



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO 2004 OF 1984**

**DEVJIBHAI BHIMJI SANGHANI & ANOTHER.....PLAINTIFF**

**AND**

**NATIONAL BANK OF KENYA LTD.....DEFENDANT**

**RULING**

This is a contested summons for directions. The difference which is to be resolved by the court is as to what are the issues in this case. The plaintiff has prepared a list of draft issues. The defendant, too, has prepared its own list.

It is not in dispute that the defendant's advocates prepared a draft and submitted its proposed issues to the plaintiff for consideration and approval or amendment. However, the plaintiff's advocates did not have the courtesy to respond to the defendant's draft issues: they did not indicate whether they approved, disapproved, or had any suggested additional issues or whether they wished the defendant's draft list to be amended at all. They simply maintained silence in that regard until the day for hearing the summons, i.e. on 20th March, 1985 when they served upon the defendant's advocate a list of draft issues as perceived by the plaintiffs, which had been filed only the previous day (19th March, 1985).

So when the summons came up before us on 20th instant, there were two sets of proposed issues as seen by both sides.

Mr Jayant C Rach appeared for the plaintiff. Mr Owade appeared for the defendant.

Mr Rach maintained that the issues in this case must be drafted and settled in the verbatim copy of those drafted for the plaintiff by Mr. Rach and filed on 19th March, 1985. Those should not be altered at all. They were in the very words of the paragraphs of the plaint which were denied by the defendant. The arguments are all there on record as written down by me and no material benefit will ensue from repeating them in this ruling.

Mr. Owade submitted that issues should be drawn and settled by looking at all the pleadings and extracting material differences from material propositions and counterpropositions. He submitted that draft issues as prepared by both sides are guides only and may be amended. The plaintiff's draft should not be the only guide. Drafts and pleadings must be considered. So, he submitted, that the issues in this case should be settled by having regard to everything on the file. Again his full arguments are also recorded and I do not think that I can usefully repeat them here.

None of the advocates cited to me any authority on these points except merely referring me to some

statutory provisions – Mr Rach literally reading to me word for word rules 1, 3 and 4 of Order 14 of the Civil Procedure Rules and expecting me to reproduce them in my record of the arguments. I refused to do so, and only noted the provisions read to me. I have since read them carefully and considered them for the purposes of this ruling. I have attempted a limited research within the short time available for preparing this ruling, and I have not yet discovered relevant cases on how to settle issues where there is disagreement between the parties.

What I know, is that an issue may be of fact or of law or of mixed fact and law. It may be raised in the pleadings or otherwise. It should not be at variance with pleadings. If parties accept an issue to be an issue for decision of the court they are bound by it and cannot later claim that the case should have been tried on another issue; the parties cannot later try to set up a new case that was not before the trying court. I hope this view is supported by the old case of *Rodrigues v Continho* (1911-1912) 4 EALR 5 decided by Hamilton J.

It has been said again and again by the courts of this country, that the primary responsibility to ensure that issues are framed lies on the court, although advocates, too, have a duty to see that this requirement is met. It is therefore the duty of the court to frame such issues as may be necessary for determining the matter in controversy between the parties. In this respect a court may frame issues on a point that is not covered by the pleadings but arises from the facts stated by the parties or their advocates and on which a decision is necessary in order to determine the real dispute. My own independent research unearthed the case of *Odd Jobs v Mubia*, (1970) E. A. 476, in the former court of appeal for East Africa, in support of this proposition. And that issues may go beyond the pleadings, is clear from *Darcy v Jones* (1959) E A 121. Moreover, issues may be amended from time to time as it may appear just to do so.

In framing issues the court does not go through the plaintiff paragraph by paragraph and then writing out an issue for each individual paragraph on the basis of how that particular paragraph was answered by the defendant in his written statement of defence. Issues are formulated and stated on the basis of the cumulative effect of all the pleadings as they presently stand, and if further proceedings have occurred, then on the basis of the pleadings plus any arguments and testimony which may reveal the real points of controversy. Those points of dispute are the ones that will form the issues. To proceed by way of framing an issue out of each paragraph in isolation from the totality of assertions and answers thereto may produce unnecessary prolixity, overlapping, tautology, contradictions and ambiguity. The confusion that may ensue from such an approach would render nugatory the essence of framing issues. Such a method would lead to calling any point denied an issue, and if that is done, then there is no way of avoiding wasteful, delaying and expensive frivolity,

Guided by the above considerations and authorities, and on a careful study of the pleadings and the draft proposed issues prepared by both parties, I consider and direct, that the following are the issues in this suit:

1. The contract dated 5th July, 1978 being between the plaintiff and a third party not a party to this suit, is the defendant liable to satisfy any claim arising under the contract?
2. if the defendant is liable under the said contract, what is the basis of its liability under the contract, what is the basis of its liability under the contract?
3. Apart from contract, (a) did the defendant make representations which were false, inaccurate and misleading? (b) was the defendant negligent in making those statements?
4. Is the plaintiff entitled to any of the reliefs sought in the plaint?

It is my opinion that answers by the court to these 4 issues will finally dispose of the case one way or another. The draft issues as proposed by the advocates for the defendant seem to me to be matters of details in support of either or some of the above issues stated by me. The draft issues as proposed by the advocates for the plaintiff hover between irrelevancy and duplicity. So, the issues shall be as I have stated them above., provided that the trial court may amend them at the trial as it sees fit. So be it.

Apart from the question of issues, the parties seek directions under part 1 and certain answers under part II of the Summons for Directions. In part II the plaintiff says that it will call four witnesses. The defendant will call 4 witnesses. By consent the plaintiffs shall, within 30 days from today, make available for the defendant's inspection, the contract document entered into between the plaintiff and Pentax Properties Ltd said to be dated 5th July 1978. By that the defendant was not a party to said agreement said to be dated 5th July, 1978. It is ordered that the plaintiff do admit within 30 days from today, that the defendant's letter of 20th July 1978 refers to a legally binding contract already executed between the plaintiffs and Pentax properties Ltd. namely the contract said to dated 5th July, 1978. By consent the plaintiffs shall, within 30 days from today admit that the defendant was not a party to said agreement said to be dated 5th July, 1978. It is ordered that the plaintiff do admit within 30 days from today, that the defendant's letter of 20th July 1978 refers to a legally binding contract already executed between the plaintiffs and Pentax Properties Ltd. namely the contract said to be dated 5th July, 1978. By consent the plaintiffs shall admit within 30 days from today, that the certificate No 33 which was between 1978 and 1981, amounting to Kshs.73,362,246/15. By further consent the plaintiffs shall admit, within 30 days from today, that whereas the contract between the plaintiffs and Pentax Properties Ltd is said to be dated 5th July, 1978, the first cheque was dishonoured on or after 30th November, 1981. I order that subject to any specific direction of the trial judge, the plaintiffs shall admit within 30 days from today, that the only documents relevant to this suit are:

- (a) the contract document entered into between the plaintiffs and Pentax Properties Ltd and said to be dated 5th July, 198=78;
- (b) the defendant's letters dated 5th July, 1978 and 20th July 1978 respectively and addressed to Barclays Bank International Ltd;
- (c) the architect's certificates Nos 1 to 35 inclusive;
- (d) the cheque referred to in paragraph 8 of the plaint.

By consent the plaintiffs are to admit within 30 days from today, that they have in their possession the documents referred to in (a) to (d) inclusive, or copies thereof. By consent, the plaintiffs shall, within 30 days from today, disclose with respect to paragraph 5 of the plaint:

- (a) from whom the plaintiffs asked for guarantee and/or assurance for the payment of the contract price;
- (b) whether the request was in writing or oral, and if it was oral, then by who, to whom and when, was it made? If in writing, then to identify the document;
- (c) what was the contract price.

Discovery and inspection of documents is not complete until and after the plaintiffs have made available for inspection by the defendant the contract document executed between the plaintiffs and Pentax Properties Ltd and further after disclosure by the plaintiffs as per (a) to (c) inclusive, immediately above. Each party is to prepare their own bundle at least 24 days after but not before the foregoing directions and have been compared with the plaintiffs' within the said period.

None of the suit is to be referred to arbitration.

Orders and/or directions accordingly.

R KULOBA

DEPUTY REGISTRAR

JUDGMENT

There is little room for doubt in this case.

The plaintiffs are builders and in 1976 were as a result of successful tender employed by a company call Pentax Properties Limited who were developing plot No.209/8525 Nairobi which is known as Ngumo Estate.

The plaintiffs had some hesitation in accepting Pentax offer, as Pentax was a limited liability company without personal guarantees from its directors who were well known figures in the Nairobi Business World.

The plaintiffs said reservations were explained by P W 1 to Pentax Chairman, a Mr Nyamu. Mr Nyamu understood the plaintiff reservations and in the presence of P W 1 telephoned Pentax's bankers the defendants herein and was assured by the said Mr Nyamu that the defendants had agreed to guarantee the performance by Pentax of its obligations under the contract. The plaintiff having received this assurance, signed the contract.

Thereafter the defendants wrote to the plaintiffs bankers on the 5th July 1978 and again on the 28th July 1978 on the terms set out in paragraphs 5 and 6 of the plaint herein. The plaintiffs were to be advised of the terms of the defendants letter by this bankers and having been so advised by their bankers, commenced work on the contract.

I am satisfied that the two letters in question were given by the defendants to the plaintiff, that the said documents were guarantors and that there was good considerate for the said quarantees.

Thirty Three certificates were duly paid in respect of the 34 certificate issued on the 31st November 1981, the cheque dated the 2nd February 1983 for Kshs.6,979,588/75 was not paid at all.

I hold that the defendant are liable to pay those sums and interest to the plaintiffs.

There will accordingly be judgment fro Kshs.3,956,100/= with interest at 12% from the 15th December 1981 until payment and for Kshs.6,979,588/75 with interest at 12% from the 17 February 1983 until payment.

The plaintiffs are entitled to the costs of this action.

**Dated and delivered at Nairobi this 15th day of Decemeber, 1981**

**J F SHIELDS**

**JUDGE**