



IN THE COURT OF APPEAL

AT NAIROBI

(COram: Nyarangi, Masime JJA & Gicheru Ag JA)

CIVIL APPEAL NO 37 OF 1986

GATUKUYU COFFEE GROWERS CO-OPERATIVE SOCIETY LTD.....APPELLANT

VERSUS

NATGIL ENTERPRISES LIMITED.....RESPONDENT

JUDGMENT

December 16, 1988, **Nyarangi, Masime JJA & Gicheru Ag JA** delivered the following Judgment.

By a letter dated July 23, 1984 the appellant, Gatukuyu Coffee Growers Co-operative Society Ltd, invited the chairman, Ashford Laboratories (K) Ltd. (Hereinafter called Ashford Laboratories) to its (appellant's) management committee meeting which was scheduled for August 13, 1984 starting at 10,00 am. This letter was copied to the Managing Director, Afrocox (K) Ltd, the commission agent of Ashford Laboratories for the supply of the Central Province. The purpose of the invitation was to discuss further about the fungicide mentioned above which had been supplied to the appellant by Ashford Laboratories. According to a letter dated August 15, 1984 addressed by the appellant to the director, Ashford Laboratories and copied to the respondent, Natgil Enterprises Ltd it would appear that the meeting referred to above did take place as scheduled. This letter which was headed:

“RE : REVOKING OF OUR ORDER NO 2533” read as follows:

“I refer to our yesterday's discussions between Gatukuyu/S M Patel of Ashford Laboratories (K) Ltd and W T Flynn of Natgil Enterprises Ltd and wish to confirm the decisions arrived by all the parties collectively.

1. It was agreed that the above quoted Order (No 2533) of February 4, 1984 be revoked and I do herein revoke it.
2. That the same order be freshed and be given to Natgil Enterprises Ltd and it is herein confirmed that, the above order has been freshed and given to Natgil Enterprises Ltd.
3. That all payments must be made in favour of Natgil Enterprises Ltd and it is herein confirmed that, all outstanding payments will be payable to Natgil Enterprises Ltd with effect from the date of this latter.
4. That the price shall be reduced from Kshs 995 to Kshs 937.50 per 25 kgs bag and this reviewed price covers the above quoted order (No 2533) in total and this decision is hereby confirmed.

I therefore request you to acknowledge this letter and confirm all the above decisions. I also ask the Natgil Enterprises to confirm these collective decisions in writing.

With co-operation.

Yours faithfully,

Signed

D K Muchiri:

Sec/Manager.”

This document, according to the counsel for the respondent, was the heard of the matter in the contract between the appelland and the respondent.

Indeed, it was the basis of the said contract. Pursuant to it therefore, the respondent wrote to the appelland on August 28, 1984 in the following terms:

“Further to our meeting with you and the committee on August 13, 1984 we have pleasure in accepting your order for Procida Stabilised Bordeaux Mixture at 937.50 per 25 kg bag. Enclosed please find our corresponding Invoice No 2403 for Kshs 933.750 against merchandise 996 bags of 25 kg pack Procida Bordeaux Mixture.

As pointed out during this meeting, your saving on this transaction will be Kshs 58,000.

Please expedite payment.

Looking forward to your continued patronage,

We remain,

Yours faithfully,

Natgil Enterprises Ltd;

Signed

W T Flynn

Marketing Director.”

The appelland never paid to the respondent the Kshs 933,750 referred to in this letter. Consequent thereto, the respondent filed suit No 648 of 1985 in the High Court of Kenya at Nairobi against the appelland claiming the said sum of money. In its defence to this suit, the appelland denied the respondent’s claim and in the alternative inter alia stated as follows:

“3. Alternatively and without prejudice to the foregoing, the defendant states that on August 15, 1984 the plaintiff misrepresented to the defendant that the ownership of the 996 bags of Procida Bordeaux Mixture and/or the right to receive payment for the 996 bags of Procida Bordeaux Mixture then in the factories of the defendant and which had been sold by Afrocox Company Ltd, the servants, agents or employees of Ashford Laboratories Company Ltd had been assigned or transferred to Natgil Enterprises Ltd (the plaintiff) and that the defendant should pay to the plaintiff Kshs 933,750. The plaintiff further misrepresented to the defendant that Ashford Laboratories Kenya Ltd had been bought by the Natgil Enterprises Ltd which was not the case.”

By a notice of motion made to the High Court under Order XXXV rule 1 of the Civil Procedure Rules, the respondent applied for summary judgment against the appellant for the sum of Kshs 933,750 together with interest and costs of the suit referred to above. The main reason for this application was that the appellant was truly indebted to the respondent in the sum of money aforementioned and that it (the appellant) had no defence to the suit mentioned above. Responding to this application, the appellant in an affidavit sworn by its Chairman, Mr Patrick K Muiruri, stated that the letter dated August 15, 1984 which is referred to above and upon which the respondent placed heavy reliance in its application for summary judgment, was written by the appellant by mistake as it was a result of misrepresentation that Ashford Laboratories had been sold to the respondent and that no other person would make any claim to the Frocida Stabilized Bordeaux Mixture. To the appellant therefore, this was one of the serious and key issues disclosed in its defence to the respondent's claim and which could only be determined at the hearing of the suit abovementioned.

Dealing with the issue of misrepresentation, the learned judge Schofield, J, as he then was) who heard the respondent's application for summary judgment had this to say:

"These misrepresentations are denied in Mr Flynn's affidavit, but even if they were made on behalf of the plaintiff it is difficult to know how they could prejudice the defendant in this contract. By the contract being taken over by the plaintiff the defendant received the fungicide at a substantially reduced price; this is not denied by the defendant. Ashford has not claimed the fungicide. Neither has Afrocox. The only complaint in respect of the new contract came from Afrocox who seem to complain that they are being deprived of their commission. This, surely, is a matter between Ashford and Afrocox, and does not concern the plaintiff.

Afrocox, it is clear from the correspondence, is interested in this matter only as an agent of Ashford and has no contractual relationship with the plaintiff. Ashford has, as is clear from the correspondence, divested itself of any interest in the fungicide. If their agents maintain an interest in it, they must do so as agents and without their principal's concurrence. All this, as I have stated, is a matter between Ashford and Afrocox and cannot affect the contract between the plaintiff and the defendant."

Applying this reasoning to the whole of the appellant's defence, the learned judge found that the appellant had no answer to the respondent's claim. Accordingly he entered judgment for the respondent against the appellant as prayed together with costs of the application for summary judgment. The appellant appealed to this court.

In the case of *Mugambi v Gatururu*, (1967) EA 196 at page 197 letters G and H Madan, J (as he then was said:

"It would be against natural justice to deprive a man of his right to defend unless the court in a plain and obvious case is satisfied without any doubt in the matter that a plaintiff is entitled to judgment and the defendant is seeking leave to defend for mere purposes of delay. The summary procedure is to be exercised with great care."

The observation by the learned trial judge as is set out above to wit that even if misrepresentations were made on behalf of the respondent it was difficult to know how they could prejudice the appellant in the contract was indicative of his incertitude that on the issue of misrepresentation the respondent was entitled to judgment and that on this issue the appellant was seeking leave to defend for mere purposes of delay. Indeed, on this issue, we think that it was not plain and obvious to the learned trial judge that the matter before him warranted the exercise of summary procedure. As was rightly pointed out by the appellant, the issue of misrepresentation was one that was serious and genuine as it affected the very contract upon which the respondent filed his claim against the appellant in the High Court. This therefore was a prima facie triable issue and the learned trial judge ought to have allowed it to go to trial. The appellant in this regard was entitled to unconditional leave to defend the respondent's claim against it. Its appeal must therefore succeed. The same is allowed with costs and the judgment together with costs entered in favour of the respondent by the High Court is set aside.

The appellant shall have unconditional leave to defend the suit filed against it by the respondent as is mentioned above. The costs occasioned by the respondent in the court below pursuant to the application for summary judgment shall be in the cause. The sum of Kshs 1,065,262.60 paid to the respondent by the appellant and secured by a bond paid for by the respondent shall be paid back to the appellant without interest. Those are the orders of the court.

Dated and delivered at Nairobi this 16th day of December 16, 1988

J.O. NYARANGI

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JUDGE OF APPEAL

J.R.O. MASIME

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JUDGE OF APPEAL

J.E. GICHERU

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Ag. JUDGE OF APPEAL

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

DEPUTY REGISTRAR