988, **Tanui J** delivered the following Judgment.

This is an application by the plaintiff under Order XXV rule 1 of the Civil Procedure Rules for summary judgment against the defendant for Shs 313,881.20 being the balance of the sum prayed for in the plaint.

By its plaint filed on 23rd September, 1987, the plaintiff claimed a sum of Shs 502,804/50 from the defendant as being reasonable amount due for goods sold and delivered to the defendant during 1986 and 1987. However in his statement of defence filed on 19th December, 1987, the defendant admitted Shs 188,923/30 of the amount claimed and denied the rest. Later on by consent judgment was entered for the plaintiff for that sum and a decree was drawn and issued.

In this application brought by a notice of motion the plaintiff is seeking summary judgment for the balance of the claim stated in the plaint. It is supported by an affidavit of one Jagdish M Patel of the plaintiff company. The application is strenuously opposed by the defendant.

Order XXV rule 1 of the Civil Procedure Rules under which this application is brought reads –

“1. (1) In all suits where a plaintiff seeks judgment for (a) a liquidated demand with or without interest; or

(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.

(2) The application shall be made by motion supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action

and any amount claimed.

(3) Sufficient notice of the motion shall be given to the defendant which notice shall in no case be less than seven days.”

I think the observations of Madan JA (as he then was) in the Civil Appeal No 35 of 1977 – *Continental Butchery Ltd. v Samson Musila Nthiwa* (unreported) succinctly bring out and give the interpretation of the general principles applicable to applications for summary judgments as provided under Order XXXV rule 1 of the Civil Procedure Rules as quoted above. In that case the learned Justice of Appeal had this to say:

“With a view of eliminate delays in the administration of justice which would keep litigants out of their just dues or enjoyment of their property the court is empowered in an appropriate suit to enter judgment for the claim of the plaintiff under summary procedure provided by Order 35 subject to there being no bona fide triable issue which would entitle a defendant leave to defend. If a bona fide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defences raised are a sham. This would be in a accord with the well-known words of Jessel, M.R. and Lord Chancellor (Halsbury) spoken respectively in *Anglo-Italian Bank v Wells* 38 L.T at p 201 and *Jacobs v Booths Distillery Company* 85 L.T. at page 262 as follows:

Jessel MR- “When the judge is satisfied that not only there is no defence but no fairly arguable point to be argued on behalf of the defendant it is his duty to give judgment for the plaintiff.”

Lord Halsbury – “People do not seem to understand that the effect of O. XXV (the equivalent of our XXXV) is that upon the allegation of the one side or other a man is not to be permitted to defend himself in a court that his rights are not to be litigated at all.”

In the case of *Zola and another v Ralli Brothers Ltd. and another*[1969] E.A 691 at page 694, Newbold P of the former Court of Appeal for Eastern Africa said this on the same subject-

“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 delaying tactics of the defendant.”

Against that general view of the court’s interpretation of Order XXXV of the Civil Procedure Rules, Madan, J (as he then was) in the case of *Mugambi v Gatururu* [1967] E.A. 196 E.A 196 at page 197 appears to put a brake to this by saying:

“It would be against natural justice to deprive a man his right to defend unless the court in a plain and obvious case is satisfied without any doubt in the matter that a plaintiff is entitled to judgment and the defendant is seeking leave to defend for mere purposes of delay. The summary procedure is to be exercised with care.”

Order XXXV rule 2 (1) of the said Civil Procedure Rules stipulates –

“The defendant may show either by affidavit or by oral evidence or otherwise that he should have leave to defend the suit.”

This rule would appear to place a burden on the defendant to show that he should have leave to defend the suit. The rule also indicates that he defendant can show this by an affidavit or oral evidence or “otherwise”.

In the instant case the defendant did not file a replying affidavit and did not give *viva voce* evidence either in support of his attempt to show that he should have leave to defend the case. In the said case of *Mugambi v Gatururu* the defendant did not file a replying affidavit and did not give oral evidence. Madan

J however held that where the defendant did not file a replying affidavit his defence should be looked at so as to establish whether he had shown that he should have leave to defend the suit. The statement of the defence in this case is a mere denial of the claim. However as indicated above the defendant admitted part of the claim and by his consent judgment was entered for the plaintiff for that sum. In *Terrazo Paviers v Standard Joinery & Building Co* [1967] E.A 307 at page 309 Mosdel J said:

“There was insufficient material before the court for it to assess the bona fide of the defendant.”

In my view the admission of a part of the claim by the defendant and his denial of the other part would be sufficient material before the court in which it can assess the good faith of the defendant.

On 26th May, 1988, a notice of grounds of objection to the application was filed on behalf of the defendant presumably under Order 50 rule 16 of the Civil Procedure Rules. I think the court is entitled to look at these grounds of objection as by virtue of the said Order 50 rule 16 it would be relevant to this application. The defendant stated in the notice of objection that on 20th January, 1988, the parties to the suit had by consent agreed that the balance of the plaintiff's claim should proceed to hearing.

According to paragraph 2 of the decree drawn and issued by this court on 11th April, 1988, this would appear to be what the parties had agreed. In the circumstances the plaintiff by agreeing to do so cannot be allowed to go back on his consent he ought to be estopped.

For the above reasons this application must fail and the same is dismissed with costs.

Date and delivered at Nairobi this 28th day of June , 1988

B.K TANUI

JUDGE