REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appeal 152 of 1996

FRANCIS KAMANDE …….....
……..APPLICANT

AND

VANGUARD ELECTRICAL SERVICES LTD …….....……..
RESPONDENT

(Appeal from the Ruling of the High Court of Kenya at Nairobi Mr. Justice A. G. Ringera dated the 2nd day of July,

IN

H. C. C. C. NO. 3395 OF 1995)

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JUDGMENT OF THE COURT

This is an appeal from the ruling and orders of the High Court of Kenya at Nairobi (Ringera J) given on 2nd July 1996.

The appellant has sued the respondent for shs. 500,000/= with interest and costs. The basis of the appellant's claim as disclosed in paragraph 3 of his plaint is that by a power of attorney one Kimani Nganga trading as Ceketco Freight Forwarders Ltd. (Ceketco) empowered the appellant to recover a sum of shs. 500,00/=, owed to him by Ceketco, from the respondent. Thus, the appellant has sued the respondent to recover shs. 500,00/= in respect of services rendered by Ceketco to the respondent namely to clear the respondent's goods with the customs Department.

By its amended defence and counterclaim the respondent denied that it owed Ceketco the said sum of shs. 500,000/= or any other sum at all as alleged in paragraph 3 of the plaint. It also denied that the respondent had any knowledge of any services rendered to it by Ceketco and put the appellant to strict proof of his claim. In the counterclaim, the respondent has alleged that there was an agreement between itself and Ceketco that Ceketco would clear the respondents goods with the Customs Department of the Republic of Kenya after paying the requisite customs duty and other dues in respect of the said goods to the Customs Department on behalf of the respondent. The respondent agreed to pay shs. 500,000/= to

Ceketco if it properly rendered the said services. Ceketco brought the goods from the Custom's bonded warehouse to the respondent representing that it had made the necessary payments to the Customs Department whereas in fact Ceketco had not made the necessary payments to the Customs Department. As a result of its failure to pay the custom duty etc the custom officers subsequently impounded the respondent's goods on 19.7.1995 which were declared abandoned due to non payment of the customs duty. Consequently the respondent had suffered loss damage and inconvenience. It is also pleaded that before it knew the true position about non payment of customs duty, the respondent had paid to Ceketco a sum of shs. 129,000/= believing that Ceketco had paid the customs duty and was therefore entitled to be paid for its services. The respondent has therefore claimed from the appellant the said sum of shs. 129,000/=, shs.695,554 as the value of the goods impounded and general damages.

By a Chamber Summons dated 29.3.96 the appellant applied for orders that the respondent's defence and counterclaim be struck out as it may prejudice embarrass or delay the fair trial of the suit. That application was based on the affidavit of the appellant filed on 4th April, 1996. The gist of his affidavit is that upon service of summons the respondent had written to him admitting the claim and offering to pay the amount claimed by instalments. By another affidavit dated 29th March, 1995 in support of that application the said Francis Nganga the proprietor of Ceketco deponed that he had fully paid all the dues to the Customs Department and handed over the receipts to the respondent and that it is not true that the respondents goods were seized by the customs department. He has also deponed that the goods which were impounded belonged to Business Machines Ltd. and not to the respondent. He has further denied that he was never paid a sum of shs. 129,000/= by the respondent.

Nathan Muinde who works with the shipping department of the respondent has by his affidavit filed on 23rd May 1996, in opposition of the application, deponed that Business Machines Ltd., is a sister company of the respondent; that he was involved in a bond check when the customs officers came to his office and informed him that according to their records considering to there was no proof of payment of the customs duty and other dues in respect of the goods cleared by Ceketco; that on several occasions he had requested Francis Kimani to produce the proof of payment as required by the customs officers but he had failed to do so; and that due to non-payment or failure to produce proof of payment by Francis Kimani the goods worth shs. 695, 554/= were impounded by the customs authorities and subsequently declared by them as abandoned. Also by his affidavit filed on 24.10. 1995 Ramesh Bhagani a director of the respondent deponed that although Kimani Nganga brought the goods from the Customs bonded warehouse and represented to the respondent that all customs dues had been paid, it later transpired that the necessary payments had not been made and goods were consequently impounded. He also affirmed that he paid some money to Kimani Nganga under the mistaken belief that he had made the necessary payments. It is further affirmed by him that there was total failure of consideration.

The learned trial judge dismissing the application said that the sole question before him on an application under O.VI r13(1) (c) is whether the court is satisfied that the defence and counterclaim or any part thereof may prejudice, embarrass or delay the fair trial of the action and that counsel for the applicant had failed to demonstrate as to how the said defence and counterclaim offended the rules of pleadings. He further held that the defence and counterclaim under attack was a perfect pleading which raised a defence of failure of consideration and counter-claimed for refund of money.

The appellant appeals to this court and in short his grounds of appeal are that the learned trial judge failed to strike out the defence and counterclaim which were evasive and designed to conceal and obscure the real issues in controversy thereby delaying the fair and just decision of the court and the second ground of appeal is that the learned trial judge erred in law by deciding the application on the basis of matters not canvassed before him namely whether the application should have been made under order XXXV of the Civil Procedure Rules. So far as the second ground of appeal is concerned the learned trial judge did not say that the application should have been made under O.XXXV. On the other hand, he observed that both Counsel had approached the application as if it was an application for summary judgment under O. XXXV which it was not.

A pleading is embarrassing if it is so drawn that it is not clear what case the opposite party has to meet at the trial. If the defendant raises relevant issues, his defence cannot be termed as embarrassing or

delaying the fair trial of the suit. Nor it can be struck out because the other party declares it to be untrue.

Madan JA said in D.J. Dobie & Co. Ltd. Vs Muchina & another Civil Appeal No. 37 of 1978 (Unreported):

"No suit ought to be dismissed unless it appears so hopeless that plainly and obviously discloses no cause of action and is so weak as to be beyond redemption and incurable by amendment."

What Madan JA said about the Plaintiff's suit equally applies to the defendant answer or defence. In Attorney General of Duchy of Lancaster vs. L & N. W. Rly Co [1982] 3 Ch. 274 C. A. it was held:

"The summary procedure under this rule can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable."

The learned Judge was right when he said that Counsel for the appellant/plaintiff did not show how the defence and counterclaim offended the rules of pleading. Surely it raised a defence of failure of consideration and counterclaimed refund of money paid under a mistake of fact and for loss and damage suffered by the defendant due to the misrepresentation by Francis Kimani that he had paid the customs dues before having the goods released from the customs bonded warehouse. The learned judge was therefore fully justified in refusing to strike out the defence and counterclaim.

There is another matter which we would like to comment upon. The appellant sues the respondent as a done of a power of attorney given in his favour by the said Kimani Nganga empowering him to recover the said sum of shs.500,000/= owed to the appellant by Kimani. He cannot sue the respondent in his own right and name unless there is a proper assignment of debt in his favour. The appellant's own locus standi, as such is very much in doubt. True that this point was not taken up by the respondent in its defence. But a point of law can be considered by court even in the absence of a pleading to that effect. Moreover as the suit is still pending the respondent can always apply for leave to amend its pleading during the tendency of the suit.

In the end we do not find any merit in the appeal and the same is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 3rd day of April 1998.

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR