



**IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: TUNOI, GITHINJI & AGANYANYA, J.J.A.)
CIVIL APPEAL NO. 234 OF 2005**

BETWEEN

**SULTAN HARDWARES LIMITED.....APPELLANT
AND**

STEEL AFRICA LIMITEDRESPONDENT

*(Appeal from the judgment and decree of the High Court of Kenya at Mombasa (Sergon, J.) dated 15th
August, 2003*

in

H.C.C.C. No. 104 of 1999)

JUDGMENT OF THE COURT

In a plaint filed at the High Court of Kenya at Mombasa on 10th March, 1999 the plaintiff-respondent claimed from the defendant-appellant a sum of \$30,000 being the balance of the amount of goods sold and delivered by the respondent to the appellant at the appellant's request at Mombasa during 1997 full particulars whereof were within the knowledge of the appellant. The plaint complained that in spite of notice of intention to sue in default of the payment of the amount having been given; the appellant had refused and/or neglected to pay the same. The respondent claimed that amount with interest and costs and any other or further order the Court may deem fit to grant.

The appellant filed a memorandum of appearance and defence dated 26th April, 1999 and 5th May, 1999 respectively. In the defence the appellant averred that there was no cause of action against it and that there was no privity of contract with the respondent and also denied the indebtedness to the respondent in the sum of \$30,000. And on a without prejudice basis the appellant averred that it had made payment to the respondent in respect of all goods purchased by it from the respondent and that there was no balance due and owing by the appellant to the respondent.

In an amended defence dated 30th November, 1999 the appellant averred further that one Gulza Darnesh who was its manager was used in his personal capacity as an agent of the respondent to market the respondent's products in Tanzania and elsewhere or to solicit and refer customers to the respondent at a fee or commission payable directly to the agent and that what the appellant did was only to permit the use of its premises and facilities for Gulza Darnesh to conduct his activities as such agent of the respondent.

After the respondent replied to the amended defence, it applied by notice of motion dated 8th October, 1999 for summary judgment against the appellant for \$30,000 under **Order XXXV, Rule 1** of the Civil Procedure Code with a supporting affidavit which stated, inter alia, that the appellant had no defence to the respondent's claim and was merely trying to delay matters by purporting to file a defence of general denial. A replying affidavit filed by one Mr. Kayam Chatur, the Managing Director of the

appellant opposed this application. He attached documents to show delivery of the respondent's goods to various customers including themselves.

The appellant also filed grounds of opposition and stated that the defence filed raised triable issues and that its defence was bonafide. The application was heard inter parties on 20th December, 2000, 11th September, 2002 and 18th July, 2003 the ruling delivered thereon on 15th day of August, 2003 (*Sergon J.*). In his said ruling, the learned judge stated, in part:

“I am not satisfied that the defendant has demonstrated that they have a prima facie case with triable issues with merits to go for trial. The defence raised is not bonafide. I am convinced that the plaintiff has to show that the defence put out by the defendants is a sham and that the same is bent to delay the fair trial of this suit. Consequently for the reasons I have stated I will allow the notice of motion dated 5th December, 1999. Judgment is therefore entered for the plaintiff and against the defendant in the sum of U.S. \$30,000 or the equivalent of Kenyan currency plus interest at court rates and costs”.

Arising from that ruling the appellant now appeals to this Court in a memorandum of appeal dated 9th September, 2005 and filed in this Court on 15th September, 2005. It has listed 9 grounds of appeal.

We are aware that the suit in the superior court was not heard on its merits and what is at stake before us is whether the appellant should have been given an opportunity to be heard on its defence which had been filed. In the case of ***Lalji t/a Vakkep Building Contractors vs. Casousel Ltd. [1989] KLR. 386*** the predecessors of this Court (*Nyarangi, Platt, J.J.A. and Kwach, Ag. J.A.*) 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”.

See also – ***Kassam vs. Sachania [1982] KLR 191*** and ***Zola v Ralli V Bros Ltd [1969] E.A. 591***.

In the application the subject of this appeal, the amount in dispute in US.\$30,000 – a large amount of money by any standards. On the replying affidavit, the appellant annexed many documents showing the customers to whom the respondent was supplying its products, apart from the appellant itself, thus partly shifting the indebtedness for US.\$30,000 to those other parties. Also during the hearing of the application names of James Rambira and Gulza Darnesh featured as parties through whom the respondent sent some of its products and it was only fair that the case goes to full trial to test the role played by these parties in this business. We are of the view that this is a case where the appellant should have been given an opportunity to be heard on its defence. In the ultimate we allow this appeal and direct that the case be fully heard by the superior court before another Judge at Mombasa. Costs of this application to be in the main case.

Dated and delivered at Mombasa this 4th day of March, 2011

P. K. TUNOI
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JUDGE OF APPEAL

E. M. GITHINJI
.....
JUDGE OF APPEAL
D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR