IN THE COURT OF APPEAL

AT NAIROBI

(CoramMadan, Law & Potter JJA

CIVIL APPEAL NO. 4 OF 1981

Betweeen

HAAS ....APPELLANT

AND

WAINAINA...RESPONDENT

JUDGMENT

Madan JA This appeal stems from an order of dismissal of an application for summary judgment made by Muli J. I shall hereafter refer to the appellant and the respondent as the plaintiff and defendant which they were respectively in the suit between them in the High Court. The plaintiff's suit against the defendant was for recovery of Austrian Schillings 724,084.59 being the balance of the agreed purchase price of machinery sold and delivered by the plaintiff to the defendant trading as Mwahito Enterprises during 1974. In his written statement of defence, the defendant "conceded" that an agreement for sale of the machinery was entered into between his firm Mwahito Enterprises and the plaintiff, but the defendant was not interested in the relief claimed at all and he was sued wrongly as, subsequently, all rights and duties under the contract for the sale of the machinery were assigned to a limited liability company called Kenwafers Limited, with the full assent of the plaintiff.

The plaintiff applied for summary judgment to be entered against the defendant under Order XII rule 6 and Order XXXV rule 1 of the Civil Procedure Rules,

> "On the admission of liability contained in the defendant's letter dated December 17, 1975 and on the ground set out in the annexed affidavit of Josef Haas, a director in the plaintiff's company …"

Mr Haas deponed in his affidavit that there was no defence to the suit. The defendant did not file an affidavit in reply. What he did was successfully to apply for a third party notice to issue against Kenwafers Limited to be joined in the suit as second defendant. In his affidavit in support of this application, the defendant deponed that he had pleaded in paragraph two of his defence that all the rights and duties under the contract were subsequently assigned to Kenwafers Limited with the full assent of the plaintiff, and he had been wrongly sued. He also claimed to be indemnified by Kenwafers Limited.

Muli J heard the two applications together. He said in his ruling which he delivered on May 29, 1980 that all he was required to determine at that stage was whether the plaintiff was entitled to summary judgment on admission against either or both defendants. The learned judge referred to certain correspondence which had passed between the parties and said the plaintiff had acknowledged that Kenwafers Limited, which had been joined as second defendant in the suit, had become its substituted purchaser of the

machinery assuming all rights, duties and liabilities of the defendant under the contract. Therefore, the application for summary judgment against the defendant must fail, and he dismissed it with costs. It was clear, he also said, that the defendant was not a proper party, accordingly he would strike him off the suit, though he may be a necessary witness.

The plaintiff gave Notice of Appeal against Muli J's ruling. Owing to the inevitable delays involved in obtaining copies of proceedings and judgment in the High Court, the plaintiff's appeal was not filed until January 20, 1981. Some of the material incorporated in this judgment has been taken from the High Court file directly which we were told had become mislaid at the time of filing the appeal, and has been found since. Upon an application for summary judgment, the procedure laid down in Order XXXV has to be followed. Under rule 2(1) of the Order the defendant may show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit. Under rule 7 leave to defend may be given unconditionally, or subject to such terms as to giving security for time of trial or otherwise, as the court thinks fit. In other words, the court must either enter summary judgment for the plaintiff, or give leave to the defendant to defend either conditionally or unconditionally. There is no power to dismiss an application for summary judgment.

The defendant's defence raised a triable issue, namely, whether the contract for sale of the machinery had been assigned and all liability thereunder passed to Kenwafers Limited, releasing the defendant therefrom, with the concurrence of the plaintiff. The proper order for the judge to make was to give the defendant leave to defend unconditionally. If that were all, the situation could be rectified easily by allowing the appeal, and substituting an order to the effect I have indicated in place of the order made by the learned judge. More has happened in these proceedings due to the plaintiff's own manoeuvres.

Before an appeal could be or was filed against the order of Muli J, the plaintiff on July 1, 1980, issued a fresh application for summary judgment to be entered against Kenwafers Limited as prayed in the plaint.

> "on the admission of liability contained in the defendant company's letter dated December 17, 1975 and on the grounds set out in the annexed affidavit of Josef Haas a director of the plaintiff company …"

Now the plaintiff was suing and seeking to enter summary judgment against Kenwafers Limited upon admission in the same letter which it had relied upon earlier in an attempt to obtain summary judgment against the defendant. This time the same director Mr Josef Haas deponed that Kenwafers Limited had no defence to the suit.

This second application for summary judgment was dealt with by Cotran J who on July 29, 1980, entered judgment for Kshs 151,739.15, a part of the plaintiff's claim against Kenwafers Limited, now the only defendant in the suit, leave to defend the rest of the claim was given. On December 5, 1980, Cotran J entered consent judgment for the plaintiff, and against Kenwafers Limited, for Austrian Schillings 451,479.50.

Earlier, a decree was drawn up which required Kenwafers Limited to pay to the plaintiff the sum of Kshs 151,739.15. The plaintiff also taxed its bill of costs in respect of the judgment found by it on July 29, 1980. The plaintiff attempted to execute this decree by attachment and sale of Kenwafers Limited's machinery, tools, motor vehicles etc. Kenya Industrial Estates Limited lodged a Notice of Objection to the attachment on the ground that the attached goods were charged to the Objector under a Debenture dated January 16, 1976 made between ICDC and Kenwafers Limited and assigned to the Objector by a deed of assignment, and the Objector had equitable rights and/or was the equitable owner of the attached goods. The plaintiff filed notice of intention to proceed under Order XXI rule 56, subject to the right of the debenture-holder not being prejudiced. Barclays Bank of Kenya Limited also filed a Notice of Objection dated December 31, 1980, by Receiver Alan Molloy appointed by the Bank under a floating debenture dated August 1, 1980, objecting to the attachment and sale of the judgment-debtor's (Kenwafers Limited) goods.

On January 13, 1981, the court recorded a consent order to the following effect, ie Mr Molloy was to sell

the machinery at the best price he could, the proceeds to go as follows (1) to defray costs of Receiver and Courtbroker (2) to the first Debenture-holder Kenya Industrial Estates Limited (3) to the second Debenture-holder Barclays Bank (4) Balance, if any to the decree-holder (plaintiff).

Counsel before us agreed that the plaintiff got nothing out of the execution proceedings. Mr Khanna for the plaintiff has argued, as an extension of the appeal filed by him against the order of Muli J, that the two judgments entered by Cotran J, which he had himself sought and obtained, are a nullity in as much as the plaintiff neither made any claim nor asked for any relief in the plaint filed by him against Kenwafers Limited. Mr Khanna said he did not amend the plaint in any way. I accept Mr Khanna's argument that judgement cannot be entered against defendant who is joined upon his own application, without an amendment to the plaint whereby the plaintiff sets out his cause of action and seeks relief against the defendant so joined. A defendant must be told what the plaintiff's claim against him is. The court cannot enter judgment against a defendant *in vacuo*.

I consider that when Muli J made the order to join Kenwafers Limited as second defendant, and struck off the defendant, the plaint was notionally amended by the court to say that Kenwafers Limited became the purchaser of the machinery, which was originally sold and delivered to the defendant, under an assignment carried out with the consent and approval of the plaintiff, which released the defendant from all liability, instead Kenwafers Limited became liable for the price of the machinery which the plaintiff claimed from it.

In my opinion, the plaintiff therefore acted in conformity with and showed its acceptance of the new contractual relationship which had come into being with Kenwafers Limited. It will bear repetition to remind ourselves that the plaintiff sought summary judgment as prayed in the plaint to be entered, took steps to execute the partial decree, taxed its bill of costs, obtained a further consent judgment, it took all these steps against Kenwafers Limited. It would not have done so if it has not agreed for the release of the defendant from all liability under the original contract, and also the assignment thereof to Kenwafers Limited. I borrow the idea from Webster J in *Pacol Ltd and others v Trade Lines Ltd and Another*, (The Times, February 8 1982), to say that an estoppel by silence and acquiescence arose because the defendant would expect the plaintiff against whom the estoppel arises, acting honestly and responsibly, to bring to the attention of the defendant that, first, it did not accept Kenwafers Limited as the sole debtor, and secondly, not to act in a manner which confirmed that the defendant had been released from all liability. The defendant's belief was actual under the assignment, and also reasonable because of the plaintiff's conduct, that he had been released from all liability. Webster J further said that the decision of Mr Justice Goff and the Court of Appeal in *Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd* [1981] 2 WLR 554, 3 WLR 565, could be construed as authority to support the existence of a species of estoppel founded on general equitable principles, and it would be unconscionable for the plaintiff now to be allowed to deny, also in this case, that Kenwafers Limited was not the proper and the only party to be sued for the price of the machinery. I consider the plaintiff is estopped from so denying.

In so far as the appeal against Muli J's order is concerned, as I have indicated earlier, the correct order to make would be to set it aside and substitute therefore an order giving the defendant unconditional leave to defend, and remit the suit for trial by the High Court. I see no useful purpose being served by making such an order. If the proceedings are remitted to the High Court, I visualise the defendant putting forward his defence on the lines propounded in the immediately preceding paragraph which would be a rehash of a useless and purposeless litigation, at considerable expense to the parties, because, in my opinion, the defence would and ought to succeed. I would therefore say nothing relating to Muli J's order, and close this litigation, insofar as the defendant is concerned, with an order dismissing the appeal, with no order for costs of the appeal.

Law JA. I have read the judgment prepared by Madan JA. I agree with it in every respect, and cannot usefully add anything. I concur in the order proposed by Madan JA.

Potter JA. I also agree with the judgment of Madan JA, which I have had the advantage of reading in draft, and with the order proposed.

Dated and delivered at Nairobi this 23rd day of February, 1982.

C.B MADAN

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JUDGE OF APPEAL

E.J.E LAW

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JUDGE OF APPEAL

K.D POTTER

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR