IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 11 OF 1996

(CORAM: GICHERU, LAKHA AND PALL JJ.A)

BETWEEN

JOHN PAUL TITI…….APPELLANT

AND

MUMIAS SUGAR CO LTD.……RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Nairobi (Justice Ole Keiwua) dated 14 November, 1995

IN

H.C.C.C. NO. 5212 OF 1992

****

JUDGMENT OF THE COURT

The appellant John Paul Titi has appealed from the ruling of the High Court at Nairobi (Ole Keiwua, J.) in the High Court Civil Case no. 5212 of 1992 in which Mumias Sugar Co (the respondent) sued the appellant on or about 25 September 1992 for the recovery of Shs. 633,558.85 being a sum had and received by the appellant for the use of the respondent. Alternatively, the respondent claimed the same amount from the appellant being the balance amount due to the respondent from the appellant as being moneys advanced to the appellant by the respondent the particular of which were said to be well known to the appellant.

By his defense dated 25th January 1993 (paragraph 2) the appellant denied that he was indebted to the respondent either as money had and received or as advances made to him and put the respondent to strict proof thereof. The appellant however conceded by paragraph 3 of the same defense that he could be indebted to the respondent in respect of cheques issued by him which could have been dishonoured (underlinings provided).

On 2 June, 1995 the respondent applied under 0.6 r13 of the Civil Procedures Rules and inherent powers of the court by a chamber summons to strike out the said defence on the grounds that:-

0. It did not disclose any defence;
0. Alternatively it would delay the fair trial of the action and is otherwise an abuse of the process of the court;

0. the court be pleased to enter judgement as pleaded in the plaint on the ground that the debt had been earlier admitted by the appellant.

By his affidavit in support of the said application Mr. Peter Otieno the Acting Financial Controller of the respondent stated that the appellant was appointed the non executive chairman of the respondent for three years with effect from 23 February, 1988. By virtue of his appointment the appellant was entitled to an honorarium among some other benefits according to the terms of his service. The appellant was not entitled to any hotel accommodation except when he was on official business for and on behalf of the respondent. The appellant started incurring unauthorised hotel accommodation bills and travelling expenses requiring the same to be paid by the respondent which resulted in correspondence to clarify the position. It was finally confirmed that the appellant was not entitled to claim any such expenses. The appellant by his own letter dated 24 February, 1990 acknowledged the correctness of the position and authorised the respondent to offset the debt incurred by him against his emoluments. The appellant however continued to incur the said unauthorised expenses upto and including July, 1991.

By 31st March, 1991 the total sum due from the appellant was Shs. 633,558/85. The respondent addressed a demand and issued a couple of reminders to the appellant who ultimately by a letter dated 10th July, 1992 responded to the said demand and reminders and admitted a part of the debt but denied the rest of it.

The appellant failed to file the grounds of opposition within the period prescribed by 0.50 r 16(1) of the Civil Procedure Rules which he was obliged to do if he wished to oppose the said application by the respondent.

When on 14.11.1995 the application came up before Ole Keiwua J. he ordered that the application will proceed exparte. The learned Judge made the following order.

> "I am satisfied that there is both no defence to the plaintiff's claim and in any event what purports to be such defence is intended in view of the correspondence and documents annexed to delay the fair trial of the suit. It is therefore abuse of the process of the court. Accordingly the defence is struck out and judgment is entered for the Plaintiff as prayed for in the plaint with cost of the suit and the application."

The appellant has now appealed from this order. The gist of the appellant's appeal to this court is that the learned Judge of the superior court erred in law in holding that the appellant had no defence to the respondent's claim; and that the appellant had not raised any triable issues in defence.

By paragraph 2 of his defence the appellant had barely denied the respondent's claim. Mr. Mulwa for the appellant agreed that the defence was no more than a general denial if looked at alone but he submitted that had the learned trial Judge taken the appellant's affidavit into account, it would have emerged that there were triable issues. However it is trite law that if a pleading is defective its defect can be cured only by an amendment of the same. Between 26.7.1995 when the respondent's application came up for interpartes hearing and 14.11.1995, when the application was actually heard, the appellant had enough time to apply for leave to amend his defence if he so wished. No attempt was made to amend it. Under 0.6 r 9(3) of the Civil Procedure Rules 9 general denial of the allegations in the plaint or a general statement of non-admission of those allegations is not a sufficient traverse of them.

The appellant's other and not alternative, defence is that he could be indebted to the respondent in respect of cheques issued by him which could have been dishonoured and that in case none had been dishonoured he denies owing any money at all. The appellant having issued the cheques would certainly know if his cheques had been honoured or not and if they had been dishonoured what the total amount of those dishonoured cheques was. The denial by the appellant is obviously evasive. Moreover it is inconsistent with his total denial of indebtedness to the respondent. In Raghbir Singh Chatte Vs National Bank of Kenya Civil Appeal No. 50 of 1996 (unreported) the appellant denied that the respondent extended any overdraft facilities to him and then in the same breath stated without saying how and when, it had been paid. Akiwumi J. A. delivering the majority judgement said

> "such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0.6 r13 (1)(a)."

Mr. Mulwa has submitted that the learned trial Judge erred in hearing and determining the respondent's application exparte. The record shows that Mr. Munyasia appeared on the hearing of the application. He conceded that the grounds of opposition had been filed late and were not served on the respondent. He did not venture to explain why he had failed to file them in time and serve them on the respondent. Despite that lapse on his part, under 0.50 r 16(3) he should have applied for leave of the court to argue the grounds so that the court could have considered his request and possibly allowed him to argue the grounds notwithstanding that they had been filed out of time and not served upon the respondent. He did not consider it necessary to do so. The learned Judge pertinently observed:

> "Mr. Munyasia does not appear to take advantage of the remedy provided under 0.50 r 16(3)"

By his letter dated 24 February 1990, the appellant responded to respondent's requests for payment and wrote as follows:

> "I write to authorise you to transfer my emoluments with effect from 1st March 1990 to clear my debt with the company. This instruction shall be in force until the debt is fully recovered".

Under cover of a letter dated 31 March, 1991 the respondent forwarded a complete breakdown of the amount of Shs. 633,558.50 to the appellant. The appellant admitted liability for some items but denied the rest of them whereas by his defence he had entirely denied the indebtedness.

In the circumstances of this case, we are fully satisfied that the learned trial Judge was justified in saying that the defence was intended to delay the fair trial of the suit. In the end we do not find any merit in the appeal and dismiss it with cost.

Dated and delivered at Nairobi this 14th day of March 1997

J. E. GICHERU

……..

JUDGE OF APPEAL

A.A. LAKHA

…….

JUDGE OF APPEAL

G. S. PALL

……

JUDGE OF APPEAL