



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, SICHALE & KANTAI, JJ.A)

CIVIL APPEAL NO. 194 OF 2012

BETWEEN

ORION HOTELS APPELLANT

AND

TIRTH CONSRUCTIONS LIMITED RESPONDENT

(An Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Khaminwa, J.) dated 7th February 2011 in the High Court of Kenya at Nairobi (Milimani Commercial Courts) in CIVIL CASE NO. 148 of 2008)

JUDGMENT OF THE COURT

The appellant herein, **ORION HOTELS LIMITED** (the then defendant) filed an appeal from the ruling of Khaminwa, J, delivered on 7th February, 2011. The background to this appeal is that the respondent, **TIRTH CONSTRUCTION LTD** (the then plaintiff) filed HCCC No. 148 of 2008 vide a Plaint dated 12th January 2008. The respondent's claim against the appellant *inter alia*, was for payment of Kshs.12,799,900/=. The respondent further averred in paragraph 12 of the plaint that the appellant had issued it with cheques numbers 000054 and 000055 for Kshs.3,099,077.60 and Kshs.3,000,000.00/= respectively which cheques upon presentation to the bank were dishonoured and a sum of Kshs.2,445,000/= was retention money, thus bringing the total sum to Kshs. 8,706,000/=, being part of the claim.

The appellant filed its defence and counter-claim on 19th May, 2008. It denied owing the respondent the sum claimed and averred in a counter-claim that it was owed "**special damages of Kshs.27,253,422.00**", besides interest and costs of the suit. In response to the claim of Ksh.8,706,000.00 contained in paragraph 12 of the plaint, the appellant averred.

"9. The contents of paragraph 10, 11 and 12 of the plaint are denied in toto and the plaintiff put to strict proof. The defendant denies that it owes the plaintiff any money and reiterates the contents of paragraph 4 hereinabove."

In paragraph 4 of the defence and counter-claim the appellant stated as follows:-

"4. The Defendant further avers that it performed its part of the contract and paid

Kshs.42,893,999.60 to the plaintiff during the period of construction of the lodge.”

By a motion on notice dated 11th February, 2009 and which was brought under O.XXXV rule 1 of the Civil Procedure Rules, the respondent sought summary judgment for the two cheques amounting to Kshs.6,099,077.60 which were dishonoured upon presentation to the bank as well as for the retention money of Kshs.2,445,000.00. The motion came up for hearing before Khaminwa, J, who in a ruling delivered on 7th

February, 2011 entered judgment in favour of the respondent for Kshs.8,544,077.60. The balance of the claim and counter-claim was to proceed to hearing. The appellant was dissatisfied with the outcome of the ruling and hence this appeal.

In its memorandum of appeal dated 9th August 2012, the appellant listed no less than 10 grounds of appeal. However, during the plenary hearing before us on 22nd September 2015, Mrs. Shaw, learned counsel for the appellant condensed the grounds into three. Firstly, she urged us to find that the learned judge erred in failing to find that even one triable issue would disentitle a litigant to summary judgment; secondly that the learned trial judge failed to consider the appellant's defence, and its affidavit, and thirdly that the learned trial judge erred in not finding that appellant had a right of set-off. She relied on the following authorities:

1. ***Harit Sheth t/a Harit Sheth Advocates Vs. Shamas Charani, Civil Appeal No. 25 of 2008 (Eklr 2014).***
2. ***Five Continents Ltd Vs. Mpata Investments Ltd, Civil Appeal No. 27 of 2003 (Eklr 2003).***
3. ***Wildlife Lodges Limited Vs. Jacaranda Hotel Ltd, Civil Appeal No. 242 of 1999 (Eklr 1999).***
4. ***Gohil Vs. Wamai (1983) 1 KLR 30.***
5. ***Gurbakash Singh & Sons Ltd Vs. Njiiri Emporium Ltd (1985) KLR 695.***
6. ***Sunderji Vs. Clyde House Company Ltd (1984) KLR 499.***
7. ***Uddham Singh Vs. Ambalal & Co. Ltd (1959) EA 67.***
8. ***Terrazo Parvious Vs. Standard Joinery & Building Co. (1967) EA 309.***

The cases cited by the appellant's counsel are in furtherance of her proposition that summary judgment is applicable in cases which are plain and obvious and not where there is a genuine dispute on a defendant's liability which can only be resolved at trial.

In response Mr. Okatch, learned counsel for the respondent contended that the summary judgment was in respect of the value of two cheques as well as the retention money. He contended that the appellant's defence was a mere denial and hence did not raise triable issues in so far as it related to the two dishonoured cheques and the retention money. He was of the view that the learned judge had properly entered summary judgment in favour of the respondent in the sum of Kshs 8,544,077.60.

We have considered the oral submissions of counsel and the issues raised in this appeal. The basis of an application for summary judgment under the provisions of the then order XXXV (now Order 36) of the Civil Procedure Rules is that a defendant has no defence to the claim. (see **ZOLA & ANOTHER V RALLY BROTHERS LTD & ANOTHER [1969] EA 691**). The basis upon which summary judgment is entered is that if a defendant's raises no triable issues or that the defence is a sham meant to defeat or delay the outcome of the case, then plaintiff should be enabled to obtain a quick judgment. In **HARIT SHETH T/A HARIT SHETH ADVOCATES V SHAMAS CHARAWIA [2014]eKLR** this Court stated as follows:-

“The principles which guide our courts in determining applications for summary judgment are not in dispute. In INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION V DABER ENTERPRISES LTD (2000) 1 EA75 this Court stated that 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 claims. To justify summary judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his 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 NDIHIWA (1989) KLR 573).”

And as to what constitutes a triable issue, this Court in **KENYA TRADE COMBINES LTD V SHAH Civil Appeal No. 193 of 1999**, 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.”

As stated above, the appellant filed its statement of defence on 19th May 2008. It denied owing the respondent the sum of Kshs.12,799,900.00 or at all. In the alternative, the appellant made a counter-claim and asked for special damages of Kshs.27,253,422.00

In its replying affidavit sworn on 2nd March 2009 in opposition to the motion seeking summary judgment, the appellant deponed that he had issued two bankers cheques on 19th January 2007 for Kshs.3,000,000.00 and Kshs.3,099,077.00 in place of the dishonoured cheques; that the respondent sought to be paid twice and finally that

“..... the claim for payment of the retention amount cannot arise at this stage because the applicant breached the terms of the contract and that issue can only be determined after a full hearing of the dispute between the parties.”

From the above, can it therefore be said that the appellant’s defence (and counter-claim) as well as the replying affidavit in opposition to the Notice of Motion raised no triable issue? We do not think so. The appellant and the respondent entered into a contract for the former to construct lodges in Masai Mara. In the course of time, the works were varied and the terms revised. The respondent claimed a total sum of Kshs.12,799,900/= out of which a sum of Kshs.6,099,077.60 was the value of two dishonoured cheques. The respondent also asked to be paid Kshs.2,445,000/= being the retention money. On its part, the appellant alleged that the respondent breached the terms of the contract by failing to complete the works on time and further that it carried out substandard and shoddy work. Regarding the two cheques, it was the appellant’s contention that he had replaced them with two banker’s cheques Nos. 239972 and 239971 of similar amounts as the dishonoured cheques. The appellant accused the respondent of dishonesty in claiming the value of the dishonoured cheques which he alleged he had replaced with banker’s cheques.

In our view, there are contestations as to who was owed what and we find that there are several triable issues that had been disclosed by the appellant’s defence and the replying affidavit to the application for summary judgment. We are satisfied that this was not a suitable case for summary judgment as there was a genuine dispute on whether the two dishonoured cheques had been replaced by two bankers cheques and also as to whether the works were completed satisfactorily so as to entitle the respondent to the retention sum. It is therefore our humble view that the matter raised in the plaint and in the summary judgment application did not entitle the trial court to enter a summary judgment in favour of the respondent. One cannot say that the appellant had no defence to the claim of the respondent and that its defence raised no triable issue. From our analysis, it is clear that the trial court gravely and grossly misapprehended the principle and concept of summary judgment. That was an error, which must be corrected.

Accordingly, we allow the appeal, set aside the ruling and order of Khaminwa, J dated 7th February, 2011

and substitute thereof with an order dismissing the respondent's notice of motion dated 11th February, 2009 with costs. The appellant shall have costs of this appeal.

Dated and delivered at Nairobi this 6th day of November, 2015.

M. WARSAME

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR