



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, KARANJA & MWILU, JJ.A)**

**CIVIL APPEAL NO 94 OF 2006**

**BETWEEN**

**JOB KILACH..... APPELLANT**

**AND**

**NATION MEDIA GROUP LTD.....1<sup>ST</sup> RESPONDENT**

**SALABA AGENCIES LTD.....2<sup>ND</sup> RESPONDENT**

**MICHAEL RONO.....3<sup>RD</sup> RESPONDENT**

*(An appeal from the ruling of the High Court of Kenya at Nairobi  
(Mutungi, J) dated 3<sup>rd</sup> June 2006*

*in*

*H.C.C.C No 80 of 2003)*

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. Nation Media Group Limited (hereinafter referred to as the 1<sup>st</sup> respondent) filed suit before the High Court of Kenya at Nairobi by way of a plaint dated 10<sup>th</sup> February 2003. In that plaint, the 1<sup>st</sup> respondent alleged that it had been a supplier to the 2<sup>nd</sup> respondent, Salaba Agencies Ltd. of its products and claimed to have been in agreement with the 2<sup>nd</sup> respondent that the 2<sup>nd</sup> respondent would be supplied with its products, on credit, for resale to the public, and that the 2<sup>nd</sup> respondent would pay the 1<sup>st</sup> respondent within 30 days of supply. In the course of business, the 2<sup>nd</sup> respondent got into debt to the tune of the sum of Kshs 11,704,306.00 that was due as at 29<sup>th</sup> November 2001 to the 1<sup>st</sup> respondent. Subsequently, the appellant and the 3<sup>rd</sup> respondent, as directors of the 2<sup>nd</sup> respondent admitted the sum due and owing . The 2<sup>nd</sup> respondent therefore claimed the sum of Kshs 11,704,306 from the defendants jointly as well as interest at court rates and costs of the suit.

2. The appellant filed a defence in response to that plaint. He stated that he was not a director of the 2<sup>nd</sup> respondent but that by an agreement dated 1<sup>st</sup> November 1996, the 1<sup>st</sup> respondent entered into a

newspaper distribution agreement with the 2<sup>nd</sup> respondent to facilitate the sales of the 1<sup>st</sup> respondent's publications. During the course of the distribution, the 2<sup>nd</sup> respondent became indebted to the 1<sup>st</sup> respondent and as such, the 2<sup>nd</sup> respondent and the 3<sup>rd</sup> respondent herein approached the 2<sup>nd</sup> defendant (now appellant) with a view to assisting the 2<sup>nd</sup> respondent pay the debt due. The appellant claimed that out of those negotiations, the 1<sup>st</sup> respondent intimated to the appellant that if he undertook to guarantee repayment of the outstanding debt then the 1<sup>st</sup> respondent would offer a fresh newspaper distribution agreement to the appellant and his company, Salaba Media Agencies Ltd. Based on this consideration of a newspaper distribution agreement, the 2<sup>nd</sup> defendant agreed to guarantee the outstanding sum.

3. The further defence of the appellant was that, the 1<sup>st</sup> respondent did not make good its promise to offer him or 'his' company a fresh newspaper distribution agreement, and consequently the consideration for the guarantee failed. The appellant saw that there was malice and deceit in the 1<sup>st</sup> respondent's actions and consequently maintained that it was not obliged to pay the outstanding sum.

4. The 1<sup>st</sup> respondent thereafter moved the court for summary judgment against the appellant for the outstanding sum. It based its application on the ground that the defendants owed the plaintiff the sum amount claimed and that the defence filed by the appellant did not raise any triable issues. The application was heard by Mutungi, J who allowed it. In his ruling, the learned judge stated that:

***“To me it is sheer legal farce for the 2<sup>nd</sup> defendant to say that he executed the letter of undertaking but did not execute any guarantee. That letter of understanding which he admits, and is on record, executing is the very document where he undertook to pay the debts of the 1<sup>st</sup> defendant/company to the plaintiff in the event of failure by the 1<sup>st</sup> defendant company. The company also undertook to sell the land with the proceeds therefrom being applied first to clear the indebtedness to the plaintiff... to talk of triable issues is a misnomer. There is no defence even, much less a triable issue.”***

The learned judge therefore entered summary judgment against the appellant for the outstanding sum together with interest on the said sum from the date of filing suit, as well as costs of the application and of the suit.

5. The appellant was aggrieved with that outcome and preferred an appeal to this court. In his memorandum of appeal dated 26<sup>th</sup> May 2006, the appellant sets out his grounds of appeal as follows:

***(a) The learned judge failed to appreciate that the defence filed on behalf of the appellant herein raised triable issues which could only be effectively and properly be determined at a trial of the suit;***

***(b) The learned judge made a fundamental error of law in determining the suit on an application for summary judgment on insufficient and inconclusive affidavit evidence;***

***(c) The learned judge erred in finding that the 1<sup>st</sup> respondent had made out for the grant of orders of summary judgment when no evidence was presented to show that the condition precedent to the enforcement of the undertaking contained in an instrument dated 29<sup>th</sup> November 2001 had been fulfilled;***

***(d) The learned judge misdirected himself in finding on the basis of the documents before him that the first respondent herein was entitled to summary judgment***

***(e) The learned judge erred in finding that the appellant admitted the debt when there was no such evidence presented to him***

***(f) The learned judge failed to consider and appreciate the contents of the pleadings filed and in holding the appellant liable for the debt of a company and in the absence of***

***a guarantee by the appellant, the learned judge gravely misapprehended the law;***

***(g) The learned judge took an inordinately long period of 11 months to deliver his ruling thereby losing the feel of the case leading to delivering a ruling not supported by the pleaded facts and authorities.***

6. At the hearing of the appeal Mr Awele, on behalf of the appellant, submitted that the learned trial judge erred as the defence raised serious triable issues. In particular, there was the issue that the appellant denied ever being a director of the 2<sup>nd</sup> respondent, and yet the debt had been incurred by the 2<sup>nd</sup> respondent, and not by the appellant. That the appellant merely undertook to make payment of certain amounts on condition of the fulfilment of certain conditions by the 1<sup>st</sup> respondent. The first of these conditions was that a parcel of land owned by Agro Metro Development Ltd, where the appellant and the 3<sup>rd</sup> respondent were directors and shareholders, would be sold and the proceeds would be used to set off the debt; and the second was that the 1<sup>st</sup> respondent would grant a newspaper distribution to a different agency, also owned by the appellant. As at the time the suit was filed, counsel added, the land had not been sold, and as such, the other conditions in the undertaking could not be performed.

7. Mr Khaseke on his part argued that the trial judge exercised his discretion correctly in granting summary judgment, and as is well settled, a discretionary decision will not be interfered with unless such discretion was not exercised judiciously. In Mr Khaseke's view, the appellant was attempting to approbate and reprobate certain facts. The appellant first admitted that he was a shareholder of the 2<sup>nd</sup> respondent, but later denied having anything to do with the company. Counsel further submitted that the letter of undertaking between the appellant and the 1<sup>st</sup> respondent merely gave the steps that the appellant and his co-director would follow in settling the amount that was due. As such,

Mr Khaseke urged that the appellant's defence did not raise any triable issues and asked us to dismiss this appeal.

8. This is a first appeal, and the court bears an obligation to evaluate and consider all the evidence tendered before the trial court and make its own independent conclusion. This duty was enunciated in ***Selle v Associated Motor Boat Company [1968] E.A. 123 at page 126***, wherein the Court held that:

***“... this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect.”***

9. Summary judgment has far reaching consequences. It must therefore be granted only in the clearest of cases, as was stated by this Court in ***Lalji t/a Vakkep Building Contractors v. Casousel Ltd. [1989] KLR. 386***, in which the predecessors of this Court held that:

***“Summary judgment is a draconian measure and should be given in only the clearest of cases. A trial must be ordered if a triable issue is found or one which is fairly arguable is found to exist”.***

An application for summary judgment under order XXXV rule 1 (now order 36 rule 1) may be made where the sum claimed is a liquidated sum, or where the defence raises no triable issues, and is a mere sham. In the authority of ***Continental Butchery Limited v Nthiwa [1978] KLR(Civil Appeal No. 35 of 1977)*** Madan JA set out the scope of the court's power to grant summary judgment as follows:

***“With a view to eliminate delay 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 from the plaintiff under summary procedure provided by Order 35 subject to there being no triable issues which would entitle a defendant leave to defend.”***

The principles upon which a court may grant summary judgment are therefore well settled. They have been the subject of various decisions of this Court, such as that of Postal Corporation of Kenya vs. Inamdar & 2 Others [2004] 1 KLR 359 where the following passage appears:

***“However, we have accepted that the application that was before the learned Judge was an application for summary judgment under Order XXXV rule 1 and 2. We must now consider whether the principles of law that need to be satisfied before such a judgment is entered were indeed satisfied. The law is now well settled that if the defence filed by a defendant raises even one bona fide triable issue, then the defendant must be given leave to defend.”***

10. Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner.

What then is a defence that raises no bona fide triable issue? A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term “**triable**” as, “**subject or liable to judicial examination and trial**”. It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.

In Gupta v Continental Builders Ltd [1976-80] 1 KLR 809, the court, dealing with an appeal from an award granted on a motion for summary judgment, and in considering the weight to be granted to the defendant's defence, Madan JA stated that:

***“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 justice 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.”***

11. A triable issue is said to exist if there is a dispute in the facts, which dispute can only be resolved after ventilation in a full hearing. In the case of Giciem Construction Company v. Amalgamated Trade & Services LLR No 103 (CAK) this Court stated:

***“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 the facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment.”*** (emphasis added)

A bona fide triable issue need not to be one that must succeed. This was stated by this Court in Olympic Escort International Co. Ltd. & 2 Others v. Parminder Singh Sandhu & Another [2009] eKLR (Civil Appeal 306 of 2002) in the following manner:

***“It is trite that, a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona fide.”***

12. The onus is the defendant's to show that there are bona fide issues that ought to be ventilated at full trial. This was stated by this Court in

Nairobi Golf Hotels (K) Ltd v Bhimji Sanghani Builders Contractors [1997] eKLR (Civil Appeal Number 5 of 1997) where the

Court stated that:

***“In an application for summary judgment the duty is cast on the defendant to prove that he should be given leave to defend but his duty is limited to showing prima facie the existence of triable issues or an arguable case.”***

13. In Mr Awele’s view, there were two triable issues raised in the defence and the replying affidavit; that the land had not been sold, and as such the undertaking was negated, and secondly, that, the 1<sup>st</sup> respondent failed to keep its end of the bargain by giving to the appellant a fresh distributorship agreement. In the instant case, it is admitted that the 1<sup>st</sup> respondent is owed the sum of Kshs 11,704,306.00. It is also clear that in an agreement between the parties dated 29<sup>th</sup> November 2001, the appellant and the 3<sup>rd</sup> respondent herein, Michael Rono admitted being directors and shareholders of the 2<sup>nd</sup> respondent. In that agreement, the appellant and the 3<sup>rd</sup> respondent acknowledged that the company was indebted to the 1<sup>st</sup> respondent. They therefore undertook that they would pay the sum of Kshs 5,000,000.00 to the 1<sup>st</sup> respondent upon the sale of the property, and they further undertook to sign guarantees as security for the amount due and owing by the company to the 1<sup>st</sup> respondent. In his defence, the appellant merely denied being a shareholder to the company that was indebted and that he undertook to pay the claim. He instead averred that the 1<sup>st</sup> respondent had acted with malice and deception. There can therefore be no question that the money is due and owing to the 2<sup>nd</sup> respondent. It is trite that mere denials do not constitute a good defence, as was expressed by the court in Mugunga General Stores V Pepco Distributors Ltd [1986] LLR 5111 (CAK) when it stated thus:

***“first of all, a mere denial is not a sufficient defence in this type of case. There must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason.”***

Our full analysis of the law and evidence brings us to the considered conclusion that the learned judge was correct in entering summary judgment for the appellant. We therefore find that this appeal has no merit, and we hereby order it dismissed with costs to the respondents.

**Dated and delivered at Nairobi this 20<sup>th</sup> day of March, 2015.**

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**P.M. MWILU**

.....

**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**