IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 95 OF 2002

OVERSEAS TRADING COMPANY LTD.

T/A "DECORA NOVA" ……...……..…….. APPELLANT

AND

SHAH HIRJI MANEK LIMITED

BAMBIS AGENCIES LIMITED ……..…...……. RESPONDENTS

(Appeal from the judgment and decree of the High Court of

Kenya at Nairobi (Mbaluto, J.) dated 21st September, 2001

in

H.C.C.C. NO. 311 OF 2001)

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JUDGMENT OF THE COURT

The appeal before us was argued on 22nd October, 2009 but was not opposed by the two respondents for different reasons. The first respondent's Advocates on record are M/S. Wamalwa & Company Advocates and they were duly served with the hearing notice but failed to attend Court. The second respondent's advocate is Mr. Satish Gautama who was also served with the hearing notice and was in court. However, Mr. Gautama informed the Court that his clients had gone bankrupt and he would not take part in the appeal on their behalf. That left learned counsel for the appellant, Mr. Kelvin Mogeni to urge the appeal unopposed. We shall return to the submissions of counsel shortly.

The appeal arises from the decision of the superior court in which Mbaluto J. granted summary judgment in favour of **M/S. Shah Hirji Manek Ltd**. ("*Manek*") the 1st respondent, and declared that the defences filed by **M/S. Overseas Trading Company Ltd. t/a Decoranova** ("*Decoranova*"), the appellant, and **M/S. Bambis Agencies Ltd**. ("*Bambis*"), the 2nd respondent, had no merits. The learned judge however declined to grant a prayer for interest claimed at 36% p.a. The decision was made pursuant to a motion taken out on 21st June, 2001 by Manek under ***Order 35 Rule 1*** and ***2*** of the Civil Procedure Rules

asserting that there was no possible defence to the cause of action; that the amount claimed was indisputably due; and that the defences filed were a sham, raised no triable issues and were merely calculated to delay the course of justice.

The main suit between the parties was filed by Manek on 2nd March, 2001 against one "Decoranova Ltd.", Bambis, and one "Harish Devani". The plaint was subsequently amended with leave of the Court on 23rd May, 2001, deleting "Decoranova Ltd" and substituting therefor "Overseas Trading Company Ltd" T/A "Decoranova" as the 1st defendant. The dispute between the parties revolves around some six promissory notes amounting to Shs.12,837,000 and the cause of action was pleaded in paragraph 4 of the amended plaint as follows:

"4. The Plaintiff's claim against the last (sic) 1st and 2nd defendants is for the sum of Kshs.12,837,000.00 being the amount due and payable from the defendants to the plaintiff on account of six (6) promissory notes made by the 1st defendant to the 2nd defendant who in turn endorsed to and discounted the same for value to the plaintiff who thereby became the holder in due course for value of the said promissory notes particulars of which (sic) set out hereunder: -

PARTICULARS

NUMBER & DATE OF NOTE	*DUE DATE*	*AMOUNT*
1. No. 331 29.7.96	*10.10.96*	*2,139,500.00*
2. No. 332 29.7.96	*20.20.96*	*2,139,500.00*
3. No. 333 29.7.96	*30.10.96*	*2,139,500.00*
4. No. 334 29.7.96	*9.11.96*	*2,139,500.00*
5. No. 335 29.7.96	*19.11.96*	*2,139,500.00*
6. No. 336 29.7.96	*29.11.96*	*2,139,500.00*

It was further pleaded that one "Harish Devani", sued as the 3rd defendant had guaranteed payment of the promissory notes on due dates. The promissory notes were subsequently dishonoured on due dates and notice of dishonor was given but ignored. Manek therefore sought judgment for the sum of Shs.12,837,000 plus interest at the rate of 36% p.a. from 29th November, 1996 until payment in full.

Decoranova filed defence to the action asserting, *inter alia*, that the instruments upon which the suit was based were not promissory notes and if they were, they had been materially altered; that Manek had been illegally carrying out financial dealings in contravention of the provisions of the **Banking Act**; that only accommodation bills, and not promissory notes, were involved in the transaction between the parties; that the whole debt was settled when Manek accepted a sum of Shs.10,128,050 from Decoranova in full and final settlement of all outstanding bills; and that there was no basis for demanding interest at the rate of 36% per annum.

Bambis also denied the claim through Wamalwa & Advocates asserting that only "accommodation bills" were endorsed by them in blank and handed over to "Harish Devani" the third defendant in the suit. They further contended that the business of Manek was money-lending lending at exorbitant rates of interest which was contrary to the Banking Act and in any event the debt had been settled long before the suit was filed. Furthermore, none of the promissory notes was presented for payment, no notice of dishonor was given, and material alterations were made on the documents, thus discharging Bambis of any liability.

Harish Devani, the 3rd defendant, also a director of Bambis, filed his defence through Satish Gautama denying liability as a guarantor but he died before the hearing of the motion for summary judgment. The

superior court observed that there was no application made to substitute the estate of the deceased and therefore declined to make any orders in relation to the claim against the deceased.

A director of Manek swore the affidavit in support of the motion exhibiting the promissory notes upon which the claim was based indicating that they were presented for payment on due dates but were dishonoured and notice of dishonor given. The director also referred to previous similar dealings with the defendants and said the defence of illegality was made in bad faith and the defendants were estopped from challenging the validity of the promissory notes. At all events, they added, the defendants were always willing to settle the promissory notes and only needed time to do so and it did not matter whether it was an accommodation bill or not. He deponed finally:

"11. That the defendant cannot deny their indebtness to the plaintiff when they have already admitted the same and even proposed to pay the amount claimed, as per their letter dated 8th November, 1996 and the allegations of payment having been made on 23rd November, 1996 are alse as payment for the promissory notes in question was rescheduled by the defendants to January and February 1997 and the payment made on 23rd November, 1996 was in respect of different promissory notes copies of which are attached hereto and marked "SS 4"that were due in November, 1996.

12. That to my knowledge there have never been any alterations to the said promissory notes and if there were any changes they were in the rescheduling of the payment dates as proposed by the defendants."

There was a lengthy Affidavit from a director of Decoranova in response to that affidavit asserting that the written statement of defence raised triable issues and summary judgment was therefore not the remedy. He swore that the purported promissory notes were presented to him and were signed in blank on the understanding that they were only accommodation notes to enable Bambis to discount them. There were no dates or numbers or due dates on any of them. The documents produced in support of the application were however numbered and fully completed with other details which were not there before. All that was done without the knowledge or authority of Decoranova and therefore they were not binding on Decoranova. The director further made the following depositions:

"19. That the first defendant had previously issued similar promissory notes since 1992 to the second defendant for its accommodation and all of them were discounted by the plaintiff with the knowledge that they were accommodation notes made by the first defendant for the benefit of the second defendants.

20. That in the premises, the first defendant had, to the knowledge of the plaintiff, signed each of the promissory notes sued on as surety for the second defendant.

21. That in or about January 1997, the plaintiff, in response to the second defendant's letter dated 17th January, 1997 (wrongly typed as 17th January, 1996) entered into a binding agreement with the second defendant to grant the latter time, and did in fact give it time, to pay the amounts due under the aforesaid six promissory notes. The said agreement was made without the knowledge or concurrence of the first defendant. In view of this fact, I am advised by Mr. I T Inamdar and verily believe that the first defendant is discharged from all liability in its capacity as surety as aforesaid and the plaintiff has therefore no cause of action against it."

There was also an affidavit in reply from a director of Bambis raising what they believed were triable issues.

Upon consideration of the application and the issues raised by the parties, the learned Judge found nothing in the defences or replying affidavit to amount to a bona fide defence except the claim that the interest claimed at 36% per annum, should go for trial. He dismissed the issue of illegality of previous dealings between the parties as wholly irrelevant as they had no bearing on the promissory notes the subject matter of the suit; held that there was admission of the debt in correspondence between the parties; found that the promissory notes were not accommodation notes as pleaded by the defendants, and

even if they were, the plea was irrelevant under ***Section 28 (2)*** by the Bills of Exchange Act; declared that the alterations made on the promissory notes were not material and was acceptable under ***Section 12*** of the Bills of Exchange Act; determined that the promissory notes accorded with the definition under ***Section 84 (1)*** of the Bills of Exchange Act; held as a matter of law that it was not necessary for notice of dishonor to be given; and found as a matter of fact that the promissory notes were dishonoured.

Those are the findings which provoked the appeal before us. The memorandum of appeal raised 16 grounds, but Mr. Mogeni sought to argue them in four tranches to establish in the end that there were triable issues and therefore the suit was not for determination under ***Order 35 Rule 1*** of the **Civil Procedure Rules**.

There is, of course, considerable learning relating to the application of ***order 35*** and we do not intend to analyse the wealth of authorities placed before us in that regard. Suffice it to emphasize that a solitary triable issue of fact or law, if bona fide, will suffice to entitle a defendant to unconditional leave to defend the suit. It has also been said that summary power should be used sparingly even where its use can be justified as being economically prudent because excessive use of such power can lead only to multiplication of the expenditure of time and money – see **Sunderji vs. Clyde House Company Ltd. [1984] KLR 499**.

Mr. Mogeni argued in the second tranche of his grounds of appeal (grounds 8 – 13) that there was a serious issue of construction of ***section 84*** of the **Bills of Exchange Act, Cap 27**, to determine whether, as contended by Manek and denied by Decoranova, the instruments the subject matter of the suit were promissory notes, and if they were, that they were drawn in accordance with the law. It was also important to determine through evidence, tested in cross-examination, whether the appellant, was merely an "accommodation party" as pleaded and therefore no liability lay against it. In Mr. Mogeni's view, the learned judge confused the definitions of a "Bill of Exchange" (**under section 3**), "accommodation Bill" (**under section 28**) and "Promissory note" (**under section 84**)of **Cap 27**, and in the process failed to appreciate the defences put forward by the appellant.

It was also Mr. Mogeni's submission under ground 1 and 7 that the issue of illegality of the entire transaction was summarily rejected without cause. That is because there was evidence, which Manek attempted to explain away, that there were previous dealings between the parties in which huge amounts of money changed hands and there was necessity therefore to explore that pleading and the relevance of it to the proceedings. It was erroneous therefore to declare the defence as irrelevant. Finally Mr. Mogeni submitted under grounds 14 – 16 that the issue of presentation of the instruments for payment and service of notice of dishonour were necessary prerequisites to the claim but there was no evidence to establish those requirements. It was erroneous therefore to hold, as the learned judge did that the law stated otherwise and that there was sufficient evidence of presentation of the promissory notes for payment.

We have carefully considered the submissions of Mr. Mogeni and examined the record fully. In our view, the appellant has sufficiently satisfied us that there was more than a solitary triable issue in this matter and it was not open to the superior court to grant summary judgment in the manner it did. Other than the claim of interest at 36% p.a which the superior court properly found was a triable issue, we think the circumstances relating to the issuance of the instruments the subject matter of the suit, the nature thereof and whether liability therefor arose and/or was satisfied, need full investigations on oral evidence tested in cross-examination. In view of the order that we are persuaded to make, we do not wish to embark on any analysis of the material on record as it may be prejudicial to the parties.

In the result, we allow this appeal, set aside the orders issued by the superior court on 21st September, 2001 and substitute therefor an order that the notice of motion dated 20th June, 2001 be and is hereby dismissed. The suit will be heard and determined on oral evidence. The costs of this appeal and of the notice of motion before the superior court shall abide the result of the main suit.

Dated and delivered at Nairobi this 22nd day of January, 2010.

P.N. WAKI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

J.G. NYAMU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR