REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 55 OF 1978

COMMERCIAL ADVERTISING AND

GENERAL AGENCIES LTD.....PLAINTIFF

VERSUS

FAUZ AHAMED QUREISHI.....DEFENDANT

RULING

April 20, 1978, **Sachdeva J** delivered the following Ruling.

This is an application by the plaintiff for summary judgment against the defendants jointly and severally under order XXXV of the Civil Procedure Rules.

The plaintiff's claim against the defendant is for Kshs 74,850 being the amount due for goods sold and delivered, and in the alternative thereto, on the foot of a promissory note date June 30, 1977, in the same amount due for payment 90 days thereafter on September 30, 1977, which was dishonoured by the defendants upon presentment. The defence was that goods were supplied to the defendant by the plaintiff, but on credit terms, it being the accepted and normal course of business between the parties that the defendants would pay for the goods only after they had sold the same. As to the promissory note, the defendants averted that it was an accommodation bill: given solely so that the plaintiff could have the said goods and others released from the bonded warehouse, and that it was not given in payment for the said goods. On the contrary, it was given even before the goods had been delivered. The defence further states that the defendants were unable to sell any of the goods, that they attempted to return the goods to the plaintiff who would not have them back and that they are willing to pay only for those goods which they are able to sell.

The plaintiff's present application was made after the defence had been filed, and it is supported by an affidavit of Mr. Gitonga, the managing director of the plaintiff company. The defence was, however, filed on February 11, 1978, and it would appear from paragraph 2 of the affidavit that he was not at that time aware of the contents of the defence. Briefly, Mr. Gitonga depones that plaintiff sold and delivered goods to the defendants on divers dated in 1977 and that in payment thereof, the defendants issued a promissory note on September 30, 1977, which was not honoured, and the defendants are truly indebted to the plaintiff and that there could be no defence to the suit.

An affidavit in reply was sworn by one of the defendants, Mr. Fauz Ahamed Qureishi. Briefly, he deponed that the goods were not delivered on divers dated, but only once July 12, 1977, that the promissory note was not issued in payment for the said goods but that it was requested and issued before the delivery of the said goods, which is confirmed by a letter dated July 7, 1977, annexed there to, that the facts set out in the defence filed on February 10, 1978, were true and that the defendants have a good

defence to the whole of the plaintiff's claim.

The principle applicable in such applications for summary judgment is not difficult to understand – although occasionally it is stated in somewhat varying terminology – but its application to the facts and circumstances of each particular case is a matter which is always of a great concern to me at least. I will first, briefly, set out the principle, and then endeavour to apply it to the circumstances of the present case as best as I can. The law on the subject was reviewed by Madan JA at some great detail in CA Civil Appeal No 35/77 C*ontinental Butchery Ltd v Samson Musila Nthiwa*, judgment wherein was delivered on January 31, 1978. In the course of his judgment, the learned justice of appeal considered a number of authorities on the subject, and also observed :

> "with a view to 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 plaintiff under the summary procedure provided by 0.35 subject to there being no bona fide triable issue which would entitle a defendant to 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 cour| feels justified in thinking that the defences raised area sham…."

In CA Civil Appeal No 33 of 1977 *B Gupta v Continental Builders Ltd*, judgment wherein was delivered on April 13, 1978, the very day on which I heard the present application, Madan JA stated :

> "The first thing to say is that this was an application for summary judgment. If a defendant is able to raise a *prima facie* triable issue he is entitled in law to unconditional leave to defend. On the other hand if no prima facie triable issue is put forward to the claim of the plaintiff it is the duty of the court forthwith to enter summary judgment for it is as much against natural justices to shut out without proper cause a litigant from defending himself as it is to keep a plaintiff out of his dues in a proper case. *Prima facie* triable issues ought to be allowed to go to trial just as a sham or bogus defence ought to be rejected peremptorily….
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> ….. Sometimes the *prima facie* issues which are proferred are rejected as unfit to go to trial being by their very nature as disclosed to the court incapable of effectively resisting the claim. The court does not thereby shut out any genuine defences of a defendant as it is the only proper order to make if no reasonable grounds of defence are disclosed even as *prima facie* triable issues only at this stage. What happens is that he court merely dos not accept the *prima facie* issues offered as genuine. This is exactly the task which the court is required to perform on a summary judgment application. In the instant case the learned judge performed his task with more than his due zeal for he said during the course of his ruling :
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> 'The essential consideration is to seek for a *bona fide* defence on the part of the defendant and in doing so to lean almost entirely on the side of the defendant in order to grant him leave to defend, this the court continues to do.'
>
> I think the learned judge meant no more than '*prima facie* defence' when he used the expression '*bona fide* defence'.."

I must confess that I am somewhat perplexed by the last quoted paragraph. A defence may be reasonable *prima facie* or on the face of it, but once a court embarks upon an inquiry to determine whether it is sham or genuine, the court has necessarily to decide to some extent on its *bona fides*. That would also explain the use of words "*bona fides*" in *Continental Butchery Ltd v Samson Musila Nthiwa* (supra).

In *Zola v Ralli Bros Ltd* (1969) EA 691, Newbold P stated at page 694 :

> "Order XXXV 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 …"

As stated earlier, the defendants do not dispute that goods were delivered to them, and hat they signed a promissory note, but it is clear from the delivery note which is dated July 12, 1977, that the goods were not delivered by the plaintiff to the defendants on divers dates but only one date. The promissory note is dated June 30, 1977, but it would it would appear to have been forwarded to the defendants for signature on July 7, 1977, and it is not clear whether it was signed before or after the delivery of the goods on July 12, 1977. However, the defendants' allegation in the defence that the promissory note was given in order to enable the plaintiff to have the goods delivered to the defendants and other goods released does not appear to be correct : it would appear that the promissory note was given only for the goods delivered to the defendants. While Mr. Qureishi's affidavit deals with the date of delivery of goods and of signing of the promissory note, it is completely silent on the substantive defence of the defendants, which I would have expected to be particularized in an affidavit in opposition tot the motion for summary judgment (see the Judgment of Law JA, in *Zolla*'s case, supra). The alleged agreement in paragraph 4 of the defence is imprecisely pleaded; one cannot ascertain, from a perusal of paragraph 4, whether it was oral or a written agreement, the date on which it was made, the meaning of the word "throughout", whether such alleged accommodation bills had been given by the defendants to the plaintiffs in the past and whether goods had been returned in the past in spite of giving promissory notes in respect of payment therefore. On the face of it, the promissory note is an unconditional order to pay to the plaintiff Kshs 74,850 90 days after June 30, 1977, ie on September 30, 1977, and there is nothing to indicate on the face of it that it is an accommodation bill and nor is that allegation supported by Mr. Qureishi's affidavit. However, the defence cannot be ignored because as Madan JA stated in *Continental Butchery*'s case (supra):

> "On an application for summary judgment the plaint, the defence, the counterclaims and the reply to defence, if any, and affidavits in support of and in reply as also all relevant issues and circumstances are all proper material for consideration. Nothing is immaterial which helps justice to be done. Nothing is extraneous which helps to prevent injustice being done."

I cannot, of course, decide the case on affidavits. As Wambuzi P (as he then was) ruled in *Pindoria Construction Co Ltd v Iron and Sanitarywares* (Civil Appeal No 16 of 1976) :

> "The learned judge did not say whether or not he considered that there was a good defence to the action. In the circumstances it may well be that from his reference to the contradictions in the affidavit and pleadings of the appellant and the unbusiness like quotations of the prices, he considered that there was no good defence to the action. If this is what happened, then the learned judge was deciding the case on affidavit evidence, with respect this was wrong. I should have thought that at that stage all that the court required was to be satisfied that there was a valid defence. The question of its truthfulness could only be determined after hearing of the evidence …"

This was elaborated by Madan JA in *Gupta*'s case (supra) as follows :

> "In any given case it is the duty of the court to examine with minute care the documents and facts laid before it. In this case there is complaint made that this was done instead of paying a compliment to the court's assiduity for doing so. If it had not been done there would be some cause for making a complaint that the court failed in its task to do so thereby possibly causing a failure of justice. A minute and careful examination of documents and facts laid before the court is carried out by the court as a part of the daily task in the performance of its judicial duty, and understandably, even inevitably, it may lead both the rejection of some documents and some facts which some people, in the case of a summary judgment application, may construe, albeit incorrectly, as an actual trial. There is no more in it except the process of determining the judicial verdict to be delivered. The merits of the issues are investigated to decide whether leave to defend should be granted but the case is not tried upon affidavits, it is that this is the procedure in the main provided for this purpose. Sometimes the *prima facie* issues which are proferred are rejected as unfit to go to trial being by their very nature as disclosed to the court incapable of effectively resisting the claim. The court does not thereby shut out any genuine defences of a defendant as it

is the only proper order to make if no reasonable grounds of defence are disclosed even as prima facie triable issues only at this stage. What happens is that the court merely does not accept the *prima facie* issues offered as genuine. This is exactly the task which the court is required to perform on a summary judgment application ……"

To sum up, this is a claim for goods sold and delivered, and in the alternative on a promissory note. The delivery of goods and the giving of a promissory note is not denied. Upon perusal and careful consideration of all the material on the record before me, I am of the view that the defendants have shown some prima facie defence to the plaintiff's case, but it might well turn out to be sham and invalid, but that I cannot conclusively decide that as matters stand, and therefore, I consider that in all the circumstances of the case, I should grant the defendants only conditional leave to defend. As Madan JA observed in *Continental Butchery*'s case (supra) :

"The Annual Practice, 1973, states, page 139, that the value of *Jacobs v Roothe Distillary Company* (85 L T 262) as an authority against giving conditional leave to defend may not be as great as has been thought. In my opinion in Kenya there should be no hesitation in giving only conditional leave to defend if the circumstances so call for."

I refuse the plaintiff's application for summary judgment at this stage but rule that the defendants must deposit the principal amount claimed (Kshs 74,850) in court within 30 days of today, and upon their so doing, the matter will proceed to trial, and the costs of this application will be in the cause. However, if the defendants fail to comply with the aforesaid order of deposit within 30 days of today, summary judgment will be deemed to have been entered in the plaintiff's favour, together with the costs of this application, and in that event, the plaintiff will be at liberty to draw a decree and execute it.

Each party is granted the right to appeal against this ruling.

Dated and delivered at Nairobi this 20th day of April , 1978.

S.K SACHDEVA

JUDGE