IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, AKIWUMI & LAKHA JJ.A)

CIVIL APPEAL NO. 40 OF 1992

BETWEEN

MITSUBISHI CORPORATION…….....……APPELLANT

AND

ANTHONY MASSAWA……..……RESPONDENT

JUDGMENT OF THE COURT

The appeal before us is against the ruling of the learned Judge of the superior court in the exercise of his powers under Order 6 r 13 (1) (b) of the Civil Procedure Rules on the grounds that the learned Judge did not consider or apply the proper principles applicable in such matters.

The respondent who was the plaintiff in the suit, claimed from the appellant, the defendant in the suit, the sum of Kshs.1,134,793 being commission earned by him for having obtained for the appellant a contract for it to supply agricultural inputs to the Ministry of Agriculture of Uganda, the sum of KShs.124,658 also by way of commission earned by him for having obtained for the appellant a contract for it to supply equipment to the Uganda Electricity Board, the return of certain documents belonging to him, and general damages for the breach of clause 10 of his contract of employment dated 8th April, 1988 with the appellant which required that his employment could only be terminated by the appellant by it paying him month's salary in lieu of notice which it did not do. In respect of this last item of the respondent's claim, the appellants, whilst admitting in its statement of defense that its then existing contract of of employment with the respondent dated 5.7.90 and not 8.4.88 contained provisions for the termination of the respondent's employment by the payment of a month's salary in lieu of notice went on to deny that such provisions were contained in clause 10 of the existing contract of employment and further averred that the respondent had been properly dismissed for misbehavior. With respect to the claims for commissions, the statement of defence put the respondent to strict proof denied that the respondent had in fact, successfully negotiated any contract for the appellant and further, that even if this had been done by the respondent, it was done in the ordinary course of his duties as an employee of the appellant for the salary he was earning and not as a commission agent. The appellant also conter-claimed for an unpaid loan it had given the respondent. The respondent then filed a reply to the defence in which he, inter alia, joined issue with the appellant as to the date of his applicable contract of employment and other issues of substance raised in the statement of defence.

The foregoing was in brief, the state of the pleadings when the respondent applied under Order 6 Rules 13 and 16 of the Civil Procedure Rules for two orders which are reproduced hereunder:-

"1. The defence dated 6th September,1991 and filed herein be struck out as being frivolous

vexations and an abuse of the process of Court

and/or

2. The said defence be struck out as disclosing no reasonable ground for (sic) Defence and judgment entered for the plaintiff."

When this application came up for hearing. counsel for the respondent stated that he would only pursue the first prayer reproduced above. This prayer is disinguishable from the second prayer sought in one important respect in that whilst the first prayer only sought for the striking out of the defence, , e second prayer sought in addition to that the summary remedy of

entering judgment for the respondent. The first prayer which did not seek the entry of judgment and thus, fundamentally limited in its scope as shown, cannot be said to have granted to the learned Judge the right to enter judgment which was not even sought. It would have been otherwise, even if as was in the case of Republic of Peru vs. Peruvian Guano Company (1887) 36 ch.D 489 at p.500, the respondent's application, though it did not ask in terms for the entry of judgement, had also by implication, asked for "such other order as may be proper". In any case. when the application was argued before the learned Judge, counsel for the respondent as the record shows, only sought for the defence to be struck out and no more.

The following comment on the corresponding English Rule of the Supreme Court namely, 0.18 r 19, which is in the same terms as Order 13 of our Civil Procedure Rules. and which can be found at p332 under the heading "Application", of the Supreme Court Practice, 1993 vol.1 part 1 is instructive:

"The application should specify precisely

what order is being sought, e.g. to strike out or to stay or dismiss the action or enter judgment, and precisely what is being attacked whether the whole pleading or indorsement or only parts thereof and if so the alleged offending parts should be clearly specified."

The order that the respondent sought before the learned judge was to strike out the defence on the grounds that was frivolous, vexatious and an abuse of the process which is in itself, was an undesirable amalgamation of the grounds on which the defence may be struck out separately under paragraphs (b) or

(d) of r. 13(1) of Order 6. An examination of the affidavit in support of the application, apart from relying again on the breach of clause 10 of the contract of employment dated 8.4.88, which was clearly no longer applicable, and the letters from the appellant promising to pay commissions namely, those dated 21.1.91, and 20.11.88, annexed to the respondent's supporting affidavit as giving rise to his unassailable claim for commissions against the appellant. demonstrates the imprecise and confused nature of the respondent's application which should have been apparent to the learned Judge. In paragraph 12 of that affidavit, the only ground deponed in support of the application is that:

"... the Defendant's defence filed herein discloses no reasonable Defence to my Suit is otherwise an abuse of the process of the court and should be struck out."

It must be remembered that where the allegation is that the defence discloses no reasonable defence, then no affidavit evidence is admissible. What was before the learned Judge when being asked to grant the very strong and summary remedy which he must only do in the clearest of cases and with extreme caution (See D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Machira and Leah Wanjiku Mbugua, Civil Appeal No. 37 of 197S) unreported, was not only an unacceptably imprecise affidavit evidence, but also an appl-ication that did not authorize the learned Judge to enter judgment as he did in addition to striking out the defence.

It is clear that the entry of judgment by the learned Judge cannot stand. But should this affect his striking ou of the defence?

We would say, yes, for the following reasons. His error in entering judgment when that had not been sought from him colours unfavourably the whole of his ruling. The undesirable confused nature of the application before him and its supporting affidavit do not constitute the requisite clear, unambiguous and deserving circumstances in which the summary remedy sought should have been granted. Upon an application to only strike out the defence on the grounds that it was frivolous and vexatious and an abuse of the powers of the court, the learned Judge did not only strike out the defence but also went beyond what was sought of him, to enter ,Judgment for the respondent. It cannot be said that he acted with the proper caution expected of him in such a matter.

In the hearing of the appeal before us, certain issueS were raised which we think we should nonetheless, also consider. It Was argued that the learned Judge first erred in virtually holding as he did, that the contract of employment that was applicable to the matter before him, was that of S.4.88, and that the appellant's denial of the existence of clause contract was conduct that could not only be:

"described as frivolous and vexatious".

but that:

"It annoys.".

But the uncontroverted facts before the learned Judge and which he failed to consider, were to the contrary. They were that as the appellant 11 all correctly averred all along, the applicable contract of employment was the one dated 5.7.90, which although it had only nine clauses and contained in the last clause, the same provisions for the termination of the respondent's services as existed in clause 10 of the contract of employment dated 8.4.38, was nevertheless, a different contract from the latter. It seems to us that the one who had misled the learned Judge on this, was rather the respondent whose plaint should have been amended, and not the appellant.

What about the commissions claimed by the respondent for the contracts that he claimed he had successfully negotiated for the appellant. He sought to establish this by the letters of20.11.88 and 21.1.91.The learned judge after a substantial

consideration of the affidavit evidence,did not accept the affidavit evidence of the appellant that he had not signed the letter of 21.1.91 or agreed to pay the respondent commission in addition to his monthly salary and one of his several reasons for doing so was, the answer given by counsel for the appellant from

the bar to a question asked by him, that the appellant had not reported the possible forgery of that letter to the police. The learned Judge had delved into the facts of the matter which he should not have indulged in, in an application for the summary remedy sought like the one before him.

In the D.T. Dobie case (supra) Madan J.A. as he then was quoted with approval the following observations of Sellers LJ in the case of Wenlock v Haloney and Others (1965) 1 W.L.R. 1238 in support of the proposition that the summary jurisdiction of the court to strike out pleadings:

“…….was never intended to be exercised by a minute and protracted examination of documents and the facts of the case To do that is to usurp the position of the trial Jude, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way.".

The appellant in his statement of defence had put the respondent to strict proof of the issue of the payment of commissions and the letters apart, that the respondent had in fact, successfully negotiated the contracts he claimed to have negotiated and how he became entitled to the amount of commission claimed. These were triable issues that were summarily rejected by the learned Judge. If the respondent had been misleading with respect to the "clause 10" was it not possible that he could do so with respect to the commissions? Furthermore, the glaring

error of the learned Judge with respect to his holding concerning the appellant's disclaimer of the famous clause 10, shows a lack of the required extreme caution on his part which makes it unsafe to uphold his conclusions as regards the respondent's claim for commission.

If we had not earlier decided to allow the appeal as previously indicated, we would allow it for the immediate preceding reasons.

The appeal is hereby allowed and the related ruling and order of the learned Judge set aside. The suit is hereby remitted to the High Court for hearing. The appellant will have its costs for this appeal and for the application before the

learned Judge. It is so ordered.

Dated and delivered at Nairobi this 15th day of March, 1996.

R.S.C. OMOLO

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***JUDGE* OF APPEAL**

A.M. AKIWUMI

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL