REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Potter & Hancox, JJ A & Chesoni Ag. J A)

CIVIL APPEAL NO 17 OF 1983

BETWEEN

GICHIEM CONSTRUCTION COMPANY ……APPELLANT

AND

AMALGAMATED TRADES & SERVICES……..RESPONDENT

(Appeal from a ruling of the High Court of Kenya at Mombasa (Bhandari, J) dated 24th February, 1983)

JUDGMENT OF THE HANCOIX, J A

The appellant sued the respondent in the High Court at Mombasa for Kshs 40,763.50 being the balance due in respect of the renovation by painting of six flats in the Tudor Estate in Mombasa, said to have been carried out by the appellant under an agreement with Kenya Shell Ltd. (to whom the flats belong). It was further alleged by the appellant, though denied by the respondent, that this agreement was, as it is put, voided by another agreement between Kenya Shell and the respondent covering the same work. Thereafter there is said to have been an agreement between the parties that the respondent pay the appellant Kshs 54,763.50 (of which Kshs 14,000 has admittedly been paid, though there is also a dispute as to the basis for the payment) on a quantum merit for the work carried out by the appellant. It was also said that the cheque for Kshs 49,287.20 given by the respondent to the appellant, but subsequently dishonoured, was intended in part payment of this quantum merit arrangement.

The matter came up before Bhandari J on February 16, 1983 on a motion for summary judgment under Order XXXV rule 1 of the Civil Procedure Rules, in a very succinct ruling, he said he was satisfied that the respondent had raised triable issues and he gave leave to defend as to the whole claim though, as Chesoni JA has observed, he did not see fit to identify the issues that he thought were triable.

In this appeal Mr Kassim Sayd, who also appeared in the court for the appellant following the grounds in his Memorandum of Appeal, submitted that no triable issues or fairly arguable defence had raised. He referred principally to the respondent's replying affidavit, since apart from that which was stated orally, this was he only material before the learned judge because of course the defence was not filed until after his ruling and pursuant thereto; though it is, correctly, included in the record of appeal which has been filed.

There was a conflict of facts between the affidavits filed respectively by the appellant and the respondent

firms. Mr Macorone, on behalf of the appellant (the plaintiff in the High Court proceedings) deponed that the cheque for Kshs 49,287.20 which he exhibited as CM2, was issued in pursuance of the quantum merit arrangement and said that the facts were borne out by the letter dated October 13, 1982 (CMI) whichhad been written by Mr Wainaina (the proprietor of the respondent firm) to Kenya Shell.

Mr Kassim Sayd strongly urged that the letter showed overwhelmingly that there was an agreement between the parties and moreover, that this was implicit from paragraphs 3 and 6 of Mr Wainaina's affidavit; for if there was no such agreement then there would have been no basis for Wainaina's statement that he would remunerate the appellant firm for the work already done. Furthermore, the contact was specifically referred to in the heading of the letter, as number M3/2B and by acknowledging the issue of the cheque of the cheque in that letter, the presentation of which was to await the issue of the cheque to the respondent by Kenya Shell, and to which had to be added Kshs 5,476.30 by way of retention fees, the respondents admitted that the appellant firm had done work to the value of Kshs 49,287.20. Mr Kassim Sayd asked this court to say that the respondent's suggestion that the cheque was issued in error, and that only two blocks (by which I take it he means only two flats) had been painted, for which only two sums of Kshs 14,000 (one of which has been paid) were due, was an after thought. It was unreasonable, he said, relying on Madan JA's words in Rudiger Vogs v George Stanley Brodyn Mombasa Civil Appeal 36 of 1982 (which was also a summary judgment case) to regard the letter of October 13 as written irresponsibly or hurriedly, as the respondent claimed before Bhandari J and the only proper construction to put upon it was that it refuted the respondent's contention that the payment was in error. This was but another example, Mr Kassim Sayd claimed, of the ingenuity of defendants, in offering material to slip out of the provisions of Order XXXV, to which Madan JA referred in Continental Buthcheries v Samson Nthiwa, Civil Appeal XXV of 1977.

While it is true, as a matter of general principle, that a court should not interfere with the exercise of the discretion of a judge unless he has misdirected himself and, as a result, arrived at a wrong decision, the passage to which Mr Kassim Sayd referred us was cited in the case of Pithon Waweru Maina v Thuku Mugiria Civil Appeal No 27 of 1982, and was in relation to an application to set aside an ex parte judgment, and not an appeal from a summary judgment application.

The proper principles to be considered in a case such as the present were set out in the locus classicus in East Africa on this subject, namely Zola v Ralli Bros, 1969 EA p 691, in which Sir Charles Newbold said at p 694:

> "Order XXV is intended to enable a plaintiff with a li1iquidated 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. 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. The mere right of the defendant to be indemnified by, or to have a claim over against, a third party in respect of the defendant's liability to the plaintiff by way of counterclaim, a sum of money which does not directly reduce the liability of the defendant to the plaintiff, does not entitled the defendant to prevent the plaintiff from obtaining a summary judgment. Normally a defendant who wished to resist the entry of summary judgment should place evidence by way of affidavit before the judgment showing some reasonable ground of defence. This is clear from there words of Order XXV, rule 2 which states: 'The court may thereupon, unless the defendant by affidavit, or by his own viva voce evidence or otherwise, shall satisfy it that he has a such facts as may be deemed sufficient to entile him to defend, pronounce judgment accordingly'."

This court on appeal will therefore 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.

There can be little doubt that there has been a tendency of the courts recently to scrutinize defences and affidavits put forward by defendants seeking leave to defend with care to see if there are genuinely triable issues, even though the court may be skeptical about the success or merits of the proposed defence. If the court has doubts about its bona fides, or considers the defence "Shadowy" or, as Mr Kassim Sayd said in

this case, that the defendant's conduct is suspicious, then it will frequently impose a condition of giving leave to defend, as occurred in the recent case of Paclantic Financing Co and Others v Moscow Narodny Bank Ltd, New Law Journal, July 8, 1982 p 665, and as the appellants have suggested this court should do as an alternative in this case.

One reason for that which may be described as a hardening of the attitude of the courts on these applications recently is because since the cases of Jacobs v Booths Distillery Co 1901, 85 LTR 262 and Wing v Thurlow, 1983 10 TLR, 151 (to take only two of the older authorities), inflation and high interest rates have made delay in payment of debts of such greater premium now accruing to the debtor who manages to achieve delay is an important causative factor in the tendency to impose a condition of payment into court or giving security more often than it used to be: see Lord Diplock in MV Yorke Motors v Edwards, 1982 1 AER 1024, and also European- Asian Bank v Punjab & Sind Bank, Law Society's Gazette, April 20, 1983 p 987, in which the decision of the trial judge who had granted leave to defend was reversed on the grounds that there could be no arguable defence in law as to the letter of credit in question.

Where, however, there is a dispute on the facts, it is with greater reluctance that a court on appeal will disturb the view of the judge below that there is a triable issue: see Lloyds Bank Ltd v Ellis- Fewster and Another The Times March 5, 1982.

In the instant case the respondent has disputed the allegation that there was any contract between the parties, and, indeed, says that the appellant started work on the flat without Mr Wainaina's knowledge and before being awarded the contract. Further it is effect disputes that there was any agreement to pay the appellant on a quantum merit and by implication, that the cheque for Kshs 49,287.20 was paid in pursuance thereof, but said it was paid on the wrong basis. It is true that the letter of November 16, 1982, exhibit CMS3, signed by Mr Mwaura, on behalf of the respondent and "left with the appellant, mentions "your money" and says he has "left this for too long" bit, to my mind, this does not detract from the respondent's case, as it is put in the replying affidavit of February 16, 1983. By the same token, although that letter refers to the cash cheque of Kshs 14,000 also left with the appellant that is as consistent, at this stage, with the respondent's contention that this was in respect of one of the two blocks which had been painted, as with the appellant's contention that it was part of the quantum merit. In other words the basis for the payment of the Kshs 14,000 is in issue. So that I would regard that as constituting a triable issue in respect of that sum also.

For these reasons I should not wish to disturb the Judge's finding that triable issues of fact issues of fact have been raised by the respondent and, in my judgment it should unconditional leave to defend the suit.

For the reasons stated by this court recently in Trikam Maganlal Gohil and Velji Nandha v John Waweru Wamai, Civil Appeal 42 of 1982, in a case where triable issues are found to exist the proper order is not to dismiss the application for summary judgment, because to do so would mean that it ceases to exist and the necessary consequential orders as to leave to defend and costs could not therefore be made. The judgment of Madan JA in Franz Haas v EN Wainaina, Civil Appeal 4 of 1981 referred to by Mr Kassim Sayd, is to the same effect. The proper order is to refuse summary judgment with an appropriate order as to costs. Accordingly, in this case, I would dismiss the substantive appeal against Bhandari J's order, but I would vary that order so as to refuse the application for summary judgment and I would order that costs of the application be reserved to be dealt with at the trial of the action. The respondent having succeeded before this court I would order that the costs of this appeal be the respondent's in any event.

Delivered at Mombasa this 22nd day of July, 1983.

A R W HANCOX

JUDGE OF APPEAL

JUDGMENT OF CHESONI AG JA

In the plaint the appellant/plaintiff states that there was an agreement between the appellant and Kenya Shell Ltd, in June 1983, wherein the appellant agreed to paint six flats at Tudor in Mombasa belonging to Kenya Shell Ltd. The appellant commenced and carried out part of the painting, but before completing the services the contract was voided by Kenya Shell Ltd, who appointed the defendants to carry out the same job. The defendant/respondent then agreed with the appellant to pay the latter Kshs 4,763.50 on "quantum meruit" basis for the work already done by the appellant and a cheque for Kshs 49,287.20 was issued to the appellant by the respondent, but when presented for payment the cheque was not honoured. The respondent thereafter paid to the appellant Kshs 14,000 which left a balance of Kshs 40,763.50 for which the appellant sued. The appellant's application for summary judgment for the balance of Kshs 40,763.50 was dismissed by Bhandari J and the appellant appealed to this court on four grounds. Although the learned judge held that the respondent had raised triable issues he did not name any of the triable issues raised, while in my opinion he should have done so, the failure to state the triable issues raised is not, by itself, fatal to the learned judge's decision.

In his replying affidavit and submission in court the respondent submitted that the appellant had painted only two blocks of flats and the cost for painting one block was Kshs 14,000 and so the appellant was entitled to only Kshs 28,000 of which he had been paid Kshs 14,000 and the respondent was willing to pay the balance of Kshs 14,000. The appellant's answer to these allegations were that it was the first time the respondent was raising them, which is not the same as saying that they are not true. In any event in an application of this nature the defendant is not barred from raising for the first time at the time of hearing the application facts that would go to show that he should have leave to defend. So the exact sum due to the appellant is a triable issue and so are the other issues considered in the judgment of Hancox JA, the draft of which I have had the advantage of reading and with which I fully agree. In my view in a case involving an oral agreement like this one, where each party alleges its own terms and conditions of the oral agreement and one party's version differs from that one of the other it is dangerous to give a summary judgment, for the variance in the parties' versions of the oral agreement, if genuine and relevant to the matter at issue, automatically raise triable issues. The discretion under Order XXXV should be exercised cautiously because as it was stated in the case of Jones v Stone [1894] AC 122, "the power to give summary judgment under Order XXXV is intended only to apply to cases where there is 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." 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. Leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment. In this case the defendant showed that he had reasonable grounds for setting up a defence eg the number of blocks painted were alleged to be only two at Kshs 14,000 each and the terms of alleged oral agreement including what the payment of Kshs 14,000 was far. In this case there is a dispute as to facts which raises reasonable doubt that the plaintiff is entitled to judgment. The discretion to give a summary judgment could not have been properly exercised in favour of the appellant in the face of these unresolved issues.

As Hancox JA has correctly observed the proper order was to reject the application for summary judgment and then grant leave to defend, because a dismissal is a final disposal of the application and so where an application is dismissed there can be no leave to defend it as the application is no longer alive. Furthermore an application for summary judgment may be dismissed only if the case is not within Order XXXV or when the plaintiff made the application he knew that the defendant had a reasonable defence - see Trikam Maganlal Gohil & Another v John Waweru Wamai, Civil Appeal No 42 of 1982 (unreported). The appellant urged us, if we agreed with Bhandari J, to make the leave conditional but that is not a matter of course. To make leave to defend conditional there should be evidence of bad faith on the part of the defendant, or of suspicion of his conduct or the defence is sham none of which was shown to exist in this case. I

would dismiss this appeal. I agree with the order of costs proposed by Hancox JA. As the appeal

is dismissed there is no need to grant the adjournment sought by the respondent.

Delivered at Mombasa this 22nd day of July, 1983

ZR Chesoni

Ag Judge of Appeal