



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Nyarangi JA, Gicheru & Kwach Ag JJA)

CIVIL APPEAL NO 48 OF 1985

Between

BALDEV RAJ AGGARWAL & 2 OTHERSAPPELLANT

AND

KAMAL KISHORE AGGARWALDEFENDANT

(Appeal from a judgment of the High Court at Nairobi, O’Kubasu J)

JUDGMENT

October 27, 1988 Nyarangi JA, Gicheru & Kwach Ag JJA delivered the following Judgment.

This is an appeal by Baldev Raj Aggarwal (hereinafter called “the appellant”) against the decision of Mr Justice O’Kubasu given on the 15th March 1984 by which he gave judgment in favour of Kamal Kishore Aggarwal (hereinafter called “the respondent”) against the appellant for Shs 1,649,385/= together with costs on an order 35 application for summary judgment.

The respondent filed a claim against the appellant for a total of Shs. 1,945,978.60. The appellant was sued in his personal capacity and as the executor of the estate of one Lekh Raj Aggarwal deceased, who died in Nairobi on 3rd February 1982. The first part of the claim totaling Shs. 415,465.85 was as to Shs 300,000/= in respect of the use and occupation by the appellant and his late father of the respondent’s house on Plot L.R. No 209/1591, Soit Olol Road, Nairobi, between a date in 1979 right up to June 1981, Shs 113,700/= being the cost of what is referred to in the claim as costs for bringing the premises to tenable condition and a small sum of Shs 1,765/85 in respect of unpaid water bills. Nothing turns on this part of the claim in this appeal as it was not affected by the summary judgment which has given rise to this appeal.

The other part of the respondent’s claim was pleaded in the claim as follows:

“(13) In the year 1975 the plaintiff Lekh Raj Aggarwal had a bank account with North Western National Bank, the North America Office, 615 Seventh Street, North Minneapolis, Minnesota, in which account the sum of US \$ 126,000 equivalent to Kshs 1,711,080/= was deposited. The plaintiff has one-sixth share in the said deposit and in interest payable therein.

(14) In the year 1975 the plaintiff Lekh Raj Aggarwal and others had a bank account with the Union Bank of Switzerland, Lousane, Switzerland, in which account the sum of DM

540,000 equivalent to Kshs 1,711,080/ = was deposited. The plaintiff had one-sixth share in the said deposit and in interest payable therein.

(15) In the letter dated 26th November 1981 written by Lekh Raj Aggarwal admitted that he and Baldev Raj Aggarwal changed the above bank account with the plaintiff's share therein without he plaintiff's name included in the said accounts.

(16) In the said letter dated 26th November 1981 the said Lekh Raj Aggarwal acknowledged and admitted to the plaintiff that he owed as a debt to the plaintiff DM 90,000 equivalent to Kshs 472,500/= for the consideration of the change of the said Union bank of Switzerland account and US \$ 21,000 equivalent to Kshs 285,180/= for the consideration of the said North Western National Bank as the plaintiff's share in the said account and promised to pay them with interest at bank rates.

(17) There is due and owing to the plaintiff from the second defendant as such executor the sum of DM 181,800 equivalent to Kshs 954,450/= and US \$ 42,420 equivalent to Kshs 576,063/60 being the admitted debt as aforesaid.

(Particulars)

(18) In the premises the plaintiff claimed (sic) against the second defendant as such executor the said sums of DM 181,800 equivalent to Kshs 954,450/= and US \$ 42,420 equivalent to Kshs 576,063/60."

The appellant filed his defence on the 19th October 1983 and in response to the specific allegations made in the plaint in relation to this part of the respondent's claim, he made the following averments in the defence:

"(10) The defendant denies the allegations contained in paragraph 13 of the plaint and puts the plaintiff to the strict proof thereof. The defendant further states that the said paragraph does not disclose any cause of action and should be struck out.

(11) The defendant further avers that if there was the sum of US \$ 126,000 (which is not admitted) the same was dealt with and formed a part of the award and the consequent decree in Misc High Court case No 361 of 1979 and any plaintiff's prior benefits were extinguished and merged into award.

(12) The defendant denies paragraph 14 of the plaint and puts the plaintiff to the strict proof thereof.

(13) The defendant further denies paragraphs 15 & 16 of the plaint and puts the plaintiff to the strict proof thereof. The defendant states further that the alleged letter (if any) of 26th November 1981 does not amount to an acknowledgment of debt as none existed and the acknowledgment of debt as none existed and the acknowledgment is bad in law for want of consideration.

(14) The defendant denies that the sums set out in paragraph 17 are owing and payable to the plaintiff or at all and puts the plaintiff to the strict proof thereof."

It is clear from these paragraphs in the defence that the appellant put in issue the respondent's claim and more specifically the existence and effect in law of the letter of 26th November 1981, which formed the central plank of the respondent's claim against the appellant in his capacity as the executor of the estate of Lekh Raj Aggarwal.

On the 18th October 1983 the respondent took out a Notice of Motion under Order 35 of the Civil Procedure Rules asking for summary judgment supported by an affidavit sworn by the respondent in

which he repeated the averments sworn by the respondent in which he repeated the averments in the plaint and deponed *inter alia*: that

“(6) The second defendant admits to pay to the plaintiff DM 90,000 and \$ 21,000 with interest in his letter dated 26th November 1981, photocopy whereof is attached hereto and marked as exhibit “KKA (1).”

(7) That the plaintiff is entitled to judgment upon the said admissions contained in the said letter dated 26th November 1981 exhibited herein as exhibit number “KKA (1)” and I hereby apply for judgment to be entered against the second defendant as prayed in the plaint.”

There was no affidavit in reply by the appellant and that was the situation on the ground when the motion came before Mr Justice O’ Kubasu on the 22nd February 1982. In the course of his submissions before the Judge, Mr Muriithi who then appeared for the appellant drew his attention to the defence on record and submitted that it disclosed triable issues. He also complained that only a Photostat copy of the letter of 26th November 1981 had been produced and that the original should have been produced and shown to the court. And he added, for good measure, that the defendant challenged that letter. Mr Joshi who then appeared for the respondent simply said that they had the original copy of the letter of 26th November 1981. There is no indication in the Judge’s notes or his ruling that the original of this hotly disputed letter was ever produced for inspection by the Court or the appellant’s Advocate and we are entitled to conclude that there is no evidence to prove that it was produced.

In his ruling given on 15th March 1984 the learned Judge reproduced the affidavit of Kamal Kishore Aggarwal *in extenso* and came to the conclusion that the letter of 26th November 1981 could not be disputed. In giving judgment for the respondent on this part of the claim the learned judge said:

“As regards the claim based on the letter marked “KKA(1)”, I find that there can be no way the defendants can resist this claim.

There can be no defence to it. Hence I enter summary judgement in favour of the plaintiff in respect of Shs. 954,450/- and Shs. 576063/60 as against the second defendant as prayed in prayer (2) of plaint. The plaintiff applicant will have costs and interest.”

Mr. Satish Gautama, for the appellant, has attacked the decision of the Judge on a number of grounds namely, that the Judge erred in law and fact in entering summary judgement against the appellant more so when there was a defence already on record; that the Judge erred in not taking into consideration that the original letter dated 26th November, 1981, was never produced by the respondent and no judgement could properly or at all be entered on a mere photocopy without evidence as to the original thereof; and that the learned Judge’s holding that the dismissal of the application for summary judgement would amount to a denial of justice constituted a misdirection in law. Mr. Gautama submitted that summary judgement should only be entered in a case where there is clearly no defence; that the defence raised triable issues and more specifically that since the letter of 26th November 1981 which formed the basis of the respondent’s claim had been challenged, the application should have been disallowed when the respondent failed to produce the original copy thereof.

He submitted that since there was a defence on the record, the Judge was obliged to look at it and was not entitled to disregard it as he did, in considering the application for summary judgement under Order 35 of the Civil Procedure rules. He submitted that Order 35 rule 2(1) permits a defendant to show either by affidavit or by oral evidence or otherwise that he should have leave to defend the suit and that a defence delivered by a defendant is one of the other courses a defendant can properly rely upon to show that he is entitled to be given leave to defend.

Mr. Deverrel who appeared for the respondent submitted that summary judgment was properly entered; that if the appellant wished to resist the application he should have filed an affidavit in reply upon which he could, if necessary, be cross-examined; that the letter of 26th November 1981 which was a clear

admission and acknowledgment of preexisting liability; that the defence was a bare denial and intended solely to buy time and delay the respondent's claim. He also submitted that although the learned judge did not specifically refer to the defence in his ruling, he must have borne it in mind in coming to the conclusion that the appellant had no answer to the respondent's claim. He also submitted that although the record is silent on the question whether or not the original copy of the controversial letter was produced, this court ought to take it for granted that it was in fact produced. We are not inclined to make such an assumption as we are bound to go by the record.

Mr. Deverrel relied very heavily on the case of *Zola v Ralli Brothers Ltd* [1969] EA 691, in support of his submission that to allow the appellant to defend this claim would whittle down the effect and defeat the purpose of Order 35, and would constitute a departure from established practice.

Order 35 is intended to enable a plaintiff with a liquidated claim, to which there is clearly no defence, to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by 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. This court will resist with as much fortitude as it can command any attempt to weaken the effect of Order 35. At the same time, we shall remain vigilant to ensure that no defendant with a reasonable or arguable defence who comes to court is deprived of an opportunity to put it forward. It is in our view more unjust to shut out a defendant with a good defence than to require a plaintiff to wait a little longer and prove his claim against such a defendant on the merits. In the clearest cases and in the interest of justice this court will not hesitate to apply Order 35 with its full rigour.

Zola's case concerned an Order 35 application. One of the defendants, Mr. B Sirley, together with two other defendants who lived abroad were sued by the respondents claiming payment under a guarantee given by them jointly and severally. Mr Sirley filed a defence denying the claim and contending that he was in relation to the claim entitled to contribution against a third party. He did not file an affidavit in opposition to the application for summary judgment. The High Court gave summary judgment against Mr. Sirley and on appeal to the Court of Appeal for East Africa, his appeal was dismissed the Court holding *inter alia* that the words "or otherwise" in Order 35 rule 2 only allow properly admissible means of satisfying the Court that there are triable issues and that the fact that a defendant might have a claim to contribution against another person did not entitle him to leave to defend the facts in *Zola's* case were entirely different from the present case. Mr. Sirley had actually signed the guarantees in relation to which he subsequently sought to deny liability.

It is to be noted that in that case although Sirley did not file an affidavit the court looked at the substance of the defence he had filed to discover whether it disclosed any defence to the claim.

Mr. Deverrel referred us to a passage in the judgment of Sir Charles Newbold P, part of which stated:

"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. This is clear from the words of Order 35 rule 2. But the words "or otherwise" would enable the judge to consider the pleadings or any other matter properly before him in order to enable matter properly before him in order to enable him to arrive at a decision on the application. I agree entirely with the words of Madan J. In *Mugambi v Gatururu*, [1967] EA196, at p 197, where he said:

"In my opinion, therefore, the expression "or otherwise" in rule 2 entitles a defendant to resist an application for summary judgment in manner other than by affidavit or by his own *viva voce* evidence but only by properly admissible means. But a method of satisfying the court otherwise than by affidavit or the defendant's own *viva voce* evidence is not to be encouraged. I would not like to see it gaining ground."

It is to be noted that nowhere in that passage did Madan J (as he then was) suggest that reliance on any mode other than affidavit or *viva voce* evidence is not permitted under order 35 rule 2. All he did was to express the wish, and no more, that it should not be encouraged. Indeed in *Zola's* case that the Court

clearly acknowledged and affirmed that on an Order 35 application, the phrase “or otherwise” in rule 2 would enable the judge to consider the pleadings or any other matter properly before him in order to enable him to arrive at a decision on the application. Pleadings, need needless to say, include a defence. It is clear therefore that *Zola’s* case does not say that a judge is precluded from looking at the substance of the defence on the file as Mr. Deverrel contended. Nor does it say that every averment in a pleading must be supported by an affidavit before the Court can consider it on an application for summary judgment. In order to discover whether there are triable issues, the judge would of necessity have to look at the substance of the defence not merely the contents of an affidavit. We are reinforced in this view by the judgment of Madan J, (as he then was) in the case of the judgment of Madan J (as he then was) in the case of *Mugambi v Gatururu* [1967] EA 196. In that a case a suit was filed in the Resident Magistrate’s Court, Meru, for the recovery of Shs. 3,000/=. A defence was filed and subsequently an application was made and for summary judgment which the defendant resisted without filing any affidavit in reply or giving oral evidence but referring to his written statement of defence. The magistrate granted the application and entered judgment for the plaintiff but in his judgment paid no apparent attention to the written statement of defence. The defendant appealed to the High Court which allowed his appeal and held that under Order 35 rule 2 of the Civil Procedure (Revised) Rules, 1948, the court is entitled to consider and should consider the merits of a written defence filed in Court.

We have therefore come to the conclusion that the learned judge completely misapprehended the correct legal position when he ignored and failed to consider the substance of the defence delivered on behalf of the appellant in this case before reaching a decision on the application.

We now turn to the letter of 26th November 1981. It is an important letter and we read it in full:

Dr Kamal Kishore Aggarwal

P O Box 40754

NAIROBI

Sir,

I did not hear of you lately, hope you are doing well with your associates. As a result of your abusive and rude attitude you have lost a lot. In any case remain calm and honest. That will pay you in long run. I as a father shall do my duty fairly and honestly to the end.

In 1977 I wrote a letter to Bank of Baroda Delhi to deposit RS 100,000 in your account to equalize you with others. From our joint account with Mr Baldev Raj Aggarwal Ji and family I have paid your 1/3 rd share in London. Now I only owe you 90,000 DM from my joint account with Mr Baldevraj and family in Union Bank of Switzerland and another 21,000 dollars from my joint account with Mr Baldevraj Aggarwalji and family in Northwestern National Bank Minneapolis, U.S.A. Both the above accounts will be paid to you with due interest as from 1975. Please note do not grumble for nothing, you will be given your dues as these are my liabilities to you. This you must be aware that I and Mr Baldevraj ji have changed the accounts with your share it (sic) in but without your name being included in it. Anyhow 90,000 DM and 21,000 dollars with interest shall be paid to you without obligations at all costs with interest.

Rest is that you should always be polite as your profession demands. Also try to dissociate with your associates. I hope you must have understand the entire situation and can relax now. This is my division and has nothing to do with arbitration. And I shall do it honestly to the end.

Sincerely by yours

Lekhraj Munshiram Aggarwal/Father.”

That is the letter which the appellant has challenged. Mr Gautama submitted that it is abnormal for a father writing to his son to address him as “Sir” and to end the letter with his full name including his designation “father”. He also said the letter is suspicious because it is unnecessarily repetitive over the question of the father’s alleged liability to make payment to the son coupled with the failure of the respondent to produce the original for inspection. He submitted that all these must inevitably lend some degree of credibility to the appellant’s suspicions that the letter was not genuine and may well have been forged and that as a matter of justice he should be permitted to maintain his challenge at a full dress hearing.

Mr. Deverrell on the other hand submitted that there is nothing suspicious about the letter, that it is genuine and was indeed written by Lekh Raj Aggarwal to the respondent and that it contains an unequivocal admission and acknowledgment of liability on the part of Lekh Dev Aggarwal. He also submitted that since the respondent filed an affidavit in which he swore that the original of the letter existed that was sufficient for the purposes of the application for summary judgment. But this in our view does not meet the appellant’s contention that the letter is not genuine whether or not the original exists. The appellant’s objection is valid having regard to the provisions of section 67 of the Evidence Act (Cap 80) which as a general rule requires documents to be proved by primary evidence.

This is an interlocutory appeal and it is neither desirable nor necessary that we should express any concluded view on the validity or otherwise of the appellant’s apprehension or suspicion. All we say at this stage of the proceedings is that we have looked at the defence he has filed and we are satisfied that it discloses triable issues which should go to trial, namely whether the letter of 26th November 1981 was in fact written by Lekh Raj Aggarwal deceased and whether, on a proper construction, the said letter constitutes an admission of liability on the part of the said Lekh Raj Aggarwal deceased.

For these reasons, we have come to the conclusion that this appeal ought to succeed and in conformity with the decisions of this court in the cases of *Trikam Gandha v John Wamai* (Civil Appeal No 42 of 1982) and *Giciem Construction Company v Amalgamated Trades ... Services* (Civil appeal No 17 of 1983), regarding the form of the order to be made in cases of this nature, we allow this appeal, set aside the judgment and decree of the High Court, and substitute therefor an order refusing the application for summary judgment and would order that the costs of the application be reserved to be dealt with at the trial of the action.

The costs of this appeal to the appellant in any event.

Dated and delivered at Nairobi this 27th day of October , 1988

J.O NYARANGI

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JUDGE OF APPEAL

J.E GICHERU

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AG. JUDGE OF APPEAL

R.O KWACH

.....

AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR