REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 136 OF 2012

KIRU TEA FACTORY CO. LTD…..…….APPELLANT

VERSUS

JOSEPH GIOCHE KURIA……RESPONDENT

JUDGMENT

The appellant's statement of defence was struck out in the magistrates' court in a suit in which the respondent had sued for what I understand to be general damages and a sum of Kshs 458,887.70 plus interest at bank rates until payment in full. The court's decision to strike out the appellant's defence was based on the respondent's motion which sought for that particular prayer and also for judgment against the appellant as prayed for in the plaint. The respondent also sought for the costs of the application and the suit.

According to the respondent's plaint, the respondent delivered 10,000 kg of green leaf tea to the appellant; the tea was Kshs 458,887.70 worth of bonus payments. The appellant declined to make the payments on the ground that the weight of the tea delivered was in excess of what the respondent could possibly deliver, considering the weight of his previous deliveries. It was the appellant's case that payments would only be made after it had conducted its own investigations into the respondent's tea deliveries.

Indeed the appellant formed what it described as what it described as an 'appeals committee' and commenced investigations on what it thought was the respondent's abnormal delivery of the green leaf tea at its factory. After the investigations, the so called 'appeals committee' returned a verdict favourable to the respondent but even then the appellant declined to make the payments thereby provoking the respondent to file a suit against it in the magistrates' court.

When the application to strike out the appellant's defence came up for hearing Ms Mwai for the appellant submitted that the case ought to be heard on merits but more importantly she informed the court the investigations into the respondent's tea deliveries were not yet complete.

In his ruling **Hon M. Nyakundi (SRM)** dismissed the appellant's counsel's submissions and in particular the learned magistrate noted that the appellant's own appeals committee had exonerated the respondent from blame and thus there was no reason to delay the respondent's dues any longer. The court also held that the defence as filed was an abuse of the due process of the court and therefore ought to be struck it out as prayed for by the respondent.

The appellant appealed against the ruling and order of the learned magistrate on the grounds that the issues in the appellant's defence were triable and it was neither frivolous nor vexatious; that the competence of the appeals committee was an issue that could only be tried at the hearing of the main suit;

that the learned magistrate erred in ignoring the defence submission that the falsification of the weight of the tea delivered by the respondent was a matter which could only be canvassed at the trial; that the court erred in finding that the decision of the appeals committee was final yet there was no evidence to that effect; and that the decision of the learned magistrate was against the rules of natural justice.

Order 2 Rule 15 under which the motion was made says:

> ***15. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—***
>
> ***(a) it discloses no reasonable cause of action or defence in law;***
>
> ***or***
>
> ***(b) it is scandalous, frivolous or vexatious; or***
>
> ***(c) it may prejudice, embarrass or delay the fair trial of the action; or***
>
> ***(d) it is otherwise an abuse of the process of the court,***
>
> ***and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.***

The concise grounds upon which the application was made are specified as (b), (c) and (d). The extent of the court's power when generally dealing with an application under Order 2 Rule 15 was explained extensively in **DT Dobie & Company Ltd Versus Muchina (1982) KLR 1.** In that case Justice Madan JA cited several English decisions on striking out pleadings under this Order; for instance, the learned judge cited Denman J in **Kellaway versus Bury (1892) 66 LT** at page 600 and 601 where, while referring to the power of the court to strike out pleadings, he said:

> ***That is a very strong power and should only be exercised in cases which are clear and beyond all doubt.***

The judge also referred to the judgment of Lindley LJ in the same case where he stated at page 602 that:

> ***It has been said more than once that rule is only to be acted upon in plain and obvious cases and in my opinion, the jurisdiction should be exercised with extreme caution.***

Taking the precautions alluded to into account, the questions that then follow are whether the suit in the court below was such a plain and obvious case that warranted the striking out of the of the appellant's defence and whether the learned magistrate exercised the necessary caution in taking this drastic step. In answer to these questions, it would be appropriate to proceed from the premise that it was common ground between the appellant and the respondent that there existed a contract of sale between them; it was also not in dispute that under this contract the respondent was bound to deliver and the appellant was bound to pay for every delivery of green tea leaf made and accepted by the appellant; it was also common ground that the respondent delivered and the appellant accepted 10,000 kg of green tea leaf for which he would ordinarily be entitled to payment in accordance with the contract between the parties.

The point of departure, at least from the appellant's perspective was, the delivery of 10,000 Kg of green leaf tea at the material time was abnormal or suspicious and therefore much as it accepted the delivery, the respondent was not entitled to his dues until after the appellant had undertaken investigations to satisfy itself that the respondent was not up to any mischief or the delivery was not fraudulent. Such investigations were indeed initiated at the appellant's behest and the outcome, as noted, was in the respondent's favour. In its defence, the appellant disputed this outcome and argued that the constitution of the organ that investigated the case was influenced by the defendant. It was not suggested in its statement of defence though how the respondent could have managed to wield such an influence as to control the

manner the appellant would conduct its own investigation as no particulars were set forth in the defence. What is clear is that the appellant purported to dispute the outcome of its own investigations.

Whatever reservations the appellant may have had on the respondent's green leaf tea deliveries, it is acknowledged that they were, nevertheless, accepted by the appellant company itself. Under the sale of goods, there are legal consequences that attach to such delivery and acceptance of goods and which would ordinarily render the purported investigations superfluous. In other words, the moment the appellant accepted the goods, its investigation into how the appellant may have acquired them was not warranted and the outcome of such investigations would have had minimal implications, if at all, on its obligations towards the respondent. The relevant law in this regard would be the **Sale of Goods Act, Cap 31** which, amongst other things, sheds light on the concepts of 'delivery' and 'acceptance' and their legal implications. Under **section 2(1)** of that Act, 'delivery' is defined as follows:-

> ***"Delivery" means voluntary transfer of possession from one person to another;"***

Whether the respondent had delivered the goods in the context of this definition is not a question that was subject to any contestation; looking at the parties' pleadings, it was beyond peradventure that the tea was delivered. Similarly, the delivery or deliveries were accepted by the appellant and this again was not an issue in dispute. **Section 36** of the **Sale of Goods Act** is clear on what amounts to 'acceptance' in the legal sense; it says:-

> ***36. Acceptance***
>
> ***The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.***

The appellant retained the goods and its assumption of possession was inconsistent with the ownership of the same goods by the respondent; it retained them and at no time was it alleged that the goods were declined or were ever returned to the appellant for whatever reason. The appellant therefore 'accepted' the goods as understood in law.

The acceptance of the goods meant that the property in them passed to the appellant as understood in **section 19** of the Act; I have not found any suggestion to the contrary in the parties pleadings more so the appellant's.

Once it was established that the goods had been delivered and accepted as conceptualised in law, one has to consider the duties imposed on the buyer who in this appeal would be the appellant; **section 28** of the **Sale of Goods Act** stipulates the duties of both the seller and the buyer but for purposes of this appeal it is the duty of the buyer that is more pertinent; that section provides:-

> ***28. Duties of seller and buyer***
>
> ***It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.***

Section 29 of the Act goes further to say that unless the contract of sale says otherwise payment and delivery are concurrent conditions.

> ***29. Payment and delivery concurrent conditions***
>
> ***Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.***

I have carefully perused the appellant's statement of defence and I have not found any pleading to the effect that payment for the green tea delivered and accepted was subject to any investigation of the variation in weight of that tea; the respondent ought to have been paid upon delivery and acceptance of his tea and the appellant's unilateral and subsequent imposition of a condition or conditions before the payment was effected was contrary to the contract of sale and inconsistent with **section 29 of the Sale of Goods Act**.

I found it necessary to consider certain aspect of the **Sale of Goods Act** in this judgment though none of the parties submitted on it in their written submissions because, in my humble view, several of the Act's provisions which I have made reference to are pivotal in determination of this appeal; I do not see how the material issues raised in this application could possibly be resolved without resorting to this Act.

The major contention in the appellant's defence was falsification of the weight but at the same time, it admitted in paragraph 3 of its defence that the respondent delivered an average of 4.49 Kg of green leaf tea per bush from his 3,577 tea bushes during the year 2009 and 2010. After the appellant resorted to investigations of what it considered the respondent's unusual deliveries, it still disputed the outcome of its own investigations on the ground that they had been influenced by the respondent. These are obviously insinuations of fraud on the part of the respondent; however, no particulars were pleaded in either of the instances that the respondent is alleged to have been fraudulent. It has not been particularised how he may have been fraudulent in his deliveries or how he influenced the constitution and the outcome of the investigations against him. Under **Order 2 rule 4** of the **Civil Procedure Rules** it was incumbent upon the appellant to plead fraud specifically if that was one of his grounds against the respondent's suit. That rule provides as follows:-

> ***4. (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—***
>
> ***(a) which he alleges makes any claim or defence of the opposite party not maintainable;***
>
> ***(b) which, if not specifically pleaded, might take the opposite party by surprise; or***
>
> ***(c) which raises issues of fact not arising out of the preceding pleading.***
>
> ***(2) ….***
>
> ***(Underlining mine)***

When the appellant implied that the appellant was fraudulent without specifically pleading and providing particulars of fraud, its defence was reduced to being scandalous, frivolous or vexatious. It was intended to prejudice, embarrass or delay the conclusion of the suit against it and it was otherwise an abuse of the process of the court.

These concepts of pleadings being scandalous, frivolous or vexatious and abuse of process have been discussed in **Halsbury's Laws of England (Civil Procedure) (Volume 11 (2009) 5th Edition, Paras 1-1108**; At paragraph 534 of 'abuse of process' is explained in the context of the court's inherent power to stay or strike out proceedings; it is explained in the following terms:

> ***534. Abuse of process.***
>
> ***The most important ground on which the court exercises its inherent jurisdiction to stay proceedings is that of abuse of process. This power will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity (See Dawkins v Prince Edward of Saxe Weimar (1876) 1 QBD 499). The applicant for a stay on this ground must show not merely that the claimant might not, or probably would not, succeed, but that he could not possibly succeed on***

the basis of the pleadings and the facts of the case.

It is an abuse of process to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings. (See Yat Tung Investment Co Ltd v Dao Heng Bank Ltd [1975] AC 581, PC).

A party may be guilty of an abuse of the process of the court even though he may comply with the strict literal terms of an applicable rule of law, where he does so for improper or ulterior motives or purposes. (see Castanho v Brown and Root (UK) Ltd [1981] AC 557, [1981] 1 All ER 143, HL).

It has been said that this is a power which ought to be exercised sparingly and only in an exceptional case **(See *Lawrance v Lord Norreys* (1890) 15 App Cas 210, HL; *Dyson v A-G* [1911] 1 KB 410, CA**. And in exercising this power it has also been held that it is not the function of the court to enter into a minute and protracted examination of the facts and documents of the case in order to determine whether the claimant can show a prima facie cause of action. **(See *Wenlock v Moloney* [1965] 2 All ER 871, [1965] 1 WLR 1238, CA)**.

The explanation given in Halsbury's Laws of England and the decisions I have cited illustrate that frivolous or vexatious proceedings are understood to be synonymous with or aspects of what is deemed to be an abuse of the process of the court and therefore these concepts may not necessarily be distinct from each other; where one exists the other will certainly be lurking somewhere. Thus in **Hunter versus Chief Constable of West Midlands Police (1982) AC 529,** relitigating on the same issues was held to be vexatious and therefore an abuse of the process. The two concepts are more often than not used interchangeably; in the **South African case of Farjas (Pty) Limited & Another versus Regional Land Claims Commissioner, Kwazulu Natal- (LCC21/96) (1998) ZALCC 1** the South African Land Claims Court made reference to the discussion of these terms in Claasen, **CJ's Dictionary of Legal Words and Phrases 1 ed (Buttherworths Durban) 1977 Vol. 2&4** where it is stated that:

The concept of 'frivolous and vexatious' has one established legal meaning. It refers to a claim or legal proceeding which is pursued where there is plainly no prospect of success and the motive of the claimant or plaintiff is to harass the defendant.

As for 'scandalous' matter, it is defined in **Black's Law Dictionary Standard, 9th Edition** as 'a matter that is both grossly disgraceful (or defamatory) and irrelevant to the action and defence'.

I am satisfied that the though the learned magistrate did not make reference to any law or precedent in his ruling he arrived at the right decision; the appellant's defence ought to have been struck out. I will therefore dismiss the appeal with costs to the respondent.

Signed, dated and delivered at Nyeri this 26th day of February, 2016

Ngaah Jairus

JUDGE