



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KOOME, G.B.M. KARIUKI & J. MOHAMMED, JJ.A.

CIVIL APPEAL NO. 200 OF 2009

BETWEEN

**SHEILA KINYA MAINGIT/A RIZIKI COMMUNICATIONS
APPELLANT**

AND

**MATRIX TECHNOLOGIES COMPANY LIMITED
RESPONDENT**

**(An appeal from the ruling & decree of the High Court of Kenya at Nairobi (Khaminwa, J)
dated 16th July, 2009**

in

HCCC NO. 339 OF 2005)

JUDGMENT OF THE COURT

Background

1. By a plaint dated and filed on 21st June, 2005 in the High Court, **MATRIX TECHNOLOGIES COMPANY LIMITED**, the respondent herein, claimed, among other things, the sum of KShs.4,327,155.40/= on account of Safaricom credit cards supplied to **SHEILA KINYA MAINGI T/A RIZIKI COMMUNICATIONS**, the appellant, between 17th and 27th May 2005.
2. In a defence dated and filed on 12th July, 2009, the appellant denied the claim and contemporaneously requested for better particulars of the respondent's claim.
3. On 13th July, 2007, the respondent filed an application under **Order 35 Rule 1(1)(a)** of the repealed Civil Procedure Rules seeking summary judgment to be entered against the appellant for the sum of KShs.4,327,155.40/=, plus costs. The grounds stated on the face of that application were that:

(a) The Plaintiff's claim against the Defendant is for a liquidated demand.

(b)The Defendant's defence against the Plaintiff's claim is amere denial and raises no triable issues.

4. In its affidavit in support of the application dated 13th July, 2007, the respondent averred that:

“(a) In pursuit to settling the said debt, the defendant issued six cheques which have been returned with remarks "refer to drawer" for KShs.4,327,155.40/=-, and annexed to this affidavit and marked "PNK1" are copies of the said cheques. [Emphasis supplied]

(b) the defendant (sic) defence is a sham defence meant merely to delay the course of justice and raises no issue for trial.”

5. The appellant in opposition to the application filed a replying affidavit sworn and dated 27th September, 2007, and averred as follows:

“[6] That the Defendant would draw cheques and then down load virtual cards from the computer for the value of the cheques. This was a usage that had continued until the Plaintiff abused the trust we had. In this instance, the Plaintiff was paid through the cheques but it failed to credit airtime for the value of the cheques. The Plaintiff would at times provide physical cards, which were paid for by the cheques.

0. It is true that I issued the cheques but I stopped them after the Plaintiff failed to credit my account with the value of airtime purchased. ... the deponent has stated that the cheques were returned with remarks " return to the Drawer" but the Plaintiff never bothered to refer to me as the drawer to explain why the cheques were returned. I would assume they knew they had not supplied me with the credit cards.

[Emphasis supplied]

6. The learned Judge considered the documents and submissions by counsel for the parties and was satisfied that the respondent herein was entitled to summary judgment as prayed and the orders were made.

7. Aggrieved by that decision, the appellant has lodged this appeal and proffered eight grounds of appeal which can be crystallized into three main grounds: that the learned Judge erred in law and in fact:

- i. for holding that the decision by the appellant to promptly stop the payment of the cheques before the clearing dates had lapsed and the reasons adduced for the said stoppage to the respondent was not satisfactory when there was no material before court to make and the assertion to the effect that no one would issue cheques without any consideration thereof.***
- ii. in failing to recognize that the appellant was neither supplied nor her account credited with the virtual cards for Safaricom airtime for the value of the cheques issued and hence caused them to be stopped in good time.***
- iii. when she held that the Defence is a sham, a mere denial, frivolous and therefore vexatious yet the same raises triable issues to be canvassed and adjudicated in a full trial.***

Submissions by counsel

8. The appeal was argued before us by both parties on 1st July, 2015, where learned counsel Mr L.L. Naikuni appeared for the appellant while learned counsel Mr S.K. Maina represented the respondent.

9. Counsel for the appellant addressed us on the evidence relating to the reason for stopping payment of the cheques by submitting that on or about 27th May, 2005, the appellant discovered that indeed after

issuing the said cheques, the virtual Safaricom credit cards had not been credited to her account. Consequently, on 28th May, 2005, the appellant wrote a letter requesting the respondent not to deposit the said cheques. Counsel submitted that despite the advance warning, the appellant proceeded to deposit the said cheques which were later returned and marked "return to drawer". The respondent thereafter filed a complaint resulting in the appellant being charged in **Criminal Case No. 1253 OF 2005** for obtaining goods by false pretences contrary to **Section 313 of the Penal Code**. The respondent at the same time filed a civil suit **HCC NO. 339 of 2005** which is the subject of this appeal.

10. On the business dealings between the two parties, Counsel submitted that the respondent was commissioned as a blue chip communication company dealing and selling Safaricom airtime credit cards to other sub-dealers including the appellant. Counsel submitted that both parties conducted their business dealings vide verbal agreements. The appellants would deposit post dated cheques to the respondent's account and in turn the respondent would credit the appellant's account with the virtual airtime credit cards to the value of the cheques.

11. Counsel submitted that in this particular case, the appellant had issued six cheques in the belief that the respondent would in turn issue the airtime credit worth the value of the cheques. Counsel faulted the learned Judge for finding that the reason given by the appellant for stopping the cheques was not sufficient. Counsel argued that the best decision would have been for the learned Judge to allow the case to proceed to full trial.

12. Counsel further impugned the ruling for the reason that it did not meet the threshold or satisfy the ingredients for issuance of summary judgment. He argued that for a summary judgment to be justified, the case should be clear, unambiguous and only in a case where the defence does not raise any triable issues, failing which the appellant should have been given an opportunity to be heard at full trial.

13. Counsel further contended that there are discrepancies between the amount calculated in respect of the liquidated sum from the total amount exhibited by the copies of the cheques, a fact which makes the case unsuitable for summary adjudication.

14. Finally, counsel submitted that despite the request for better particulars under **Order VI Rule 8** of the repealed Civil Procedure Rules and the subsequent affirmative ruling and order issued on 22nd July, 2005, by Kasango, J, the respondent declined to furnish better particulars in respect of the nature of the goods supplied. Counsel urged us to allow the appeal with costs.

15. On his part, Mr Maina for the respondent submitted that contrary to the assertion, the appellant did not make a stop payment on the cheques but that the cheques were returned unpaid due to insufficient funds in the appellant's account. Further, he submitted that the amount claimed was never disputed by the appellant. Counsel urged us to dismiss the appeal with costs.

Determination

16. We have carefully considered the issues raised in the appeal, the submissions by counsel and the law. This being a first appeal, we are mandated by law to re-evaluate the matter and arrive at our own independent conclusions. See **SELLE V ASSOCIATED MOTOR BOAT CO, [1968] EA 123**. The principles which guide our courts in determining applications for summary judgment have been succinctly laid down in the case of **INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION V DABER ENTERPRISES LTD, (2000) 1 EA 75** where this Court stated:

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

17. The appellant contended that she stopped payment of the cheques issued to the respondent on the

grounds that her account had not been credited with the virtual Safaricom airtime cards for the value of the cheques issued. The appellant further contended that her defence raised triable issues that ought to be canvassed and adjudicated in a full trial. The learned trial

Judge found that:

“The defendant admits having issued these cheques and then says she stopped payment. The excuse she gives for stopping the payment is not satisfactory. She says she was in business with plaintiff for a long time. I find it not truthful to say that she did not know about the debt. I find no merit in the statement of defence. I find no triable issue and I allow the application and grant orders as prayed with costs to the applicant.”

18. The question for our determination is – was this a proper case for summary judgment? Should the appellant have been given an opportunity to be heard on her defence which had been filed? In the case of **DHANJAL INVESTMENTS LTD V SHABANA INVESTMENTS LTD, CA NO. 1232 OF 1997 (Unreported)** this Court stated:

“The law on summary judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of KUNDANLAL RESTAURANT V DEVSHI & CO LTD, [1952] 19 EA 77 and followed in the Court of Appeal for Eastern

Africa in the case of SOUZA FIQUEREDO & CO V MOORINGS HOTEL, [1959] EA 425, that if the defendant shows a bona fide triable issue he must be allowed to defend without conditions.”

19. S 108 of the Evidence Act, provides that the burden of proof in a suit or proceedings lies on the person who would fail if no evidence at all was given on either side. **S 112 of the Evidence Act** also provides that in civil proceedings the burden of proving or disproving a fact within the special knowledge of a party is upon that party.

20. The respondent pleaded that their claim against the appellant was for the sum of KShs.4,327,155.40/= due and owing to the respondent on account of virtual airtime cards supplied to the appellant. The appellant did not produce the records of transactions and accounts in question to prove that the respondent did not credit her account with the virtual airtime cards to the value of the cheques issued and subsequently allegedly stopped. Further, the appellant did not claim to have paid the sums claimed or any part of it. As stipulated in **S 112 of the Evidence Act**, the burden of proving that she stopped payment of her cheques on account of the respondent’s failure to credit the virtual airtime cards to her account was upon the appellant. She failed to discharge this burden as she did not adduce the requisite evidence.

21. The respondent brought to the Court’s attention a letter from the appellant to the respondent dated 28th May, 2005, which states in part:

“I have realized that I have problem clearing some of the last cheques I had written to your company. I suspect it could be as a result of my up in my transaction of my account. Kindly give me up to Wednesday upon when I will have checked the problem with my transaction.”

It is notable the date of the letter is seven [7] days after the plaint was filed. There is no indication in the said letter that the appellant had a complaint regarding the respondent’s failure to credit her account with virtual airtime cards necessitating her to stop payment of her cheques to the respondent.

22. The learned Judge found in the circumstances of this case, that the excuse given by the appellant for stopping the payment was not satisfactory. The appellant did not adduce any evidence to prove her allegation that the respondent was in breach of his obligations to her by failing to credit her account with virtual airtime cards thereby necessitating her to stop payment of the said cheques. The appellant, therefore, failed to discharge the burden of disproving the respondent’s evidence.

23 In the circumstances of this case, the appellant did not raise any genuine defence and her defence raises no bona fide triable issue. We are satisfied that the learned Judge reached the correct decision and accordingly, this appeal is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 30th day of October, 2015.

M. K. KOOME

JUDGE OF APPEAL

G. B. M. KARIUKI

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR