REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI Civil Appeal 188 of 2002

BACHOO PATEL T/A K.G. PATEL SHOP LIMITED.....APPELLANT

Versus

STANLEY GEORGE WAMUTIRA.....RESPONDENT

(From original judgment of the Principal Magistrate's Court at Kerugoya in Civil Case No.48 of 2001 by S.M. MOKUA – SRM)

J U D G M E N T

By a plaint dated 21st February, 2001 and filed in the Principal Magistrate's Court at Kerugoya on the same date through Messrs J. Ndana & Company Advocates, the respondent herein then as plaintiff sued the appellant, the as the defendant for Kshs.34,410/=, cost of the suit, as well as interest. The suit was informed by the fact that between 1989 and 1993, the appellant had contracted the respondent to supply him with steel windows and doors for several schools and individuals. Pursuant to the said contract the respondent duly supplied the appellant with the same totaling, Kshs.158,430/= out of which the appellant paid a sum of Kshs.124,020 leaving a balance of Kshs.34,410/=. The suit filed was thus to recover outstanding sum aforesaid.

Through messrs Bali-Sharma & Bali-Sharma, the appellant responded to the respondent's claim. It denied its description in the plaint. Accordingly the plaint was bad in law. It went on to plead that the claim of the respondent was statute barred by the virtue of the Limitation of Actions Act. Further it categorically denied owing the respondent the sum claimed as aforesaid or any other sum. The respondent's suit was otherwise frivolous, vexatious and an abuse of the court process so the appellant claimed.

Arising from the foregoing averments in the defence, the respondent was compelled to amend his plaint. By an application dated 28th May, 2002 and filed in court on 30th May, 2002, the respondent sought and was by consent on 25th July, 2002 allowed to amend his plaint. The amendment contemplated was to include a paragraph in the plaint to the effect that the respondent had no other case in court between him and the appellant over the same subject matter.

The hearing of the case commenced before S.A. Okato, RM on 1st November, 2002. Only the respondent and appellant testified. The respondent testified that between 1989 and 1993 he was contracted by the appellant to make for him steel windows, steel doors and steel grills at a total cost of Ksh.158,430/=. The appellant used to sell steel metals. The respondent would thus order the same from his shop whose cost would be offset from what was due to the respondent from the appellant once the items were delivered. As at the time of the filing of the suit, the respondent had supplied to the appellant items worth 158,430/-. The respondent had ordered from the had the appellant steel worth 109,520/=. The appellant had paid him Kshs.14,500/- thereby leaving a balance of Kshs.34,410/=.

Under cross-examination by Mr. Mahan, learned counsel for the appellant, he conceded that the contract was between him and K.G. Patel Ltd which was a company. He had no contract with Bachoo Patel as a person. That the money owed to him if any was by K.G. Patel Shop Ltd.

As for the appellant, he testified that he was not Bachoo Patel but Mafatlal Khodabhai Patel. He never entered into any contract with the respondent but admitted that his company K.G. Patel Shop Ltd had dealings with the respondent. K.G. Patel Shop Ltd had however been wound up and taken over by K.G. Patel international Ltd. He did not know whether K.G. Patel shop Ltd owed the respondent any money.

The learned magistrate having carefully considered and evaluated evidence tendered by both the appellant and respondent reached the conclusion in these terms:-

> "….I have also perused the court file and noted that on 25.7.2002 a consent order was recorded granting leave to the plaintiff to amend his plaint and the amended plaint amended on 28th May, 2002 and annexed to the affidavit sworn by John Ndana Advocate in support of the application dated 20=8th May, 2002 was deemed to be duly filed. The defendant was at liberty to file his amended defence within 14 days. The defendant did not file his amended defence and in my view there is no defence on record. The effect of amending the plaint technically removed the plaint dated 21st February, 20001 from the 1st pleadings. The defence that was filed in answer to the averments contained in the said plaint is of no legal consequences for what it answered to no longer exists as a pleading. In my view therefore the plaintiffs claim against the defendant stands unchallenged. I would not have be laboured the merits or otherwise of the plaintiff's claim, the same being undefended but having heard the defendant I am constrained to D.O.SC.(sic) The defendant admitted that all the exhibits produced by the plaintiff were from his company. K.G. Patel shop Limited where he was a director. Although he said that the same was wound up and taken over by K.G. Patel International Ltd in 1995 he did not produce any document to support the same. Having admitted that the company was his, it matters not that he is Bachu Patel or mafatlal Patel and having admitted that this company had dealings with the plaintiff I find that the defendant had a contract with the plaintiff and he owes him Kshs.34,410/= I have considered the evidence on record and find that the plaintiff has proved his case on a balance of probabilities and I accordingly enter judgment in his favour as prayed in the amended plaint amended on 28th May, 2002."

The appellant was aggrieved by the said judgment and decree. On 10th December, 2002 he lodged the instant appeal. In a 4 point memorandum of appeal, the appellant complained:-

> "1. That the learned trial magistrate erred in law when he erroneously concluded that there was no defence on record to challenge or contest the plaintiffs plaint and therefore the plaintiff's claim was deserving to be allowed.
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> 2. That even so, the learned trial magistrate further erred in law when he failed to understand the law governing the legal capacity to be sued vis-a-vis a limited company and a private person.

3. That the respondent categorically admitted that he had no contract with the appellant, but with the company.

4. That the decision and judgment of the learned trial magistrate is not only flawed by error on the record but total misunderstanding of the legal principals involved in ascertaining liability."

When the appeal came up for directions, Mr. Mahan for the appellant and Mr. Ndana for the respondent agreed to canvass the same by way of written submissions. The submissions were subsequently filed and exchanged. I have carefully read and considered them together with the authorities cited.

In my view, the learned magistrate grossly erred in law when he held that; "…the defendant was at liberty to file his amended defence within 14 days. The defendant did not file his amended defence and in my view there is no defence on record." It is not a mandatory legal requirement that whenever an amended plaint is filed it must automatically be followed by an amended defence. It is optional to a defendant confronted with an amended plaint to file an amended defene if he/she so wishes. Indeed order VIA rule 1(2) cannot be any clearer. It provides "……where an amended plaint is served on a defendant – (a) if he has already filed a defence, the defendant may amend his defence…." From the foregoing therefore it is not mandatory that a defendant served with an amended plaint must of necessity file an amended defence as the learned magistrate erroneously thought. The operative word is *"May"* It is permissive and not mandatory therefore.

Further order VI A rule 1(6) provides interlia "….where a party has pleaded to a pleading which is subsequently amended and served on him under sub-rule (1), then if that party does not amend his pleading under the foregoing provisions of this rule, he shall be taken rely on it in answer to the amended pleading…" The appellant herein was served with an amended plaint. It had already filed its defence to the plaint prior to the amendment. It did not see the need to amend its defence. In terms of the aforesaid sub-rule, the appellant was deemed therefore to rely on its defence filed earlier. In the circumstances the learned magistrate erred in holding that in the absence of an amended defence to the amended plaint, there was no defence properly on record. The defence on record was dated 31st May, 2001 and filed in court on the same day. It raised several legal defences to the respondents claim Viz, the capacity in which the appellant had been sued and that the claim was statute barred. Without amendment to the same, it was still capable of countering the respondents claim. In any case the amendment to the original plaint was merely to insert a paragraph to the effect that there was no other litigation between the appellant and respondent pending in another court over the same subject matter. This was an innocuous and insignificant amendment which did not require an amended defence. On this ground alone this appeal must succeed.

Technicalities aside, did the respondent prove his claim against the appellant to the requirement standard? I do not think so. First, the appellant challenged the capacity in which he was sued. He stated categorically that Bachoo Patel was not this name. Rather his name was Mafatal Khodabhai Patel. This fact was not seriously challenged by the respondent. The issue was raised very early by the defendant in its defence. It behoved the respondent to marshall credible evidence as to counter that assertion. He did not. If anything, the respondent admitted under cross-examination that "…I had contract with K.G. patel Limited and it was a company. I had no contract with Bachoo Patel as a person. The money owed to me if any is ordered (sic) by K.G. Patel Shop Limited…" Even the delivery notes and invoices are in thename of K.G. Patel (shop) Ltd so that even if the appellant was Bachoo Patel, the claim against him would still fail on the basis that the dealings the respondent had was with K.G. Patel (shop) Limited and himself and not with the appellant as a person. The respondent was

aware that he was not dealing with Bachoo Patel as an individual but with his company. Accordingly the respondent should have directed his claim to the company and not the appellant in person.

In his judgment the learned magistrate went on to hold that "….Having admitted that the company was his, it matters not that he is Bachoo patel or Matatlal Patel and having admitted that his company had dealings with the plaintiff I find that the defendant had contract with the plaintiff and he owes 34,410/=…." Again this is a gross misdirection in law by the learned magistrate. I appears to me that the learned magistrate had thrown through the window the basic principles of company law as elucidated and enunciated in the leading case of Solomon V Solomon and Co. ltd (1987) A.C and Lee V Lee's Air Farming Ltd (1960) 3 ALL E.R. 420. It is trite law that a limited liability company is a legal entity separate from the directors. It can sue and be sued in its name. Accordingly it cannot be said that merely the appellant was a director of the company, he can be held personally for the liabilities of the company. The company's separate legal entity and or personality is not clouded and cannot be transferred to its director. The appellant cannot thus assume the debts and or responsibilities of a limited company.

For all the foregoing reasons, I would allow this appeal, set aside the judgment and decree of the learned magistrate. In substitution I order that the respondents suit be dismissed. The respondent shall bear the costs of this appeal as well as in the subordinate court.

Dated at Nyeri this 22nd day of March, 2010.

M.S.A. MAKHANDIA
JUDGE

Delivered on 22nd day of March, 2010,

By:

J.K. SERGON
JUDGE