



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT KISUMU

CIVIL APPEAL 50 OF 1996

RAGHBIR SINGH CHATTE.....APPELLANT

AND

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

(Appeal from the judgement and Decree of the High Court of Kenya at Kisumu (Justice Githinji dated 11th day of August, 1994

IN

H.C.C.C. NO. 315 OF 1993

JUDGMENT OF AKIWUMI, J. A.

On 11th August, 1994, Githinji, J. heard an application by the respondent filed on 10th September, 1993, to strike out the defence of the appellant in a suit filed by the respondent, against the appellant and to enter judgment for the respondent. The application was brought under Order 6 rule 13(1)(a), (b) and (c) under any which, if a pleading is struck out, the suit may by virtue of rule 13(1), be stayed, dismissed or judgment entered accordingly. As already alluded to, in addition to striking out the defence, the respondent sought consequentially, judgment as prayed in its plaint. Although the application in its heading as far as the striking out of the defence is concerned, was said to have been brought under Order 6 rule 13(1)(a), (b) and (c), what was actually sought in the application itself, was only the striking out the defence under paragraph (a) of r 13(1) of Order 6, on the ground that it discloses no reasonable defence. The respondent also sought in the alternative, entry of judgment on admission under O 12r 6, which was dismissed.

I must now turn to the suit itself. In a straight forward plaint, the respondent, a bank, sued the appellant for the sum of Kshs. 9,062,660/- and interest thereon, which it was alleged the appellant owed the respondents by way of an overdraft which had been extended to the appellant by the respondent in pursuance of a written agreement made between the two of them, and which, the appellant despite demands made, had failed to pay. In answer to this straight forward claim, the appellant filed what in my view can only be described as a spurious and evasive defence. Paragraph 3 and 4 of the plaint which had averred with more than sufficient particulars that at the behest of the appellant, the respondent had advanced to the appellant the total sum claimed and interest thereon which the appellant had in breach of the written agreement failed to pay though due and owing, were dealt with in paragraphs 1 & 3 of the defence by way of an empty general traverse in this manner:

“1. Save as herein specifically admitted the defendant denies, singular and several, the allegations contained in the plaint, as if the same were set forth seriatim and specifically traversed.

3. Paragraph 3 & 4 of the plaint are denied in toto and the plaintiff is put to the strict proof thereof.”

Paragraph 5 of the plaint which was in the following clear, and detailed terms, was also not deigned any specific traverse in the statement of defence:

“The plaintiff’s claim against the defendant is for the payment of Shs. 9,062,660/- being the amount due and owing from the defendant together with interest thereon at 24% per annum from 10th June, 1993 until payment in full.”.

Paragraph 4 of the defence then indulged in what can only be described in the particular circumstances of the case, as prevarication, lack of candidness and double tongue and which in my view, made things worse than they already were, when it was baldly averred in that paragraph as follows:

“IN THE ALTERNATIVE AND WITHOUT PREJUDICE TO THE FOREGOING the Defendant avers that if any overdraft facilities were extended by the Plaintiff to the Defendant (which is denied) the same had been fully paid and discharged.”

This was the state of the pleadings when the respondent applied to have the defence struck out and judgment entered. As already indicated, the application as regards the striking out of the defence was on the ground that it discloses no reasonable defence. In such a case, no affidavit evidence is admissible and it is clear from his ruling, that the learned judge of the superior court was well aware of this and in considering this issue, did not take into account the affidavit evidence that had been filed in the application by both sides or the grounds of objection filed by the appellant that related to the affidavit evidence before him. The learned judge’s ruling on this issue deserves to be set out in extenso:

“I conclude therefore that the defence is sought to be struck out on the three grounds stated in order VI rule 13(1)(a)(b) and (d) and that the affidavit evidence is admissible. In any case even if the application is solely based on the ground that the defence discloses no reasonable defence, it is clear that the defence on the face of it is evasive and equivocal. The defendant in paragraph 3 of the defence merely denies the contents of paragraph 3 and 4 of the plaint. In paragraph 3 of the plaint, the plaintiff pleads that by a written agreement, it agreed to and did advance defendant overdraft facilities at defendant’s request and that defendant agreed to repay overdraft. In paragraph 4 of the plaint, plaintiff pleads that defendant in breach of the agreement failed to pay the overdraft or any part thereof. Paragraph 4 of the plaint shows the sum claimed as Shs. 9,062,660/-. After denying paragraphs 3 and 4 of the plaint, defendant in paragraph 4 of the defence pleads:-

‘In the alternative and without prejudice to the foregoing, the defendant avers that if any overdraft facilities were extended by the plaintiff to the defendant (which is denied) the same has been fully repaid up and discharged.’

The defence as framed as such is a bad defence. Defendant, if he indeed received the overdraft should admit so in his defence and then put forward a positive defence that he has fully repaid the overdraft. The defence as framed is evasive and does not put forward any positive defence on which issues can be framed for trial. So, even if the affidavit evidence is excluded, there is no reasonable defence pleaded and on that ground plaintiff’s application would succeed.”

The learned judge then went on to strike out the defence and to enter judgment as prayed.

The appeal against this decision is based on the following grounds: that the orders sought in the application were not clearly specified; that the grounds on which the respondents application was brought were not concisely set out; that the plaint itself, which was not sought to be amended, was vague as it did not contain the date of the written agreement, the breach of which, the plaint was founded on; that the defence was not a mere denial and that a general traverse of the allegation in the plaint was in any case, a

valid and effective denial; that the alternative though inconsistent defence averred, was permissible and should not have been held against the appellant; that the learned judge did not exercise the requisite extreme caution when dealing with the application before him; and that the learned judge erred in relying upon S.3A of the Civil Procedure Act in granting the prayers sought in the application before him.

I have already pronounced that in an application for the strong summary order for striking out, the particular order sought, should be clearly set out in the application, otherwise it would be wrong to entertain it. The respondent's first prayer clearly stated that it was for the striking out of the defence, under O.6, r.13(1)(a) as indicated in the heading of the application, and on the ground as concisely set out in the application, that the defence did not disclose a reasonable defence. I can see nothing wrong with this. This ground relied upon was obvious and clear for all to see and no objection was raised before the learned judge. What is more, in answer to the assertion made on behalf of the respondent at the hearing, that the defence was a mere denial, counsel for the appellant had urged as follows:

“...ground for striking out defence is provided in order VI rule 13 (1)(a). There is no other ground on which defence is sought to be struck out. I invite court to provisions of order VI rule 13(2) c & d – no evidence shall be admissible on an application under rule 13 (1)(a) – so the affidavit filed in supporting (sic) of the application irrelevant and inadmissible as they are pieces of evidence. – This ground should be determined on scrutiny of the pleadings.”

On the other hand, where the heading of the application had as in this case, stated that it had also been brought under O.6, r. 13(1)(a) and (d), but what was sought under these rule and for what reason, were not set out in the body of the application, the learned judge erred in considering their prayers simply because evidence that could support such prayers were contained in the affidavit evidence before him.

It was argued in the present appeal by Mr. Menezes, counsel for the appellant, that the mere denial or general traverse contained in the defence was valid and effective. In support of this, Mr. Menezes cited two authorities mainly the case of Shah v Patel (1961) EA 397 and Halsbury's Laws of England, 4th Ed. Vol. 36 page 22 para 30 which is headed “General denial insufficient”.

In Shah the plaintiff had sued the defendant claiming certain sums of money advanced to the defendant against promissory notes under a second mortgage with particulars thereof. In its defence the defendant averred, inter alia, that the second charge was invalid because it did not conform to statutory requirements, that it was not validly attested or given for valuable consideration, that it was intended to secure payment of money otherwise irrecoverable since the plaintiff had been leading money illegally in contravention of the Money Lenders ordinance, and that the second mortgage was consequently unenforceable. These substantial issues of defence that were averred, were then followed by a general denial of all the allegations set out in the plaints. At the trial, the learned judge ruled that since the defence had not put in issue the fact of the existence of the second charge, or the fact of its having been registered, or the fact that the loan had been made and had become payable, the defendant should begin. He also rejected the averments which the defendant had made in his defence in relation to primary issues averred in the plaint. On appeal, Sir Kenneth O'Connor, P. relying on the English Court of Appeal case of Lancaster Radiators v General Motor Radiators Co. Ltd. (1946) 2 All E. R. 685, having referred to the learned trial judge's ruling that the defendant had in the defence not put in issues the primary facts I have already referred to, and were therefore, not denied, went on to state by way of obiter dicta, and which indeed, did not constitute any of the holdings in Shah, the following:

“I think, with the greatest respect, that the learned Judge fell into error. He seems to have overlooked the general denial contained in paragraph 7 of the defence ...This denied all the allegations contained in the plaint as if they had been set out and traversed seriatim except where expressly or impliedly admitted. A general denial of this kind is valid and effectual: Lancaster (John) Radiators Ltd. V General Motor Radiator Co. Ltd. (1), (1946) 2 ALL ER 685. There was no express or implied admission of the matters mentioned. It is in para. 6 of the plaints that the making of the second charge is pleaded and the lending of Shs. 70,000/= under it. In para. 2 of his defence the first defendant pleads:

‘As to paras. 6 and 7 of the plaint, this defendant will without admitting the accuracy or correctness of the

allegations set out therein, maintain that the second charge is invalid, etc.’

Clearly, there is no express or implied admission here (or elsewhere) in the defence of the first defendant which would modify the general denial, contained in para 7 of each defence, of the making of the second charge and the lending of Shs.70,000/= under it. Neither did the first defendant admit the plaintiffs’ averment that they lent Shs.70,000/- to him upon the terms and conditions stated in the second charge since he was averring (in para 4 of the defence) that the loan was already outstanding when the second charge was executed. There was no “confession” in the defence of the primary facts averred in the plaints and the onus was upon the plaintiffs to prove the making of the second charge and the lending of money under it before any question arose on its legality or of repayment of money lent. I think, with respect, that it was for the plaintiffs to begin,”

It seems to me from the foregoing dicta of Sir Kenneth O’Connor, P. which show that the defence had not only sufficiently denied primary averments contained in the plaint but had also raised legal issues of substance, and that the general denial was merely an appendage thereto, that the defendant had not “confessed” to the plaintiff’s averment as to an amount to admission of the primary facts averred in the plaint or that the defence discloses no reasonable defence. It was not like in the present appeal where there was only a general denial to the primary facts averred in the plaint and where the point at issue was not like in Shah, whether the defence tended to prejudice, embarrass and delay a fair trial of the suit, but whether a reasonable defence had been disclosed.

It is now necessary to consider in some detail Lancaster Radiators which gave birth to the foregoing dicta of Sir Kenneth O’Connor, P. The following head note and holding in that case give a sufficient background of the issues involved:

“In an action in which the plaintiffs alleged that the defendants had wrongfully and maliciously conspired to defraud and injure the plaintiffs in their business, the statement of claim set out (inter alia) several acts alleged to have been done by the defendants in furtherance of the conspiracy. The defence contained a clear and comprehensive denial of the alleged conspiracy, a general denial of all the acts alleged to have been done in furtherance thereof, and a denial of every item of damage. It further stated: ‘The defendants....deny each and every allegation in the statement of claim contained as fully as if the same were herein set forth and denied seratim.’ The defence did not, however, set out, and deal specifically with, each allegation. The plaintiffs appealed to have the defence struck out under R.S.C. Order 19 r. 27, on the ground that it tended to prejudice, embarrass and delay the fair trial of the action: -

HELD: it was obligatory on a defendant to deny one by one each allegation in statement of claim, and, as the defendants had denied every allegation of fact in the statement of claim, it could not be said that the defence tended to prejudice, embarrass or delay the fair trial of the action. (Adkins v. North Metropolitan Trammways Co. (1) applied). Whether the defendants had denied unnecessarily allegations which were not really in dispute, and thereby increased the costs of the action, was a matter for the trial judge.”

In his leading judgment in Lancaster Radiators Morton, L. J. pointed out at p.687 that what the court had before it was not a case where the defence consisted of only a general denial. He made the following noteworthy statement which to my mind, makes it inapt to rely upon Shah which in turn, is derived from the Lancaster Radiators as authority in the particular pleadings of the present appeal for the proposition that a general denial is in all cases a valid and effective pleading:

“The defendants have chosen to plead in a manner which alleges, in effect, that the statement of claim and every allegation of fact in it is incorrect from beginning to end. We do not know whether that is so or not. No doubt, when the matter comes to hearing, if the court thinks that the statement of defence has involved the plaintiffs in unnecessary expense, the court will know how to deal with the matter by way of costs, but I am unable, on the material before us, which consists simply of the statement of claim and defence, to say that this defence tends to prejudice, embarrass or delay the fair trial of the action. The plaintiffs are left in no regard to every single allegation in the statement of claim. They deny every one of them, and, for all we know, every one of them may be false.

I do not propose to express any view, unless and until the matter arises, on a defence consisting simply of one paragraph;.....The defendants and each of them deny each and every allegation in the statement of claim contained as fully as if the same were , herein set forth ad denied seriation...’ In this case the defendants have gone further than that. They have started by answering in unambiguous terms what seems to be the point of substance in the statement of claim, i.e., the alleged conspiracy. They go on, in para.2, to deny all the acts which they alleged to have done in pursuance of the alleged conspiracy and, in para.3, to deny every item of damage and to raise a further defence that the alleged damage, if it had been suffered, is not the result of any act or default of theirs.”

Morton L.J. also considered the case of Adkins v North Metropolitan Tramways Co. (1893), L. J. Q. B 361. In that case the plaintiff had brought an action against the defendant company for personal injuries to a pony and damages to a van through the alleged negligence of the defendants company. The defence to the plaintiff’s plain which set out his version of the facts was merely that:

“The defendants deny each and all the several statements and allegations set out”, in paragraph 2 and 3 of the plaint. On appeal against the decision of the judge to strike out the defence, Hawkins, J. of the Divisional court consisting of Hawkins, and Lawrence, JJ. in dismissing the appeal, made the following observation which Morton, L. J. approved of:

“The defence is no doubt not strictly in accordance with the wording of the rules Rule 17 does say that there must be specific denial, or rather that ‘each party must deal specifically with each allegation of fact of which he does not admit the truth.’ But it is admitted here that the defence does intend specifically to deny each and every allegation of the statement of claim, and the defendants’ counsel is ready to draw out each denial specifically if the plaintiff really requires him to do so.”

Morton, L. J. then went on after considering the case of Thorn v Holdsworth (1876)3 Ch.637 at 640 in which Jessel, M. R. had held that the defence filed in that case amounted to an admission on the ground that it was plainly evasive and obscure, to hold that in the appeal before him, it could not be said that the defence was plainly evasive and obscure.

The words of Jessel M.R. on this issue are the following:

“When a party in any pleading denied an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum, or any part thereof, or else set out how much he received. And so, when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged along those circumstances, but fair and substantial answer must be given.”

I shall revert to this later on. Back to Adkins. I will only like to comment that in that case, there was no application to strike out the defence on the ground that it disclosed no reasonable defence neither was it alleged or found that the defence was evasive and obscure as can be said of the defence in the present appeal. Moreover, the circumstances in Adkins as observable in the observation of Hawkins, J. are different from those in the present appeal.

As regards the statement of the law as set out in Halsbury’s Laws of England, the particular passage referred to is as follows:

“General denial insufficient. It is not sufficient for a defendant in his defence to deny generally the grounds alleged by the statement of claim, or for a plaintiff in his reply to deny generally the grounds alleged in a defence by way of counterclaim: each party must deal specifically with each allegation of fact of which he does not admit the truth, except damages. When a party in any pleading denies an allegation of fact I the previous pleading of the opposite party he must not do so evasively, but must answer the point of substance. However, it has become common practice to use in a defence a traverse in a general form, this merely puts the opponent to proof.”

It is not necessary to say more than that the authorities referred to in Halsbury's Laws of England in connection with the statement that it has become common practice to use in a defence a traverse in general form, are Adkins and Lancaster Radiators which as I have endeavoured to show, are distinguishable from the circumstances of the present appeal.

Counsel for the appellant submitted that inconsistent pleading are allowable if they are in the alternative. That may be so, but if not when the alternative defence is plainly evasive and contradictory and particularly so when as in this case, no particulars of payment made are even vouchsafed. This court's attention was drawn to Mulla, the Code of Civil Procedure, Act V of 1908, 12th Ed. P 578 in support of the proposition that inconsistent pleading is not prohibited. That may be so, but the answer to the argument of counsel for the respondent is as I have stated and as also set out in Mulla, opus cit. At 579 as follows:

“What the rules prohibit are not inconsistent pleading, but pleadings which set up inconsistent and embarrassing claims and inconsistent and embarrassing defence.” (underling supplied).

Counsel for the appellant also argued that the appeal should be allowed because the learned judge erred in depending upon s 3A of Civil Procedure Act, which gave him the inherent power to make orders to prevent abuse of the process of the court, to make the orders that he did. But it is clear from the ruling of the learned judge so far as concerns the application before him to strike out the defence as disclosing no reasonable defence and to consequently, enter judgment for the respondent, that he did not rely on S 3A of the Act. His reference to that section of the Act was only in respect of the invalid application to strike out the defence on the grounds that it was frivolous or otherwise, an abuse of the process of the court.

Mr. Wasuna, counsel for the respondent, submitted that the decision of the learned judge being one that he had reach in the exercise of his undoubted discretion, it was now well settled, could only be disturbed if he had misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that he was clearly wrong in the exercise of his discretion and that a result there has been misjustice. Whilst I do not think that the learned judge took into account extraneous matters, I must consider whether he applied wrong principles. Indeed, this is what the grounds of appeal in substance are all about. In this regard, counsel for the respondent drew attention to an authority of this court on the meaning to be ascribed to the phrases a “mere denial” and “the defence not being a good defence”, which although determined in an application brought under 0 35 for summary judgment and not under the 0 6 r 13(1)(a), should be applied when considering applications brought under the latter rule. In the case of Magunga General Stores v Pepco Distributor Ltd (1988-92) 2 KAR 89, the plaintiff sued the defendant for the sum of Kshs. 91,170/- being the amount due upon nine dishonoured cheques issued by the defendant for goods supplied by the plaintiff. Subsequently, after the defendant had entered appearance and filed his defence which was a general traverse, the plaintiff applied under 0 35 for summary judgment in respect of the liquidated demand. This application as required, was supported by an affidavit and both were served on the defendant. There was no affidavit in reply and ex parte judgment was entered for the plaintiff. The defendant then applied to the ex parte judgment set aside. He himself, said that on the day when the ex parte judgement was entered, he had, without giving any reason for his late arrival, arrived at the court after judgment had already been entered. He further stated baldly that he was prepared defend himself as he had triable issues to raise at the hearing. His counsel, who was also present, stated that the defence filed which was a mere general traverse would be amended to improve it. The learned judge in refusing to set aside the ex parte judgment dwelt mainly on the lack of merit in the defence. In the subsequent appeal to this court, it was held that a mere denial is not a sufficient defence in the type of action that had been brought against the defendant. In the judgment of this court delivered by Platt, J. A. as he then was, it is clearly stated as follows:

“First of all a mere denial is not a sufficient defence in this type of case there must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given.”

Thus is Magunga General Stores this court authoritatively enunciated the principle that in an action for a

debt or liquidated demand a mere denial or general traverse will not do for all purposes. Applying the same principle a defence in an action of that type that is a mere general traverse cannot be and is not a sufficient defence and also discloses no reasonable defence for the purposes of 06 r 13(1)(a). In 0 6 r 9, it is provided that every allegation made in a plaint which it is not intended to be admitted, shall not be specifically traversed in defence and a general denial shall not be a sufficient denial of them. The following comments on the corresponding English rule namely 0 18 r 13, which appear in the Supreme Court Practice 1993, vol. 1 PART 1 p.323 para 18/13/1, also clear supports and view that in a suit for a liquidated demand where the facts are clearly set out in the plaint as in the present appeal, a general denial is of no use and demonstrates not only a reprehensible lack of candidness in defence but also that the defence discloses no reasonable defence which can be the basis for an application to strike out the defence either under 0 6 r 13(1)(a) or 0.35:

“This rule enforces a cardinal principle of the system of pleadings, that every allegation of fact in a statement of claim or in a counterclaim must be traversed specifically, otherwise it is deemed to be admitted. It thus prescribes how the pleader should answer his opponent’s pleading, by providing that the penalty for not specifically traversing an allegation of fact is that it will be taken to be admitted, whether this was intended or not. The effect of a traverse, if properly pleaded, is that the party who makes the allegation has to prove it; the effect of an allegation which is treated as admitted is that the party who makes it need not prove it.

The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in Thorp v Holdworth (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible”, (underling supplied).

I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in he appellant’s defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. 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 r 13(1)(a).

In an application such as the one before the learned judge to strike out the defence and to enter judgment, the judge is required to exercise extreme caution. This principle had been variously put and this court’s decision in D. T. Dobie and Company(Kenya) Limited v Joseph Mbaria Macharia and Leah Wanjiku Mbugua, Civil Appeal No. 37 of 1978 (unreported) bears testimony to that. He also required to exercise his summary powers in clear and obvious cases. Having regard to the pleadings in this appeal and the views that I have already expressed on the defence and taking into account the law as authoritatively enunciated by this court in Magunga General Stores, it cannot be said that the learned judge did not act with the necessary caution required of him or in a clear and obvious case where the defence filed discloses no reasonable defence. I must also conclude that the learned judge exercised his discretion properly in striking out the defence on the ground that it discloses no reasonable defence and in consequently, entering judgment as prayed by the respondent. I would in the result dismiss the appeal with costs.

Dated and delivered at Kisumu this 26th day of April, 1996.

A. M. AKIWUMI

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JUDGE OF APPEAL