IN THE COURT OF APPEAL

AT NAIROBI

(CORAM:OMOLO, O'KUBASU JJ A & ONYANGO-OTIENO AG JA)

CIVIL APPEAL NO. 189 OF 2001

BETWEEN

POSTAL CORPORATION OF KENYA .....APPELLANT

AND

I.T.INAMDAR & 2 OTHERS .....RESPONDENTS

(Appeal from the ruling and order of the High Court at Nairobi (Visram J) dated July 5, 2001

in

H.C.C.C. No 1629 of 2000)

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JUDGMENT

Mr IT Inamdar, a senior partner in the firm of Inamdar & Inamdar Advocates, was instructed by Kenya Posts & Telecommunications Corporation before the same corporation was demerged by the Postal Corporation Act 1998, to act for it as a lead counsel in an application in HCCC No 822 of 1996 at Nairobi. His firm entered into an agreement with the same Kenya Posts & Telecommunication Corporation that the fees for the firm (in which the respondents are the partners) would be Ksh.2,000,000/= (exclusive of VAT and disbursements). Half of this was to be paid in advance and the balance would be paid at the conclusion of the application. Kenya Posts & Telecommunication Corporation paid the firm of Inamdar & Inamdar Ksh1,160,00/= representing the agreed 50% down payment plus VAT. Before the balance could be paid, Kenya Posts & Telecommunication Corporation was then split and by virtue of Legal Notice No. 156 of 1999, its liabilities with respect to HCCC No 822 of 1996 were vested in the appellant. The respondents lodged a claim against the appellant, Postal Corporation of Kenya for Ksh1,203,464/= being the balance of the agreed fee plus VAT and disbursements. The appellant filed memorandum of appearance and statement of defence. In the statement of defence, the appellant admitted certain parts of the plaint but it denied that any liability relating to the fee agreement was vested in it by virtue of Legal Notice No 156 of 1999. Three days after the filing of the statement of defence, the respondent filed notice of motion which was, on the face of it, brought under order 35 rules 2 & 3 of the Civil Procedure Rules. That notice of motion had only one prayer which was as follows:

"1. The judgment be entered against the defendant as prayed in its plaint filed herein."

The application was brought on one ground and that was that:

There is no defence to the plaintiff's claim against the defendants in this action."

That notice of motion was supported by an affidavit sworn by Indravadan Tribhovandas Inamdar. The deponent in that affidavit having set out the history of the claim, ended by stating that the appellant was truly indebted to his firm in the sum claimed and that he believed there was no defence to the suit. The appellant replied to that affidavit by way of its (appellant's) affidavit sworn by its Corporation Secretary, Mr JFK Omanga and filed on 20th November, 2000 in which the appellant stated that whereas Legal Notice No 156 of 1999 vested certain liabilities of the defunct Kenya Posts & Telecommunication Corporation on the appellant and whereas HCCC No 822 of 1996 had been vested in the appellant, the respondents' claim which was a claim based on a contract of service to provide legal services to Kenya Posts & Telecommunications was not part of the liabilities vested in the appellant. That notice of motion came up for hearing before Visram J, who after hearing it allowed the application as prayed. The appellant was aggrieved and has brought this appeal, which has eleven grounds.

We have considered the eleven grounds cited in the memorandum of appeal. In our view some of the grounds namely grounds 1, 2, 7 and 10 are grounds that complain against the entry of summary judgment without allowing the appellant an opportunity to be heard on the entire case whereas the remaining grounds are attacking the substantive decision of the learned judge of the Superior Court on the way he interpreted and applied the provisions of Legal Notice No 156 of 1999. For reasons that will emerge from our judgment later, we propose to consider the grounds that fall in the first category. These are, as we have stated, grounds 1, 2, 7 and 10. These state as follows:

"1. The learned judge erred in law and in fact in granting the strong remedy for summary Judgment when the application before him was premised solely on order XXXV rules 2 and 3 of the Civil Procedure Rules, Cap 21 of the Laws of Kenya.

2. The learned judge erred in law and in fact in unilaterally transforming the application before him for summary judgment to one for judgment on admission without any legal justification whatsoever.

...

7. The learned judge erred in law and in fact in failing to appreciate the strong defence on record for the appellant and the weighty triable issues raised therein.

...

10. The learned judge erred in law and in fact in accepting the explanation offered by Counsel for Respondents for the incompetence of the application before him, well after an objection was raised and he further erred in law in that he proceeded to grant the summary Judgment when the said "Typographical error" was not corrected/amended."

We stated at the beginning of the judgment that the application that was before the Superior Court was brought under order 35 rules 2 and 3 of the Civil Procedure Rules. The relevant rule for summary judgment application is rule 1 of the same order 35 and that was not cited in the application. Further, the prayer in the application did not specifically seek summary judgment to be entered. All it did seek was that "judgment be entered against the defendant as prayed in the plaint filed herein."

In our view, the notice of motion that was before the Superior Court could have been better drafted and the appellant's sentiments are not altogether baseless, particularly when one considers that the application was seeking orders that were to see a finality of the entire suit. However, we also note that the learned counsel for the appellant did not lose sight of the main gist or the thrust of the application and appreciated that the application was for summary judgment under order XXXV rules 1 and 2 of the Civil Procedure Rules. Under those circumstances, we do not find that the appellant was prejudiced by the bad drafting of the notice of motion and thus, nothing turns out on the first and tenth grounds of appeal. Citation of a

wrong order or rule is not necessarily fatal to an application.

That leaves grounds 2 and 7 for consideration. The application, as drafted, with the flaws as we have referred to hereinabove, was apparently for summary judgment under order 35 rules 1 and 2. The record however, shows that when the application came up for hearing before the Superior Court, Mr Esmail, the learned counsel for the respondents, opened his submissions as follows:

"Application is dated 8.11 for judgment on admission for payment of balance of their fees."

He then proceeded to address the Court but did not point out, as the record shows, any evidence demonstrating that the appellant admitted the alleged debt either in the pleadings, in any other documents or otherwise. The appellant's counsel in his address in reply pointed out to the Superior Court that the application was for summary judgment and not for judgment on admission. But in answer to that submission, counsel for the respondents confirmed his position when he stated: "Body of application makes clear that it is for judgment on admission."

But again, he did not point out the admitted parts of the claim and the manner in which the debt was admitted; whether in the pleadings or by other documents. The learned judge of the Superior Court in the opening remarks of his ruling stated: "This is an application for judgment on admission and stated to be brought under order XXXV rules 2 and 3 of the Civil Procedure Rules (hereinafter referred to as "the rules")"

He also went further and confirmed towards the end of his ruling that Mr Esmail had argued in reply to the appellant's case that from the body of the application, it was clear that the application was for judgment on admission and the learned judge agreed with Mr Esmail, but for some reason not easy to understand, he stated that Mr Ahmednasir for the appellant, in saying the application should have been brought under order XXXV rule 1 of the Civil Procedure Rules, did confirm that he (Ahmednasir) knew the substance of the application. Of course, the learned counsel for the respondents knew the substance of the application to be an application for summary judgment under order XXXV rule 1 and not an application for judgment on admission under order 12 rule 6 as the learned judge of the Superior Court appeared to appreciate.

It is clear to us from the parts of the proceedings and from the parts of the ruling of the learned judge of the Superior Court that the learned judge treated the application as an application for judgment on admission. He may have been confused by the submissions by the learned counsel for the respondents but whatever happened, in doing so, he was plainly wrong. The application that was before him was in substance an application for summary judgment under order XXXV rule 1 of the Civil Procedure Rules, and should have been considered as such. Further, even if it were to be treated as an application for judgment on admission, what constituted admission? We have, on our own, perused the pleadings and the relevant documents including the affidavits and we cannot see any admission of the amount in dispute by the appellant. Mr Esmail in his submission to us, stated that the defence admitted that 50% of the agreed fee was paid; and pointed out that at paragraph 2 (a) of the appellant's replying affidavit to the notice of motion that was before the Superior Court, the appellant did admit paragraphs 2, 3, 4 & 6 of the respondents' affidavit. In our view, the admitted paragraphs of the respondents' affidavit ie paragraph 2, 3, 4 and 6 were on matters that were never in issue, nor could the payment of 50% of the claim be construed to be an admission for purposes of the application that was under consideration as that payment was made by Kenya Posts & Telecommunication Corporation before the demerger of the same corporation. The appellant was a creation of the same demerger. The issue that was in dispute as we understand it, was as to whether the contract of service entered into between the respondent and defunct Kenya Posts & Telecommunication Corporation is part of liability vested in the appellant after the demerger of Kenya Posts & Telecommunication Corporation. We can see no admission of this pleading either in the appellant's defence, replying affidavit or any other documents. If there was such admission, the law would have required it to be clear and completely unequivocal before a court of law could act on it to enter judgment on admission under order 12 rule 6. The decision of Madan JA (as he then was) in the case of *Lalchand Danlatram Dheroomal Choitram vs Herta Elizabeth Charlotte Nazani* (1982 – 88) 1 KAR 437 sums the law in this respect. He stated, *inter alia*, as follows:

"For the purpose of order 12 r 6 admission can be express or implied either on the pleadings or otherwise, eg in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment 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 that the parties passed out of the stage of negotiations onto a definite contract. It matters not if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admission by analysis."

We cannot see such a case in the suit that was before the learned judge and that being the case, even if he proceeded on the basis that the application was for judgment on admission, there could have been no proper case before him for entering such a judgment.

However, we have accepted that the application that was before the learned Judge was an application for summary judgment under order XXXV rules 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 to 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 this case, the defence was a denial that any liability relating to the fee agreement between the respondent and the defunct Kenya Posts & Telecommunication Corporation was vested in the appellant by virtue of Legal Notice No 156 of 1999. The learned judge appears to have considered this defence and feeling it was a sham, rejected it. In our view, we feel, with respect, that the learned judge was not right in rejecting this defence summarily. The defence raised a major issue on the interpretation of Legal Notice No 156 of 1999 and its effect on the appellant who was in effect saying that it was wrongly sued. The appellant and the respondent should have been afforded full opportunity at a full hearing of the entire case to argue the issue fully before a decision could be made on it. In saying this, we are conscious that there are cases where the point in dispute may be clear and unarguable such that to grant leave to a defendant to defend would be no more than a waste of time and a denial to the plaintiff of his just dues. In such cases, summary procedure should be adopted so as to ensure quick and sweet justice. However, in our mind, and without saying more, we feel this is not such a case.

From what we have stated above, it will be clear that the learned Judge could not have been right when he treated the application before him as an application for judgment on admission. Further, even if it were such an application, there was nothing before him to justify granting of such an application. The application was seeking summary judgment, and there was at least one triable issue which entitled the

appellant to be heard on its defence. This appeal is allowed. The order issued by the Superior Court is set aside. We order that the suit in the Superior Court should proceed to hearing. The appellant will have the costs of the appeal and of the application in the Superior Court.

Dated and Delivered at Nairobi this 2nd day of April 2004.

R.S.C.OMOLO

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JUDGE OF APPEAL

E.O.O'KUBASU

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JUDGE OF APPEAL

J.W.ONYANGO OTIENO

.....

JUDGE OF APPEAL

I certify thet this is a true

copy of the original

DEPUTY REGISTRAR