IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kneller & Nyarangi, JJ.A. & Gachuhi, Ag. J.A)

CIVIL APPEAL NO. 36 OF 1984

BETWEEN

KENYA HORTICULTURAL EXPORTERS (1977) LIMITED..... APPELLANT

AND

PATRICK PAPE (t/a OSIRUA ESTATE) .....RESPONDENT

(Appeal from the order of the High Court of Kenya at Nairobi (Todd J) dated 24th March, 1983

in

Civil Case No. 2077 of 1982)

JUDGMENT OF NYARANGI, J.A.

This is an appeal in an unusual case. The appellant as plaintiff sued the respondent as defendant claiming a sum of Kshs 96,721.15 plus interest at court rates from the date of filing suit until payment purported to be the balance of money due from and payable by the defendant to the plaintiff in respect of goods sold and delivered to the defendant at this request during the years 1951 to 1952 full particulars of which according to the defendant, the plaintiff had been supplied with.

The defendant by his defence dated August 12, 1982 denied being indebted to the plaintiff for Kshs 96,721.15 or any sum at all and put the plaintiff to strict proof thereof.

Then comes this critical paragraph:

“Further and without prejudice to the foregoing, the defendant will contend that if any goods were supplied to it then the same did not fit the description of the goods it ordered for. The defendant therefore returned the said goods due to a fundamental breach of the contract entered into between the defendant and the plaintiff”

The defendant prayed that the suit be dismissed with costs.

Six months later the plaintiff moved the High Court by a notice of motion pursuant to order XXV rule l, order V1 rule 13, order X11 rule 6 of the Civil Procedure Rules and section 3A of the Civil Procedure Act for an order that summary judgment be entered for the plaintiff under order XXV rule 1 for the sum claimed with interest and costs as prayed in the plaint. In the alternative the plaintiff sought an order that the defence be struck out under order VI rule 13 or be disallowed or that judgment be entered for the

plaintiff as prayed in the plaint on the ground that the defence is frivolous and / or vexatious, is calculated to prejudice, embarrass or delay the fair trial of the action, is an abuse of the process of court and / or discloses no reasonable defence. Mr Dhanani, a director of the plaintiff deponed in an affidavit in support of the Notice of Motion that he had read a copy of the defence but that the defendant is justly and truly undebted to the plaintiff in the sum of money due from and payable by the defendant. Reference was made in the affidavit to a copy of a demand letter, a copy of the reply thereto, and the report of the plaintiff's advocates. Mr Dhanani deponed further that the goods were supplied as ordered by him, that the defendant at no time returned the goods as alleged in the defence and that there was no fundamental breach of the contract on the part of the plaintiff.

The defendant's advocate (not the defendant in person) deponed in a replying affidavit that he had been informed by the defendant and verily believed it to be true that the defendant denied being indebted to the plaintiff in the sum alleged,

> "and that this dispute was referred to the Kenya National Farmers' Union long before the plaint."

The advocate continued,

> "That I have been informed by my client that my client never ordered the goods in question. That if the goods were sent to my client, the same were returned to the plaintiff."

The High Court (Todd J as he then was) found that there was no admission to the plaintiff's claim that the defendant had shown that he should have leave to defend the suit on the basis of the defence, gave unconditional leave to defend and dismissed the application for summary judgment and for striking out the defence with costs to the defendant.

The appeal, therefore, is by the plaintiff from the ruling of Todd J on the grounds that:

1. The learned judge erred in law in holding that the defendant (respondent) should be given leave to defend the suit.

2. The learned judge failed in law in not holding that the affidavit of Mr Felix Nyauchi was inconsistent with the defence.

3. The learned judge erred in law in not striking out the defence.

4. The learned judge failed in holding that there were no triable issues.

5. The learned judge misdirected himself in giving unconditional leave to the defendant (respondent).

Mr S Gautama, for the appellant, said the claim the subject-matter of this appeal is a simple and straightforward one for goods sold and delivered. Counsel argued that the defence is inconsistent with the replying affidavit sworn on behalf of the defendant, that the advocate deponed to matters not within his knowledge and therefore on instructions, which is hearsay, that the onus is on the defendant to show that there are triable issues on facts, that para 3 of the defence is a general denial with no reference to goods or price, para 4 of the defence does not give any particulars of the alleged fundamental breach and does not state in what respects the goods did not fit the description of the goods which were ordered and that there was no complaint about the price. Mr Gautama dealt with the letter dated April 2, 1982 written on behalf of the defendant by his advocates. The letter was in reply to the demand letter which was written on the instructions of the plaintiff. Mr Gautama submitted that there is no suggestion that goods were not sold and delivered by the plaintiff to the defendant, no suggestion that goods were returned and no suggestion that the goods were ordered by a third party. Miss Mwangi for the respondent could not tell what the goods were and did not know how the body called Kenya National Farmers' Union Ltd comes in the matter. Counsel for the respondent submitted that under the proviso to order 18 rule 3(1) in an interlocutory proceedings an affidavit may contain statements of information and belief showing the

source and grounds thereof, that the parties had dealings before and, finally, that the replying affidavit of the defendant's advocate discloses a triable issue regarding the ordering of goods.

The questions for this court are, first, did Todd J in all the circumstances correctly apprehend the defence by his ruling that the defendant should have unconditional leave to defend the action and, secondly, were any triable issues disclosed?

It is worth observing that the critical paragraph 4 of the defence is inconsistent with the letter dated April 2, 1982 written by the respondent's advocate. In the letter the respondent does not state that the goods did not conform with the description of the goods ordered, does not say that the goods were returned to the appellant and makes no mention of any fundamental breach of contract. Instead, the advocate for the respondent regards the matter as an issue upon which the respondent will instruct him further after the issue is sorted out by the Kenya National Farmers' Union. Also the respondent's advocate requested the appellant to hold his hands in the matter and stated "they would be grateful" if the appellant took no further step. That, on any fair view of the matter is a plea on behalf of the respondent to the appellant not to re-assert his lawful rights immediately. The contents of the letter do not repeat or refer to the defence or to the major part of the defence. Read as a whole the letter clearly is inconsistent with the defence. The reference to Kenya National Farmers' Union for the first time introduces a strange circumstance to the case. There is no basis on which the plea to the appellant and the mere mention of National Farmers' Union can disclose a triable issue. It is not claimed that the two matters are in any way concerned with the sale and delivery of the goods. Any "disparity in the amounts paid to different farmers" would not, on the pleadings and on the whole of the affidavit evidence, affect the sale and delivery of the goods to the respondent.

The stream of authority runs uniformily and clearly in favour of the general principle that all that a defendant has to show is that there is a triable issue of fact or law. The general principle is exemplified by *Churanjilal & Co. v Adam* (1950) 17 E A C A 92. Leave will normally be given unconditionally except where a judge considers that there is ground for believing that the defence is a sham in which case he may exercise his discretion to impose conditions: *Gamille v Merali* [1966] E A 411, *Souza Figuerido & Co Ltd v Moorings Hotel Co Ltd* [1959] E A 425 and *City Printing Works (Kenya Ltd) v Bailey* [1977] KLR 85.

Here, no triable issue was disclosed. The defence became a sham after Mr Nyauchi, advocate for the defendant replied to the plaintiff's demand letter. The trial judge was still at liberty to consider whether to give unconditional leave. I have considered; as I am entitled to in the first appeal, whether to give conditional leave to defence. The sum of money claimed is large, and, by asking the plaintiff to hold his hand, the defendant was admitting, no more and no less, that he could not resist the plaintiff's claim. Any sorting out by the K N F U and such negotiations as there might be are unlikely to advance the case of the defendant. All in all it is preferable that the defendant is made aware of the debt he owes.

In reply to Mr Gautama's contention that Mr Nyauchi's affidavit is hearsay, Miss Mwangi relied on the proviso to order 18 rule 3(1) as a justification of the decision by Mr Nyauchi to swear an affidavit on behalf of his client, the respondent. Considering that there is a suit in existence within which the application for summary judgement was brought, the proceedings before Todd J were, in my view, interlocutory in nature. The opening words of order XXXV rule 1 are "In all suits where plaintiff seeks …… where the defendant ……" which means there shall be a suit within which the plaintiff may apply for summary judgment. Such an application is not an originating one. Rule 3(1) of order 18 provides,

> "Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the source and grounds thereof"

I have underlined the word contain. I do not understand the proviso to provide that an affidavit in interlocutory proceedings may be sworn by a deponent unable of his knowledge to prove facts, or that such an affidavit may be confined entirely to statements of information and belief even if the sources and ground are shown. The words 'may contain' suggest that the main body of an affidavit in interlocutory

proceedings has yet to be confined to such facts as the deponent is able of his own knowledge to prove. Curiously enough the defendant did not swear any affidavit. I doubt very much if Mr Nyauchi could prove all the statements of information and belief. In the circumstances it was necessary for the defendant to swear an affidavit in person. Supposing an advocate has to be cross examined on an affidavit such as the one sworn by Mr Nyauchi on behalf of the defendant, what further light would an advocate in that position throw on the matter? There is a helpful passage in vol 15, p 266 para 486 *Halsbury's Laws of England*, 3rd edition in the following words.

"A witness cannot be called, in proof of a fact, to state that he heard someone else state it to be one. Care must be taken to distinguish between evidence which is tendered to prove that someone else has spoken certain words when the fact of which proof is required is merely the speaking, and evidence which is tendered to prove that someone else has spoken certain words as leading to a conclusion that the words spoken were true. The former is admissible (as in cases where the uttering of a slander has to be proved); the latter is not."

See also p 10 paragraph 11 *Halsbury's Law of England*, 14th edition. Be that as it may, for the reasons I have given I would allow the appeal, set aside the order dated March 24, 1983 and make orders as prayed in paragraph 1 of the Notice of Motion. I would order the respondent to pay the costs of the appeal and below.

Kneller JA. I cannot usefully add anything of my own to the judgment of Nyarangi JA so I shall content myself by merely declaring that I agree with all that has fallen from my brother. Gachuhi Ag JA agrees too. The orders proposed by Nyarangi JA now become the orders of the Court.

Gachuhi JA. Having read the judgment delivered by Nyarangi JA, which I entirely agree with, I feel I have nothing to add. I also agree with the orders he proposes the court should make.

Delivered at Nairobi this 4th day of July, 1986.

J.O. NYARANGI

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JUDGE OF APPEAL

A.A. KNELLER

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JUDGE OF APPEAL

J.M. GACHUHI

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AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR