**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 1760 OF 1981**

**J.G.TAYLOR.....PLAINTIFF**

**VERSUS**

**W.F.BOLUS.....DEFENDANT**

**RULING**

By his application filed on October 7, this year under Order XXXV rule 1 of the Civil Procedure Rules, the plaintiff claims summary Judgement for Kshs 300,000 with costs and interest as set out in the plaint. The plaint itself claimed this sum as having been paid over the Defendant on October 30, 1980, to be held by him in trust pending certain discussions as to the possible purchase of shares in WJ Alan & Co and alleged that, despite request, the Defendant failed to make the company's account available for inspection until the April 8, this year, and even then produced only draft accounts, which showed a loss situation, and did not disclose the true state of the finances. Accordingly, it is alleged, the Plaintiff informed the Defendant that he was no longer interested in purchasing the shares and demanded the return of the money, which is now said to be money had and received on a total failure of consideration. The plaintiff also claims, in the alternative, that there was a contract which was subject to the condition that the company was solvent and that proper books of accounts were kept. The breach alleged is an allocation of shares in October 1980, and the Plaintiff's appointment as a Director. The defendant says further that the books were fully available for inspection, and any money paid was with full knowledge of the Company's financial state. There was no condition as to solvency. The receipt for the money, Ex JGTI, is on a company complimentary slip, but purportedly signed by the Defendant, so it is not clear from that document alone in which capacity the money was received. However, Mr Ransley, for the Plaintiff, puts his case in this way: a search of the Registry on April 15, 1981, showed there were in all 25,000 ordinary shares of Kshs 20 each comprising the authorised share capital of the company. On these Mrs John Bolus was registered as owning 8437 shares, the defendant as owning 10313 shares and the Standard Bank nominees 6250 shares, making up the 25,000. The last figure only is common to the Plaintiff's Affidavit and the minute of the meeting of October 2, attached as Ex WFBI to the Defendant's Affidavit. Apparently as a result of a divorce settlement the shares belonging to Mrs Bolus were intended to be transferred to the plaintiff as the nominee of Mr Paul Bolus. In order to equalise the number of shares held in the company by the plaintiff and the defendant, the latter agreed to transfer 937 shares to the plaintiff, bring his holding to 9374, and reducing the defendant's holding to 9376 shares, less a further two shares to be transferred as to one each to Mrs Taylor, the Plaintiff's sister-in-law and to Mr Paul Bolus. As the holdings shown in both documents comprised and total authorized shares capital Mr Ransley argued that there was no way in which Kshs 300,000 could have been paid to the

company, (whether through the defendant or otherwise) because there was nothing left for the company to allocate, or more correctly to allot, to the plaintiff. Consequently the Defendant's account of the matter could not possibly be true, and the averment that shares were allocated in October 1980 to the Plaintiff was thereby shown to be manifestly untrue.

The Defendant says in his Affidavit that the purchase of the shares was part of larger business arrangements involving companies in London and an agency agreement with the Company. It is said that a transfer for the shares was sent to the Plaintiff on January 4, 1980 in London leaving the balance of the certificate to be forwarded later.

Mr Ransley submitted that the arrangement set out in the defendant's Affidavit was inchoate and thus the position was still as reflected in his client's Affidavit, the inspection having shown that arrangements proposed on October 2, were impossible to implement there being no shares to allocate whatever might have been the intention. Mr Khaminwa, however, submitted that there is a clear inference that the money was in respect of shares the plaintiff acquired in the company, that any prudent person would satisfy himself as to the state of accounts before paying over the kind of money, and that it was a further inference, as appears in Pennington's Company Law 4th Edition p 662, that as the Plaintiff had been made a Director he not only held the necessary qualification share or shares but had a substantial share-holding. The same quotation from Pennington also, I note, states that shares in a private company are rarely transferred.

Mr Khaminwa submitted that in truth what had happened was that the arrangement had become unwelcome to the Plaintiff and that this was a device to try and avoid his obligations. Mr Ransley again argued strongly in his reply that as the whole of the share were clearly taken up there was nothing available for allotment to form the consideration for the Kshs 300,000, either on October 30, or for that matter, on October 2, 1980. He said that even if the court could not grant summary judgment at this stage, at the very least, the defendant should be ordered to deposit the money with the advocates jointly upon interest until the case can be heard in full.

Both sides submitted authorities on the law on these applications, the principles of which are well known. In *Kirat Singh & Co v Mehje* [1952] 19 EACA p 33 leave to defend was given, and the same applied in *Kundanlal Restaurant v Devshi*, in the same volume at p 77. In *Commercial Advertising and General Agency v Qureeish* HCCC 55 of 1978, Sachdeva J gave only conditional leave to defend on the ground that, although a *prima facie* defence had been shown, the defendant's case might well turn out to a sham. In *Kantibhai Patel v Josphine Motion* HCCC 2910 of 1979, the same judge held that the defence was a sham and gave summary judgment as prayed. In that case the leading authority of *Zola v Railli Bros* was quoted in which Newbold p said:

"Order XXXV is intended to enable a plaintiff with a liquidated claim, to which there is clearly no good defence, to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by the delaying tactics of the defendant. If the judge to whom the application is made considers that there is any reasonable grounds of defence to the claim the plaintiff is not entitled to summary judgment."

So this shows the trend in East Africa. It is against giving leave to defend, unconditionally at least, if the plaintiff is obviously entitled to judgment and it is clear that the defendant is adopting devious and delaying tactics.

The principles then are quite clear. If the plaintiff's claim is undoubted and clear and there is only a sham and spurious defence, the order will be granted. If on the other hand the defendant has fairly

arguable case, never mind the likelihood of its success, or can show a triable issue, he must have leave to defend. I am perfectly satisfied that those are the principles I must apply now.

It is very tempting to accede to Mr Ransley's attractive argument and I accept at once that the complexity of the case or of the law does not debar a plaintiff from having summary judgment once the Court is satisfied that the defence is really unarguable. See *Jacobs v Casey* [1949] 1 KB at 481, per Lord Green (MR) The difficulty, however, as I see it, is that I have to say on affidavit evidence that the negative, that is to say that the circumstances were such that the plaintiff could not have received any consideration for his money, has been established to my satisfaction at this stage. It may well be that there is an inaccuracy in both the defence and the Replying Affidavits that shares actually were transferred to the Plaintiff, but there is still on record an allegation that a share transfer form was sent to the Plaintiff, and that the Plaintiff was appointed a Director. Again it is difficult to see, on the minutes of the meeting of October 2, or indeed on inspection of the Register deponed to in paragraph 5 of Plaintiff's affidavit, how the plaintiff had the necessary qualifications share or shares to be a Director. And this is a telling point in favour of the plaintiff. However, of course, consideration would be provided if there was a promise to transfer the shares, and the allegation that a transfer form was sent in paragraph 8 of the Defendant's Affidavit is still extant. In these circumstances, although the matter is very close, I do not feel able to give full summary judgment to the plaintiff on the present material before me.

Should I therefore give conditional leave to defend only, attaching the stipulation to which Mr Ransley referred" The Annual Practice commentary on the corresponding English provision states that the condition of payment into court or giving security is nowadays more often imposed than it used to be, and the phrase is used "that the Master is prepared very nearly to give judgment for the Plaintiff". On the other hand in *Llyods Banking & Co v Ogle* [1876] IEX D 263, which was an action on a guarantee, there appears at page 264 the following dictum of Bramwell B:

"If the plaintiffs had sworn that the debt had been admitted by the company, and that the defendant had been informed of the amount, and had not dissented or in any other way denied his liability, it would seem to me that he could only defend the action for the purpose of delay, and such an order as that appealed against might be made; but where a guarantor bona fide says that he does not know that the debt is due, and that he requires it to be proved. I think the statute was not intended to operate to take that right from him. It is said that this right is not taken away here, because the defendant may bring the money into court or give security for it; but those conditions practically may take away the power to defend, and they should only be applied when there is something suspicious in the defendant's mode of presenting his case.

This question arose quite recently in *Fieldrank Ltd v Stein* 1961 3 All ER 681 and the above passage from the Annual Practice was quoted.

Devlin LJ after referring to Bramwell B's dictum said:

"I should be very glad to see some relaxation of the strict rule in *Jacobs v Booth's Distillery* C (3). I think that any judge who has sat in chambers in RSC, Order XIV summonses has had the experience of a case in which, although he cannot say for certain that there is not a triable issue, nevertheless he is left with a real doubt about the defendant's good faith, and would like to protect the plaintiff, especially if there is not grave hardship on the defendant in being made to pay money into court. I should be prepared to accept that there has been a tendency in the last few years to use this condition more often than it has been used in the past; and I think that that is a good tendency."

In the East African case of *Souza Figuereido & Co v Moorings Hotel & Co Ltd* [1958] EA 425, the

East African Court of Appeal removed a condition of leave to defend on the grounds that the matter raised were not necessarily put forward mala fide on the defendant's behalf and raised substantial triable issues of law and fact. The principle applied on conditional leave are in practice very similar in England and in Kenya. *Jacobs v Booth's Distillary* [1901] 85 LT 262 was a similar case, and is referred to in *Kundanlal Restaurant v Devshi* (supra).

I have considered carefully Sachdeva J's decision in the *Commercial Advertising* case (supra), but I do not feel there is enough on record for me to be able to say here and now that the defence will necessarily turn out to be a sham. It is not one of those cases deprecated by Law JA in *Zola v Ralli Bros* at page 695 of the report, where the defendant adopts a purely passive attitude, with a bare denial of liability. Not without some hesitation I have decided that the Defendant should be given full leave to defend without a condition. However, I add the rider that it is clearly in the interests of justice that this case to be brought on as soon as possible for hearing, and that it be included in the call-over list not later than January 1982, ensuring a hearing by the end of February. This, I understood him, is supported by Mr Khaminwa.

In the result I dismiss the Application in the Notice of Motion, but in the circumstances order that the costs be in the cause.

**Dated and Delivered at Nairobi this 26th day of November 1981.**

**A.R.W.HANCOX**

**JUDGE**