REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO. 1117 OF 1974

EPHANTUS KAGUONGO NDEI

T/A NDEI AND COMPANY.....PLAINTIFF

VERSUS

MATHIRA DAIRYMEN'S CO-OPERATIVE

SOCIETY LIMITED.....DEFENDANT

JUDGMENT

A preliminary point has been taken by Mr Daine, Advocate for the plaintiff, to have the defendants' counter-claim struck out under Order VI rule 13 of the Civil Procedure rules.

The plaintiff filed a suit on July 19, 1974 for a sum of Kshs 52,220 for work done and materials supplied from October, 1973, to January, 1974. Particulars of work done and charges in respect thereof are detailed in the plaint.

The defendants filed a defence on August 17, 1974 denying that the plaintiff had done any work or that the defendants ever requested the plaintiff to do that work; the defence further pleaded that no prices were agreed upon and the prices charged were exorbitant. Liability was totally denied.

On March 10, 1978, over 31/2 years after the filing of the defence, the defendants successfully applied for leave to file and did file an amended defence and counter-claim.

Mr Daine has now sought to have the counter-claim struck out on two grounds:

1. That all the pleadings pertaining to the counter-claim are vague and do not disclose any cause of action.
2. That the payments by the defendants were made voluntarily. There was nothing pleaded to taint the voluntary nature of these payments. No cause of action was disclosed.

Dealing with his first ground, Mr Daine referred to paragraphs 7(a) and 7(b) of the defence and counter-claim which referred to the plaintiff's invoices dated September 4, 1973 and September 28, 1973 and further invoices numbered 245, 244, 250, 249, 155, 156, 153, 152, 154, 158 and 157 for work done and material supplied and for which the defendants had paid the plaintiff. The counter-claim is based on the allegations of over-charges made and remedial and unnecessary duplication of work carried out by the plaintiff in respect of these invoices.

Mr Daine's complaint was that these allegations had not been itemised to show on what items and in what

way and to what extent on each item were the over-charges made and on what items was the remedial work and/or unnecessary duplication of work done. The pleadings were vague leaving the plaintiff to conjecture on the items in relation to which the allegations of over-charges, remedial work, and unnecessary duplication of work had been levelled.

Any attempt to have the pleadings in the counter-claim amended at this late stage would amount to an abuse of process of court.

Mr Shah for the defendants of course has not applied to amend the pleadings in the counter-claim. He started by urging that because the application to strike out pleadings under Order VI rule 13 had been made so late, the court should decline to exercise its discretion in favour of the applicant/plaintiff. Quoting from the Annual Practice he said that such application must be made promptly and, as a rule, before the close of the pleadings; or the court may, in its discretion, decline to exercise its jurisdiction (Annual Practice [1952] Order 19 rule 27 p 366 - Application). I have considered what Mr Shah has urged on the question of delay in making this application and I agree with him that such applications should be made promptly. However, keeping in mind the history of the pleadings in this case and all the relevant factors, I am satisfied that this is a case in which the court in its discretion ought not to decline to exercise its jurisdiction. I am also satisfied that no undue prejudice is thereby being caused to the defendants.

As regards Mr Daine's claim that the pleadings in the counter-claim were vague and did not disclose any cause of action, Mr Shah replied that paragraphs 7(a) and (b) of the defence were the basis for the counterclaim. These paragraphs had set out the manner in which the over-payments were made being over-charges, remedial work and unnecessary duplication of work. Mr Shah claimed that the defence and counter-claim had set out in details what was done, not done, improperly done and what was duplicated. With respect, Mr Shah's afore-mentioned claims are extravagant and not supported by the pleadings as can be noted therefrom and which I have reproduced below in respect of remedial work, unnecessary duplication of work and one in respect of overcharges:

> "7(a)(i) The plaintiff's invoice numbered 163 of September 4, 1973 for Kshs 21,105 carries an overcharge of Kshs 9,355.
>
> 7(a)(ii) The plaintiff is not entitled to charge the sum of Kshs 9,742 raised in his invoice numbered 164 of September 4, 1973 as it is in respect of remedial work carried out by the plaintiff for his own mistakes.
>
> 7(a)(iii) The plaintiff's invoice numbered 165 of September 4, 1973 for Kshs 5,942 was not payable by the defendant as the same is in respect of unnecessary duplication of work."

Pleadings in paras 7(a)(iv) and 7(b) follow the same pattern and are in respect of over-charges and over-pricing.

Taking for example pleading in para 7(a)(i) it will be noted that all that has been pleaded is an over-charge of Kshs 9,355 in the invoice No 163 of September 4, 1973. The invoice must have been in respect of electrical work done and /or materials supplied. The plaintiff is an electrical contractor. The invoice must have been made up of one or more items of work done, labour charges in respect thereof and the material or materials supplied, if any. Was the over-charge in respect of labour charges and if so on what item or items and to what extent? Or was the over-charge made up of over-pricing in respect of any particular material or materials supplied or fitted? It was necessary, in fact vital, to give the details of how the over-charge of Kshs 9,355 was made up. Without these details the plaintiff in this case, I am satisfied, is left in complete darkness as to the manner in which he is claimed to have over-charged, and is prejudiced in the preparation of his defence as to the details of over-charges that would be revealed to him for the first time during the hearing of the suit. The same applies to the rest of the pleadings in paras 7(a) and 7(b). It has also to be kept in mind that the plaintiff's claim as particularised in the plaint relates to work done and materials supplied from October 16, 1973 to January 16, 1974. On the other hand, the invoices mentioned in paras 7(a) and 7(b) of the amended defence and counter-claim relate to work done previously at an earlier stage. Further full payment had been made for the invoices referred to in paras

7(a) and (b) of the amended defence and counter-claim.

I agree with Mr Daine that the pleadings in para 7(a) and (b) of the defence and counter-claim are scandalous, frivolous and vexatious and that these ought to be struck out. They are vague. They do not disclose any cause of action. The pleading in para 7(c) is a mere totalling up of the over-payments pleaded in paras 7(a) and 7(b) and is therefore liable to the same fate as the pleadings in the other two paras. Likewise the counter-claim pleaded in para 7(e) is based on the over-payments pleaded in paras 7(a) and 7(b) and therefore ought to be dismissed on this ground. On the second ground Mr Daine argued that once a contract had been discharged by performance and payment it could not be reopened except on certain recognised grounds such as fraud. But such a ground like fraud had to be specifically pleaded. In the counter-claim no fraud had been mentioned.

Further, any right to a claim arising from any irregularity antecedent to a voluntary payment - the irregularity being within the knowledge of the parties concerned at the time the payment is made - was waived by the act of the payment which then acted as an estoppel.

Mr Daine continued that the payments made and mentioned in the counterclaim were voluntary payments. The law on voluntary payments was wellsettled that such payments could not be recovered unless it was shown that they were made under a mistake of fact or law. A payment made under a pressure or duress could also be recovered.

Mr Daine cited the case of *Maskell v Horner* [1915] Law Reports King's Bench Division Vol 3, 595 and the case of *Morgan v Ashcroft* [1937] 3 All ER p 92. Mr Daine urged that the counter-claim had not pleaded that the payments were made under a mistake of fact or law or that they were not voluntary payments. The pleadings in the counter-claim did not disclose any cause of action and therefore the counter-claim must be struck out as being an abuse of process of court.

Mr Shah's contention on behalf of the defendants was that the counterclaim pleaded in para 7(e) was based on three causes of action mentioned therein as being:

1. For moneys had and received to which the plaintiff was not entitled;
2. Unjust (or unlawful) enrichment by the plaintiff at the expense of the defendants;
3. Refund due from the plaintiff to the defendants for over-charges, work not properly done or not done at all.

On the first and third causes of action which I shall deal with together, Mr Shah said that any payments made by way of an excess or over-charge could be recovered. He cited examples of excessive fees paid to a broker under distress and over-charges paid to a carrier to induce him to carry or deliver goods which could be recovered. I must point out here that the existence of a pressure being exerted is evident in the examples.

Mr Shah contended that an over-charge by itself was a cause of action. In the first place the defendant was not saying that he paid through a mistake of fact. The same applied to a right to a refund for over-payment or for work not done properly. Further, in this case, the facts as pleaded, showed why over-payments were made even though the defendants had not specifically pleaded mistake of fact.

With respect, I do not agree with either of these two contentions of Mr Shah. A mere pleading of an over-charge when the payment has been voluntarily made is not in itself a cause of action. Nor is a pleading of refund of a voluntary over-payment by itself a cause of action.

If an over-payment has been made voluntarily then a cause of action for a refund of excess payment arises only if such voluntary over-payment has been made on account of a mistake of fact or a mistake of law, or fraud. But the facts pleaded in the plaint must clearly point out to the particular head or heads such as mistake of fact or law, or fraud, which had led to the making of the over-payment and which then is the cause of action.

Likewise, if the over-payment has not been made voluntarily, then again the reason or reasons for the over-payment such as pressure or duress must be pleaded clearly. Facts must be pleaded which clearly indicate the reason which had led to the over-payment. That becomes the cause of action.

The case of *Maskell v Horner* which was cited very clearly illustrates the necessity of pleading the above requirements in order to give rise to a cause of action in such cases. In that case, the plaintiff had brought action against the defendant for money had and received to recover the tolls the plaintiff had paid claiming that he paid them (1) under a mistake of fact and (2) not voluntarily but under the pressure of the seizure of his goods.

The plaintiff had made clear the two causes of action under which he was claiming, that is:
(i) payment under a mistake of fact;
(ii) payment under pressure or duress.

The defence pleadings in question have not stated any facts from which an inference can be drawn that the over-payments were made because of a mistake of fact or of law. Nor have any facts been pleaded for an inference to be drawn that these were not voluntary payments or that the payments had been made under some pressure. Why did the defendants pay for remedial work or for unnecessary duplication of work? Why did they pay for over-charges or excess charge? No reason for such over-payments has been pleaded nor is any statement of fact made from which any inference can be drawn for reasons for such payments. Lord Reading CJ in *Maskell v Horner* as reported on p 118 of Kings Bench Division Law reports Vol 3 said as follows:

> "If a person with knowledge of the facts pays money, which he is not in law bound to pay and in circumstances implying that he is paying it voluntarily to close the transaction, he cannot recover it. Such a payment is in law like a gift and the transaction cannot be reopened."

The above is exactly the position according to the pleadings in paragraphs 7(a) and 7(b) of the amended defence and counter-claim. The defendants therein have pleaded as follows:
(a) they paid with knowledge of all facts;
(b) they claim they are not in law bound to pay;
(c) they have not pleaded any other fact to show that the payments were not made voluntarily or that they were not intended to close the transactions.

These, therefore, according to the pleadings, were mere voluntary overpayments made 31/2 years ago with the intention to close those transactions. These cannot be recovered under either of the two causes of action now under consideration.

I now come to the cause of action arising out of unjust enrichment pleaded in paragraph 7(e) of the counter-claim. Referring to the quotation from Goff & Jones in their treatise, Law of Restitution, on p 11, cited by Madan JA in the Court of Appeal, Appeal No 8/1978 *Chase International Investment Corp and Another v Laxmanbhai & Co*, Mr Shah laid stress on the following three conditions pre-supposed in the principle of unjust enrichment:

1. The defendant has been enriched by receipt of a benefit;
2. That he has been so enriched at the plaintiff's expense;
3. That it would be unjust to allow him to retain the benefit.

But the nature and extent of pleadings in the defendant's counter-claim are different from those in the above-quoted Civil Appeal No 8/78. In the Civil Appeal, the material portions pleaded by the plaintiffs, Laxmanbhai are set out in the judgment of Law JA. The pleadings clearly show the causes of action which had led to the unjust enrichment of the defendants as being:

> a) "On an alleged express contract" [Details of the contract were given in the pleading]
> b) "On the basis that the representations were false and that the plaintiffs in reliance upon them acted to their detriment and suffered loss" and

c) “On the footing of fraud and restitution.”

Again, the details of fraud were given. On the other hand, the only facts alleged in the pleadings in paragraphs 7(a) & 7(b) of the defendants’ defence and counter-claim are voluntary payments made for over-charges, remedial work and unnecessary duplication of work.

A vital difference between what is pleaded in the civil appeal and in this case is that the defendants, in their defence and counter-claim, have not pleaded the reason why it would be unjust to allow the plaintiffs to retain the benefit of a voluntary over-payment. A pleading which merely alleges a voluntary over-payment does not create a cause of action. The law on that has been clearly stated, as pointed out earlier, by Lord Reading CJ in *Maskell v Horner* to the effect that if a voluntary payment of money is made with knowledge of all facts with a view to close the transaction then the money cannot be recovered; such a payment is in law like a gift and the transaction cannot be reopened.

I uphold Mr Daine’s preliminary submission that the counter-claim filed by the defendants does not disclose reasonable cause of action and that it is frivolous and it will embarrass and delay the fair trial of the action and is an abuse of the process of court.

I now strike out the following pleadings from the defence which have formed the basis of the counter-claim and also the counter-claim itself: Paragraphs 7(a)(i), (ii), (iii) & (iv), 7(b), 7(c) and 7(e). Costs in respect of this application and counter-claim are awarded to the plaintiff against the defendants.

Dated and delivered at Nairobi this 8th day of July, 1982.

A.M Cockar

JUDGE