IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GICHERU, KWACH & OMOLO, JJ.A.

CIVIL APPEAL NO. 130 OF 1993

BETWEEN

FIRESTONE EAST AFRICA (1969) LIMITED...................APPELLANT

AND

BUCKLEYS TYRE SERVICE STATION LIMITED)

SAMUEL MUTHIA MAGUA

MONICA MUTHIA MAGUA………..............…… RESPONDENTS

(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Justice O'Kubasu) dated 10th February, 1993

in

H.C.C. SUIT NO. 3185 OF 1991)

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JUDGMENT OF THE COURT

With profound respect to Mr Gaturu for the appellant, we think this appeal is totally devoid of any merit and must fail.

Founding itself upon Order 35 Rule 1, and Order 6 Rule 13(1) of the Civil Procedure Rules, the appellant asked the learned Judge of the High Court (O'Kubasu J.) to strike out the respondent's defence on the ground that the same disclosed no reasonable defence; the learned Judge was also asked to strike out the respondent's counter-claim on the ground that the same disclosed nc reasonable cause of action. After fully hearing the parties oz these points the learned Judge came to the conclusion that the defence disclosed triable issues between the parties; he wal apparently also satisfied that the counter-claim disclosed reasonable cause of action. In the event, he refused to exercise his undoubted discretion in favour of the appellant and ordered it notice of motion dismissed with costs to the respondents. M Gaturu, for the appellant, sought to demonstrate to us that the learned Judge was wrong in the manner in which he exercised hi discretion. To do so successfully, the appellant had to convince us on two matters. First the appellant had to satisfy us that the respondent had admitted its claim and we take it that was the basis of

the application for summary judgment under Order 35 Rule 1. For that purpose the appellant relied on one small portion of a letter from the respondent dated the 3rd March, 1988 and that portion real as follows:-

"Regarding our letter Ref: 37 of the same date in respect of our outstanding debit, may we assure you that the sooner this adjustment of Shs.147,927.00 is effected, we are now in a position to make payments and resume our business as usual."

Basing himself upon this extract Mr Gaturu contended before us that what the respondent was challenging in this letter was only Shs.147,927.00, and that the respondent challenged nothing else. But as Mr Gaturu rightly conceded before us, in the absence of the appellant's letter Ref:37 mentioned in the extract, it was not possible either for the trial judge or for us to say how much mone3 the appellant was then claiming from the respondent and out of which claim the respondent was disputing only Shs.147,927/-. It was clearly the duty of the appellant to demonstrate to the trial judge that in its letter Ref: 37, the appellant had demanded fron the respondent the payment of the sum of Shs.1,686,939/25 claimed in the plaint and that it was from that demand that the respondent disputed only Shs.147,927/-. In the end, Mr Gaturu did concede that in the absence of the other letter the extract we have set our hereinabove fell far short of an admission as that word is understood in law. Once that concession is made the application for summary judgment under Order 35 Rule 1 was bound to fail and rightly failed before the learned judge.

As to striking out the defence under Order VI Rule 13(1), w (are, like the learned Judge, satisfied that the defence disclose(triable issues and we reject the contention that the defence was bare denial. In paragraph 6 of the amended defence and amended (counter-claim, the respondent had pleaded, and we quote:

"The defendants categorically deny the contents of paragraph 8 of the plaint and aver that they have neither refused nor neglected to pay the sum claimed in the plaint as they do not owe the plaintiff any monies at all and they put the plaintiff to strict proof thereof."

A classic example of a bare denial is to be found in the case of MAGUNGA GENERAL STORES V PEPCO DISTRIBUTORS LTD (1982-1988) 1 KAF 89 which Mr Gaturu cited to us. There it was alleged in the draft defence that

"The defendant further denies the contents of paragraphs 3 and 4 of the plaint and will put the plaintiff to strict proof of their claim".

That averment elicited the following comments from Platt, JA, as he then was:

"First of all a mere denial is not a sufficient defence in this type of case [i.e. where a specific sum is claimed as being due and owing]. 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".

Our understanding of this authority is that in cases where specific sum is claimed as being due and owing, say for goods sold and delivered, it is not enough to simply deny that the money is due; one must give some reason for the denial. Taken together with the other averments in the defence the respondent's could hardly be called a bare denial. Nor was the defence evasive as in the case of RAGHBIR SINGH CHATTE V NATIONAL BANK OF KENYA LTD, (Civil Appeal No. 50 of 1996) (Unreported) in which receipt of the loan was denied, but then pleaded in the alternative that if the loan had been given, it had been repaid. The defence of the respondent was, never in any such category and we respectfully agree with the unconditional leave to defend the claim. That being our view of the matter, this appeal fails and we order that it be and is hereby dismissed

Dated and delivered at Nairobi this 25th day of October, 1996

J.E. GICHERU

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JUDGE OF APPEAL

R.O. KWACH

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JUDGE OF APPEAL

R.S.C. OMOLO

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JUDGE OF APPEAL