REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA PEAL AT NAIROBI

Civil Appeal 271 of 1996

AGRICULTURAL FINANCE CORPORATION…….……
APPELLANT

AND

KENYA NATIONAL ASSURANCE COMPANY LIMITED (IN RECEIVERSHIP)……..…
RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Nairobi (Justice Hayanga)

dated 29th May, 1996

IN

H.C.C.C. NO. 269 OF 1996)

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JUDGMENT OF THE COURT

This is an appeal by the unsuccessful plaintiff, the appellant in the appeal, from a ruling of the superior court (Hayanga, J.) delivered on May 29, 1966, whereby the learned Judge dismissed an application by the appellant for judgment on admission under Order X11 rule 6 of the Civil Procedure Rules against Kenya National Assurance Company Limited (In Receivership), which is the defendant in the suit and the respondent in this appeal. From that ruling the appellant has appealed.

The facts are that on June 27, 1985, the appellant entered into a contract in writing with the respondent whereby the respondent agreed to administer on behalf of the appellant a Deposit Administration Account under the respondent's Master Policy No. 1665 (hereinafter referred to as "The Policy"). The effective date of the policy was to be January 1, 1982, from which date the appellant has at all material times without fail contributed to the policy as provided under the terms thereof. Under the terms of the policy, the appellant was entitled on request to being furnished by the respondent with the details of the status of the said account from time to time. It is the appellant's case that it did make several requests to the respondent to furnish it with such details but when such requests were invariably ignored, the appellant in 1994 appointed an actuarial consultant to examine the said account and give its report to the respondent. This was done in March, 1994.

As at December 31, 1993, the respondent claimed that the account had a credit balance of Shs.77,610,074.85. The appellant contends that if the respondent had prudently invested the fund, the subject matter of the account, as required by the Insurance Act, Cap 487 of the Laws of Kenya, the balance in the account as at the said date of December 31, 1993, should have been at least

Shs.93,255,535.00. It is averred in the plaint dated February 2, 1996, that the respondent was imprudent, negligent and reckless in the way it invested the account as a result of which the appellant has suffered loss and damage. Paragraphs 7 and 8 of the plaint set out the particulars of negligence, loss and damage.

As the appellant no longer operates the account save for the withdrawals from time to time on account of beneficiaries under the policy, the appellant demanded a refund of all sums now in credit in the account and policy. The appellant avers, working on a conservative rates of interest on 16% per annum, that the total credit on the account as at the end of September, 1995 ought to have been Shs.120,494,440.30 but the respondent contends that as at December 30, 1995 it was Shs. 92,602,757.75 which figures the appellant does not agree with.

The appellant therefore sought from the superior court a declaration that the respondent has been negligent investing the appellant's account, an order that had the respondent not been negligent in investing the said account, the credit balance in the account as at December 31, 1993, would have been Shs.93,255,535.00 and not Shs.77,610,074.85 as claimed by the respondent, an order that December 31, 1993, be the relevant date for the purposes of calculating what is truly owed by the respondent to the appellant, interest on such sum and judgment on admission in the sum of Shs.92,602,757.75 and costs.

The respondents' defence to the appellant's averments were that the findings by the actuarial consultant are not binding and have no consequence on the contract between the appellant and itself. The respondent further denied investing imprudently or in contravention of any law. It also denied breaching the policy and contended that the appellant was actually the party in breach of the contract by refusing to accept repayment in accordance with the said policy to which it is bound in the absence of an alternative agreement between the parties.

On March 26, 1996, the appellant filed a notice of motion under Order X11 rule 6 of the Civil Procedure Rules asking that judgment on admission be entered against the respondent in the sum of Shs.92,602,757.75 as at November 30, 1995, with interest thereon and, in the alternative, judgment on admission in the sum of Shs.64,821,930.40 being 70% of the Fund Value assuming the respondent is entitled to 30% deduction on account of administration charges as alleged by the respondent.

When the application to enter judgment on admission came before the superior court the respondent resisted it on the ground that there are clear provisions in the master policy stipulating the mode of payment and that those provisions should be adhered to by the parties. Provision 8(2) of the policy provides as follows:-

"(2) – Upon written notice from the Trustees that no further Premiums under the Scheme will be paid to the Company, the Company will pay to the Trustees or such person or corporation as such Trustees shall direct in full satisfaction of all claims under this policy:

(a) The accumulated balance of the Account

Payable in equal half-yearly instalments over a period of five years commencing from the date of notice of transfer during which time interest will continue to be credited and charges to be debited, or

(b) Such immediate cash payment as shall be agreed between the Trustees and the Company."

The learned judge of the superior court after considering the above provision and the correspondence exchanged between the parties held in his ruling that he was not satisfied that there was an admission of the claim and dismissed the application. The appellant has appealed against that ruling.

Several grounds of appeal are set out in the appellant's memorandum of appeal but at the opening of his submissions, Mr. Kembi Gitura for the appellant, informed us that he would make a global submission. However, the substantial ground is that it was an error on the part of the learned judge in not finding that there was a clear admission of the appellant's claim by the respondent as shown by the letters dated June 20, 1995, December 20, 1995 and January 30, 1996.

The relevant paragraphs of the letter dated June 20, 1995 are reproduced below:-

"Messrs. Kembi Gitura

Advocates

P.O BOX 45834

NAIROBI

Att: Kembi Gitura, Esq

Dear Sirs,

RE: AGRICULTURAL FINANCE CORPORATION

STAFF RETIREMENT BENEFITS AND GROUP

LIFE ASSURANCE SCHEME

We are in receipt of your letter dated 22nd June, 1995 and respond thereto as under:-

(iv) We enclose herewith the Fund statement calculated upto and including 30th June,1995 taking into account various withdrawals already processed.

The Fund Value is KShs. 91, 308,568/60 and the Current interest rate per Actuarial Valuation is 16% p.a.

(v) We note your demand for immediate payment of the sum of KShs.114,393,456/= together with interest and reiterate the Fund Value as per attached statements.

(vi) We advise that should your client wish to discontinue the Scheme with us, they should abide with Provision No. 8(2) (a). Kindly note however, that should your client opt for immediate cash immediate cash payment, we shall be entitled to deduct 30% of the Fund Value being the cost to be incurred in obtaining the very substantial lump sum payment as short notice.

(vii) We have had long standing and mutually beneficial business relationship with your client and would not wish to be involved in litigation with them neither would we wish to deprive them of their due rights under the existing policy.

Kindly therefore let us have your confirmation of the Fund statement and your clients instructions on the treatment thereof.

Yours faithfully,

C. A. ORARO (MRS)

Ag. COMPANY SECRETARY/CHIEF LEGAL OFFICER"

The appellant replied to the above letter on September 14, 1995. It stated that there was nothing in the policy entitling the respondent to withhold 30% or any other percentage of the fund value in case the immediate payment is demanded. The appellant rejected any deduction from the fund and gave further notice to sue if payment was not received within 21 days from the date of that letter.

By letter dated December 20, 1995, the respondent wrote to the appellant's counsel as follows:-

"M/s Kembi-Gitura

Advocates

P.O BOX 45834

NAIROBI.

Dear Sirs,

RE: AGRICULTURAL FINANCE CORPORATION

STAFF RETIREMENT BENEFITS AND GROUP

LIFE ASSURANCE SCHEME

We note with regret that we have still not received your response to our letter of 22nd November, 1995, copy enclosed.

In the absence of further instructions from you, we have taken the liberty of forwarding herewith a fund statement in respect of the above scheme as at 30th November, 1995 showing a Fund Value of KShs.92,602,757.75. Also enclosed are schedules of payments payable commencing 1st December, 1995 and a list of withdrawals paid from 1st July to 30th November, 1995. Under the terms of the Master Policy herein, as your client is not agreeable to penalty payment/deduction on total withdrawal, the only other option is the five year half-yearly instalment programme.

We therefore forward herewith the Discharge Form in respect of KShs.9,167,673/= for your clients' signature and return to enable us prepare our cheque in respect of the same.

Please note that there are a few pending claims which are under process and the same will be deducted from any instalments due once paid.

We await your response.

Yours faithfully,

C.A. ORARO (MRS)

COMPANY SECRETARY /CHIEF LEGAL OFFICER"_

The appellant declined to accept the proposals and returned the discharge voucher unsigned.

The final letter by the respondent before action is written by its Managing Director. It is reproduced in full:

"Mr. G. K. Toroitich

The Managing Director

Agricultural Finance Corporation

Development House

NAIROBI

Dear Gideon,

Subject; Agricultural Finance Corporation Staff Retirement Benefits and

Group Life Pension Scheme

We refer to previous correspondence herein and write to request your consideration of the position taken by your Corporation to proceed with litigation in your above Schemes with us.

We reiterate that we respect your decision to withdraw the Schemes from us and the only issue in dispute is the mode of payment.

As you are aware the Master Policy provides the mode of payment in Provision 8(2) as follows:-

(a) The Pension Fund Value is payable in equal half yearly instalments over a period of five years commencing from the date of notice during which time interest will continue to be credited and charges debited

OR

(b) Such immediate cash payment as shall be agreed between the Trustees and the Company.

It is our view given the wording of the Policy Document, our long standing business relationship, our status as sister parastatals and all other prevailing conditions, that it would not be in our best interests to resolve this matter in Court.

We therefore suggest that you accept payment by equal half-yearly instalments over a period of five years as stipulated in Section 8 (2) (a) or arrange a meeting between ourselves with a view to reaching an agreement on an alternative mode of payment.

We trust this request will receive your serious and urgent consideration.

Yours sincerely,

W.K.B. Arap CHELASHAW

MANAGING DIRECTOR"

There was no reply to the above letter and two weeks later this suit was instituted.

Order 12 r 6 empowers the court to pass judgment and decree in respect of admitted claims pending disposal of disputed claims in a suit. Final judgment ought not to be passed on admissions unless they are clear, unambiguous and unconditional. A judgment on admission is not a matter of right; rather it is a matter of discretion of the Court and where a defendant has raised objections which go to the very root of the case, it would not be proper to exercise this discretion. In the case of CHOITRAM V NAZARI (1982-88) 1 KAR 437 Madan, J.A (as he then was) said at pages 441 to 442:-

"For the purposes of O.X111 r. 6 admissions have to be plain and obvious, as plain as a spikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language

used. The admission must leave no room for doubt that the parties passed out of the stage of negotiations on to a definite contract. It matters not even if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admission by analysis."

The principles enunciated in the above case, which we accept as a sound proposition of law, were certainly placed before the learned judge and the only question in connection therewith is whether or not he correctly applied them when dealing with the matter before him. According to Mr. Kembi-Gitura, the learned judge did not do so; and consequently, he unfortunately fell into grave error.

The correspondence exchanged between the parties speaks for itself. It was not ambiguous. It is clear that the only prime issue raised in the pleadings and subsequent proceedings before the learned judge was the mode of payment.

The invocation of clauses(2)(a) and (b) of provision 8 of the policy cannot afford the respondent leave to resile from satisfying payment of the claim. It is clear that upon written notice the respondent is bound to effect payment, either in equal half-yearly instalments over a period of five years from the date of notice or in such immediate cash payment as shall be agreed between the parties. Whatever option payment is mandatory.

By letter dated June 20,1995, the respondent contended that it was entitled to retain 30% of the Fund Value being the cost to be incurred in obtaining the lump sum payment at short notice. In the circumstances, the learned judge, with respect, fell into an error in not considering at all the alternative prayer in the Notice of Motion in which the appellant prayed for 70% of the admitted amount, assuming that the respondent was entitled to deduct 30% of the said admitted amount to cover administrative and other charges.

Looking at the matter as a whole, it is manifestly plain that the appellant had placed evidence by way of affidavit and correspondence before the learned judge showing clear admissions of part of the claim by the respondent and on that basis it became obligatory of the learned judge to exercise his discretion in favour of the appellant by granting its motion on notice for judgment on admission.

We need not dilate here on the merits of an application under Order 35 r.2 of the Civil Procedure Rules, assuming that it had been brought, suffice it to say that under this Order the respondent would have had no good defence and the appellant would probably have obtained a quick and summary judgment.

Accordingly and, for the reasons above stated, the appeal is allowed and ruling dated May 29, 1996, is set aside.

Judgment on admission is entered for the appellant against the respondent in the sum of Shs.64,821,930.40 as at November 30, 1995, (being 70% of the sum claimed in prayer (e) of he plaint) with interest thereon at Court rates together with costs.

The respondent shall also pay to the appellant the costs of the appeal.

Dated and delivered at Nairobi this 26th day of February, 1997.

R. O. KWACH

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JUDGE OF APPEAL

R. S. C. OMOLO

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL