



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CIVIL CASE NO 2632 OF 1988**

**AHMED & 3 OTHERS .....PLAINTIFFS**

**VERSUS**

**MAGUGU.....DEFENDANT**

**RULING**

This application has been brought by the plaintiffs for summary judgment against the defendant in the sum of 9,500,000/= plus costs and interest. The affidavit in support is to the effect that the sum of 9,500,000 /= is the balance of the purchase price due from the defendant to the plaintiffs for the purchase of 85% of the shares in the Kamiti Tanners (Kenya) Ltd owned by the plaintiffs. Annexed to the affidavit is the agreement for the sale of the shares.

The defendant's affidavit in reply in my view raises triable issues. First of all, since the agreement for the sale of the shares signed by the plaintiffs state that the defendant had made a down payment of 2,500,000/= the receipt of which the plaintiffs acknowledged, it would seem that there is an issue to be tried, as it is contended by the defendant, whether the claim should be for 9,500,000/= in the first place at all. For if one deducts 2,500,000/= from the agreed purchase price of 10,000,000/= one is left with an outstanding amount of only 7,500,000/= in the rejoining affidavit of the 1st plaintiff, an attempt was made to show that the sum of 2,500,000/= was never paid but if this is so why did the plaintiffs acknowledge receipt of the same.

The defendant has also been able to show *prima facie* that on 24<sup>th</sup> November, 1987 after the execution of the agreement for the sale of the shares, the defendant was further credited with the sum of 1,490,000/= being the value of certain vehicles which were not to form part of the assets of Kamiti Tanners to be taken over by the defendant. This triable issue will increase to 3,990,000/= the amount subject to dispute among the parties. The 1st plaintiff's rejoining affidavit on this issue leaves the position still equivocal.

The defendant deponed in paragraph 4 of his affidavit that he paid to the plaintiffs a further sum of 500,000/= . The 1st plaintiff's rejoining affidavit is silent on this. And so the disputed amount increases to 4,490,000/= about half of what the plaintiff claims. The other half has not been admitted as owing by the defendant. Counsel for the plaintiffs was, however, towards the conclusion of his submission to change gear and to ask for summary judgment for only this other half namely, the sum of 5,500,000/= . Lastly, the defendant deponed in his affidavit and averred in his defence that contrary to what had been

agreed by the parties in a supplementary agreement to the agreement for the sale of the shares, that Kamiti Tanners' indebtedness over and above 60,000,000/= would be paid by Kamiti Tanners and was not the concern of the defendant. But if the defendant was purchasing 85% of the shares in Kamiti Tanners and became virtually its sale owner, would it not be a matter of some substance to him and which affects the financial health of what he was going to take over, if the indebtedness of the company he was purchasing was not 60,000,000/= as agreed but an amount some 20,000,000/= more" Is this not a triable issue that may affect the whole transaction irrespective of the provision that any amount in excess of the 60,000,000/= shall be paid by Kamiti Tanner particularly when the defendant owned 85% of it, and not to be paid by the plaintiffs. I would say that this raises a triable issue.

The disagreement which I have endeavoured to show cannot be resolved on the available affidavit evidence and as Nyarangi JA stated in the Court of Appeal case of *Kenya Properties Limited v Abhay Kumar Sharma*, Civil Appeal No 76 of 1983 (unreported), where *inter alia*, the dispute had arisen as to whether there was interest payable on a friendly loan made by the appellant to the respondent and whether the appellant was money lender Cap 528:

"The disagreement on this aspect of the case could not be resolved on the affidavit evidence and does raise an obvious triable issue. The general rule is that unconditional leave to defend should be given unless there is reasonable ground for holding that the defence put forward is bogus."

The various payments which the defendant claims he made are issues that cannot be resolved on the affidavit evidence. Whether there has been a breach of contract with respect to the amount of the indebtedness of Kamiti Tanners irrespective of whether the amount in excess of the agreed indebtedness was to be paid by Kamiti Tanners, is a question of law which is not clear. Nyarangi JA in the *Sharma case (supra)* and on the issue whether the appellant was a money lender or not disposed of the question thus:

"was the plaintiff a money lender or not within the terms of the Act at the material time" On the face of the affidavit that question of law is not clear, is arguable and leave to defend should be given."

A very old authority which concludes this point and which I would like to refer to is the case of *Jones v Stone* [1894] AC 122 Chesoni Ag JA as he then was, was to quote with approval in the Court of Appeal case *Giciem Construction Company v Amalgamated Trades and Services*, Civil Appeal No 17 of 1983 (unreported), the following passage from the judgment in that case:

"As a general principle where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a *bona fide* defence, he is to have leave to defend. Leave to defend must be given unless it is clear that there is no real substantial question to be tried, that there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment".

It should also be pointed out that the defendant has counterclaimed for the sum of 20,000,000/= being the additional liability he incurred as a result of the plaintiffs' misrepresentation concerning the debts of Kamiti Tanners at the time its shares were being sold to the plaintiff. I have already had occasion to refer to this question when dealing with the last triable issue raised by the defendant in his affidavit. But what is the effect of the counterclaim itself" In *Camille v Amin Mohamed Merali* [1966] EA 411, Spry JA considered the question whether a triable issue could only arise out of a plaint and not on a counter claim. He came to the following conclusion:

"I am by no means persuaded that there cannot in Kenya be a set off against a claim for rent but I think

it unnecessary to decide that question because there can in my opinion, undoubtedly be a counter-claim against a claim for rent and I think that, for the purpose of Order 35, a counterclaim must be regarded as a defence..... I think that it is sufficient for the appellant to show a triable issue on a counter-claim”

In the same judgment, Spry JA reiterated the general principle governing the granting of leave to defend in this way:

“The general rule is, that leave to defend should be given unconditionally unless there is good ground for thinking that the defences put forward are no more than a sham; and it must be more than mere suspicion”.

There is a dispute as to whether the defendant owes the plaintiff the amount claimed in their application for summary judgment. There is a dispute as to whether there is a misrepresentation on the part of the plaintiffs because the amount of the indebtedness of Kamiti Tanners exceeded what had been agreed by the parties that they were at the time of the agreement for the sale of the shares. I am not prepared to say that the defence and counterclaim are a sham. Were I to hold otherwise, I would then, as I have been urged by counsel for the plaintiffs to do under the authority of *City Printing Works (Kenya) Ltd v Bailey* [1977] KLR 85, exercise my discretion and grant leave to defend on conditions, but I not so hold. I have also considered the authority of *Gupta v Continental Builders Ltd* [1978] KLR 83 which counsel for the plaintiffs also referred me to. It has not changed he view that I take of the application.

In conclusion, there are triable issues disclosed which must go to trial. The plaintiffs’ application for summary judgment is therefore refused and costs of the application is reserved to be dealt with at the trial of the action. The reply and defence to counterclaim to be filed within 21 days.

Dated and Delivered at Nairobi This 17<sup>th</sup> Day of November, 1988

**A.M. AKIWUMI**

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**JUDGE**



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