



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MADAN, WAMBUZI & LAW JJ A)

CIVIL APPEAL NO 35 OF 1977

CONTINENTAL BUTCHERY LIMITED.....APPELLANT

VERSUS

NTHIWA.....RESPONDENT

JUDGMENT

(Appeal from the ruling and order of the High Court of Nairobi (Muli J) in Civil Case No 569 of 1977, dated 15th July 1977)

January 31, 1978, the following Judgments were delivered:

Madan JA: This appeal is against an order of refusal to enter summary judgment under order 35 of the Civil Procedure (Revised) Rules, 1948, for shs 76,000/- being the amount claimed to have been lent and advanced by the appellant to the respondent.

The motion for summary judgment was initially supported by the affidavit of a director of the appellant company Mr Juxton Shako who deponed that the respondent was truly and justly indebted to the appellant in the sum of shs 76,000/- for money lent and advanced and that full particulars of the appellant's claim were contained in the amended plaint filed in the suit against the defendant. Mr Shako further deponed that he verily believed there was no defence to the suit and the respondent had entered appearance for the purpose of delaying judgment. In fact no amended plaint was filed in the suit.

The respondent swore an affidavit in reply for the purpose of obtaining leave to defend, in which he stated that he carried on as the sole proprietor the business of export and import of meat under the firm name of Nthiwa and Company until 1st September, 1975, when a limited liability company called Nthiwa and Company Limited (hereafter referred to as the company) was incorporated with nominal capital of Shs 200,000/- divided into 2,000 shares of shs 100/- each, to associate the appellant with and to take over the respondent's business; initially one share each was allotted to him and Mr Shako.

The respondent further deponed that a few days before 10th October, 1975 he was orally promised by Mr Sadrudin Kurji, another director of the appellant company, that he would be paid shs 10,000/- towards the acquisition of the goodwill of his former business, and a further sum of shs 76,000/- to enable him to buy 760 shares in the company if he signed certain documents prepared by Messrs Esmail and Esmail who

were the advocates for Mr Kurji and who had been concerned with the incorporation of the company. The respondent's affidavit continued that at the offices of Esmail and Esmail, Mr. A K Esmail produced three documents which had already been written, namely two cheques, one for shs 10,000/- for the aforesaid goodwill, and the second for shs 66,000/-.

The third was a typed document purporting to be a receipt by the respondent acknowledging a loan of shs 76,000/- from the appellant with interest thereon at 12% per annum; that both cheques were made out in his name but the cheque for shs 66,000/- had an endorsement at the back thereof which also had been already written making it payable to the company; that at the request of Mr Esmail he signed the endorsement and also the receipt both of which documents Mr Esmail retained but gave him the cheque for shs 10,000/-; that on this occasion he also signed in his capacity as director of a company a debenture over the assets of the company securing a loan of shs 200,000/- to the appellant together with a form of return relating to the debenture.

The respondent further said in his affidavit that he signed the acknowledgment receipt in anticipation of a loan of shs 76,000/- which Mr Sadrudin Kurji had promised him; that while the sum of shs 66,000/- was entirely paid to the company through the cheque for it no part of it was paid to him, and the cheque for shs 10,000/- towards payment of the aforesaid goodwill was credited in his banking account. In the circumstances, the respondent also swore, neither of these two sums was a loan to him; if the receipt purports to refer to these two sums as a loan, it does not represent the correct situation, is without consideration and the respondent signed it under a misapprehension. Therefore the appellant has not lent him shs 76,000/- and he has not received it as a loan from the appellant.

The respondent also refers in his affidavit to a return filed by Mr Minez Kurji a brother of Mr Sadrudin Kurji and Secretary as well as receiver of the company appointed under the debenture, in which the respondent is shown to have been allotted 660 shares in the company. The respondent says this was done without his consent and he neither paid nor received a loan from the appellant to pay for these shares; further, that he was never informed that his endorsement of the cheque for shs 66,000/- was required for the allotment of 660 shares to him; that if the cheque for shs 66,000/- was a payment for the purported allotment of 660 shares instead of 760 shares it was not payment at his request and it cannot in any event constitute money lent and advanced to him as no part of it was received by him.

The respondent also took the objection that Mr Shako's affidavit purports to verify an alleged cause of action in a non-existent document described as an amended plaint. The respondent's affidavit elicited an affidavit in reply by Mr Akber Esmail a partner in the firm of Esmail and Esmail in which he states that he handed to the respondent at his offices two cheques one for shs 66,000/-, another for shs 10,000/-; that thereafter the respondent signed a receipt which had been prepared by Mr Esmail for the amount received; that the respondent in Mr Esmail's presence also endorsed the cheque for shs 66,000/- in favour of the company and he took away both cheques which were duly presented for payment and honoured. A copy of the receipt signed by the respondent which is attached to Mr Esmail's affidavit was in the following form, i.e.:-

“Continental Butchery Limited,

.....

Dear Sir,

I hereby acknowledge the receipt of the loan of shs 76,000/- which you have given to me, *inter alia*, to enable me to purchase shares in Nthiwa and Company Limited.

I agree to pay interest on this loan at the rate of 12% per annum.

Dated at Nairobi this 10th day of October, 1975.

Revenue Stamp 10 cents. Samson Musila Nthiwa.”

It was on the foregoing material before him that the learned judge was called upon to decide whether to give leave to defend. He said the suit bristles with fundamental strong triable issues and gave unconditional leave to defend to the respondent.

I venture to think that next to applications for execution of decrees under order 21 of our Civil Procedure (Revised) Rules, 1948, order 35 is the busiest order with the large number of applications for summary judgment that are lodged under it. It is not difficult to understand the meaning of the straight forward provisions of order 35, what is difficult is to apply the effect of the meaning to different applications for summary judgment each of which presents its own set of facts, its own set of circumstances and its own set of controversies between parties; what is difficult is to construe the true purport of the affidavits in reply which each time come up with new manouvers, new logistics, new strategy and tactics with the object of obtaining leave to defend, the *ruse de guerre* changes with each application. Sometimes it is a battle royal, sometimes a shabby skirmish merely, for example when it is a genuine claim for the price of goods sold and delivered or a claim for payment of rent. There is no limit to the ingenuity of defendants, aided by advocates, in the offering of new material to slip out of the provisions of order 35; there is also no limit to the acumen of judges to deal with the legal jumble.

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 order 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 court feels justified in thinking that the defences raised are a sham. This would be in accord with the well-known words of Jessel MR and the Lord Chancellor (Halsbury), spoken respectively in *Anglo – Italian Bank v Wells*, 38 L T at page 201, and in *Jacobs v Booths Distillery Company*, 85 LT Reports at 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 OXIV (the equivalent of our Order 35) 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.”

Or, on our home plane, in the words of Newbold, P, in *Zola and Another v Ralli Brothers Limited and Another*, [1969] EA 691 at p 694 that –

“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 the delaying tactics of the defendant.”

With respect, the foregoing was perhaps re-echoing in a different language the following words of Lord Halsbury in *Jacobs v Booths Distillery Company* (supra), i.e. :-

“There are some things too plain for argument; and where there were pleas put in simply for the purpose of delay, which only added to the expense, and where it was not in aid of justice that such things should continue, Order XIV was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.”

The Annual Practice, 1973, states, p 139, that the value of *Jacobs v Booths Distillery Company* (supra) 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.

An affidavit which purports to verify the cause of action in a non-existent amended plaint, is quite valueless to support an application for summary judgment under order 35 in respect of a cause of action pleaded in a plaint. The two pleadings are different documents. Such as Mr Shako's affidavit in the instant case. No attempt was made to put the matter right in anyway. The learned judge pointed out that he had not seen the amendedplaint with the result that Mr Shako's affidavit was of little value. The situation was such as to deprive the court of jurisdiction to entertain the application for summary judgment. As matters stood before it even if so disposed the court could not, and ought not properly, to enter any summary judgment for the appellant. That situation still obtains and, in my opinion, this court would be justified in dismissing this appeal for the reason which I have just stated.

The learned judge however dealt with the application for summary judgment as if it were in order in the form in which it was before him. I will consider this appeal on that basis and assume the appellant to have applied for and been granted leave to file a supplementary affidavit to delete the word "amended" as the contents of an affidavit may only be changed by a further sworn statement.

Shs 10,000/-:

The appellant's claim of shs 76,000/- is made up of two sums of money shs 10,000.- and shs 66,000/- as money lent and advanced to the respondent at the respondent's request. It may help to clear any confusion that there may be if I say that the suit is between the appellant and the respondent and not between the company and the respondent.

The respondent admittedly received the sum of shs 10,000/- which he deposited in his banking account. This was money handed to him on behalf of the appellant. It is common sense, and it is also reasonable to assume, that if at all goodwill must have been agreed to be paid by the company at the time or before it acquired the former business of the respondent and not about six weeks later. In the normal course of business deal such as the one described by the respondent, it would be the company and not the appellant who would be paying for the goodwill and any arrangement for the payment of goodwill would be a part of the original take over agreement. I can see neither any reason nor consideration for the appellant to pay shs 10,000/- to the respondent for goodwill of the latter's business.

I therefore think the learned judge erred when he said there was a clearly triable issue in regard to the sum of shs 10,000/- because if it formed a part of the loan why was it not paid to the company direct for the purchase of shares; he further said, also additionally, there was a triable issue whether the sum of shs 10,000/- was paid as goodwill. I think if there is any issue over goodwill it can only be between the company and the respondent who does not claim that goodwill was to be paid by the appellant; therefore the question of goodwill is incapable of creating a triable issue between the parties.

Shs 66,000/-:

The respondent's endorsement of the cheque for shs 66,000/- was an acknowledgment by him of the receipt and payment at his direction of the proceeds thereof to his credit to the company. He actually received the money for the cheque for he put his name on the back of it. His endorsement was a receipt for the payment of the money to him. The respondent therefore cannot be heard to say that he never received any part of the loan of shs 76,000/-. He received shs 10,000/- in cash by depositing the cheque in his account. He received shs 66,000/- by endorsing the cheque which he passed on to the company who in turn allotted him shares to the value thereof. As the payee, and therefore the owner of the cheque he used this money to his own credit. Even if the company had not allotted any shares to him after it received the money, or refused to account for it, the respondent would still be held to have received shs 66,000/- in so far as the appellant is concerned.

With respect the learned judge erred when he said that the respondent never received shs 66,000/- to his use. If anything is clear in this case it is that the respondent did receive this money to his use. The learned judge also erred in thinking that a triable issue was raised whether the shares were allotted to the respondent without his consent; neither does it raise a triable issue in so far as the appellant is concerned that the respondent does not, as he says in his affidavit in reply, wish to continue his association with or to

take further shares in the company. These are matters of concern between the company and the respondent exclusively.

The respondent says he signed the receipt for shs 76,000/- under a mistake and it was without consideration. What mistake! He does not reveal it. Why without consideration! He received the full amount of it.

For the reason I have stated I am of the opinion that the learned judge erred in granting unconditional leave to defend. At the same time I feel that upon a totality of the circumstances related by the respondent concerning the business transactions which took place between the parties, and also the company, it would not be right to leave him completely shorn. I bear in mind the following words of Bramwell LJ in *Harrison v Bottenheim*, [1878], 26 WR 362 at p 363:-

“..... though a man cannot show a defence still, if he has shown enough to entitle him to interrogate the plaintiff, the case is not within Order 14, and should not be pursued without his being allowed to defend.”

Bramwell LJ, also referred to the remarkable fact that the action was on a bill of exchange three years old, and so the case was one of a stale claim. I feel intrigued by the collective impact of many aspects of this case such as why are there so many twists to an otherwise simple business deal whereby the company was incorporated to associate the appellant with and to take over the respondent's business of export and import of meat; the appellant's name indicates it is also engaged in the meat business; why was not goodwill agreed to be paid at the time of the take over of the respondent's business instead of about six weeks later; was he to be paid a sum of money only for goodwill, did his business have no other value, no other assets; why did the respondent from being the sole proprietor of his business agree to become a minority shareholder in the company; why did the appellant agree to lend shs 76,000/- apparently an unsecured loan; why was the loan split into two cheques; why did the respondent as sworn by Mr Esmail endorse only the cheque for shs 66,000/- in his presence and then take it away with him in a negotiable state potentially dangerous in the event of it being lost; upon whose instructions were the words “*inter alia*” included in the receipt; were shares worth shs 66,000/- allotted to the respondent at his request; what was the consideration for the debenture of shs 200,000/-; why did the company fold up and a receiver appointed?

I have also taken into account everything else on record such as the averments in the plaint, the defence, the sworn statements in the affidavits and the documents which have been produced so far, and I say that although the respondent is unable to show a defence enough to entitle him to interrogate the plaintiff. I however think that the case is within order 35 to the extent I point out because as I have stated the respondent did receive the total sum of shs 76,000/- and I would give him only conditional leave to defend.

I would therefore set aside the order made by the learned judge and substitute therefor an order that the respondent is given conditional leave to defend subject to his depositing in court shs 76,000/- within thirty days and costs of the application for summary judgment will be in the cause. Should the respondent fail to deposit the money as ordered, the appellant as the plaintiff will be at liberty to sign judgment as prayed against the respondent as the defendant together with costs of the application for summary judgment.

However as both Wambuzi JA and Law JA are of the opinion that unconditional leave to defend should be given in regard to the cheque for shs 10,000/-, it is so ordered. As regards the sum of shs 66,000/- the respondent is given conditional leave to defend upon the terms stated by me save that in case of default by the respondent in depositing this sum in court, the appellant will be at liberty to sign judgment only for the sum of shs 66,000/- with interest thereon and costs.

Finally, I would refer to the third ground of appeal that the learned judge took into account and paid undue attention to immaterial and extraneous facts, issues and circumstances.

On an application for summary judgment the plaint, the defence, the counterclaim and the reply to

defence, if any, and affidavits in support 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.

The respondent must pay the appellant's costs of this appeal.

Wambuzi JA. I have had an opportunity to read in draft the judgment prepared by Madan JA. I agree that the respondent cannot now be heard to say he did not receive the cheque for shs 66,000/- to his use. He admits he was handed this cheque which was made out in his names and which he endorsed or rather signed the endorsement at the back in favour of the new company. This cheque was honoured and shares for that sum were allotted to the respondent. He must therefore have received the amount stated in the cheque which he used to purchase shares in the new company and I think it is irrelevant that he may now be having second thoughts about the matter.

As regards the second cheque I respectfully differ from my learned brother Madan JA. There is no dispute that the appellant agreed to advance or lend the sum of shs 76,000/- to the respondent. It is the case for the respondent however that in addition to this loan the appellant had, through a Mr Sadrudin Kurji, agreed to pay to him shs 10,000/- for the goodwill of the respondent's business which had been taken over. If I may say so my learned brother Madan JA has pointed out that if anybody was to pay for the goodwill this must be the new company. I must say however, that the circumstances of this case are a little involved. The respondent who owned the business which was taken over is a member of the new company and so is the appellant. If, therefore, the new company was to pay for the goodwill, I can see that the respondent had also to contribute. In these circumstances, it is understandable that an arrangement could have been made whereby only the appellant pays its proportion, the fixing of which may have taken into account the fact that the respondent, the vendor in this case, would also have been a purchaser. The respondent does not deny signing the receipt, the terms of which are far from supporting his case that any part of shs 76,000/- he received represented purchase money for the goodwill. However, he claims he was mistaken. He thought the separate cheque which he paid into his own bank account was to pay for the goodwill for his former business. I think this is a triable issue. I note that the appellant was lending money not only to the respondent but also to the new company. I would accordingly have given unconditional leave to the respondent to defend in respect of the shs 10,000/-. Subject to that I concur in the orders proposed by Madan JA.

Law JA. I have had the advantage of reading in draft the judgment prepared by Madan JA, in which the facts and background to this appeal are fully set out.

As regards the cheque for Shs 66,000/- I agree that any leave to defend should be conditional. By endorsing the cheque over to Nthiwa and Company Limited, in consideration of an allotment of shares in that company, the respondent had the use of the proceeds of that cheque, and the receipt signed by him supports the appellant's contention that the cheque represented a loan made by the appellant to the respondent.

As regards the cheque for Shs 10,000/-, Madan JA has commented that if it represented a payment of goodwill, he would have expected the cheque to have been issued by Nthiwa and Company Limited and not by the appellant.

That is, with respect, a sound argument. It must be however remembered that it was the appellant's directors who floated and financed Nthiwa and Company Limited, and it seems to me not beyond the realms of probability that, as part of this financing, it was the appellant which made the payment of a sum in respect of goodwill. In my opinion, a *bona fide* ground of defence was shown to exist in this respect.

I would grant conditional leave to defend as to the cheque for shs 66,000/ - subject to paying into court Shs 66,000/- within 30 days, and grant unconditional leave to defend in respect of the cheque for Shs 10,000/-. In all other respects I agree with the order proposed by Madan JA.

January 31, 1978

