IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(Coram: Wambuzi P, Law V-P & Musoke JA)

CIVIL APPEAL NO. 54 OF 1976

BETWEEN

CITY PRINTING WORKS (KENYA) LTD..APPELLANT

AND

PETER S.BAILEY...RESPONDENT

(Appeal from the Judgment of the High Court (Madan J) Dated 24th June 1976 in Civil Case No. 499 of 1976)

JUDGMENT

Law V-P The appellant company was the defendant in a civil suit filed in the High Court of Kenya by the respondent. (I shall refer to them as "the defendant" and "the plaintiff", respectively.) By his plaint in the suit, the plaintiff averred that the defendant had agreed, on or about 29th August 1973, to employ him as general manager on terms including an annual bonus of Shs 12,000, that he worked in that capacity for two years, and he claimed Shs 24,000 being the agreed bonus for that period. By its defence the defendant admitted the facts pleaded in the plaint:

... save that the plaintiff did not work as a general manager as aforesaid but as a designer and there never was any agreement on gratuity as alleged.

The plaintiff then applied for summary judgment under the Civil Procedure Rules, order XXXV, rule 1, and annexed two letters to his supporting affidavit. The first letter, dated 29th August 1973, was signed by Mr S M Githegi, Managing Director of the defendant. It is addressed to the plaintiff, and reads as follows:

I will be pleased to have your service from 1st October 1973, in my new organisation, the City Printing Works (Kenya) Ltd as a general manager, for a period of two years. Terms as follows: (1) Salary Shs 5000 per month. (2) Use of company vehicle and allowances. (3) Annual bonus of Shs 12,000. (4) Normal local leave and other benefits.

The second letter, dated 30th August 1973, was written by the plaintiff to Mr Githegi and stated, *inter alia* "I shall be pleased to accept your offer and confirm that I shall be joining your company as from 1st October 1973". Mr Githegi filed an affidavit in reply. In it he admitted writing the letter of 29th August and receiving the plaintiff's reply of 30th August. Mr Githegi went on to state:

5.That [the plaintiff] commenced duties as such general manager from 1st October 1973, and worked in that capacity for a period of approximately three months.

6.That after the said period of three months the plaintiff approached me on his own accord and informed me that he was unable to work as a general manager of the company and that he preferred to work as a planner without having to control any staff and without any other duties.

7.That it was accordingly agreed between [the plaintiff] and myself that he would henceforth work for the company as planner and not general manager and that he would not therefore be entitled to the annual bonus.

The application was duly heard by Madan J. The judge directed himself as follows:

In an application for summary judgment the Court weighs the balance of probabilities carefully as well as taking into account the *bona fides* of the parties, in particular in a case where the plaintiff's claim is for a liquidated demand supported by documentary evidence.

The judge then went on to consider the conflicts apparent between what was stated in the defence, filed on 1st April 1976, and in Mr Githegi's affidavit, sworn on 7th June 1976, just over two months later. In the defence, it was pleaded that the plaintiff did not work as a general manager, but in the affidavit it is conceded that he did work in the capacity for approximately three months. In the defence it was stated that there "never was any agreement on gratuity as alleged", whereas in the affidavit it is conceded that there was such agreement, but it was contended that the plaintiff's entitlement to gratuity was abandoned by agreement between the parties. These conflicts led Madan J to remark:

... when the differences between the defence and Mr Githegi's affidavit are considered the defendant's *bona fides* are clouded with strong doubt. In his affidavit Mr Githegi seems to be setting up a new defence to the plaintiff's claim.

The judge gave his decision on the application for summary judgment in the following terms:

Nevertheless the Court will not shut out the defendant from defending the suit. The defendant company is granted leave to defend conditionally subject to depositing in Court the sum of Shs 24,000 within twenty days failing which liberty to plaintiff to sign judgment as prayed against the defendant together with costs for this application; otherwise the costs of this application to be costs in the cause claim.

From this decision the defendant, represented by Miss Karago, has appealed. Miss Karago's main submission was that as Madan J had not found that the defences put forward were a sham, he should have granted unconditional leave to defend, and she relied on *Kundanlal Restaurant v Devshi & Co* (1952) 19 EACA 77 and *Souza Figuerido & Co Ltd v Moorings Hotel Co Ltd* [1959] EA 425, and on the *dictum* of Spry JA in *Camille v Amin Mohamed Merali* [1966] EA 411, 419, to the effect that:

The general rule is, that leave to defend should be given unconditionally unless there is good ground for thinking that the defences put forward are no more than a sham; and it must be more than mere suspicion.

Miss Karago also submitted that the judge misdirected himself by saying that in an application for summary judgment the Court "weighs the balance of probabilities". With respect, I see no merit in this latter ground. As is stated in 22 *Halsbury's Laws of England* (3rd Edn), page 761:

A defendant may successfully resist an application ... if he can satisfy the master that he has a good defence to the action on the merits.

The defendant must show a reasonable ground of defence, or a *bona fide* defence or facts which may constitute a plausible defence. In deciding whether the defendant has done this, the Court must have regard to merits of the application as disclosed in the pleadings and affidavits, and in using the expression "balance of probabilities" Madan J was adverting to the matter before him, that is to say, whether on a

balance of probabilities the defendant had satisfied him that his defence was both reasonable and *bona fide*. He was not, in my view, purporting to prejudge the final decision of the suit on the merits, but was confining himself to consideration of the grounds of defence relied on as justifying leave to defend. I do not think that there was any misdirection in this respect. As regards the main ground of appeal, that unconditional leve to defend should have been given, it is true that nowhere in his ruling did the judge say, in terms, that the defences put forward were no more than a sham. He was clearly, however, most unimpressed by the validity of those defences, because in the written statement of defence the defendant had unequivocally pleaded (a) that the plaintiff did not work as a general manager, and (b) there never was any agreement on gratuity; whereas in its affidavit seeking leave to defend it conceded (a) that the plaintiff did work as a general manager for three months, and (b) that there was in fact a written agreement on gratuity which, it was contended, had been nullified by a subsequent oral agreement. The judge asked himself why the real defence had not originally been set out, and came to the conclusion that "the defendant's *bona fides* are clouded with strong doubt", and that "a new defence to the plaintiff's claim" was being set up. Clearly the judge had grave doubts as to the genuine nature of this new defence, and he almost entered summary judgment for the plaintiff. With some hesitation he decided, however, not to shut out the defendant from defending; but gave leave to defend subject to the condition that the amount of the plaintiff's claim be brought into Court. In my opinion, if a judge thinks that the proposed grounds of defence are a sham, or (which is in my view the same thing) if he thinks that those grounds are not genuine, he has a discretion to impose conditions. If the grounds of defence are reasonable or plausible, and *bona fide*, the judge has no discretion; the defendant is entitled to unconditional leave to defend. In this case, for good reasons specified by him, the judge had grave doubts as to the *bona fides* of the defences put forward in the defendant's affidavit; he doubted if they were genuine, which is equivalent to thinking that they were a sham. He accordingly had a discretion to order that leave to defend should be conditional, and it has not been shown that he exercised this discretion wrongly. I would dismiss this appeal, with costs.

Wambuzi P. I have had the benefit of reading in draft the judgment prepared by Law V-P. I agree with it and concur in the proposed order.

Musoke JA. I entirely agree with the judgment of Law V-P.

Appeal dismissed with costs.

Dated and Delivered at Nairobi this 21st day of April 1977.

S.W.W.WAMBUZI

....

PRESIDENT

E.J.E.LAW

....

VICE PRESIDENT

J.S.MUSOKE

....

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

<u>DEPUTY REGISTRAR</u>