



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HC. COMM. 1 OF 2009

UNEECO PAPER PRODUCTS LTD.....PLAINTIFF

VERSUS

BUSINESS FORMS & SYSTEMS LTD.....RESPONDENT

JUDGMENT

1. By a letter dated 26.5.2010 and lodged and adopted by court as an order on the 27.5.2010, Mombasa HCC No. 1 of 2009 was consolidated with Mombasa CMCC No.17 of 2009. It is to be noted that the plaintiff in the High Court suit is UNESCO PAPER PRODUCTS LTD. While the plaintiff in the lower court file was UNESCO INDUSTRIES (KENYA) LTD.
2. On 14.9.2015 when the parties appeared before court an amendment was sought and allowed by consent by which the plaint in the HCC. NO. 1 of 2009 was amended at paragraph 3 & 5 and prayer (a) to read kshs.1,999,723.20. Equally amend was the period alleged to be when the parties transacted to read 2005 & 2006.
3. The plaintiff evidence at trial was short and succinct to the effect that during the period in question the plaintiff UNESCO PAPER PRODUCTS LTD supplied the defendant with products for which supply the defendant owed to it Kshs. 1,997,723.20 and US\$78,357.30 plus costs and interest.
4. The plaintiff's prayers as pleaded is equally simple and straight forward. It is for the recovery of the balance of the costs of goods sold and delivered by the plaintiff to the defendant during the year 2005 & 2006.
5. In the defence filed in HCC. No. 1 of 2009, the defendant was equally succincts and specific at paragraphs 4 & 5 , 7 of the defence that there was no sum outstanding and that if any sums were outstanding then the same were penalties paid to the customs department as a result of delay by the plaintiff for which the defendant cannot be held liable.
6. To the statement of defence the plaintiff filed a Reply to Defence which in response to paragraph 5 & 6 of the defence denies the same in toto and reiterate paragraph 4 of the plaint.
7. Effectively therefore the pleadings having closed with the Reply to Defence as the last pleading on record, the plaintiffs claim revealed that it was seeking to recover the balance of the purchase price for the costs of goods sold and delivered to the defendant by the plaintiff(s).
8. Having led his evidence and when put to cross examination the plaintiffs witness stated as follows:-

“There was no debt as at December 2006. Page 127 of the bundle of documents shows part of the claim relating to customs duty, fine and penalties”

When referred to page 63 of the bundle of document, he said;

“Yes we received the payment”

9. Under order 2 Rule 6 a party is not permitted to depart from its pleading. Infact the legal mantra is that a party is bound by its pleadings. To this court this is a concept and foundation of the right to of fair hearing so that when a defendant is served with the plaint, it is from that day warned and notified of the claim against it upon which it is expected to respond and prepare from the trial. It is therefore a rule designed to avoid ambush at trial and a rule that must be guarded jealously if the right to a fair hearing is to be observed.

10. For the case before me, I am convinced that in so far as the documents and evidence seek to prove a claim other than the price of goods sold and delivered to the defendant; that claim is alien to the claim before court, it was not pleaded and is not available for proof or determination by the court.

11. In IEBC & ANOTHER -VS- STEPHEN MUTINDA & MULE & 3 OTHERS, (2014) eKLR having considered and reviewed several authorities on this point the court of Appeal said.

“The authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limit the issues upon which a trial court may pronounce. The learned judge however well intentioned went well beyond the grounds raised by the petitioners and answered by the Respondent before her thereby determined the partition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score”

12. Put in the context of the matter before me, I am bound not to consider any issues not pleaded and sought to be determined by the plaintiff. Indeed the defendant having raised the issue of fines and penalties in its defence, the gates had been opened for the plaintiff to read the signs of the time or just correct its errors by an amendment. It did not seek to do so instead it denied the assertion by the defendant. That denial did one thing; to confine the claim to be for costs of goods sold and delivered, not more.

13. That being my finding, I hold that it would be unnecessary to consider the big issue raised in the evidence in chief and cross examination regarding merger of the two companies and when it took effect if at all. I may only comment that due to the public policy informing the need for competition and possible effects of monopolistic practices as then governed by the then Restrictive Trade practices, Monopolies and Price Control Act (now repealed) and replaced by the Competitions Act it was mandatory that such take over be sanctioned in law. From my reading of the Resolution the company was aware of the final or legal requirements to be met. The Resolution at page 11 reads:

“c) That the directors be empowered to undertake all necessary steps to finalise the above resolutions and execute all the documents to required to be executed.”

14. The above excerpt to the court, means that beyond the resolution there was a duty upon the directors to implement the resolutions by which Unesco Paper Products Limited was to take over 'the undertakings assets, and all of the debts, liabilities and engagements of Unesco Industries (Kenya) Ltd. See STANDARD BANK LTD. -VS- D.L. PATEL PRESS (KENYA) LTD. [1985] eKLR AND BEN MWANGI KITHIA -VS- NATIONAL BANK OF KENYA LTD. [2005] EKLR.

15. By dint of the provisions of section 107 -109 of the evidence, it was upon the plaintiff to lay before court evidence that the resolution was indeed implemented in its terms. This burden was never discharged and not so discharged in direct affront of the law as enunciated in Stephen Wasike Wakili -vs- Security Express Limited [2006] eKLR as follows:

“A party seeking justice must place before the court all material evidence and facts which if considered in the light of the law would enable the court to arrive at the decision as to whether the relief sought is available. Hence the legal diction that *“he who alleges must prove”*”

16. The only other issue I need to comment on is the fact that issues for determination by the court must flow from the pleadings and not otherwise. In this case, based on the state of the pleadings, the questions of penalties to customs department and others involving TRIO accounts were not in the pleadings and were improperly imported into the suit by evidence.

17. The upshot is that the plaintiff has failed to prove his case as pleaded and the only consequence is that the claim fails and the same is therefore dismissed with costs to the defendant.

Dated, signed and delivered in the presence of Mr.Wafula for the Defendant Mr.Kalimbo for the plaintiff.

P.J.O.OTIENO

JUDGE

7.6.2016