



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: VISRAM, KARANJA & KOOME, JJ.A)**

**CIVIL APPEAL NO. 74 OF 2015**

**BETWEEN**

**DANIEL LAGO OKOMO.....APPELLANT**

**AND**

**SAFARI PARK HOTEL LTD.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

***(An Appeal from a Ruling and Order of the High Court of Kenya at Nairobi (Ougo, J.) delivered on 7<sup>th</sup> November, 2013 In HCCC NO. 427 OF 2011)***

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**JUDGMENT OF THE COURT**

1. This appeal was filed by the appellant in person on 31<sup>st</sup> March, 2015. As we were going through the record of appeal that is before us, we noticed that many important documents have been left out from the record of appeal as filed. Such include the plaint which must have set out clearly what the appellant's claim against both defendants was. We shall however, do the best we can to try and decipher the appellant's claim and what his grievance before this Court is.

2. From the Notice of Appeal dated 25<sup>th</sup> August, 2014, the appellant was aggrieved by the Ruling of Rose Ougo, J. delivered on 7<sup>th</sup> November, 2013.

From the information we can get from the record, the appellant was arrested on 25<sup>th</sup> May, 2007 at Safari Park Hotel (1<sup>st</sup> respondent) and taken to Kasarani Police Station where he was charged before Makadara Principal Magistrate's Court with trespassing upon private land in **Criminal Case No. 2827 of 2007**. He was tried and acquitted of the charge. Subsequently, the appellant filed a claim against the respondents in **Civil Case No. 427 of 2011** wherein he was granted leave to file the suit as a pauper. At some point, it appears that the appellant filed an application for summary judgment dated 4<sup>th</sup> June, 2013. Unfortunately, that application does not seem to be part of the record before us. There is however, another application dated 26<sup>th</sup> September, 2014 filed under **Order 40 of the Civil Procedure Rules**, in which the appellant was seeking injunctive orders against the 1<sup>st</sup> respondent for it to be stopped from selling its hotel during the pendency of the appellant's suit. That application was nonetheless filed after the Ruling now impugned had already been delivered, and it has no bearing to this appeal.

3. In her two page ruling in respect of the summary judgment application, the learned Judge indicated that summary judgment was sought for Ksh. 803,508/= and another Ksh 102,215,000/=. The same was opposed by the 2<sup>nd</sup> respondent by way of a notice of preliminary objection filed on 27<sup>th</sup> June, 2013 in which the 2<sup>nd</sup> respondent contended that the matter was not suitable for summary judgment and that the same ought to have been fixed for hearing.

The learned Judge dismissed the application for summary judgment but made no orders as to costs. She also magnanimously advised the appellant *“to seek help from a lawyer or legal body like Kituo cha Sheria to help him particularise his claim clearly to enable the court that will hear the case know what his actual claim is.”*

4. That unsolicited advice did not go down well with the appellant who believes that he can articulate his issues without seeking help from an advocate. That short Ruling is the subject of this appeal. There are no prayers in the appellant’s memorandum of appeal, but we believe that he is asking this Court to set aside the impugned Ruling and allow his application for summary judgment (which as noted earlier on is not in the record before us).

In his oral submission before us, the appellant faulted the learned Judge for advising him to go and seek help from a lawyer saying that *“I was not in weakness to prosecute my case”*. He also accused the learned Judge of falsifying figures.

5. Mr. Okeyo, learned counsel for the 1<sup>st</sup> respondent submitted that the learned Judge was right in refusing to allow summary judgment. He informed the Court that the case was one for malicious prosecution against the two respondents, and it was not therefore a claim for a liquidated sum. He submitted that the appellant was just throwing figures at the court without evidence as to how he had arrived at the said figures. He was of the view that the claim was one for general damages, which could not therefore be determined through summary trial.

6. Ms. Mbeda, learned counsel for the 2<sup>nd</sup> respondent was in agreement with submissions by counsel for 1<sup>st</sup> respondent. She told the Court that Ougo, J. in advising the appellant to seek help from a lawyer had acted in good faith and had no sinister motives whatsoever. She further submitted that the case was not suitable for summary judgment as the claim was unliquidated and the defences filed raised triable issues which needed to be ventilated during trial. She also informed the Court that Civil Suit No. 427 of 2011 was subsequently dismissed for *“want of prosecution”*, but she did not avail a copy of the order dismissing the same as requested by the Court.

7. Having painstakingly perused the record, in our view, there is only one issue for our determination. We agree that from the pleadings and other documents filed before the High Court, and also from the documents filed by the appellant before this Court, it is evident that his issues would have been articulated better if he had services of a lawyer. We say so in utmost good faith because, for instance, there are several important documents that ought to have been part of the record of appeal and they are not. Further, in our view, a lawyer could have been in a better position to clearly explain to the appellant the requirements in law for a matter to be suited for summary judgment. After all, the practice of law is a learning process and even the best of lawyers learn every day. It is not demeaning for a party to receive or accept advice from the Bench or the Bar. Having said so, we are satisfied that the learned Judge had no sinister motive in advising the appellant to procure services of a lawyer, and she was doing so in good faith.

8. Our task now is to examine the appellant’s claim *vis-à-vis* the law on summary judgment and determine whether his application met the required threshold for summary judgment. We have considered carefully all the material before us. We observe that learned counsel for the 2<sup>nd</sup> respondent informed the Court that the suit giving life to this appeal has since been dismissed and this appeal has therefore been left with no leg to stand on. Learned counsel submitted at length on that issue. We wish to point out that although learned counsel undertook to avail a certified copy of the dismissal order from the High Court, no such order found its way into our records. Moreover, even if the suit was dismissed for want of

prosecution, the appellant still has an opportunity to revive the same on application before that court if he is so minded.

9. We note further that the impugned ruling was in respect of summary judgment and not a case of striking out the appellant's plaint. Learned counsel for the 2<sup>nd</sup> respondent cannot therefore invite this Court to strike out the appellant's plaint as she has done through her submissions. If she wanted the suit struck out, then she should have moved the High Court under Order 2 Rule 15 for those orders, as advised by the court in the impugned Ruling.

10. As stated earlier, the only issue that falls for our determination in this appeal is whether the learned Judge erred in her finding that the appellant's claim was "not a clear case for summary judgment". **Order 36 of the Civil Procedure Rules 2010** explicitly stipulates which claims are suitable for summary judgment. It provides in relevant part:-

**36(1) In all suits where a plaintiff seeks judgment for;**

**a. A liquidated demand with or without interest; or**

**b. the recovery of land...,where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed , or part thereof, and interest, or for recovery of the land and rent or mesne profits.**

11. Did the appellant's claim meet the above criteria? As observed earlier, we could not trace a copy of the plaint in the record of appeal. We cannot therefore tell with precision what the appellant's claim was in terms of the amount. There was nonetheless a defence filed by the 1<sup>st</sup> respondent denying liability. There is also a response to the application for summary dismissal at page 20 of the record of appeal, by way of Notice of Preliminary Objection which indicated that the appellant had cited two figures in his application; Ksh.803,508,000.00/= while the plaint gave the amount claimed as Ksh. 102,215,000.00/=. These are the same figures given by the learned Judge in her Ruling. According to the learned Judge, it was not clear what the appellant was claiming and so she could not enter summary judgment. Moreover according to the 1<sup>st</sup> Respondent, there was no deposition by way of affidavit to support that claim.

12. This Court has addressed the issue of summary judgment on several occasions. Summary judgment can only be entered in the clearest of cases where the amount claimed is a liquidated amount, and where the claim is either admitted or not expressly denied and where it is clear to the court that the defence tendered is s sham and only meant to delay the matter. This Court in its decision in **ICDC vs DABER ENTERPRISES LTD [2000] 1EA 75** pronounced itself as follows;

**"The purpose of the proceedings in an application for summary judgment is to enable the plaintiff to obtain a quick judgment where there is plainly no defence to the claims. To justify summary judgment, the matter must be plain and obvious, a party to a civil litigation is not to be deprived of his right to have the case tried by a proper trial where if necessary, there has been discovery and oral evidence subject to cross examination".**

(See also **Continental Butchery Ltd V Ndhiwa, (1989) KLR 573**).

In **Dhanjal Investments Ltd V Shabaha Investments Ltd Civil Appeal No. 232 of 1997**, the Court had earlier stated as follows regarding summary judgment:-

**"The law on summary judgement procedure has been settled for many years now. It was held as early as in 1952 in the case of Kandlal Restaurant vs Devshi & Company (1952) EACA 77 and followed by the Court of Appeal for Eastern Africa in the case of Souza Figuerido & Company Ltd vs Mooring Hotel Ltd (1959) EA 425 that, if the defendant shows a bona fide triable issue, he must be allowed to defend without conditions..."**

13. Regarding what constitutes triable issues, in **Kenya Trade Combine Ltd V Shah, Civil Appeal No.**

193 of 1999, this Court stated as follows:

**“In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed.”**

14. We have considered the claim before the trial court. Although not very articulately put, there is no doubt that the genesis of the appellant’s claim is the incident where he was arrested for alleged trespass at Safari Park hotel and charged with the offence of trespass. From what we can glean from the record, the claim was one for damages for malicious prosecution and defamation. Claims for general damages for malicious prosecution, or defamation are not claims for liquidated damages. They are claims that require calling of evidence firstly to establish liability and secondly for assessment of damages. The respondents denied liability and it was imperative for the claim to go to trial. We hold the view that this case did not meet the threshold for summary judgment as set out above. The appellant’s claim was not suited for summary procedure.

15. The learned Judge did not therefore err in dismissing the appellant’s application for summary judgment. We have said enough to demonstrate that the appeal before us lacks merit. The same is accordingly dismissed with no orders as to costs.

**Dated and delivered at Nairobi this 8<sup>th</sup> day of December, 2017.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**