



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 850 of 2007

SOFTA BOTTLING COMPANY LTD.....APPELLANT

VERSUS

CORNERSTONE SECURITY SERVICES LTD.....RESPONDENT

(Being an appeal from the ruling of the Chief Magistrate's Court at Nairobi, Milimani Commercial Courts delivered by the Honourable Mr. Were on 12th September, 2007 in CMCC No.13209 of 2006)

J U D G M E N T

1. This appeal arises from a suit which was filed in the Chief Magistrate's Court at Nairobi by Cornerstone Security Services Ltd (hereinafter referred to as the respondent). The respondent had sued Softa Bottling Company Ltd who is the appellant. The respondent's claim was for Kshs.219,748/= being the unpaid value for security services provided by the respondent to the appellant at the appellant's request.

2. The appellant filed a defence to the respondent's claim denying the claim in totality. By a notice of motion dated 9th February, 2007, the respondent sought summary judgment under Order XXXV Rule 1(1a), 2 and 8 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act. The application was opposed by the appellant who maintained that there were triable issues and that the appellant should be heard on its defence.

3. In his ruling delivered on 15th June, 2007, the trial magistrate found that neither the defence filed by the appellant nor the replying affidavit sworn in response to the application for summary judgment, raised any triable issues. The trial magistrate therefore allowed the application and entered summary judgment as prayed by the respondent.

4. On 13th July, 2007, the appellant moved the court under Order XLIV Rule 1(1a) and 2 and Order XLI Rule 4 of the Civil Procedure Rules, Section 3A and 80 of the Civil Procedure Act. The appellant sought *inter alia* review and or setting aside of the judgment entered against the appellant on the 15th June, 2007, and an order for stay of execution of the decree and or order issued on the 15th June, 2007, pending the determination of the application for

review.

5. The application was based on the grounds that the motion dated 9th February, 2007 raised new issues which were not contained in the pleadings, and which therefore ought to have been adjudicated upon at the full trial. The appellant also lamented that its previous advocates failed to apply for leave to amend the defence to include a counterclaim or seek a setoff contrary to the appellant's instructions. The appellant urged that the court in the interest of wider justice, to grant the appellant's application.

6. The application was supported by an affidavit sworn by the appellant's managing director Peter Kuguru. In the affidavit, Kuguru deponed that the appellant had a set off and counterclaim against the respondent for the amount of Kshs.168,410/= which arose as a result of the appellant's premises having been broken into and goods stolen, whilst being guarded by the respondent's employees. Kuguru swore that they were not aware that their previous counsel had failed to amend the defence to include the counterclaim.

7. The respondent's general manager Dorcas Kosgey swore a replying affidavit contending that no new issues were raised by the appellant in the application for review. The respondent urged the court to find the notice of motion filed by the appellant frivolous and incompetent. Kosgey deponed that the appellant had the opportunity to seek leave of the court to amend its defence, but having failed to do so, the application was nothing other than an opportunity to use its previous advocates as a scapegoat.

8. Following the hearing of the application, a ruling was delivered on 13th September, 2007, in which the trial magistrate noted that during the hearing of the application for summary judgment, the court had considered all the issues including the issues being raised in the application for review as new issues. The trial magistrate ruled that the appellant had knowledge of its possible claim against the respondent but did not include it in its pleadings. The trial magistrate further noted that by the time the application for summary judgment was heard, the defence had not been amended to include the counterclaim. He therefore found no merit in the application for review and dismissed it.

9. Being aggrieved by that judgment the appellant has lodged this appeal raising 7 grounds as follows:

- (i) That the learned magistrate erred in law and in fact in the manner in which he considered the respondent's application for review before him.
- (ii) That the learned magistrate erred in law and in fact by ignoring and failing to take into account the fact that the respondent, in its application for summary judgment in the original suit CMCC No.13209 of 2006, introduced new matters which had not been pleaded in the plaint. Such introduction of new matters should have automatically warranted a review of the summary judgment entered against the appellant.
- (iii) The learned magistrate erred in law and in fact by ignoring the fact that the appellant, who was the defendant in the original suit, had in its reply to the respondent's application for summary judgment raised a claim of Kshs.168,410/= against the respondent and which issue was never controverted thus constituting an admission of the claim by the respondent as well as raising a triable issue therefore disentitling the respondent to summary judgment against appellant herein.
- (iv) That the learned magistrate erred in law and in fact by allowing the application for summary judgment yet the failure to counterclaim was due to the laxity of its previous advocate on record thus occasioning an injustice to the appellant.
- (v) That the learned magistrate erred in law and in fact by failing to dismiss the respondent's application for summary judgment, in the original suit, on the ground that the respondent did not traverse any allegations made in the appellant's replying affidavit, in this respect the learned magistrate failed to uphold the provisions of Order VI Rule 9 of the Civil Procedure Rules.
- (vi) That the learned magistrate erred in law and in fact by failing to hold that there were triable issues and that the matter ought to have gone to full trial in the interest of justice and fairness so as to establish the correct position in the matter.

- (vii) That the learned magistrate erred in law and in fact by failing to consider the material circumstances of the case and thus arrived at a wrong conclusion.

10. Following an agreement by the parties, written submissions were exchanged and filed. For the appellant it was submitted that the application for summary judgment raised an issue which was not pleaded. This was the issue of services alleged to be rendered to the managing director's residence. It was contended that under Order VI Rule 6 of the Civil Procedure Rules, a party cannot make an allegation of fact or raise new ground or claim, inconsistent with the previous pleading. It was further submitted that the trial magistrate ignored the fact that during the hearing of the application for summary judgment, the appellant raised a claim for Kshs.168,410/=, which claim was not controverted by the respondent. It was argued that the trial court should not have allowed the respondent's application for summary judgment, but instead should have allowed the matter to go for full hearing, as there were substantial issues raised which could only be canvassed at the full hearing. **Barcho Hiring and Leasing Ltd vs Zahra Spares Ltd & 6 others HCCC No.2062 of 1998 High Court Milimani** was relied upon.

11. It was further submitted that the trial magistrate ought not to have allowed an application for summary judgment where the defence on record was capable of being put right by an amendment. In that regard, **HCCC No.1619 of 2000 Asea Brown Boveri Ltd vs Bawazir Glass Works Ltd** was relied upon. It was maintained that had the court considered the application for summary judgment, the replying affidavit and the defence on record, it ought not to have entered summary judgment. It was contended that the trial magistrate erred in failing to find that there were triable issues. Reliance was further placed on the case of **DT Dobie & Company Ltd vs Joseph M. Muchina & another Civil Appeal No 37 of 1978**.

12. For the respondent, it was submitted that the appeal was against the refusal of the trial magistrate to review his judgment as per his ruling delivered on 13th September, 2007. The court was urged to reject grounds number 2, 3, 4, 5 and 6 in the appellant's memorandum of appeal, in so far as they challenge the trial magistrate's decision in the application for summary judgment. It was further noted that under Order XLIV Rule 1 and 2 of the Civil Procedure Rules, the review of the trial magistrate's judgment could only have been undertaken under the following circumstances:

- (i) Discovery of new and important matter or evidence which after exercise of due diligence was not within the appellant's knowledge, or could not be produced by him.
- (ii) Mistake or error apparent on the face of the record.
- (iii) Any other sufficient reason.

13. It was submitted that the failure by the appellant to quote any of the above grounds on the face of his application for review, was a fatal omission justifying the dismissal of his application. **Civil Appeal No.211 of 1996 National Bank Limited vs Ndungu Njau**, was cited for that proposition. It was further argued that assuming that review was sought on the ground that there was an error on the face of the record, the error had to be a glaring error which did not need lengthy arguments to be established. It was submitted that no such error existed or was demonstrated by the appellant.

14. On the issue of discovery of new and important matter or evidence, it was noted that in this regard the applicant had to prove existence of the new facts alleged, and the fact that he acted with due diligence, and that the existence of the evidence was not within his knowledge. **Civil Appeal No.225 of 2008 Rose Kaisa vs Angelo Mpanju** was cited. It was submitted that the fact that the appellant did not know that his advocate had not filed a counterclaim (which fact was not proved), is not a new matter as contemplated under Order XLIV Rule 1 of the Civil Procedure Rules. It was contended that the appellant with minimal diligence could have procured a copy of the defence.

15. It was submitted that the appellant's director who swore an affidavit opposing the application for summary judgment must have known the nature of the defence filed. It was maintained that the appellant did not give

any evidence to show or to demonstrate that it had instructed its counsel to file a counterclaim. It was argued that the attempt to introduce the amended defence and counterclaim with the application for review was an attempt to supplement the evidence or to introduce new evidence which was a belated attempt by the appellant to change the nature of its defence.

16. On the ground of sufficient reason, it was submitted that the grounds canvassed by the appellant did not amount to sufficient reason. It was contended that review cannot be sought to supplement the evidence or to introduce new evidence. In that regard, *Misc. Civil Suit No.693 of 2002 James King'aru & 17 others vs J.M. Kangari & others* was cited. The court was therefore urged to dismiss the appeal with costs.

17. I have carefully considered the proceedings of the lower court. I have also considered the memorandum of appeal and the submissions made before me. In the application which was before the trial magistrate, there were two main grounds upon which the appellant sought to have the judgment of the trial court reviewed. These were the fact that the court failed to consider that the appellant claimed to be having a counterclaim against the respondent, and the fact that the trial court failed to consider that the failure to amend the appellant's defence to include the counterclaim was a mistake made by the appellant's counsel. It was also alleged that the trial court wrongly allowed the appellant to raise new issues which were not contained in the pleadings. All these were deponed in the affidavit of Peter Kuguru which was sworn in support of the application for review.

18. As was pointed out by the respondent's counsel Order XLIV Rule 1 and 2 of the Civil Procedure Rules provides the circumstances under which a judgment can be reviewed. The reasons given by the respondent in support of his application does not fall within any of the circumstances provided under Order XLIV Rule 1 and 2 of the Civil Procedure Rules. The appellant was well aware about its counterclaim. It has not alleged nor has it been established that the counterclaim was only discovered after the judgment. Indeed, the trial magistrate who had occasion to consider the alleged counterclaim whilst considering the application for summary judgment, rightly rejected the counterclaim as it had not been pleaded. The fact that the appellant's advocate failed to amend the defence to include the counterclaim does not bring the appellant's application within the circumstances provided under Order XLIV Rule 1 and 2 of the Civil Procedure Rules. As regards the allegation that the trial magistrate considered issues which were not pleaded, that is a matter which ought to have been dealt with by way of appeal. It cannot be raised by way of review. I find that this appeal has no merit and it is accordingly dismissed with costs.

Dated and delivered this 11th day of May, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Kimani H/B for Wachira for the appellant

Nzioka H/B for Njuguna for the respondent

Eric - Court clerk