REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 946 of 2002

COOPER KENYA LIMITED……..……PLAINTIFF

VERSUS

ANAGRO KENYA LIMITED...…...……..….1ST DEFENDANT

GEOFFREY K. KIBUI ……..…..……2ND DEFENDANT

RULING

The plaintiff filed a plaint dated 24th July 2002 against the defendants herein seeking judgement against both defendants jointly and severally for;

(a) Kshs.1,500,520/78 together with interest thereon at 2.5% per month from 1/6/2002 and

(b) Costs of this suit.

In paragraph 7, the plaintiff states;

"By a guarantee in writing dated 20th June 2001, in consideration of the plaintiff having granted credit or time for payment or accepted personal/company cheque for goods sold and delivered to the first defendant for a period of 48 months or for bearing to sue or demand immediate payment from the first defendant for goods sold and delivered to the first defendant, the second defendant unconditionally and irrevocably guaranteed payment to the plaintiff on demand of all monies due from the first defendant together with interest at 2.5 per month on such amount outstanding that may be due or become due including legal and other costs provided that the total amount recoverable from the second defendant should not exceed the sum of Kshs.4,500,000/=".

And in paragraph 10 the plaintiff avers in par;

"by a letter dated 11th June 2002 the plaintiff called upon the second defendant as guarantor to make payment of the sum of Kshs.1,603,808/64 which was then outstanding with interest thereon at 2.5% per month from 1st June 2002".

Further in paragraph 11 the plaintiff avers;

"Despite demand made and notice of intention to sue the defendants have failed or neglected to pay the sum claimed".

Upon being served, the 2nd defendant filed a defence and counterclaim dated 28th August, 2002. In reply

to paragraph 7 of

the plaint the 2nd defendant stated in paragraph 4 of his defence;

"The 2nd defendant denies the allegations contained in paragraph 7 of the plaint and pleads that the allegations are false to the plaintiff's knowledge on that;

a) The guarantee was made by the 1st defendant whose name is clearly stated therein.

b) The 2nd defendant signed the guarantee on behalf of the 1st defendant as instructed by the plaintiff.

The 2nd defendant did not deny the contents of paragraph 10 and 11 of the plaint in its defence and counterclaim. The plaintiff as a matter of preliminary requirement filed issues for determination on 19th December 2002. Some of the issues that are essential for the determination of this application were;

(1) Issue No.7 – is the second defendant properly joined in this suit?

(2) Issue No.8

(a) Did the second defendant execute a valid and enforceable guarantee in favour of the plaintiff to secure the first defendant's obligations under the agreement.

(b) Is the guarantee dated 20th June 2001 invalid for reasons that neither the first or second defendant appeared before the Advocate.

(c) Was the guarantee obtained by acts of misrepresentation by the plaintiff?

After hearing the rival evidence and submission of the parties and their Advocate Justice Azangalala delivered a judgement dated 29th October 2007. The Judge answered issues No.7 and 8 in the affirmative. In dealing with Issue No.7, the Judge rendered himself;

"The plaintiff's claim against the 2nd defendant is based on a personal guarantee executed by the 2nd defendant. The plaintiff produced the guarantee. It is indicated in the guarantee that the 2nd defendant executed the same before an Advocate. Whether the guarantee is or is not valid is irrelevant in considering issue No.7. I find and hold that the 2nd defendant is properly joined in the suit. In any event he has lodged his own cross claim in the suit. The issue as to whether or not he is a proper party is now spent. The answer to issue No.7 would in any event be in the affirmative".

And on issue No.8 the Judge held;

"Was the guarantee valid and enforceable? I think that it was. It was properly executed. The 2nd defendant did not deny the execution. His contention that he did not do so before an Advocate is not serious. An Advocate did attest his signature. If the 2nd defendant believed that the signature of the Advocate was forged, he should have brought proceedings against the Advocate. ….In the premises the answer to issue No.8(a) is in the affirmative and that of issue No.8(b) is in the negative. There is no substance in issue No.8(c) in view of my finding that the 2nd defendant executed the guarantee in the presence of an Advocate".

What has brought about the grievances raised by the plaintiff in the application under my determination is when the judge held at page 23 of his judgement;

"under the guarantee however, before the 2nd defendant would be liable to pay the claim, the plaintiff had to make a demand for the same. The 2nd defendant insisted that no demand for payment under the

guarantee had ever been made by the plaintiff or any one else for the plaintiff. The plaintiff's position was that as the 2nd defendant was the kingpin of the 1st defendant and a demand had been made against it, the 2nd defendant must be taken to have been served with the demand accordingly.

In my view that argument flies in the face of the very well known principle of company law that a company and its directors and shareholders are distinct persons in law. In the premises, there having been no demand made against the 2nd defendant under the guarantee, he cannot be held liable".

The trial judge proceeded and dismissed the plaintiff's claim against the 2nd defendant and as result the plaintiff filed an application dated 21st January, 2008 seeking to review part of the decision reached by Justice Azangalala. The plaintiff is seeking to review the judgement made on 29th October 2007 in so far as that judgement dismisses the plaintiff's claim against the 2nd defendant.

The substantive ground in support of the plaintiff's application is that the Judge was wrong in dismissing the claim on the basis that no demand had been made on the 2nd defendant under the guarantee when that was not an issue for determination before court.

Mr. Kimani Kiragu learned counsel for the plaintiff submitted that there were 13 issues and none of those include whether a demand had been made on the 2nd defendant. In his view one of the fundamental aims of pleadings is to assist parties to know the case they would meet at trial. There was no specific denial and indeed what the 2nd defendant did was to deny that he was a proper party to the suit. The 2nd defendant said that he did not intend to assume personal liability in signing the guarantee.

In summary Mr. Kimani submitted that the trial judge was not entitled to consider whether or not a demand had been made for two reasons;

(1) By the rules of pleadings demand is deemed to have been admitted.

(2) Courts can only determine matters which arise from the pleadings.

And by determining an issue that was not raised in the pleadings of the parties, the judge committed a very clear error.

The 2nd defendant filed a notice of preliminary objection, grounds of opposition and a replying affidavit sworn by the 2nd defendant. Mr. Macharia learned counsel for the 2nd defendant made able resistance to the plaintiff's application and arguments in support. He contended that there is no error or mistake on the face of the record to enable this court to review the judgement of Azangalala J. The error is whether demand for payment was or was not made an issue for determination. Mr. Macharia Advocate posed the question whether the issue of demand was a legitimate issue in law to have been determined by the trial judge. In answer, he submitted that it is misreading of the provisions of Order 14 to submit that unpleaded issue cannot be determined by the court. He contended that Order 14 Rule 3(c) states that the court may frame issues by the contents of the documents produced by the parties, therefore the court has jurisdiction to frame issues on its own. And that issues once framed by the parties are not cast on stone.

It was the view of Mr. Macharia Advocate that it is wrong to suggest that once parties have framed issues, the court is bound by it. Mr. Macharia Advocate also made reference to the submissions made before the judge that service of a demand letter under the guarantee was a condition precedent to which the plaintiff's standing to commence an action was founded. He also contended that when a party lacks locus standi, that becomes a fundamental point so under the provision of section 107 of Cap 80, the burden was clearly cast on the plaintiff to produce that notice of demand had been made and served on the 2nd defendant.

Mr. Macharia Advocate also contended that the point raised by the plaintiff may be a good ground of appeal but is not a proper ground for an application for review.

I have considered the application and all the documents filed by the parties. I have also taken into consideration the submissions and authorities by Mr. Kimani Kiragu for the plaintiff and Mr. Macharia learned counsel for the 2nd defendant. And from the arguments and the documents filed by the parties there are two issues for determination namely;

(1) Whether this court has jurisdiction to review part of the judgement delivered on 29th October, 2007.

(2) Whether there are circumstances conferring powers to review the said decision.

In my understanding the object of review is to correct an evident error or omission and it is immaterial how the error or omission occurred. An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is an obvious and patent mistake and not something which can be established by a long drawn process or reasoning on points or which there may conceivably be two opinions. If an elaborate process or reasoning is necessary to arrive at the conclusion that there is an error apparent on the face of the record, it cannot be said that there is an error apparent on the face of the record. It is not sufficient ground for review that another High Court Judge had taken a different view. See Nyamogo & Nyamogo Advocates vs Kogo, Court of appeal decision.

It is clear from the case of Nyamogo & Nyamogo Advocates that a mere error of law is not a ground for review or that part of a decision is erroneous in law is no ground for ordering a review. The law is that an error is apparent on the face of the record when it is obvious and self evident and does not require an elaborate argument to be established. The question is whether the issues involved in the present application can be said to be an error on the face of the record.

In answering such a question, I think it is important to understand that cases are ordinarily decided on the issues framed by the parties. And if a party intends to raise and rely on other issues, they must be placed on the record through the correct procedure. In my understanding where an issue has been decided by a judge not raised in the pleadings and evidence in support of the pleadings then that is an error on the face of record. It does not matter how the error arose. If there is an error, there is an error which must be corrected through review.

Mr. Kimani Advocate submitted that the plaintiff is not asking for re-evaluation of the evidence but invites this court to consider that cases should be decided on the issues that arise before court. On the other hand, Mr. Macharia Advocate was of the persuasion that un-pleaded issues can be determined by the court. He contended that Order 14 Rule 3(c) states that the court may frame issues by the contents of the documents produced by the parties, therefore the court has jurisdiction to frame issues. He also submitted that the court is empowered to frame issues on its own motion.

It is clear that issues arise when a material proposition of fact or law is affirmed by one party and denied by the other. Order 14 of the Civil Procedure Rules states that material propositions are those propositions of law or fact which a party must allege in order to show a right to sue or a defendant must allege in order to constitute a defence. The issues in dispute must follow from the pleadings filed or evidence presented before court by one party and the other party had the opportunity to contest. The proposition of one party and denied by the opposite party, forms the basis of a distinct issue for determination before court. In essence the court does not have blanket powers to make an issue as that for determination, in which the parties did not intend to do so in their pleadings and evidence before court.

I agree with Mr. Macharia Advocate that the court is empowered to frame issue as set out in Order 14 Rule 3 which states;

“The court may frame the issues from all or any of the following materials;

(a) Allegations made on oath by the parties or by any persons present on their behalf or made by the Advocates of such parties.

(b) Allegations made in the pleadings or in answers to interrogatories delivered in the suit.

(c) The contents of documents produced by either party.

I think Order 14 Rule 3 must be read together with Rule 1(5) of the same order which read;

"At the hearing of the suit when issues have not already been framed the court shall, after reading the pleadings, if any and after such examination of the parties or their Advocates as may appear necessary, or certain upon what material propositions of fact or law the parties are at variance and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend".

No doubt that before the hearing started, the issues on all the matters in contest were framed and submitted before court for determination. And in framing an issue which is outside the issue presented before court, the court is obligated to consider the pleadings and evidence tendered by the parties to the dispute. The court can only act upon what material propositions of fact or law the parties are at variance. In my humble opinion the powers of the court in framing issues can only arise when parties are at variance on a particular proposition of fact or law.

In this case the plaintiff pleaded at paragraph 10 of the plaint dated 24th July 2002 that demand had been made on the 2nd defendant as a guarantor and identified the date of the demand letter as 11th June, 2002. There was no specific denial in the defence and counterclaim filed by the 2nd defendant. In deed what the 2nd defendant did was to deny that he was a proper party to the suit. He said that he did not intend to assume personal liability in signing the guarantee. And that was the subject matter of issue No.8. In answer the trial judge found that the 2nd defendant was a guarantor. As was clearly determined, the plaintiff's claim against the 2nd defendant is based on a personal guarantee which he executed. The trial judge found that the guarantee was properly and validly executed by the 2nd defendant, therefore he was properly and regularly joined in this suit. I think, it was a fundamental error on the part of the 2nd defendant to question the issue of demand at the late stage of submission when he had ample opportunity to raise such an important matter in his pleadings or through his evidence before court. That was not done.

Order 6 Rule 4(1) states;

"A party shall in any pleading subsequent to a plaint plead specifically any matter….

(a) which he alleges makes any claim or defence of the opposite party not maintainable or

(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.

The issue of demand being made and served on the 2nd defendant was a critical and important issue which should have been raised in the defence of the 2nd defendant. Again that was not done. In any event the 2nd defendant was required to make a specific denial to the assertion made in paragraph 10 of the plaint. It is insufficient to answer the specific allegation made by the plaintiff in some general denial. It was incumbent upon the 2nd defendant to comply with the provisions of Order 6 Rule 9 (3) of the Civil Procedure Rules. If there was no compliance with the rules of pleading, it was not open to the trial court to make reference to the issue of demand. To do so was in flagrant violation of the rules of engagement by the court amounting to an error.

I am also in agreement with Mr. Macharia Advocate that a party who alleges is required to prove the allegation made in his plaint. However, it is important to appreciate that a party can only endeavour to prove an assertion which is denied by the opposite party. It is not a rule of law to prove every allegation/assertion made in a plaint. The good law is that a party is only required to prove what is

contested or made an issue for determination by the opposite party. The 2nd defendant was obliged to make a denial that no demand had been made on him by the plaintiff.

I agree with Mr. Kiragu Kimani Advocate that where a matter has not been denied, it is deemed to have been admitted. In my view since demand is deemed to have been admitted, there is no requirement for the plaintiff to prove that it had made a demand to the 2nd defendant. To rule otherwise would be to rubbish the objective of pleadings.

The correct position is that the trial judge was not entitled to consider whether or not a demand had been made to the 2nd defendant because of two reasons namely;

(1) The rules of pleadings restrict the powers and jurisdiction of the court to only matters contested by the opposite party to be made a point for determination and

(2) That courts can only determine matters which rise from the documents filed and evidence presented before court.

The purpose of pleadings is of course to secure the interest, rights, obligations, duties and liabilities of both sides. In essence it is through pleadings that a party shall know what are the points in issue between the parties, so that each may have full information of the case he/she has to meet and prepare his evidence to support his own case or to meet that of his opponent. It is for that reason that a relief not founded on the pleadings will not be given without sufficient and proper basis.

In this case the 2nd defendant did not question the issue of demand in his defence or evidence before court and it was an error on the face of the record to base a decision on matters outside pleadings filed by the parties. The plaintiff must have been taken by surprise by the introduction of the unpleaded issue into the judgement given by the trial court. I think and with profound respect, it was an error for the trial judge to grant an order to the 2nd defendant which had not been asked for by that party in his pleadings before court. Once again, I admit that a court may base its decision on an unpleaded issue, if it appears from the course followed at the trial that the issue has been left to the court for determination. That is not the case in this matter.

All in all, it is with profound respect to my learned brother and with great humility that I must say that demand was not an issue for determination. It would only have been an issue if the parties made it an issue for determination before the trial court. I make a finding that there was no reason to determine whether demand had been sent and received by the 2nd defendant. And in view of the clear and sound determination reached by the trial judge at pages 22 and 23 of his well reasoned judgement, I think it was not open to him to depart from the conclusions therein. He did. And it is for that reason that I have come to the painful decision to review part of the judgement made on 29th October, 2007 in so far as it dismisses the plaintiff's case against the 2nd defendant with costs. I substitute with an order that judgement be and is hereby entered against the defendants jointly and severally together with costs.

Dated, signed and delivered on this 25th day of June, 2008.

M. A. WARSAME

JUDGE

25th June, 2008

Coram Warsame J

Erick – court clerk

Mr. Njeru for the applicant

No appearance for the respondent

Court: Ruling delivered in the presence of **Mr. Njeru** for the applicant and no appearance for the respondent/2nd defendant in Chambers.

M. A. WARSAME

JUDGE

25.6.2008