



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kwach, O’Kubasu & Githinji JJ A)

CIVIL APPEAL NO 306 OF 2000

FIVE CONTINENTS LTDAPPELLANT

VERSUS

MPATA INVESTMENTS LTD.....RESPONDENT

(Appeal from the Ruling of the High Court at Nairobi)

(Mbaluto J) dated 1st November, 1999 in HCCC No 449 of 1999)

JUDGMENT

This is an appeal against the decision of Mbaluto J in which the learned judge of the superior court struck out the defence of Five Continents Ltd. (the appellant) and entered judgment for Mpata Investments Ltd. (the respondent) in the sum of Shs 1,194,240/80 with interest and cost under order XXXV rule 2, Civil Procedure Rules.

According to the plaint, the respondent’s claim against the appellant was for the sum of Shs 1,194,240/80 outstanding since February, 1996 being the agreed and reasonable charges for services rendered by respondent to the appellant at defendant’s own request.

The claim was denied in the defence. Defendant pleaded further and in the alternative that all the amounts owing to the plaintiff was fully paid. Plaintiff filed an application for summary judgment on the ground that the defence was a sham, a mere denial and frivolous. The application for summary judgment was supported by a brief affidavit of Mr Soju Isshiki – the Managing Director of plaintiff company. The supporting affidavit shows that the claim arises from business transactions between plaintiff and the defendant between 14th August, 1994 and 28th February, 1996.

The plaintiff’s case was that the defendant owed plaintiff Shs 2,567,337/ 80 for services rendered as at 21st September, 1994 but after deducting what the plaintiff owed the defendant the outstanding balance was Shs 1,194,240/80 as at 28th February, 1996. Dilip Shah, the Managing Director of the plaintiff filed a replying affidavit in which he described the nature of the business relationship that existed between the parties. According to him, the plaintiff claimed a total of Shs 544,872/80 from defendant on account of hotel bookings, while defendant claimed Shs 736,195/= as at October, 1995 from plaintiff in respect of airline tickets obtained at request of the plaintiff.

It was the defendant’s case that by a verbal agreement in about August,

1996 made between defendant and plaintiff's Managing Director – one Mr Ito Tokunya, the parties agreed to set-off various amounts owed to each other and by virtue of that set-off, defendant does not owe the plaintiff the Shs 1,194,240/= claimed.

The learned judge of the superior court considered the application and concluded as follows:

“The statement in the affidavit of the respondents Managing Director deliberately ignores and therefore fails to deal with the evidence contained in the affidavit sworn by the applicant's managing director Mr Soju Isshiki and in particular the claim that prior to 28th February, 1996 the sum owed by the respondent was much more than the sum of Shs 1,194,240/80 being claimed. The applicants position is that as at 21st September, 1994, it was owed Shs 2,567,334/80 which as the analysis shows is calculated up to 28th February, 1996. By talking about an alleged debt which is said to have been owed as at October, 1995 which period is much earlier than the time the sum claimed in this suit is shown to have been outstanding, the respondent is refusing to answer the applicant's claim. Its defence cannot therefore be said to have raised any *bona fide* triable issue. It is clearly a sham ...”.

There are three grounds of appeal which Mr Odera, learned counsel for the defendant condensed into one, which in effect means that the second and third grounds were condensed with the first ground which states:

“The learned judge erred in law in striking out appellants statement of defence and entering summary judgment against the appellant on the basis of secondary documentation deficient to entitle the respondent to such judgment”.

Mr Odera submitted that the plaintiff failed to produce the vouchers emanating from the defendant but relied on accounts analysis and guest folios which do not show that services were requested by defendant. Mr Odera further submitted that the guest folios produced by plaintiff show that all the services were paid for. Mr Okeyo for the plaintiff concedes that the vouchers were not produced and that the guest folios, *ex facie*, show that the amount was fully paid. Mr Okeyo ultimately conceded that there was a triable issue in view of the fact that the vouchers were not produced.

In *Dhanjal Investments Limited v Shabaha Investments Limited* (Civil Appeal No. 232 of 1997) (unreported), this Court 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 *Kandnlal Restaurant v Devshi & Co* (1952) EACA 77 and followed by the Court of Appeal for Eastern Africa in the case of *Sonza Figuerido & Co Ltd v Mooring Hotel Limited* [1952] EA 425 that, if the defendant shows a *bona fide* triable issue he must be allowed to defend without conditions....”. And in *Provincial Insurance Company of East Africa Limited* now known as *UAP Provincial Insurance limited v Lenny M Kivuli* (Civil Appeal No 216 of 1996)(unreported), this court again stated:

“In an application for summary judgment even one triable issue if *bona fide*; would entitle the defendant to have unconditional leave to defend.”

Lastly, in *Kenya Trade Combine Ltd vs M M Shah* (Civil Appeal No 193

of 1999) (unreported), this court said:

“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.”

From the supporting affidavit of Mr Soju Isshiki and from the replying affidavit of Mr Dilip Shah, there is no dispute that the two parties were doing business with each other for sometime and that at some stage each owed the other money. It is also apparent from the two affidavits that there is no dispute that the

accounts were settled at some stage. But there is a dispute as to the quantum of the debt each owed the other at the time of the settlement of the accounts. There is also a dispute as to the result of the settlement. According to Mr Soju Isshiki the defendant's debt was reduced from Shs 2,567,334.80 to Shs 1,194,240.80 after the settlement.

But according to Mr Dilip Shah the plaintiff owed the defendant Shs 736,195 in respect of airline tickets while the defendant owed the plaintiff Shs 544,872/80 in respect of booking at the time of the settlement of the accounts.

The plaintiff mainly relied on the accounts analysis to show the defendant's indebtedness. That accounts analysis was apparently prepared by the plaintiff for use in this suit. It is not itself a book of account regularly kept in the course of business. Even if it were, such a statement would not alone be sufficient evidence to charge the defendant with liability (see Section 37 of the Evidence Act). It follows that the accounts analysis on which the learned judge relied has no evidential value.

Further, Mr Dilip Shah stated in paragraphs 6 and 7 of the replying affidavit that the custom and procedure was that the defendant would issue a client with a voucher for use at the plaintiff's hotel and that the plaintiff would act in accordance with the instructions contained in the vouchers. The plaintiff did not produce or rely on the vouchers issued by the defendant which is the best evidence to show the state of the defendant's indebtedness to the plaintiff before the settlement of the accounts.

It is apparent that the learned judge accepted the plaintiff's accounts and documents on the face value without serious scrutiny. Had he scrutinized the guest folios, on which the plaintiff mainly relies, it would have been apparent that each of the guest folios, without exception, show a debit, and corresponding credit leaving a nil balance. As Mr Odero submits and as Mr Okeyo agrees, the respective guest folios show on the face that the debt incurred in each guest folio has been fully paid. So, the guest folios did not support the plaintiff's case.

In our judgment this was not a plain and obvious case on which summary judgment could have been entered. There was a genuine dispute on the defendant's liability to the plaintiff which can only be resolved at the trial.

For the foregoing reasons, we allow this appeal. The judgment and decree of the superior court is set aside and the defence is restored. The defendant is granted unconditional leave to defend. The plaintiff's motion for summary judgment is hereby dismissed with cost.

Dated and delivered at Nairobi this 27th day of June, 2003

R.O. KWACH

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR