Case Number:	Civil Appeal 106 of 1986
Date Delivered:	17 Nov 1987
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Joseph Raymond Otieno Masime, James Onyiego Nyarangi, Harold Grant Platt
Citation:	Solomon Munywoki v Ahmed Gaid[1987] eKLR
Advocates:	-
Case Summary:	-
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO 106 OF 1986

SOLOMON MUNYWOKI ……APPELLANTS

V

AHMED GAID……..……RESPONDENT

JUDGMENT

This appeal fromt the ruling of Rauf J raises the question whether the defendant's written statement of defence disclosed bonafide triable issues upon which the defendant is entitled to defend without condition.

The plaintiff (now respondent) brought an action against the defendant (now appellant) for the recovery of a sum of Kshs 1.1 Million which according to para 3 of the plaint was advanced on October 8, 1985 as a friendly loan and the defendant offered to repay the loan within two months.

The defendant denied that he was advanced on October 8, 1985 as a friendly loan and the defendant offered to repay the loan within two months.

The defendant denied that he was advanced a loan and maintained:-

a. that he never entered into any written agreement with the plaintiff for any loan and he never signed any agreement.

b.That he did not receive any money from the plaintiff at the plaintiff's house and that if there was any money received from the plaintiff in form of bank cheques, which he denied the money was for running a joint business between him and the plaintiff and the plaintiff had been paid his dividends and the enterprise has collapsed.

In his affidavit in support of the application for summary judgment under order 35 r 1 of the Civil Procedure Rules, the plaintiff deponed that on a dozen occasions between December 1, 1984 and June 26, 1984, the dates of which are particularised in para 3 of the affidavit, he advanced to the defendant as a friendly loan sums of money by cheques which the defendant acknowledged by drawing the proceeds from the bank. The names of the banks and the amounts of money, whose total is Kshs 403,550,00 claimed to have been drawn from the banks are also stated in para 3 of the affidavit. Also that on October 8, 1985, the defendant went to the plaintiff's house and at his request, the plaintiff gave him a sum of Kshs 606,450 in cash, making a total payment advanced to the defendants Kshs 1.1 Million. Further, that on the same day on agreeing on all sums advanced, the defendant certified the same and signed a note that he would repay the whole sum advanced within two months.

A number of distinct points arise. First, the claimed friendly loan was not advanced on October 8, 1985. On the plaintiff's own evidence a total sum of Kshs 403,550 was advanced between December 1, 1984

and June 27, 1984 and only the sum of Kshs 696,450 was given on October 8, 1984. The question that arises is whether the averment in para 3 of the plaint, is correct. That is a matter that cries out for oral evidence.

The defendant specifically denies ever signing the note by which he is alleged to have admitted borrowing Kshs 1.06 Million and not Kshs 1.1 Million. The names on the document are different from the defendant's names. The signature on the note is, even by the naked eye, different from that of the defendant as it appears on his affidavits. Evidence is therefore essential as to whether the defendant signed the material note and also to explain why the defendant who is alleged to have borrowed Kshs 1.1 Million certified that he borrowed Kshs 1.06 Million. The difference is not pea nut on any view of the matter.

Returning to the question of the cheques, it is plain to us that the vital question is for the plaintiff to show by evidence that the cheques were cashed by the defendant. Hence the need for oral testimony to ascertain if the cheques were in form of a friendly loan or for a joint enterprise as was asserted by the defendant.

That however does not conclude the matters which obviously call for examination in a trial. It will be seen that the defendant denied receiving any money at the plaintiff's house. Thus, the onus is on the plaintiff to prove that the defendant asked for, and was given the very large sum of money.

Mr Shah who appeared with Mr Waki for the appellant criticised the ruling Solomon Munywoki v Ahmed Gaid and order of the High Court on several grounds most of which we have already identified. It was submitted that the judge did not adequately analyse the statement of defence and that consequently, he erred in the exercise of his discretion if favour of the plaintiff.

For the respondent, Mr Khaminwa urged that the defence is a mere denial ant that the judge was right to grant summary judgment.

Having stated, as we thought to be necessary at an early stage of this judgment, the matters which raise triable issues, we feel fortified in our opinion by the following passage in the judgment in *Kundanlal Restaurant v Devshi* & Co [1955] 19 EACA 77, at p 79,

"The principles on which the court acts is that where the defendant can show by affidavit that there is a bona fide triable issue, he is to be allowed to defend as to that issue without condition (*Jacobs v Book's Distillery Co* [1901] 85 L T 262 H L) ……. A condition of payment into court ought not to be imposed where a reasonable ground of defence is set up. Since *Jacobs v Booths Distrillery Co*. (supra) the condition of payment into court, or giving security, is seldom imposed, and only incases where the defendant consents, or there is good ground in the evidence for believing that the defence set up is sham defence and the master is prepared very nearly to give judgment for the plaintiff in which case only the discretionary power given by this rule may be exercised *(Wing v Thurlow* 10 T L R 53, 151). It should not be applied where there is a fair probability of a defence *(Ward v Plumbley* 6 T L R 198, Bowes v Caustice Soda Co T L R 328) nor where the practical result of applying it would be unjustly to deprive the defendant of his defence.

We leave open for another occasion in what circumstances conditional leave should be granted.

Looking at the case as a whole, we have come to the conclusion that the judge was in error in decision that there were not triable issues disclosed in the defence. We therefore allow the appeal, set aside the ruling and order of the High Court dated May 16, 1986 and substitute therefore an order that the

defendant shall have unconditional leave to defend, before some other judge.

Costs of this appeal to the appellant. Costs of the High Court to be costs in cause.

Order accordingly.

November 17, 1987

NYARANGI, PLATT & MASIME JJ A