IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NYARANGI, GICHERU & KWACH JJ A)

CIVIL APPEAL NO 54 OF 1989

JOSEPH OCHIENG

PHILIP KAFUANDE

HENRY HEGGA T/A ACQUILINE AGENCIES…….. APPELLANTS

VERSUS

FIRST NATIONAL BANK OF CHICAGO……... RESPONDENT

(Appeal from the ruling and decree of the High Court of Kenya at Nairobi (Rauf J) dated 20th March, 1989 in Civil Case No 3818 of 1985)

JUDGMENT

Mr Joseph Ochieng', Mr Philip Kafuande and Mr Henry Hegga are the proprietors of a firm called Aquiline Agencies (hereinafter called the appellant). Sometime in 1985, the appellant filed a suit in the High Court at Nairobi against the First National Bank of Chicago (hereinafter called the Bank) seeking damages for inducing breach of contract and an injunction restraining the bank from exercising its statutory power of sale in relation to immovable property known as Nairobi/Block 82/302, mortgaged to the bank to secure a loan made to Joseph Ochieng' by the bank.

The claim for inducing a breach of contract was pleaded in the plaint as follows:

"(3) In or about January 1984 the plaintiffs entered into a confirmed contract with Printpak (Tanzania) Limited whereunder the plaintiffs would supply 1000 tonnes of newsprint to the said Printpak (Tanzania) Limited at a total cost of Kshs 23,800,000 to be paid in dollars through Mantrust Manufacturers Hanover Trust of London.

(4) The plaintiffs with the concurrence of the defendant entered the defendant as the negotiating bank to receive and disburse the funds after the plaintiffs opened a letter of credit.

(7) In may 1984, in breach of its duties owed to the plaintiffs as the plaintiffs' negotiating bank in the contract the defendant wrongfully and unlawfully induced a breach of the said contract by stating alleging and/or making representations to Mantrust Manufacturers Hanover Trust, the National Bank of Commerce of Tanzania, Printpak Tanzania Ltd, Madhupaper International Limited, who were to supply the newsprint, that the plaintiffs' firm, the said Aquiline Agencies, was bogus, of doubtful existence and

incapable of performing a contract of the magnitude in question and in consequences (sic) the said contract was rescinded and the plaintiffs have suffered loss and damage. And the plaintiffs claim damages from the defendant."

A defence was delivered on behalf of the bank which contained the following averments in answer to the allegations made in paragraphs 3,4 and 7 of the plaint:

"(2) The defendant is a stranger to the allegations contained in paragraphs 3 and 5 of the plaint and puts the plaintiffs to strict proof.

(3) The defendant categorically denies paragraphs 4 and 6 of the plaint and puts the plaintiffs to strict proof thereof. In particular the defendant denies:-

(a) That it concurred in entering itself as the negotiating bank to receive and disburse the funds after the plaintiffs opened a letter of credit.

(b) In or about May, 1984, Printpak (Tanzania) Limited remitted the said sum of US $ 161544 in payment of the goods through Mantrust Manufacturers Hanover Trust of London for onward transmission to the defendant.

(4) As regards paragraph 7 of the plaint, the defendant states as follows:

(a) The defendant denies owing any duties to the plaintiffs as alleged in paragraph 7 of the plaint;

(b) The defendant denies inducing any breach of the alleged contract and puts the plaintiffs to the strict proof thereof;

(c) As a consequence the defendant denies that the plaintiffs have suffered loss and damage which in any event has not been quantified."

The application by the appellant for a temporary injunction against the Bank was dismissed by Mbaya J (as he then was) on May 6, 1986. In due course, the bank's advocates issued and served a request for further and better particulars of paragraph 7 of the plaint and the appellant's advocates gave detailed particulars running into some thirteen pages including annextures. The suit was then listed for directions at which issues as disclosed on the pleadings were agreed and signed by advocates for both parties.

On December 13, 1988 the case came up for hearing before the late Rauf J, when Mr Otieno Kajwang' appeared for the appellant and Mr Lakha (Mr Owino with him) appeared for the Bank. The appellant's advocate then applied to withdraw, and Mr Joseph Ochieng', who was present in court, not objecting, Mr Otieno Kajwang's application was allowed. The hearing of the suit was then adjourned to be herd from January 30, 1989, to February 1, 1989.

When the trial opened on January 30, 1989, Joseph Ochieng' appeared in person and Mr Lakha (Regeru with him) appeared for the bank. Mr Lakha then informed the judge that he wished to raise a preliminary objection in respect of which he had given notice on December 7, 1988. He sought to strike out the plaint as disclosing no cause of action and made specific reference to paragraph 7 of the plaint.

The judge held that the plaint did not set out important averments relating to the alleged inducing breach of contract and consequently did not disclose any cause of action and ordered it to be struck out, giving rise to this appeal.

The memorandum of appeal contains some 9 grounds of appeal, most of which are directed against the learned judge's finding that because the plaint did not contain particular averments, it could not sustain a claim for damages for inducing a breach of contract. We also invited the appellant's advocate to address us on whether the judge was right in allowing the bank's advocate to raise the preliminary point in the manner in which he did namely, by merely serving notice as opposed to bringing a chamber summons as

required by order 6 rules 13 and 16 of the Civil Procedure Rules.

As regards the first broad ground of appeal, Mr Otieno Kajwang' cited a number of authorities in an attempt to show that there was no deficiency in the plaint as it stood and that it disclosed the cause of action upon which the appellant's claim was founded namely, inducing a breach of contract. The authorities were only of marginal if any assistance and did not in our view advance the appellant's case. The appellant alleged in paragraph 7 that the defendant had wrongfully and unlawfully induced a breach of contract. It is stated in *Bullen and Leak's Precedents of Pleadings,* 12th edition, at page 500 under the rubric Right of Action that:

"The essential ingredients of the tort of inducing a breach of contract are (1) that the wrongdoer knew or acquired knowledge of the contract in question and its essential terms, (2) that he so acted or interfered whether by pursuation, inducement or procurement or other means as to show that he intended to cause a breach of the contract or prevent its performance by one party to the detriment of the other party, (3) that the breach of contract was directly attributable to such act or interference, and (4) that damage was occasioned or was likely to be occasioned to such other party."

In the model statement of claim given in *Bullen and Leak* (No 266 at p 501) it is pleaded in paragraph 3 that:

"The defendants wrongfully (maliciously) induced and procured the plaintiff's workmen forthwith to leave their work without notice and in breach of their several contracts with the plaintiffs."

Although in paragraph 7 of the plaint in the present case it was stated that the defendant wrongfully and unlawfully induced the breach of contract, there was no allegation that the defendant acted maliciously and no particulars were given. To that extent therefore, the plaint was deficient but in our judgment that deficiency could and should have been cured by an amendment.

Having considered the matter ourselves, we entertain no doubt whatsoever that the pleading was inadequate and that strictly as a matter of law Mr Lakha was entitled to take the preliminary point. But the issue in this appeal is essentially whether the judge's decision to allow the point to be taken resulted in injustice or caused prejudice to the appellant. We have no doubt that it did.

We entirely agree with Mr Lakha that the procedure for striking out pleadings under order 6 rule 13 of the Civil Procedure Rules does not exclude other means for instance, by way of a preliminary objection, as long as the point raised is purely one of law.

Mr Lakha, exercising his right took a calculated gamble when he decided to take a purely legal point against a layman appearing in person. In these circumstances it seems to us that it was incumbent upon the judge to require Mr Lakha to exercise his right in accordance with the procedure laid down under order 6 rule 13 of the Civil Procedure Rules which is in the following terms:

"13(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that –

(a) It discloses no reasonable cause of action or defence; and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under sub-rule (1)(a) but the application shall state concisely the grounds on which it is made." The rule requires the grounds of objection to be stated concisely. In this case apart from giving notice that a preliminary objection was going to be taken that the plaint be struck out on the ground that it did not disclose a reasonable cause of action, Mr Lakha did not state concisely the grounds of objection which is a legal requirement in such an application. If this had been done, the appellant would have had notice of the grounds of challenge and would have had an opportunity to seek legal advice and to make an application for leave to amend, if so advised. The course adopted by the judge deprived the appellant of this right with the result that he was driven from the

judgment seat without his complaint being considered on the merits. Under order 6 rule 13 the judge has a discretion whether to order a pleading to be struck out or amended. In exercising his discretion by ordering the plaint to be struck out in a situation where the party whose pleading was the subject of scrutiny was unrepresented, and on the application of an advocate of great experience, the judge clearly exercised his discretion wrongly and we are bound to intervene to redress the appellant's grievance.

Finally, we would reiterate the importance of the rules of procedure in the administration of justice but in the application of these rules, the courts in the exercise of their discretion should take into account the economic reality that the majority of our people cannot engage advocates to represent them in their causes and they should not be disadvantaged on that score.

In the result this appeal succeeds and is allowed. We set aside the judgment and decree of the High Court, recall the plaint, and exercising our power under section 3(2) of the Appellate Jurisdiction Act (cap 9), make an order upholding the preliminary objection but giving the appellant leave to amend the plaint within 14 days.

As the appeal has succeeded on a ground other than those urged on behalf of the appellant, we make no orders as to costs.

Dated and Delivered at Nairobi this 8th Day of June, 1990

J.O. NYARANGI

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JUDGE OF APPEAL

J.E. GICHERU

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JUDGE OF APPEAL

R.O. KWACH

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JUDGE OF APPEAL