IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Nyarangi, Platt & Kwach Ag JA)

CIVIL APPEAL 11 OF 1986

LALJI T/A VAKKEP BUILDING CONTRACTORS.....APPELLANT

VERSUS

CAROUSEL LIMITED.....RESPONDENT

JUDGMENT

(Appeal from a judgment and decree of the High Court at Nairobi, Butler-Sloss J dated 12th September 1985,

in

Civil Case No 587 of 1985)

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January 18, 1989 the following Judgment of the Court was delivered.

This is an appeal from the judgment of the High Court given in favour of Carousel Ltd (the respondent) against a firm called Vakkep Building Contractors (hereinafter called the appellants) on an Order 35 application for summary judgment.

The claim which has culminated in this appeal arose out of what is commonly known as a building dispute. On 29th June, 1981 the appellants entered into a contract (the main contract) with Mukawa (Hotels) Holdings Ltd under which the appellants agreed to build Lillian Towers, the well known building on University Way. Under a sub-contract dated 12th March, 1983 made between the appellants and the respondent, the appellants agreed to manufacture and supply furniture for the said Lillian Towers. The prices were agreed but the dispute which has now arisen revolves largely on the scheme of payment agreed or believed to have been between the parties to the sub-contract. From the plaint filed by the respondent it would seem that all the sums payable under the sub-contract were paid except for the sum of Kshs 183,650 in respect of which the respondent sought judgment together with interest and costs.

The appellants filed a defence in which they contended inter alia:

> (a) that payment to the plaintiff was to be made pursuant to the provisions of payment both in the main contract and the sub-contract and not the sub-contract;

(b) that the sub-contract was supplemental to the main contract and in particular the terms relating to payment;
(c) that the plaintiff was deemed under the provisions of the sub-contract to have notice of all the provisions of the main contract except the detailed prices of the contract and bills of quantities;
(d) that as the defendants had not been paid by the employer under the certificate upon which the plaintiff's claim was based the plaintiff was not entitled to be paid the amount claimed or any part thereof.

That defence was filed on 10th May 1985, and on 13th May, 1985, counsel for the respondent took out a Notice of Motion under Order 35 rules 1 & 8 of the Civil Procedure Rules asking for summary judgment against the appellants. The application was supported by the affidavit of Mark Stephen Thompson who was at the material time the General Manager of the respondent Company. He verified the facts constituting the cause of action and stated his belief that there was no real defence to the claim.

The affidavit in reply and in opposition to the application was sworn by Vishram Ravji Halai (one of the appellants) in which he repeated basically the averments in the defence.

When the motion came before Butler-Sloss J on 12th July and 19th July 1985 counsel filed written submissions. In his written submissions, Mr Khan, who then appeared for the appellant, raised for the first time an issue which had previously not been pleaded in the defence or raised in the replying affidavit namely that there is a custom in the building industry in Kenya that payment to a sub-contractor is conditional upon payment being first made to the main contractor.

In a reserved judgment the learned judge held that the respondent's entitlement to payment was governed exclusively by clause 13 of the sub-contract and that no evidence had been produced to sustain the alleged custom and concluded:

> "Accordingly, I am satisfied that there is no defence to the plaintiff's claim and that the plaintiff is entitled to the relief claimed in the Notice of Motion."

The appellants have raised 8 grounds of appeal which in a nutshell are that the judge did not consider the effect of supplemental agreement on the main contract; that he failed to consider the effect of clause 27(a) of the main contract on the sub-contract; that he failed to consider the effect of clause 2 of the sub-contract; that he failed to deal with the apparent contradiction between Clause 27 in the main contract and Clause 13 in the sub-contract; and finally that he rejected the appellants' plea of custom in the building trade in Kenya whereby a sub-contractor's entitlement to payment is conditional upon the contractor being paid first by the employer without giving the appellants an opportunity to adduce evidence to establish the existence of such custom.

Before proceeding further it is better to set out the clauses in the respective contracts which have generated so much controversy. The main contract signed between Mukawa (Hotels) Holdings Ltd and Vakkep Building Contractors is headed: AGREEMENT AND SCHEDULE OF CONDITIONS OF BUILDING CONTRACT (WITH QUANTITIES) and is dated 29th June 1981. Clause 27(a)(vii) and (b) is in the following terms:

> "(27) The following provisions of this condition shall apply where the prime cost sums are included in the contract Bills or arise as a result of Architect's instructions given in regard to the expenditure of provisional sums in respect of persons to be nominated by the Architect to supply and fix materials or goods or to execute work.
>
> (a) such sums shall be expended in favour of such persons as the Architect shall instruct and all specialists or others who are nominated by the Architect are hereby declared to be sub-contractors employed by the contractor, and are referred to in these conditions as "nominated sub-contractors". Provided that the Architect shall not nominate any person as a subcontractor against whom the contractor shall make reasonable objection, or (save where

the Architect and Contractor shall otherwise agree) who will not enter into a sub-contract which provides (inter alia):

(iii) That payment in respect of any work, materials or goods comprised in the sub-contract shall be made within 7 days after receipt by the contractor of the sum to which the contractor shall be entitled by virtue of the Architect's certificate issued under Clause 30 of these conditions which states as due an amount calculated by including the total value of such work, materials or goods, and shall when due be subject to the retention by the contractor of the sums mentioned in subparagraph

(viii) of paragraph (a) of this condition.

(b) The Architect shall direct the Contractor as to the total value of the work, materials or goods executed or supplied by a nominated sub-contractor included in the calculation of the amount stated as due in any certificate issued under Clause 30 of these conditions and shall forthwith inform the nominated sub-contractor in writing of the amount of the said total value. The sum representing such total value shall be paid by the contractor to the nominated sub-contractor within 14 days of receiving from the Architect the certificate less only

(i) any retention money which the contractor may be entitled to deduct under the terms of the sub-contract and

(ii) any sum to which the contractor may be entitled in respect of delay in the completion of the subcontract works or any section thereof."

The contradiction between sub-clauses (a)(vii) and (b) of Clause 27 of the conditions will be immediately apparent and we shall revert to this later in this judgment.

We turn for a moment to the sub-contract. It is headed: AGREEMENT AND SCHEDULE OF CONDITIONS OF BUILDING SUBCONTRACT BETWEEN VAKKEP BUILDING CONTRACTORS AND CAROUSEL LIMITED and is dated 29th June 1981. This sub-contract is expressly stated to be:

"SUPPLEMENTAL to an Agreement (hereinafter referred to as "the Main Contract") made the 29th day of June between Mukawa (Hotels) Holdings Ltd (the Employer) and the Contractor."

We have always understood the position to be that when a deed is expressed to be supplemental to the previous instrument such a supplemental deed has to be read in conjunction with the deed to which it is expressed to be made supplemental in order to see that the terms of the latter deed have been duly complied with.

It is provided by Clause 2 that:

"(2) The sub-contractor shall be deemed to have notice of all the provisions of the main contract except the detailed prices of the contractor included in schedules and bills of quantities"

And Clause 13 which formed the anchor or the central plank of the learned judge's decision is in the following terms:

"(13) Within fourteen days of the receipt by the contractor of any certificate or duplicate copy thereof from the Architect the contractor shall notify and pay to the sub-contractor the total value certified therein in respect of sub-contract works and in respect of any authorized variations thereof and in respect of any fluctuations in duties or amounts ascertained under clause 9(c) hereof less:-

(i) Retention money, that is to say the proportion attributable to the sub-contract works of the

> amount retained by the Employer in accordance with the main contract; and (ii) The amounts previously paid."

We have looked at, for purposes of comparison, the Standard Form of building Contract sponsored by the Royal Institute of British Architects better known as The RIBA Contract, in *Building Contracts* by D Keating, 4th edition, and have noted that clause 27(a)(vii) makes the Architect's certificate a condition precedent to the nominated sub-contractor's payment from the contractor, whereas in this contract payment to the nominated sub-contractor by the contractor is expressly made conditional upon receipt of payment by the contractor from the employer. This is a significant and novel departure which was a matter which only came to light before this Court.

From the foregoing, it will be readily apparent that there was a serious conflict as to the scheme of payment agreed between the parties not fully resolved by Clause 13. There was also the question of custom alluded to both by Mr Khan in the High Court and repeated before us by Mr Lakha who appeared for the appellants.

Order 35 has a special purpose. It is the equivalent of the English RSC Order 14. In the case of *Cow v Casey [*1949] 1 KB 474, the respondent was allowed to sign judgment on an Order 14 application in a claim for recovery of possession involving a sub-tenant who had held over after the head tenant had vacated the premises and who claimed the protection of the law which he felt entitled him to leave to defend. The Court of Appeal dismissed the appeal and in the course of his judgment Lord Green, MR, in relation to Order 14 said at page 481:

> "That order, in the view that I have taken of it (and I think the Court has always taken of it), is a very stringent procedure because it shuts the door of court to the defendant. The jurisdiction ought only to be exercised in proper cases. .. If a point taken under the Rent Restriction Acts is quite obviously an unarguable point, the Court has precisely the same duty under order 14 as it has in the other case. It may take a little longer to understand the point and to be quite sure that one has seen all round it in a case under the Rent Restriction Acts than in other cases, but when the point is understood and the court is satisfied that it is really unarguable, the Court has the duty to apply the rule."

Cow v Casey was followed in later cases and approved in principle by this court in the case of *Cassam v Sachania* (Civil Appeal No. 63 of 1981), in which **Potter, JA**, after referring to a passage from the judgment of Lord Denning, MR in the case of *Tiverton Estates Ltd v Wearwell Ltd* [1974] 1 All ER 209 at page 213, continued:

> "In the case before us the learned judge has held that the reasoning in the *Tiverton Estates* case is applicable to applications under Order XII rule 6. I agree. In my view it is prima facie applicable to all interlocutory proceedings. But summary determinations are for plain cases, both as regards the facts and the law. An issue between the parties to an interlocutory application should not be decided at that stage unless the material facts are capable of being adequately established and the law is capable of being fully argued without the benefit of a trial."

In the well known case of *Zola v Ralli Brothers Ltd* [1969] EA 691, whose facts we do not need to recite here, Sir Charles Newbold, P, who wrote the leading judgment for the Court had this to say at page 694 (C-D):

> "Order 35 is intended to enable a plaintiff with a liquidated claim, to which there is clearly no good defence, to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by the delaying tactics of the defendant. If the judge to whom the application is made considers that there is any reasonable ground of defence to the claim the plaintiff is not entitled to summary judgment."

In the case of *Giciem Construction Company v Amalgamated Trades & Services (*Mombasa Civil Appeal

No 17 of 1983 this Court reiterated the principles enunciated in Zola's case and added:

> "This Court on appeal will therefore examine the decision of the Judge in the Court below together with the material before him to see if there really was an arguable defence or triable issues raised."

Issues are either of fact or of law. Whether there is a custom is a question of fact to be proved by parol evidence and whether the custom is reasonable is a question of law for the court to decide. The importance of order 35 was again recently reaffirmed by this Court in the case of *Baldev Raj Aggarwal v Kamal Kishore Aggarwal* (Nairobi civil appeal No 48 of 1985. The court said:

> "This Court will resist with as much fortitude as it can command any attempt to weaken the effect of order 35. At the same time, we shall remain vigilant to ensure that no defendant with a reasonable or arguable defence who comes to Court is deprived of an opportunity to put it forward. It is in our view more unjust to shut out a defendant with a good defence than to require a plaintiff to wait a little longer and prove his claim against such a defendant on the merits."

Summary judgment is a draconian measure and should be given in only the clearest of cases. And a trial must be ordered if a triable issue is found to exist or one which is fairly arguable. The Court should avoid the temptation to anticipate the ultimate result of the trial.

Looking at the material before the judge objectively, it is plain to us that this case involves a difficult question of construction of documents not to mention the issue of alleged custom in the construction industry in Kenya upon which evidence would have to be led. In our view, these are not matters which could have been properly dealt with under the summary procedure of Order 35. We are satisfied that this is not a clear case and that the issues raised by the appellants cannot fairly be said to be unarguable. It follows that this appeal succeeds and is allowed and the judgment and decree of the High Court is set aside and we substitute therefor an order refusing the application for summary judgment. As the respondent has performed and completed the work under the sub-contract, and from which the employer has no doubt benefited, we think in the interest of justice, that leave to defend should be granted on terms. The amount involved will be placed in an interest bearing account in the joint names of the Advocates for both parties.

The appellants will have the costs of this appeal to be taxed if not agreed. Those then are the orders of the Court.

Dated and delivered at Nairobi this 18 th ady of January , 1989

J.O NYARANGI

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JUDGE OF APPEAL

H.G PLATT

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JUDGE OF APPEAL

R.O KWACH AG

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR