IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Hancox, Nyarangi JJA & Platt Ag JA)

CIVIL APPEAL NO. 104 OF 1984

AGRICULTURAL FINANCE CORPORATION .....APPELLANT

AND

LENGETIA LIMITED.....1ST RESPONDENT

JACK MWANGI .....2ND RESPONDENT

(Appeal from the High Court at Nakuru, Masime J)

JUDGMENT

The first respondent to this appeal, the plaintiff in the original suit filed in the High Court at Nakuru, is a company which carries on business as a farm contractor, that is to say it provides equipment and carries out agricultural services such as harrowing, planting and harvesting for individual farmers in return for payment. It is common ground in the instant case that the company carried out services for the second respondent (the original defendant) to the value of Shs 152,463 during the years 1978 and 1979, as represented by the two invoices No 703 and 785, produced as part of the agreed bundle of documents in the High Court and put in by consent as a supplementary bundle (not as a supplementary record) in this appeal.

The difficulty that has arisen is as regards who is to pay for the services admittedly rendered. The first respondent maintains that this was on the express condition that payment would be made by the Agricultural Finance Corporation (the AFC) who are the appellants herein, from the advance that had been approved against the second respondent's guaranteed minimum return against essential crops in accordance with section 116 of the Agriculture Act (cap 318). Under section 126 of that Act the AFC, a statutory corporation established under the Agricultural Finance Corporation Act, (cap 323), acts as the agent of the Central Agricultural Board, set up under section 35 of the Agriculture Act, in effect the government, *inter alia*, in making advances under section 116. Had it not been understood all along that the AFC would meet the bill, the second respondent equally has maintained, the contract would never have been entered into and the services in question would never have been incurred.

The two invoices were rejected by the AFC computer on April 9, 1979, on the grounds that the "account" (presumably the second respondent's account with the AFC) was frozen, and on September 7, of that year the Branch Manager of the AFC at Molo returned the two invoices to the first respondent requesting it to contact the farmer (that is the second respondent) to meet the payments. After unfruitful correspondence the first respondent sued the second respondent for a lesser sum by a plaint filed on December 3, 1979, and the defence to this, claiming that payment was to be made by the AFC, was filed on February 4, 1980.

Accordingly on March 27, 1980, Messrs Lawrence Long and Company, acting for the first respondent, wrote to the AFC in the following terms:

> "Our client was requested to submit these invoices to you for payment and when they were submitted for payment, they were rejected by you on the grounds that the account of the above customer was frozen. This was communicated to us by your Nakuru Branch vide their letter of September 7, 1979.
>
> As a result of this, we are requested to recover the sum due to our clients and court proceedings were instituted against M/s Jory Traders in December, 1979. M/s Jory Traders have now filed a written Statement of Defence claiming that responsibility of the payment was totally with Agricultural Finance Corporation and a copy of their defence dated February 4, 1980, is enclosed herewith.
>
> You will, of course, realise that we do not wish to involve you in unnecessary court proceedings in this matter and therefore we shall be grateful if you will kindly let us know the reasons for rejecting payment when these invoices were submitted to you.
>
> We also understand that during the 1978/79 period when GMR advances were approved they were approved by you on an application form M/s Jory Traders. Could you kindly confirm this in writing? We may once again confirm that our client has no interest in joining you as a party to the proceedings."

There were several reminders to the AFC, but it eventually paid the full sum claimed (and not the full sum reduced to accord with the sum stated to be approved on the first invoice) by a cheque in favour of the first respondent dated August 20, 1980. Meanwhile Lawrence Long & Company had written to the advocate for the second respondent on August 12, stating, *inter alia*:

> "You will appreciate that under the Agriculture Act, Guaranteed Minimum Return Advances made available by the Government are generally considered and approved in the name of the wheat grower and as such <u>our clients have no right of action against M/s Agricultural Finance Corporation for non-payment</u>. Please refer to section 116 of the Act." (The emphasis is mine)

This was repeated in a letter of September 5, which additionally referred to "putting pressure" on the AFC to effect the payment (although by then it had been effected) and stated that thereafter the only outstanding issues would be those of costs and interest. I find this strange in view of their letter to the AFC of August 7th, which said that failing a reply they would have to consider joining the AFC as a party to the action: an attitude which the general manager of the AFC found "rather surprising", in his letter of August 19th, advising them that payment had been made.

Unfortunately, the payment by the AFC did not resolve the matter (and I doubt if it anticipated the complexity of the litigation in which it was soon to be embroiled, very largely as a result of it), for the second respondent refused to pay Lawrence Long and Company's costs, and, indeed, his advocate sought his costs from the first respondent. After further correspondence, in which Lawrence Long & Company again threatened to join the AFC as a party (notwithstanding that the principal debt had been paid), this time because of the claim for costs made by the second respondent's advocate, the AFC, though denying liability for them, asked for particulars of the advocate's costs, and on May 20, 1981, those particulars were supplied. Including interest of Shs 8,550.80, the sum claimed for both interest and costs was Shs 19,137.80.

Nothing happened thereafter until Mead J allowed the first respondent's application to join the AFC as a co-defendant on February 16, 1982. This application, if not made *ex parte* was certainly heard *ex parte*. The amended plaint, filed pursuant to the order, stated, as did the affidavit in support of the chamber summons, that the plaintiff entertained a genuine doubt as to which of the two defendants was liable for payment of the principal sum, which, I emphasise had been paid nearly eighteen months earlier.

The amended plaint asked for the court's determination as to which of the defendants was liable for the principal sum and sought, *inter alia*, a Bullock Order as to costs, that is to say one in which the plaintiff may recover, in addition to his costs the costs he has had to pay to the successful defendant, from the unsuccessful one. This form of order is most frequently used in road accident cases, where each defendant blames the other and therefore until the court's decision none can say which defendant is responsible. It is not applicable where a doubt exists as to the law, and I am far from satisfied that it was applicable in this case, since Lawrence Long & Company had repeatedly said in the correspondence that their client had no cause of action against the AFC. This is wholly inconsistent with their claim in the amended plaint and in the supporting affidavit that there was a doubt as to which of the two defendants the plaintiff should sue.

The AFC filed a defence in which it stated that its joinder as a defendant was solely for the purpose of making it liable for the costs in the earlier litigation and was an abuse of the process of the court. If it thought that then I fail to understand why the AFC did not apply to strike out the plaint, insofar as it affected it, under order 6 rule 13 of the Civil Procedure Rules. It did not do that, however, and even admitted that the services were rendered to the second respondent at its request.

When the case came on for hearing before Masime J on June 17, 1983, Mr Varia's statement, on behalf of the first respondent, that the only outstanding matter was the question of interest and costs, was not disputed by the other parties, and Masime J, so treated it in his judgment. He said that it was AFC's responsibility to have paid the invoices representing the principal amount with reasonable dispatch. The fact that it did not do so forced the plaintiff to "fall back on his contract and seek payment". Thus it was "only just" to lay the responsibility for the consequential costs and interest at the door of the AFC. With all respect to the learned judge I cannot see that any of those conclusions follow from that which had gone before. His judgment does not disclose that there was any contractual basis for holding the AFC liable for the invoices which were addressed to the second respondent and not to the AFC. It is true that they were the agency statutorily responsible for paying the guaranteed minimum return advance to the farmer, and it may well be that before the first respondent would perform the agricultural services sought it would ensure payment direct to itself from a responsible body such as the AFC. But that is a wholly different thing from binding themselves contractually, the one to the other, to pay for services for another party. To put it another way, what was the consideration moving from the first respondent to the AFC in return for its promise to pay? As it stated in *Halsbury's Laws of England*, 3rd Edition, Volume 8 at paragraph 110:

> "As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."

Mr Varia, appearing on behalf of the first respondent on this appeal, took us through the correspondence in detail and asked what, as the innocent party merely seeking payment for services performed, which were never in dispute, was his client to do other than bring in the AFC as a co-defendant in order to secure payment of his costs and the interest? He complained that his client had been kicked around "like football" between the AFC and the second respondent.

It is true, as I said, that the AFC admitted in its defence that the services were rendered at its request, but that is coupled with a denial of any indebtedness to the first respondent. I tend to agree with Mrs Oraro's submission towards the close of the appeal that this paragraph is in substance a confession and avoidance; (see Odgers' on *Principles of Pleading and Practice* 22nd edition, at pages 126 to 129 and 140), even though it is inaptly expressed. In my opinion the supposed admission amounts to no more than one that the mutual obligations of the contracting parties were undertaken at the request of the AFC. It did not render the AFC a contracting party. It was not suggested in the pleadings or otherwise that the AFC was liable as a guarantor for or to indemnify the debt of the second respondent.

Mr Varia further submitted that the amendment to the plaint related back to the original plaint, and so the first respondent was entitled to claim interest and costs from that date, notwithstanding that it was over

two years before the AFC were brought into the case. I cannot accept that proposition, for which no authority was cited. To do so would mean that in any case in which a plaintiff became doubtful of recovering his costs he could join for the purpose any person of substance who might remotely be connected with the transaction in question.

Mr Kigondu, on behalf of the second respondent, also supported the judgment of Masime J. He reiterated that which had been stated before, namely that the contract for the agricultural services was entered into solely on the basis that they would be paid for by the AFC, and that that was the understanding throughout. He referred us to the evidence of Mr Sessions, the first respondent's Managing Director, and the only witness called, as to the procedure for granting guaranteed minimum return advances by the AFC. He submitted what showed that the liability to pay the contractor always rests with the AFC. In the instant case not only had the AFC paid the contractor, but it paid it the exact amount demanded in the amended plaint, namely Shs 152,463. The sum was not paid with any reservation, or without prejudice. It was paid with full knowledge of the defence filed by the first respondent, (a copy of which had been sent to it by Lawrence Long & Co), and, accordingly, the AFC could not now be heard to say that it was not liable for the principal debt. Finally, Mr Kigondu said the order as regards the costs was made by Masime J, in the exercise of his judicial discretion under section 27 of the Civil Procedure Act and, should not be interfered with by this court. Moreover, on the authority of *Devram Nanji v Haridas Kalidas Dawda* (1949) 16 EACA 35, a successful defendant should not be deprived of his costs except for good reason.

Mr Kigondu eventually agreed, in answer to a member of the court during the appeal, that there were in truth two transactions, namely one between the first respondent, and another between the second respondent and the AFC. If this was so, how then could the AFC be liable for the first transaction to which it was not a party? His earlier argument did not therefore meet the express finding by Masime J, that the initial contract was between the first and second respondents, and that the fact that payment was to be made by the appellant did not change that situation. Indeed in view of this express finding of fact that the learned judge made, which was amply justified on the evidence, it is surprising that he went on to hold that AFC were liable for the costs and interest incurred in the action between the two respondents.

Returning to the case argued on behalf of the first respondent, I agree with Mr Varia to the extent of saying that a plaintiff may sue persons collectively or in the alternative under order 1 rule 3 of the Civil Procedure Rules, without having to bring a separate suit, if he considers he has a right to relief from them on the determination of a common question of law or fact, or may do so under order 1 rule 7 if he is in doubt as to the person from whom he is entitled to obtain redress. He cited the East African authority of *Overseas Touring Company (Road Services) Ltd v African Produce Agency (1949) Ltd* [1962] EA 190, in which it was held that the second defendant (who had already been added as a third party to the proceedings) was correctly joined as a party under the Uganda order 1 rule 7 (which corresponds with our rule) so that the issue between the two defendants could be resolved without having to bring a separate suit. That case however was a classic one in which it was appropriate to seek a Bullock Order as to costs, which in turn stems from there being a genuine doubt as to whom to sue, because a cargo of kerosene loaded onto a vehicle, which was involved in an accident with another vehicle, was severely damaged, and therefore the question as between the two owners of those vehicles, as to who was to blame for the accident, had to be decided in the case. This could not be done if the second defendant was dismissed from the suit as had been sought. That is exactly the situation contemplated in the commentary to order 62 rule 2 in the 1979 Rules of the Supreme Court of England, which speaks of liability for the injury of a passenger in one of the two vehicles. In such a case it is manifest that there might well be a genuine doubt as to whom to sue until the evidence is actually heard.

That however, is quite a different situation from the present one. The joinder of parties under rule 3 or rule 7 of order 1 presuppose a genuine liability on the part of one or both of the proposed defendants. Here in my judgment there was no doubt as to whom to sue, because, as Mr Varia's firm said several times in the correspondence to which I have referred, there was no cause of action against the AFC. The most that can be said to have existed was an arrangement as to the payment for the services rendered on behalf of and for the convenience of the second respondent. The AFC derived no benefit from the contract at all, and its failure to pay with reasonable despatch, which impressed the learned judge, did not affect the position because the liability was not theirs. It was only being discharged on behalf of and by

arrangements with the second respondent. Accordingly, the only way in which the AFC would, in my opinion, properly be brought into the action, if at all, was as a third party by the second respondent under order 1 rule 14, as was submitted by Mrs Oraro when replying in this appeal on behalf of the AFC.

Moreover, as Mr Mbaluto also on behalf of the AFC, had earlier submitted and as I have said earlier in this judgment, the judge never purported to decide the main issue of liability at all, but assumed this, and then proceeded to order the AFC to pay interest on a sum that they had never been found liable to pay, and costs of proceedings most of which had been incurred well before it ever became a party to the case. It is true that this was, in one sense, an order of costs, but it was not made after a determination of the whole case, as Mr Mbaluto earlier submitted. It was not an order of costs following upon an event, and was not therefore, an order as to the costs and incidental to a suit as section 27 of the Civil Procedure Act provides, but a residual matter which had purportedly (and in my opinion wrongly) been left for the determination of the Court, '*in vacuo*, so to speak, without a decision on the dominant or main issue. The same considerations, in my judgment apply to the order in respect of interest. There can be no interest awarded under section 26 unless it is appurtenant to something, in this case the principal debt, and there was no "principal sum adjudged" as being due from the AFC to the first respondent in this case.

Accordingly, the judge's order, in my judgment, was made on a wrong premise. It was fallacious to join the AFC, not because they were liable in the main suit or on genuine cause of action, but as a convenient body who would be able to pay costs already incurred, and, moreover, to do so after they had discharged the principal debt, even though they were not liable for it.

As I am of this view, it is unnecessary for me to deal with Mr Mbaluto's point, arising on ground 3 of the memorandum of appeal, as to the alleged non-compliance with section 3(1) of the Law of Contract Act (cap 23).

The question remains, however, should the interest and costs lie where they have fallen or should the second respondent pay them?

It follows from that which I have already said in this judgment that although Masime J made no finding as to liability, adverse to the second respondent or otherwise, there was no conclusion possible on the evidence in this case other than that the second respondent should be liable for the principal sum. Fortuitously, it was paid by the AFC, but well after proceedings against the second respondent were commenced. I consider that the judge should have ordered the second respondent to pay the interest and costs to the first respondent. In my opinion the second respondent should pay the interest on the principal sum from the date of filing the original plaint until payment thereof by the AFC (which seems to have been taken as August 15, 1980, notwithstanding that the cheque was dated August 20) at the rate claimed, namely eight percent per annum. As there was no judgment given against the second respondent on liability that part of prayer (b) in the original plaint which claims interest from judgment to the date of payment does not, in my opinion, apply. I consider also that the second respondent should pay the first respondent's costs and court fees as set out in Lawrence Long and C Company's letter of May 20, 1981, which run to August 15, 1980 namely Shs 6,500 plus Shs 4,087, making Shs 10,587.

For the foregoing reasons, then, I would allow the appeal against Masime J's decision. I would set aside his order that the AFC pay the interest and costs in question, and I would substitute for it an order that the second respondent pays to the first respondent the interest and costs that I have just enumerated.

As regards the costs of this appeal, in my view, the AFC was partly responsible for the order being made against it, because it did not apply before the hearing to strike out the action as against itself, which it clearly believed was without foundation and an abuse of process. Neither, at the hearing, did it object to the course that was being taken, and thereby it was partly responsible for misleading the judge into making the order he did. In my view, therefore it should only have half its costs of this appeal, notwithstanding its success, and I would order that those costs would be borne equally by the first and the second respondents.

As Nyarangi JA and Platt Ag JA agree those are the orders of the court.

Nyarangi JA. I have had the advantage of reading the judgment of Hancox JA in draft wherein the simple facts of the contract between the first respondent and the second respondent and the matters of controversy that followed are fully set out. The respondent, as plaintiff, claimed against the defendant in paragraph4 of the plaint in the following terms:

> 4. The plaintiff's claim against the defendants is for the sum of Shs 152,463, the amount of an account now due and owing in respect of agricultural services rendered by the plaintiff to the defendants at the defendants' request during the years 1978/1979, full particulars of which are known to the defendants.

The appellant corporation was the second defendant. In paragraph 5 of the plaint, the respondent as plaintiff was:

> "….in doubt as to which of the defendants is liable for payment of the aforesaid sum …."

The appellant corporation as the second defendant denied that it was indebted to the plaintiff/respondent but averred as further reply to the allegations contained in paragraph 4 of the plaint that the sum claimed had been paid by the appellants to the respondent and that at the hearing of the suit the appellant would submit that the joining of the appellants as co-defendant was intended to make the appellant liable for costs incurred by the respondent in an action to which the appellant was not a party. It was therefore plain that the first issue for determination by the High Court was whether, notwithstanding the joinder, the first respondent had a sustainable cause of action against the appellant. The judge avoided the submission which was made by Mr Opio on behalf of the appellant that the case should be dismissed as against the appellant and proceed to find, correctly, that the parties to the contract out of which the claim arose were the plaintiff and the first respondent. Nevertheless the judge held that it was the responsibility of the appellant to pay the invoice presented by the respondent and that having not paid with despatch the appellant should be liable for consequential costs. This is, I must say with respect, a startling finding based on no concept known to the law. The appellant paid the principal sum not because it would otherwise have been held liable but because it had access to the advance against guaranteed minimum returns which had been made available to the first respondent under section 116(1) of the Agricultural Act (cap 318).

The respondent as plaintiff requested the High Court in paragraph 4 of the plaint to determine who was liable for the payment of the sum claimed. The judge in effect found that the appellant was not liable. The respondent is bound by his pleading; which is salutary and necessary rule. *Pusha v Fleet Transport Company* [1960] EA 1025. The first respondent was not a successful litigant against the appellant and so there was no decision on costs left to the discretion of the judge – see *Donald Campbell v Pollak* [1927] AC 732 and *Devram Nanji Dattam v Haridas Karidas Dawda* (1949) 16 EACA 35. I agree that the appeal should be allowed and that the second respondent should pay to the first respondent the interest and costs of the appeal.

Platt Ag JA. I agree with the orders proposed. It may however be useful to add a few comments.

It seems to have been difficult for these three parties to keep clear what contracts existed between them. The principal contract to do the work was that between Lengetia Ltd and Jack Mwangi T/A Jory Traders. The financing thereof was no doubt a matter between the Agricultural Finance Corporation and Jack Mwangi. It seems that out of the necessity to control the performance of these contracts, the Corporation authorized work and scrutinized invoices before paying the money to the contractor. Because of this Jack Mwangi at first refused payment. The corporation also refused. Belatedly the Corporation paid the sum outstanding for the work done. Who was to pay the costs? Lengetia Ltd then joined the Corporation. Had the Corporation paid within a reasonable time without refusing payment, this case would not have been necessary, and this aspect of the matter drove the learned judge to order the Corporation to pay the costs of the suit that Lengetia Ltd was forced to bring. However, as Lengetia Ltd had no contract with the Corporation, as the judge himself held, that result was not possible. It may be that Jack Mwangi should consider his position, as against the Corporation, which is a matter for himself.

Dated and delivered at Nakuru this 30th day of May, 1985.

AR.W HANCOX

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JUDGE OF APPEAL

J.O NYARANGI

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JUDGE OF APPEAL

H.G PLATT

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR