



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi, Gicheru & Cockar JJ A)

CIVIL APPEAL NO 19 OF 1989

MATEX K LIMITED..... APPELLANT

VERSUS

EAST AFRICAN MOLASSES COMPANY LTD..... RESPONDENT

(Appeal from a ruling of the High Court of Kenya at Nairobi

(Akiwumi J) dated 8th August, 1988

in HCCC No 3514 of 1986)

JUDGMENT

Gachuhi JA. Matex Kenya Limited (the appellant) filed a suit in the High Court claiming from the respondent the repayment of money paid and lent to the respondent or paid for and on behalf of the respondent at its request from time to time in the years 1984 and 1985 amounting to a total sum of Shs 4,000,000/-. After appearance was entered the appellant applied for summary judgment under order XXXV rule 1 of the Civil Procedure Rules (cap 21). The respondent filed its defence and counter claim out of time with the consent of the appellant. Numerous affidavits were filed by the parties before the hearing of the Chamber Summons. Counsel for the appellant supplemented his submissions with written submissions. After the hearing of submissions, ruling was delivered dismissing the Chamber Summons and granting unconditional leave to defend giving rise to this appeal.

The facts of the case are that the respondent entered into an agreement of sale with the appellant dated 18th November, 1985 to sell its land known as title numbers Mombasa /Block XLVIII/139 and 140 referred to in the sale agreement as “EAM Land”. The respondent was also in the process of acquiring adjacent area which was also included in the sale agreement for sale if acquired. The respondent had movables on EAM land which was also to be sold to the appellant. The aggregate price of Shs 10,750,000/- in respect of all three items was apportioned as follows:

- (i) Kshs 2,000,000/- for EAM land
- (ii) Kshs 750,000/- for the adjoining area if acquired
- (iii) Kshs 8,000,000- for movables

The respondent received the sum of Kshs 2,687,500/- as part payment under the agreement of sale. The balance was to be paid (adjusted due to inability of the respondent to acquire the adjoining area) on the completion date which was agreed to be 8th January, 1986.

The sale was subject to the respondent obtaining consent for sale and transfer of EAM land and adjacent area from appropriate authorities. It was also provided in the agreement that if the consent was refused (other than due to any default on the part of the respondent in complying with any such requirements) and such refusal was not reversed or given before the completion date, then of the payment received, Shs 1,000,000/- shall be forfeited to the respondent and the balance to be refunded with interest. Thereafter the agreement shall be rendered null and void and neither party will have any claim against the other of whatever nature.

On 31st December 1985 a charge over the EAM land was created to secure the repayment of the amount paid under the agreement of sale and further amount paid under exchange of letters between the parties amounting in all to Kshs 5,000,000/- or Shs 4,000,000/- as the case may be with interest at 15%. The said charge though duly stamped could not be registered due to lack of consent. The appellant subsequently filed a caveat against the EAM land.

The respondent in its defence and counter-claim denied the appellant's allegations in the plaint and pleaded that it filed its defence and counter-claim to prevent judgment being entered against it. I further pleaded that the appellant never lent or paid the money on behalf of the respondent but the payment was in pursuance of the agreement for sale.

The appellant filed 8 grounds of appeal, which Mr Gautama submitted generally on all and stated that the case was simple as it hinges on the interpretation of the documents which speak for themselves and do not require oral evidence in interpreting them. The documents referred to are the agreement for sale and the unregistered charge. He further submitted that since consent was refused, the agreement for sale was rendered null and void and the respondent has to refund money received with interest and legal costs. According to the appellant there was only one agreement which was unseverable.

Mr Da Gama Rose for the respondent submitted that the respondent has suffered loss and damages and the defence and counter-claim has raised triable issues. He submitted that the agreement is severable and the respondent has always been willing to transfer the movable and set-off the amount received of Shs 4,000,000/- (which is not disputed) against the sale price of Shs 8,000,000/-.

Looking at the sale agreement, consent to the sale and transfer was required for EAM land and the adjacent area if acquired. Adjustment for the payment was provided for if the adjacent area was not acquired. If it was not, payment was to be adjusted to exclude the amount of Kshs 750,000/- earmarked for it and the appellant would have been required to pay for EAM land Shs 2,000,000/-. No consent was required for the sale of the movables and there was nothing stated in the agreement that the appellant will purchase movables only if and when consent to the sale and transfer of EAM land was granted. It is an arguable point whether or not the sale of movables could still be enforceable once the agreement for sale was rendered null and void.

From the massive affidavits filed of allegations and counter allegations, it appears that this transaction is not all that simple as Mr Gautama wishes this Court to believe. It has not been explained to Court why the appellant had to forfeit such large amount to the respondent. There must be a reason anyway. The appellant is in a hurry to obtain judgment disregarding the defence and counter-claim filed by the respondent.

There is no doubt over the interpretation of the agreement for sale, as to whether the sale of three items is severable or not. Mr Gautama submits that the appellant was not interested in buying the movables without the land. There are also submissions that the apportionment of the figure of Shs 10,750,000/- between the three items in the sale agreement was for the purpose of income tax and for the payment of stamp duty. If I accept Mr Gautama's submissions, then I have to find those submissions in the documents themselves without searching for oral evidence in the affidavits and correspondence filed as

annextures to those affidavits.

Mr Gautama further insists that because the respondent does not dispute the receipt of the money, it should repay the amount since the sale agreement was rendered null and void and the receipt is contained in the unregistered charge document.

Looking at these documents and the approximate dates they were executed and the contents therein, the date of completion and the nullification of the agreement rendering the amount to be refunded less Kshs 1,000,000/-, there are certain matters which may need oral evidence for clarification or for an explanation.

Mr Gautama has cited to us *The Supreme Court Practice* 1976 Vol 1. Order 14 which relates to summary judgment in particular page 139 para 14/3 – 4/7. This paragraph relates to instances where leave to defend should be granted. It further indicates that the order was not intended to shut out a defendant who could show that there was a triable issue applicable to the claim as whole from laying his defence before the Court.

“Order 14/3 - 4/7 Leave to defend unconditional leave.

The power to give summary judgment under O 14 is intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment, and where therefore it is inexpedient to allow a defendant to defend for mere purposes of delay. (*Jones v Stone* [1894] AC 122). As a general principle, where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a *bona fide* defence, he ought to have leave to defend”.

This provision does not support the case for the appellant since the entire claim is resisted. The respondent has put up a defence that the appellant agreed to purchase three separate and identified items thus setting up its claim that the agreement is severable. This is an issue to be tried. Order 14/3 – 4/10 allows for leave to defend to be given where a difficult question of law is raised. Nevertheless if the point is clear and the Court is satisfied that it is really unarguable, leave to defend will be refused.

Mr Da Gama Rose is of the view that the appellant has to show that the judge of the superior court was wrong in exercising his discretion by not striking out the defence and counter-claim and entering judgment for the appellant on the Chamber Summons. He further submits that the respondent’s defence and counter-claim raises arguable points as to the causes of action as set out in the plaint, whether money paid and lent or paid for and on behalf or money received in pursuance of a nullified agreement of sale.

The respondent’s counter-claim is a claim that needs to be proved on the evidence. A counter-claim is a valid defence. A defendant who has a counter-claim should not be shut out so as to strike out a defence and the judgment be entered for the plaintiff. It was held by the predecessor to this Court in *Elizabeth Edinea Camille v Amin Mohamed E A Merali and Another* [1966] EA 411 that the existence of counter-claim entitles a defendant to defend the suit. In the present appeal, a defence and a counter-claim was filed. The defence raised triable issues. Relying on the decision in *Camille v Merali* in the existence of a counter-claim, summary judgment cannot be entered and the respondent is entitled to defend the suit. The superior court relied on this decision and refused to enter judgment for the appellant. Until the decision in *Camille v Merali* is overruled the law is that the existence of counter-claim affords good defence. A defendant in that case cannot be shut out from proving its case which may establish a defence to the plaintiff’s claim. For the reasons stated herein, I would uphold the ruling of the superior court and dismiss this appeal with costs. The parties should endeavour to have their dispute determined by the superior court.

Gicheru JA: I have had the advantage of reading in draft the judgment of Gachuhi, JA. I agree that this appeal be dismissed with costs.

Cockar JA: I have perused in draft the judgment of Gachuhi JA. I concur with it.

Dated and Delivered at Nairobi this 30th day of September, 1993

J.M. GACHUHI

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JUDGE OF APPEAL

J.E. GICHERU

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JUDGE OF APPEAL

A.M COCKAR

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JUDGE OF APPEAL