



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: WAKI, M'I NOTI & MURGOR J.J.A.

CIVIL APPEAL NO. 252 OF 2008

BETWEEN

HARIT SHETH T/A HARIT SHETH ADVOCATES APPELLANT

AND

SHAMAS CHARANIARESPONDENT

(Appeal from the ruling and decree of the High Court of Kenya at Nairobi (Kimaru, J) dated 9th April, 2008

in

HCCC NO. 1651 OF 2001)

JUDGMENT OF THE COURT

On 9th April, 2008 the High Court (Kimaru, J), entered summary judgment in favour of the respondent for KShs.32 million, with interest at court rates from the date of the suit, as well as costs. The learned judge found that the defence filed by the appellant comprised mere denials, was evasive and a sham meant to delay the just determination of the suit. The learned judge found too that the appellant had admitted receipt of the said sum from the respondent.

Aggrieved by that decision, the appellant lodged the present appeal in which he raised a whopping 32 grounds of appeal. As was to become plainly obvious when Mr Pheroze Nowrojee, learned senior counsel who led Mr Wanjohi for the appellant argued the appeal, the same turned on only four issues, namely:

- (i) *Whether the appellant's defence disclosed triable issues;*
- (ii) *Whether summary judgment should have been entered when the respondent's case was founded on fraud;*
- (iii) *Whether the summary judgment was based on errors of fact; and*
- (iv) *Whether the learned judge had exercised his discretion wrongly.*

We wish to remind counsel, as we did in ABDI ALI DERE V FIROZ HUSSEIN TUNDAL & OTHERS, Civil Appeal No. 310 of 2005 (unreported) and LSK V CENTRE FOR HUMAN RIGHTS & DEMOCRACY & 13 OTHERS, Civil Appeal No. 308 of 2012 (unreported) (per Kiage JA), that rule 86(1) of the rules of this Court requires that grounds of appeal should be concise, without repetition, argument or narrative and that unduly wordy and expansive grounds of appeal serve no purpose other than to obfuscate the issues.

Be that as it may, the following is the brief background to this appeal. By a plaint dated 29th October, 2001 and amended on 5th May, 2004, the respondent claimed against the appellant KShs.32 million, interest thereon at 21% per annum from 29th June, 1998 and costs of the suit. The respondent pleaded that in 1995 the appellant had represented to him that he was selling LR NO 2951/19 LORESHO NAIROBI, measuring 20.4 acres for KShs.70 million on behalf of the registered proprietor, MATHAGA LTD; that he was a director of the said vendor; and that he was acting in the transaction as the vendor's advocate. In furtherance of the transaction, the respondent paid to the appellant a deposit of KShs.32 million to be held by him as stakeholder. The respondent further pleaded that the sale fell through and although the appellant had acknowledged in writing receipt of the KShs.32 million, he had failed or refused to refund the same to the respondent despite demand. Lastly the respondent set out in the plaint extensive particulars of misrepresentation, fraud and professional misconduct and negligence on the part of the appellant.

The appellant filed a defence dated 9th January, 2002 and amended the same on 6th August, 2004. The gist of the defence was that in the transaction in question, the purchaser was *Delton Limited* rather than the respondent; that the sum of KShs.32 million was received by the appellant from or on account of the said *Delton Limited*; and that the said amount was paid over to the vendor after the completion date. The appellant otherwise denied all the particulars of misrepresentation, fraud, professional misconduct and negligence.

On 24th July, 2007 the respondent applied under the then *Order XXXV Rules 1 and 8 and Order XII Rule 6* for summary judgment for KShs.32 million as prayed in the amended plaint and in the alternative judgment on admission. The grounds upon which the application was made was that the claim was for a liquidated sum; that the appellant was well and truly indebted to the respondent; that the appellant had no reasonable defence to the respondent's claim.

The appellant resisted the application by an affidavit sworn on 22nd October, 2007 in which he endeavoured to show that his amended defence raised several triable issues which fully answered the respondent's claim, thus entitling him to unconditional leave to defend the suit. After hearing the application, the learned judge found otherwise and entered summary judgment in favour of the respondent in the terms earlier referred to in this judgment.

Mr Pheroze Nowrojee, learned senior counsel for the appellant reduced the expansive and roving grounds of appeal into the four issues already set out above. On whether the appellant's defence disclosed any triable issues, senior counsel submitted that even one *bona fide* triable issue would suffice to entitle a party to leave to defend a suit. In this appeal however, he continued, there were many plainly discernible triable issues, such as:

- 1) *Who were the parties to the transaction;*
- 2) *Whether the appellant had dealt with the respondent in his personal capacity;*
- 3) *Whether the respondent was a beneficial shareholder of Delton Ltd;*
- 4) *Who had paid the Kshs 32 million to the appellant; and*
- 5) *Whether the letter of 9th June 1998 was an admission of liability to refund the said Kshs 32 million to the respondent personally.*

Senior counsel submitted that the above issues were *bona fide* triable issues and that the learned judge had erred by making conclusive and final findings on the same without the benefit of a trial entailing cross examination and discovery.

On the issue of fraud, learned senior counsel submitted that the respondent had alleged substantial fraud against the appellant in the amended plaint. That fraud was particularized in no less than seven sub-paragraphs of paragraph 3g of the plaint. The appellant relied on the decision of this court in WESTMONT POWER KENYA LTD V FREDERICK & ANOTHER T/A CONTINENTAL TRADERS & MARKETING, (2003) KLR 357 where it was held that a court ought not to enter summary judgment when serious allegations of fraud and other wrong doing are alleged and that such issues should be decided, not on conflicting affidavits, but after a proper trial.

Regarding the errors of fact made by the learned trial judge, Mr Nowrojee cited two conclusions made by the trial judge and which he submitted were contrary to the pleadings and the affidavits filed by the parties. The first was the finding that there was an advocate and client relationship between the appellant and the respondent. Counsel submitted that the agreement for sale (which was annexed to the application for summary judgment) was between *Mathaga Ltd* and *Deltron Ltd* and not between *Mathaga Ltd* and the respondent. Counsel further argued that the pleadings were clear that the appellant had acted for *Deltron Ltd* and not for the respondent in his personal capacity.

The second erroneous conclusion reached by the trial judge, in counsel's submission, was that the respondent paid the KShs.32 million to the appellant. Counsel argued that the respondent had deponed in his own affidavit in support of the application for summary judgment that the said sum of KShs. 32 Million was paid in the name of *Deltron Ltd* rather than in his own name, and the payment was made after the agreement for sale between *Mathaga Ltd* and *Deltron Ltd*. In addition, counsel submitted, the appellant's pleadings were clear that he had not received any money from the respondent in his personal capacity but from *Deltron Ltd* for its own account.

Lastly, counsel impugned the ruling on the basis of wrong exercise of discretion. He submitted that because the learned judge had misapprehended the facts, he had taken into account matters that he ought not to have taken into account and failed to take into account relevant facts, which easily disclosed triable issues. The effect, he concluded, was wrong exercise of jurisdiction which justified interference by this Court.

Regarding the alleged admission of indebtedness of the appellant to the respondent for KShs.32 million, counsel submitted that the reference of the letter dated 9th June, 1998 (the alleged admission) was "*Deltron Ltd*" and that the letter was very unequivocal that the refund was to come from the vendor, *Mathaga Ltd* and not the appellant.

Mr Ashford Mugwuku, learned counsel for the respondent opposed the appeal and submitted that the learned judge had properly entered summary judgment in favour of the respondent. He attacked the appeal as incompetent because the appellant had not sought any relief in his memorandum of appeal as required by *rule 86(1) of the Rules of this Court*, which provision counsel submitted was a mandatory requirement.

As far as counsel was concerned, there were no triable issues disclosed before the High Court because the appellant had received KShs.32 million from the respondent; there was evidence of advocate-client relationship between the appellant and the respondent; and that there was no evidence that the appellant had received instructions from the respondent to remit the said KShs.32 Million to the vendor or that he had actually made the remittance. Counsel relied on GUPTA V CONTINENTAL BUILDERS LTD, (1978) KLR, 83 and TRUST BANK LTD V SHREEJI TRANSPORTERS (1990) LTD, Civil Appeal No. 96 of 2001 (unreported) for the proposition that where no *prima facie* triable issue is put forward for the plaintiff's claim, it is the duty of the court to forthwith enter summary judgment because it is equally against natural justice to keep a plaintiff out of his dues in a proper case.

Counsel submitted further that from the agreement for sale, the appellant was a director of the

vendor and that in itself was evidence of fraud, obviating the need for a trial. In his view, a court is not obliged to conduct a trial for the sake of it once it was convinced that there was no defence to a claim.

On the alleged admission of indebtedness by the appellant, counsel submitted that the letter of 9th June, 1998 was signed by the appellant and was addressed to the respondent. In his view, the letter constituted unequivocal admission by the appellant that he owed the respondent KShs.32 million.

Counsel concluded by submitting that the learned judge in the High Court had carefully considered the pleadings and the affidavit evidence before him and had properly concluded that the appellant's defence did not raise any triable issue; comprised bare denials; was evasive, and a sham. On the authority of the majority decision of this Court in RAGHBIR SINGH CHATTE V NATIONAL BANK OF KENYA, Civil Appeal No. 50 of 1996 (Kisumu) (unreported) counsel argued that in a liquidated claim, a mere general traverse or denial of liability without giving some reasons cannot constitute a sufficient defence.

In reply, the appellant readily admitted that the memorandum of appeal did not expressly state the nature of the order which this Court was being asked to make. However, Mr Nowrojee submitted that the appellant was not asking for any more than the orders that this Court is empowered to make by *rule 31* upon hearing an appeal. In addition, counsel relied on the overriding objectives in *sections 3A and 3B of the Appellate Jurisdiction Act* and submitted that the irregularity cited by the respondent should not be allowed to defeat the appeal.

We have considered the issues raised in the appeal as well as the submissions of counsel. On the competence of the appeal for failure to state the nature of the prayers sought, we are of the view that the same is the type of irregularity that both *Article 159 of the Constitution and sections 3A and 3B of the Appellate Jurisdiction Act* demand should not command undue regard and attention. From both the Notice of Appeal dated 10th April, 2008 and the Memorandum of Appeal itself, the appellant was aggrieved by the entire ruling of the High Court, and from the grounds of appeal it can easily be surmised, including by the respondent, that the appellant intended that the appeal be allowed and the ruling set aside. These are consequential orders which the Court has the power to make under *Rule 31*. We do not think that the failure to expressly state that the appellant is seeking the setting aside of the ruling of the High Court, and the allowing of his appeal has occasioned the respondent any prejudice.

The principles which guide our courts in determining applications for summary judgement are not in dispute. In INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION V DABER ENTERPRISES LTD, (2000) 1 EA 75 this Court stated that the purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgement 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 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...”

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.”

The defendant is at liberty to show, by whatever means he chooses, whether by defence, oral evidence, affidavits or otherwise, that his defence raises *bona fide* triable issues. (See DEDAN KING'ANG'I THIONGO V MBAI GATUMA, Civil Appeal No. 292 of 2000 and BANQUE INDOSUEZ V D J LOWE & CO LTD, Civil Appeal No 79 of 2002. Where *bona fide* triable issues have been disclosed, the Court has no discretion to exercise in regard to the defendant's right to defend the suit. (See MOMANYI V HATIMY & ANOTHER, (2003) 2 EA 600). That is precisely the reason why the defendant is entitled to unconditional leave to defend.

From the defence and the appellant's replying affidavit, can it be said that it is plain and obvious that his defence discloses no triable issues? In our view, this was not, by any means a plain and obvious case justifying an order for summary judgment. The agreement in question which was before the High Court was between *Mathaga Ltd* and *Deltron Ltd*, not between *Mathaga Ltd* and the respondent. This fact alone renders credence to the averments by the appellant that he had not dealt with the respondent in his personal capacity, but on account of *Deltron Ltd* and it was in that capacity that the sum of KShs.32 million was paid to him. The appellant has pleaded that he paid the sum of KShs.32 million to the vendor, which the respondent disputes.

For the respondent to be entitled to judgment on admission, the admission too had to be plain and clear. In CHOITRAM V NAZARI, (1984) KLR 327, Madan JA (*as he then was*) stated as follows regarding admissions:

“Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgement being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt...”

(See also Momanyi v Hatimy & Another, (*Supra*).

The letter of 9th June, 1998, far from being plain and obvious or an unequivocal admission of the appellant's indebtedness to the respondent, refers to negotiations with the vendors for mutual termination of the sale agreement and refund by the vendor of the KShs.32 million to the respondent.

It is not lost to us to that the respondent had extensively pleaded fraud against the appellant. As was stated by the former Court of Appeal for Eastern

Africa in R. G. PATEL V LALJI MAKANJI, (1957) EA 314:

“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.

(See also GUDKA V DODHIA, Civil Appeal No. 21 of 1980. It is for that reason that this Court in Westmont Power Kenya Ltd V Frederick & Another T/A Continental Traders & Marketing, (*supra*) stated that it is quite unusual to enter summary judgment when serious allegations of fraud and other wrong- doings are made.

The learned judge properly cited the principles applicable to applications for summary judgment and judgments on admission as well as the relevant authorities. But for inexplicable reasons, he did not apply those principles in this case. He completely overlooked clear triable issues that had been disclosed by the appellant's defence and replying affidavit. We are satisfied that this was not a suitable case for summary judgment and judgment on admission.

Accordingly we allow the appeal, set aside the ruling and order of Kimaru, J dated 9th April, 2008 and substitute therefor an order dismissing the respondent's notice of motion dated 24th July, 2007

with costs. The appellant shall have costs of this appeal.

Dated and delivered at Nairobi this 28th day of February, 2014.

P. N. WAKI

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

A. K. MURGOR

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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