IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Miller & Potter JJA)

CIVIL APPEAL NO. 18 OF 1981

BETWEEN

KENYA COMMERCIAL BANK LTD.....APPELLANT

AND

JAMES KARANJA.....RESPONDENT

JUDGMENT

Madan JA This appeal arises out of a ruling made by Nyarangi J in the High Court who dismissed the appellant's application to strike out the respondent's defence to a counterclaim.

The litigation between the parties commenced with Suit No 1104, which was dismissed by the court on June 10, 1978, under Order XVI rule 6. The Kenya Commercial Bank Ltd was the plaintiff, Noor Alam was the first defendant and James Karanja the second defendant.

Order XVI rule 6 reads as follows:

"In any case not otherwise provided for in which no application is made or step taken for a period of three years by either party with a view to proceeding with the suit, the court may order the suit to be dismissed; and in such case the plaintiff may, subject to the law of limitation, bring a fresh suit."

Suit number 2640 of 1979 was instituted by Noor Alam and the other above named three plaintiffs against the first and second defendants. The first defendant, the Kenya Commercial Bank Ltd filed its defence, and then making itself plaintiff by original action and counterclaim, and the first above named plaintiff Noor Alam the first defendant and the respondent James Karanja the second defendant, it counterclaimed jointly and severally against them the sum of Kshs 11,754,658 arrived at, as stated in paragraphs 30, 31 and 32 of the counterclaim, as follows:

"30. By three joint, several and cumulative guarantees dated June 4, 1971, October 19, 1972 and February 20, 1974, Noor Alam and James Karanja bound themselves to pay on demand to Kenya Commercial Bank Ltd (appellant) all sums owed to the bank by Highways Construction Company Limited together with interest and charges subject to the respective maximum amounts of Kshs 3,500,000, Kshs 8,000,000 and Kshs 11,100,000 together with interest.

31. By demand dated April 5, 1974 the bank demanded payment from the guarantors of Kshs 11,754,658 together with interest thereon at 9% pa until payment in full.

32. Noor Alam and James Karanja have failed to pay any part of the sums guaranteed."

The respondent Karanja filed the following defence to the counterclaim:-

"Defence of James Karanja the Second Defendant in suit No 1101 of 1974

1. The second defendant in suit No 1101 of 1974 (hereinafter called James Karanja) admits that he along with the first defendant were defendants in High Court Civil Case No 1101 of 1974 which said suit has been dismissed by this Honourable Court on June 10, 1978.

2. That James Karanja is not a party to this suit. By joining him in this suit in this manner the first defendant is attempting to revive the suit which has already been dismissed by this Honourable Court.

3. Save as aforesaid expressly admitted James Karanja denies each and every allegation contained in the counterclaim, particularly that the first defendant is entitled to any sum from him as alleged in paragraph 27 (averments of liability) of the defence or at all."

The appellant's application in respect of (a) Karanja's above quoted Defence to Counterclaim and (b) Noor Alam's Reply and Defence to Counterclaim was made under Order VI rule 13 for an order:

"a) Striking out the defence of James Karanja.

b) Striking out paragraphs 9 and 10 of the Reply and Defence to Counerclaim of the first defendant filed for the plaintiff

c) For consequential orders thereon, on the grounds that:

(i) as regards the defence paragraphs 1 and 2 and the reply paragraph 9 and 10 by reason of the provisions of the Civil Procedure Rules Order XVI rule 6,

(ii) and as regards paragraph 3 of the defence that it is a bare denial contrary to the rules of pleading."

Nyarangi J, held that Order XVI rule 6 had no application to a suit which had been determined (my underlining). As regards paragraph 2 of the defence the learned judge said there could be no proceedings in the court concerning a suit which had already been determined by the same court. He also held that the respondent had denied in paragraph 3 of the defence specific allegations contained in the counterclaim and particularized one of them, that that was not a bare denial, and the defence did not breach any of the provisions of Order VI rule 13.

The appellant has appealed on the grounds that

"1. The learned judge erred in law by refusing to strike out paragraph 2 of the defence of the respondent and in entering judgment accordingly.

2. The judge erred in holding that the court has no power to hear a suit where a previous suit has been dismissed under Order XVI rule 6 in view of the specific wording of that rule.

3. The judge erred in holding that paragraph 3 of the defence of the respondent was any more than a bare denial contrary to the rules of pleading."

The appellant has not appealed against the learned judge's refusal to strike out paragraph 9 and 10 of the reply and defence to the bank's counterclaim filed for the plaintiff Noor Alam. We were told during the hearing of the appeal before us by Mr Salter for the respondent that a new situation had arisen since the Ruling of Nyarangi J, in that a settlement had been reached between the appellant bank and the first defendant Noor Alam, as a result of which the first defendant Noor Akam was no longer liable on his guarantee to the Bank. Mr Le Pelley for the appellant confirmed that the first defendant had in effect no

further liability under his guarantee.

The main burden of Mr Salter's argument before us was that Order XVI rule 6 does not entitle a plaintiff to bring what he called an old suit in the guise of a fresh suit in the form of a counterclaim, and the plaintiff should have started a separate fresh suit. This argument runs contrary to Order VIII rule 2, which inter alia provides that a defendant in a suit may set up by way of counterclaim against the claim of the plaintiff any right or claim and such setoff or counterclaim shall have the same effect as a fresh cross-suit.

Mr Salter further submitted that it would be inequitable to allow the appeal as the first defendant Noor Alam having been released as a guarantor under his guarantee, the appellant may not proceed against the remaining quarantor, the respondent. This issue is not before us in this appeal.

In my opinion the learned judge was wrong in holding that Order XVI rule 6 had no application to the suit, or that there could be no proceedings in court concerning a suit which had already been determined by the same court. I think the real object of Order XVI rule 6 is to goad plaintiffs into action to pursue their suits diligently to finality, so as to avoid too large a backlog of unfinished litigation building up in the courts. The marginal note to rule 6 is: "suit may be dismissed if no step is taken for three years." The dismissal of a suit under rule 6 for want of prosecution is not intended to deprive the court of jurisdiction to entertain the same suit again as a fresh suit, nor is it intended to deprive a plaintiff of his cause of action in that suit which is not extinguished. The rule expressly authorizes a plaintiff, subject to the law of limitation, to bring a fresh suit, upon the same of the original cause of action. Even if there were no mention of it in the rule, the fresh suit referred to in Order XVI rule 6 would still be subject to the law of limitation as a matter of normal operation of that law.

A counterclaim is a fresh suit, and the defendant instituting it becomes plaintiff for all intents and purposes. The counterclaim is combined in the plaintiff's proceedings for convenience, to enable the court to pronounce a final judgment in one set of proceedings, both on the original and on the cross claim. It is a fresh suit, and not an attempt to revive the original matter which was dismissed by the court, as Mr Salter would have us say. Defence stand or fall by the third paragraph, which contains the substance of the defence, which is a traverse. The last sentence of paragraph 2 does not constitute a defence. I would strike it out.

The learned judge rightly pointed out that the respondent had denied specific allegation in paragraph 3. Sometimes the nature of a pleading is such that a party cannot do more than deny specifically allegation made against it. Such a denial is not a bare denial or contrary to the rules of pleading. A sensible view is required to be taken of such a pleading. *John Lancaster Radiators Ltd v General Motor Radiator Co Ltd and others* [1946] 2 All ER 685; *Adkins v the North Metropolitan Tramway Company* [1894] 63 LJ QBD 361.

A reasonable defence means a defence which stands some chance of success when only the pleading is considered. A defendant should always be permitted to plead a fairly arguable defence. The respondent may well succeed in proving his specific denials, and that is enough to save paragraph 3 from being struck out. A defendant is entitled to a reasonably liberal view of his defence as a pleading so that the door of justice is not shut in his face.

I would allow this appeal to the extent of ordering that the respondent's defence be amended by striking out the second sentence in paragraph 2. I would make no order as to costs.

Miller JA. I have had the benefit of reading in draft the judgment of Madan JA in this appeal. I agree with it and the order he had proposed. I would only observe as follows:

I think that the striking out of all the litigant's defence or part thereof, is a highly discretionary exercise; and providing the filed pleading is not clearly irrelevant, scandalous or the like, upon an application so to do, the court must itself reflect upon two questions, ie

(i) Whether there might not in fact be a good and sustainable defence

or

(ii) Whether the defence as seen, merely offends as a matter of procedural error.

Withdrawal and compromise are open to both sides to a contention throughout their litigation; and parties are not to be seen to be precluded from pursuing their respective contentions unless barred for example, by res judicata or limitation.

There is a fundamental difference between cause of action and proceedings to secure acclaimed rights from causes of action; and in my view Order XVI rule 6 recognises this by the very phrase “may bring a fresh suit.” A counterclaim is of itself a suit which may not necessarily arise on the presentation of the first contention placed before the court; particularly where, as in this case, there are quests for pronouncement of rights and excuse from liability, arising between more than two parties. There can also be, as is this case, proceedings which are somewhat similar to third party proceedings; and in which joinder of issues may be either express or implied, such joinder itself operating as a denial. Even in such circumstances, since Order XIV rule 5 (1) permits the court to amend or frame issues at any time before passing a decree, I think that the court should hesitate to exercise its discretion against the litigant’s pleading with a bare denial or a part thereof.

Potter JA. I have had the advantage of reading the judgment of Madan JA in draft; I agree with it and with the order proposed, and I have nothing useful to add.

Dated and Delivered at Nairobi this 16th day of October 1981.

C.B.MADAN

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JUDGE OF APPEAL

C.H.E.MILLER

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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