IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: O'KUBASU, KEIWUA & ONYANGO OTIENO, JJ.A.)

CIVIL APPEAL NO. 134 OF 2003

BETWEEN

ISAAC AWUONDO..APPELLANT

AND

SURGIPHARM LIMITED..1ST RESPONDENT
LIZA KIMBO..2ND RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Nairobi (Nyamu, J.) dated 21st March, 2003

H.C.C.C. NO. 1522 OF 2001)
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JUDGMENT OF THE COURT

This is an appeal from the ruling of *Hon. Justice J. Nyamu* (sitting as a High Court Judge) delivered on *21st March, 2003* in which the learned judge granted a prayer for summary judgment.

The genesis of this appeal is *High Court Civil Case No. 1522 of 2001* in which ***SURGIPHARM LIMITED*** as the plaintiff vide a plaint filed in the superior court on *3rd October, 2001* sued ***ISAAC AWUONDO*** as the 1st Defendant and ***LIZA M. KIMBO*** as the 2nd Defendant. The salient paragraphs of the plaint were as follows:-

"3. On the 26th August, 1997 one Pharma Med Limited applied to the plaintiff for the supply of goods on credit agreeing to pay interest at 30% p.a. on delayed payments.

4. By a continuing Guarantee in writing also dated the 26th August, 1997 signed by the Defendants and addressed to the Plaintiff, the Defendants in consideration of the plaintiff supplying goods and giving and continuing to give credit to the said Pharma Med Limited guaranteed and bound themselves for the repayment to the plaintiff of all sums of money the said Pharma Med Limited might then or from time to time thereafter owe to the Plaintiff.

5. The plaintiff accordingly supplied the said Pharma Med Limited with goods on credit upto December, 1999.

6. There now remains due and payable to the Plaintiff by the said Pharma Med Limited a sum of K.Shs.8,243,407/=.

7. Despite demand having been made and notice of intention to sue being given neither Pharma Med Limited nor the Defendants have paid the Plaintiff the said sum of K.Shs.8,243,407/= or any part thereof. The plaintiff claims K.Shs.8,243,407 together with interest at the agreed rate of 30% per month as from 31st December, 1999 until payment in full.

8. The cause of action arose within the jurisdiction of this Honourable Court.

9. The plaintiff avers that there is no suit pending and that there have been no previous proceedings in any court between the plaintiff and the Defendants over the subject matter herein.

REASONS WHEREFORE the Plaintiff prays for judgment against the Defendants jointly and severally for:-

(a) the sum of K.Shs.8.243,407/= with interest thereon at 30% per annum from 31st December, 1999 until payment in full.

(b) the costs of this suit together with interest thereon at court rates from the date of judgment until payment in full.

(c) *Such other or further relief this Honourable Court may deem fit to grant.”*

Through his lawyers, Oraro & Co. Advocates, the 1st defendant filed a defence dated *8th November, 2001* in which he stated inter alia:-

“3. The defendant admits that one Pharma Med Limited applied to the plaintiff for supply of goods on credit but denies that there was an agreement to pay interest at 30% p.a. on delayed payments.

4. It is further the defendants case that the application for credit facilities was limited to a maximum credit of Kshs.75,000/=.

5. The plaintiff accepted Pharma Med Ltd. application and thereafter the plaintiff allocated Pharma Med Ltd. account No. P022 in the name of Pharma Med Limited.

6. The defendant in respect to paragraph 4 of the plaint states:-

6.1 The guarantee executed by him on 26th August, 1997 was limited to the extent of credit applied for by Pharma Med Ltd.

6.2 The guarantee executed was in respect of the limited credit facilities extended to Pharma Med Limited on account No. P022.

7. The defendant avers that he was discharged from any further obligations under the subject guarantee on 28th August, 1998 when account No. P022 was closed by the plaintiff with a zero balance and the plaintiff made a fundamental departure from the original terms of the principal credit contract.

8. It is the defendant’s case that he is not liable under his guarantee or at all for goods supplied or any other account.

9. The defendant has no knowledge of the contents of paragraphs 5 and 6 of the plaint and avers that he is a stranger thereto.

10. Paragraph 7 of the plaint is denied.

11. Paragraph 8 and 9 of the plaint are admitted.

12. It is the Defendant's case that the plaint is bad in law, discloses no cause of action and is an abuse of the process of the court.

REASONS WHEREFORE ***the Defendant prays that the Plaintiffs suit be dismissed with costs."***

On her part, the 2nd defendant filed her defence through her lawyers Simba & Simba Advocates and the pertinent paragraphs of that defence were as follows:-

"2. The 2nd Defendant denies intoto the contents of paragraph 3 of the plaint filed in particular that the alleged transaction took place.

3. The 2nd Defendant denies intoto the contents of paragraph 4 of the plaint. In particular the 2nd Defendant states that the alleged Guarantee does not nor did not exist and the plaintiff is put to strict proof thereof.

4. The 2nd Defendant denies the contents of paragraph 5 of the plaint and states that no such goods as alleged were supplied to Pharmamed Limited.

5. The 2nd Defendant denies intoto the contents of paragraph 6 of the plaint and states that neither the alleged nor any sum is owing to the Plaintiff from Pharmamed Limited and the Plaintiff is put to very strict proof thereof.

6. In the alternative and without prejudice to the generality of the foregoing, the 2nd Defendant states that if any Guarantee existed at all, which is still denied, the Guarantee was in respect of a completely different transaction for a certain sum of money not covered by the transaction subject of this suit. The 2nd Defendant shall also aver that the earlier Guarantee was time barred long before this suit was filed and this suit is therefore time barred and should be struck out with costs to the 2nd Defendant.

7. Further and without prejudice to the generality of the foregoing, the 2nd Defendant states that the alleged interest of 30% was never agreed upon, and if it were, which is denied, is punitive and ought not to be allowed.

8. No demand or notice of intention to sue has been given to the 2nd defendant and the plaintiff is therefore not entitled to the costs of this suit as prayed or at all as against the 2nd defendant.

9. The 2nd Defendant admits the contents of paragraphs 8 and 9 of the plaint save that the plaintiff has no cause of action against the 2nd Defendant.

10. Save what is herein above expressly admitted the 2nd Defendant denies each and every allegation of fact in the plaint as if the same were herein expressly and seriatim set out and traversed verbatim.

REASONS WHEREFORE the 2nd Defendant prays that the Plaintiff's suit against her be dismissed and/or struck out with costs to the 2nd Defendant."

By a Notice of Motion dated *19th November, 2001* expressed as having been brought under ***"Order XXXV rule 1, 5,*** and ***8 Order VI rule 13(1)(b)*** of the Civil Procedure Rules, ***section 3A*** of the Civil Procedure Act and all enabling provisions of law", the plaintiff sought the following orders:-

"1. Judgment be entered against the defendants jointly and severally for the sum of

K.Shs.8,243,407/= with interest thereon at 30% per annum from 31st December, 1999 until payment in full.

2. The Defence be struck out for being scandalous frivolous and vexatious.

3. The costs of this application be awarded to the plaintiff."

That application was brought on the following grounds:-

"1. In consideration of the plaintiff supplying goods on credit to one Pharma Med Limited the Defendants by a letter dated 26th August, 1997 jointly and severally guaranteed to pay to the plaintiff all moneys that may become due and payable to the plaintiff by Pharma Med Limited.

2. As at 31st December 1999 a sum of K.Shs.8,243,407/= remains due and payable to the plaintiff by the said Pharma Med Limited. The said company is now insolvent.

3. Despite demand having been made the Defendants have failed, refused and/or neglected to pay the Plaintiff the outstanding amount or any part thereof."

The application was placed before Nyamu, J. (as he then was) on *4th March, 2003* for determination.

The learned judge considered the rival submissions presented before him and came to the conclusion that the plaintiff was entitled to summary judgment as prayed in the Notice of Motion. In concluding his ruling delivered on *21st March, 2003* the learned judge said:-

"Although there was a limit of K.shs.75,000 in the initial application form the application itself is not the Guarantee in law and as outlined above it cannot be used to explain the Guarantee, and this suit is based on the guarantee whose words are not ambiguous. It is clear from the accounts and the subsequent dealings between the parties that higher amounts than K.Shs.75,000 were contemplated and indeed transacted and the Guarantee itself is unlimited in amount and is of a continuing nature. I accordingly accept the legal position as outlined above.

From the above analysis I find no bona fide triable issue or defence.

The prayer for summary judgment succeeds.

I would therefore enter judgment as prayed in the plaint and also award the costs of this application to the plaintiff."

Being aggrieved by the foregoing ruling the 1st defendant, through his lawyers, filed this appeal citing the following seven grounds of appeal:-

"1. THAT the learned judge erred in failing to appreciate sufficiently or at all that the pleadings, affidavits and submissions made before him disclosed several triable issues which could only be effectively and properly determined at a trial of the suit.

2. THAT the learned Judge made a fundamental error of law in determining the said issues on conflicting and insufficient affidavit evidence and relying on materially altered documents.

3. THAT the learned Judge erred in law in finding that the appellant had no defence to the first respondent's claim and that the appellant's statement of defence did not disclose or raise any reasonable or plausible triable issues.

4. THAT the learned Judge misdirected himself in finding on the basis of the documents before him that the defence filed by the appellant was a sham and did not merit being ventilated at a full trial.

5. The learned Judge misdirected himself in proceeding on the premise that the Appellant's status as a shareholder/director of the principal debtor was the same as his status as a guarantor.

6. THAT the learned Judge misdirected himself in finding that the guarantee furnished by the appellant to secure payments in respect of account No. P022 covered account P002 held by Pharmamed/AAR.

7. The learned judge erred in law in failing to appreciate that the guarantee which was subject of the suit had been discharged by the First Respondents action in materially altering the terms of the principal contract."

The appeal came up for hearing before us on *21st September, 2010* when Mr. Chacha Odera appeared for the appellant, ***ISAAC AWUONDO***, while Mr. O.P. Nagpal with Mr. Goswami appeared for the 1st respondent, ***SURGIPHARM LIMITED*** and Mr. Khamala appeared for the 2nd respondent ***LIZA KIMBO***. It was agreed by consent of the advocates appearing for the parties that written submissions be filed after which the appeal was listed for further hearing on *21st October, 2010* when counsel for the parties would highlight their respective written submissions.

On *21st October, 2010* the Court reconvened and counsel informed the Court that they would go by their written submissions. Judgment was set for *10th December, 2010* but, unfortunately, by that date one of the judges had fallen sick ending up in his being flown to India for specialized treatment. This has contributed to the delay in delivering this judgment.

Having perused the pleadings, the ruling of the learned judge and the written submissions filed by counsel for the parties, we are of the view that the main issue to be determined is whether this was a proper case for summary judgment. It is for this reason that we set out the pertinent paragraphs of the plaint and the defences filed in the superior court.

The dispute herein relates to supply of goods which the 1st respondent claims to have supplied to a firm connected with the appellant, based on a continuing guarantee signed by both the appellant and the 2nd respondent. The 1st respondent's claim was said to be the balance of the purchase price which at the time of filing suit in the superior court stood at **Shs.8,243,407/=.** The appellant's answer to the foregoing was that both the appellant and 2nd respondent had applied for credit facilities limited to a maximum of **K.Shs.75,000/=** and that the appellant was discharged from any further obligations under the guarantee on *28th August, 1998* when account No. P022 was closed by the appellant with a Zero balance. It was the appellant's contention, as per his defence, that he was not liable under his guarantee or at all for goods supplied on any other account.

In her defence the 2nd respondent denies the claim and goes on to aver that if any guarantee existed at all then it was in respect of a completely different transaction for a certain sum of money not covered by the transaction subject of the suit.

The foregoing sets out the respective positions of the parties in this suit. The learned judge considered what was urged before him in the application for summary judgment and came to the conclusion that the plaintiff (*1st respondent in this appeal*) was entitled to summary judgment as prayed. We still have to answer the question we posed earlier. Was this a proper case for summary judgment?

Summary judgment is a drastic remedy which may be granted in clearest of cases in which there is no bona fide defence to the plaintiff's claim. Can it be said that the appellant herein had no defence to the claim against him in the superior court? We have briefly stated the defence put forth by each defendant in the superior court. There is an issue whether the credit facilities were limited to Shs.75,000/=. There is also an issue whether the appellants account was closed by the first respondent with the account reading zero. Lastly there is the issue of guarantee. Was it a continuing guarantee? These in our view were issues

which required evidence to be adduced before final determination.

In ***MOI UNIVERSITY VS. VISHVA BUILDERS LIMITED*** - *Civil Appeal No. 296 of 2004* (unreported) this Court said:-

"The law is now settled that if the defence raises even one bona fide triable issue, then the defendant must be given leave to defend. In this appeal we traced the history from the commencement of relationship between the parties herein. The dispute arises out of a building contract. In the initial plaint the sum claimed was well over 300 million but this was scaled down by various amendments until the final figure claimed was Shs.185,305,011.30/- We have looked at the pleadings and the history of the matter and it would appear to us that the appellant had serious issues raised in its defence. As we know even one triable issue would be sufficient – see H.D Hasmani v. Banque Du Congo Belge (1938) 5 E.AC.A 89. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in Patel vs. E.A. Cargo Handling Services Ltd. [1974] E.A. 75 at P. 76 Duffus P. said:-

*"In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as SHERIDAN , J put it "*a triable issue*" that is an issue which raises a prima facie defence and which should go to trial for adjudication."*

And finally in **Postal Corporation of Kenya vs. Inamdar & 2 Others [2004] 1 KLR 359** at p. 365 this Court said:-

*"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. There are several authorities in support of this proposition. One of them is this Court's decision in the case of* **Continental Butchery Limited vs. Samson Musila Ndura**, *Civil Appeal No. 35 of 1997 where this Court stated:*

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.

If a bona fide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the Court feels justified in thinking that the defences raised are a sham.

*That decision was made in 1977. In 1997, this Court again confirmed the same principle in the case of **Dhanjal Investments Limited vs. Shabana Investments Limited**, Civil Appeal No. 1232 of 1997 (unreported) where it 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 vs. Devshi & Company Limited [1952] 19 EA 77*, ***and followed in the Court of Appeal for Eastern Africa in the case of*** *Souza Fiqueredo & Co. vs. Moorings Hotel* ***[1959] EA 425, that if the defendant shows a bona fide triable issue he must be allowed to defend without conditions."***

In view of the foregoing, we are satisfied that the appellant's defence in the superior court raises triable issues which should have been allowed to go for adjudication and hence this was not a proper case for summary judgment. We must hasten to state that a defence which raises triable issues does not necessary mean a defence that will eventually succeed.

For the foregoing reasons, this appeal is allowed, the ruling of the superior court dated *21st March, 2003* is set aside and the appellant is permitted to defend *Nairobi High Court Civil Case No. 1522 of 2001.*

The appellant will have the costs of this appeal and costs in the superior court. It is so ordered.

Dated and delivered at NAIROBI this 8th day of April, 2011.

E.O. O'KUBASU
....
JUDGE OF APPEAL

M. OLE KEIWUA
....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO
....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR