IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KWACH, TUNOI & SHAH JJ A)

CIVIL APPEAL NO 84 OF 1994

BETWEEN

KENYA CO-OPERATIVE CREAMERIES LTD.....APPELLANT

AND

DAVIES E. MWAI.....RESPONDENT

(Appeal from the Ruling of the High Court of Kenya at Nairobi (Hon. Mr . Justice E.Githinji) dated 7th day of November , 1991

IN

H. C. C. C. NO. 2223 OF 1991

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JUDGMENT OF THE COURT

On 7th November, 1991 Githinji J. ruled that the defence filed by Kenya Cooperative Creameries Ltd. (the appellant) in the superior court did "not disclose a reasonable defence on the basis of which any issues can be framed and a trial held". He was obviously referring to the issue of liability as he did say, and quite correctly in our view, that the issue of damages should proceed to proof by way of assessment of damages.

Mr. Mwenesi, for the appellant, argued before us that the learned judge (Githinji J.) erred in striking out the defence and he propounded his argument on the basis that Order Vi rule 13(1) (a) of the Civil Procedure Rules does not allow the court to go into evidence. That argument, in so far as Order V1 rule 13 (1) (a) is concerned is correct . But the plaintiff's application in the superior court was based on Order V1 rule13(1) without specifying any of the particular grounds (a), (b) (c) or (d) of sub-rule (1). Whilst we would expect want counsel to specify the particular ground he relies on so as not to take the opponent by surprise we see no prejudice to the appellant in the superior court as the application was stated to be based on the grounds in the affidavit of the applicant (respondent to this appeal) which affidavit (paragraph 3 thereof) referred to delay of fair trial of the action which ground falls under order V1 rule 13 (1) (c).

The respondent's claim was based on alleged wrongful dismissal. The respondent was an employee of long standing of the appellant. The claim is not insubstantial.

Two important paragraph of the plaint, namely paragraphs 6 and 7 primarily set out the respondent's cause of action. The allegations made in these paragraphs were nor denied at all in the defence dated 2nd July 1991.

Mr. Mwenesi did attempt to argue that paragraph 5 of the defence denied paragraphs 6 and 7 of the plaint. We see nothing of the defence did not see it fit to deny those paragraphs. The defence does not even aver that services of the respondent were properly terminated. Nor does it say anywhere (if such indeed was the case) that the services were terminated for some good cause.

Order V1 rule 9 of the Civil Procedure Rules is clear. Any allegation of fact made by a party in this pleading shall be deemed to be admitted by the opposite party unless it is traversed by that party in his pleading. Damages of course are always in issue unless specifically admitted.

It was observed by Chesoni Ag. J.A in the case of Choitram vs Nazari (1982-88) 1 K. A. R. 437 (see pages 445 and 446)

'Where a defendant fails to specifically deal with an allegation of fact in the plaint the truth of which he does not admit there may by necessary implication arise an admission. An admission by necessary implication may also arise where a defendant denies an allegation in the plaint evasively."

In this case as there was no denial at all of the allegation of the alleged wrongly dismissal and in any event there was no application made to the judge orally or otherwise to amend the defence, we see no point in letting the issue of liability go any further as indeed the learned judge thought.

In short we see no error of principle on the part of the learned judge and this appeal is dismissed with costs.

Dated and delivered at Nairobi this 5th day of June, 1995.

R. O. KWACH

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR