



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: MADAN, KNELLER JJA & CHESONI AG JA)

CIVIL APPEAL NO. 5 OF 1983

BHANDARI CONSTRUCTION COMPANY APPELLANT

VERSUS

STANDARD JOINERY & BUILDING COMPANY..... RESPONDENT

JUDGMENT

The appellant as the plaintiff sued the respondent/defendant in the High Court for the recovery of Kshs 104,105 for goods sold and delivered, and/or services rendered to the defendant. The defendant's request for the supply of further and better particulars of paragraphs three and five of the plaint in a normal manner was ignored by the plaintiff. On the defendant's application the court ordered the plaintiff on June 7, 1982 to supply the particulars asked for in the prescribed form No 15, Appendix B of the Civil Procedure Rules, within seventy days. The plaintiff purported to supply the particulars asked for but more than seventy days later. The defendant applied to the court for an order dismissing the plaintiff's suit on the grounds that the particulars were supplied late by the plaintiff, and they were also not in conformity with form No 15 as ordered by the court.

The court made the order asked for and the plaintiff's suit was dismissed even though the particulars had been supplied before the hearing date of the defendant's application, and notwithstanding also the plaintiff's offer to pay the defendant's costs of the application. The court said the ends of justice so dictated.

The plaintiff has appealed in the main on the grounds that the learned judge exercised this discretion wrongly in dismissing the plaintiff's suit, and also in the holding that the court's order of June 7 was mandatory. As regards the second objection, the court's order was mandatory, and the plaintiff failed to obey it. Notwithstanding that, we agree that the learned judge exercised his discretion wrongly, as in this particular instance, not only the particulars had already been supplied when the order dismissing the plaintiff's suit was made, the defendant had also filed its defence about three months previously which was merely a denial of liability *in toto*, coupled with a further averment that the plaintiff's claim had already been paid in full and settled by the defendant before the filing of the suit, the onus of proving which would normally have lain on the defendant, and if true, without causing any hardship.

The dismissal of an action for the failure to supply particulars imposes a drastic penalty. The same principles apply to the striking out of a particular defence as apply to the dismissal of an action; per Devlin J in *Reiss v Woolf* [1952] 2 All ER 3 at p 5.

Green LJ said in *Abalian v Innous* [1936] 2 All ER 838:

“... any order dealing with the dismissal of an action unless something is done should be absolutely and perfectly precise in its terms. The dismissal of an action at an interlocutory stage is a very serious matter and may well work serious injustice.”

With respect the learned judge erred. First, because he did not state in his order that unless the plaintiff carried it out, the action will be dismissed. Secondly, in addition to the required particulars having been already supplied, because of the nature of the plaintiff’s cause of action. Thirdly, because of the nature of the defence indicating as it did that a dismissal of the action may well cause serious injustice. Fourthly, because of the plaintiff’s offer to pay costs to compensate the defendant for the inconvenience. Costs is the soothing balm which cures most procedural grievances in legal proceedings.

For these reasons we would allow the appeal, set aside the order made by the learned judge, and direct that, subject to any further necessary interlocutory applications whether relating to particulars or other matters, the suit proceed to hearing in the normal manner.

We would make no order for costs of the appeal. The plaintiff is to blame for finding itself in its plight brought about by dilly-dallying in supplying the particulars.

Dated and Delivered at Nakuru this 6th October, 1983

C.B. MADAN

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JUDGE OF APPEAL

A.A. KNELLER

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JUDGE OF APPEAL

Z.R. CHESONI

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Ag JUDGE OF APPEAL