IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Sir James Wicks CJ, Wambuzi & Law JJ A)

CIVIL APPEAL NO 37 OF 1977

Between

WJ FAULKNER .....PLAINTIFF

AND

AGRICULTURAL DEVELOPMENT

CORPORATION.....DEFENDANT

(Appeal against the judgment of Madan J in the High Court, Nairobi, on 28th April 1976, in Civil Case No 1327 of 1970)

JUDGMENT

Law JA This is an appeal by the defendant in a civil suit tried in the High Court in which judgment was given for the plaintiff for Shs 78,800, with interest and costs. By its amended plaint, the plaintiff (now the respondent) claimed from the defendant (now the appellant) Shs 76,000 being the price of goods sold and delivered in 1969. In the course of the trial two further amendments were made to the amended plaint, on informal oral applications made by Mr Ransley, who represented the plaintiff at the trial and on this appeal. The first amendment, which was virtually unopposed by Mr Cassidy, who represented the defendant at the trial and on this appeal, had the effect of increasing the claim from Shs 76,000 to Shs 78,800. Nothing now turns on this amendment.

The second amendment was made as a result of Mr Ransley's oral application after he had closed his case. It was that the reference to the year "1969" should be deleted from the plaint and replaced by references to the years "1967" and "1968". This application was strongly resisted by Mr Cassidy, on the ground that the amendment would have the effect of allowing a claim to be made in respect of transactions in 1967 which, without the amendment, would be barred by limitation.

The trial judge, Madan J, allowed the amendment. He was satisfied that no prejudice or injustice would be caused, as the plaintiff's advocates had informed the defendant's advocates by a letter dated 27th September 1971, when no question of limitation arose, that they would apply at the trial for the amendment to be made. The judge then wrote in the margin of the plaint "amended 26th March 1976" and signed his name. He deleted the reference to "1969" and wrote in its place "1968 and 1969". This was an error. He meant to write "1967 and 1968", as is clear from his ruling, and I have since ascertained from him that he intended to write "1967 and 1968", and that he would have corrected the error had his attention been drawn to it. I have gone into this matter in some detail, as one of the grounds of appeal argued by Mr Cassidy was that the alteration of the dates should not have been allowed, because it

introduced into the suit a claim barred by limitation, and because the appellant would be prejudiced by the amendment as his elder brother, who was more familiar with the transactions between the parties, had died a few months prior to the amendment. Mr Ransley submitted that this ground of appeal was not open to the appellant, as no appeal had been brought against the order allowing the amendment.

With respect, I see no merit in this submission. If an application for amendment of pleadings is made in the ordinary way by chamber summons, it is an interlocutory proceeding giving rise to an order and is appealable with leave. If the aggrieved party does not appeal, he cannot challenge the order in an appeal against the subsequent judgment and decree in the suit. The procedure by way of chamber summons is not exclusive. The Civil Procedure Rules, order VIA, rule 3, makes it clear that a Court may allow any part to amend his pleadings "at any stage of the proceedings" which includes the trial. Applications for amendment in the course of a trial are made orally, and are not interlocutory proceedings.

Any ruling on such an oral application in the course of a trial does not, in my view, give rise to an appealable order within the meaning of section 75 of the Civil Procedure Act, and can be made a ground of objection in the memorandum of appeal against the decree, as being an error or irregularity affecting the decision of the case, see section 76(1) of the Civil Procedure Act. To hold otherwise, as was said by Sir Audley McKisack CJ, in *DD Bawa Ltd v G S Didar Singh* [1961] EA 282, would be to produce "a highly inconvenient result attended with unnecessary delay". In my view, a ruling on an oral application for amendment made in the course of a trial is a matter appealable in an appeal against the judgment and decree in the suit, as was done here. The appeal on this point is accordingly competent.

As to its merits, an amendment may by order VIA, rule 3(2), be made although it is made after the period of limitation has expired, if the Court thinks just; and by rule 3(5) such an amendment may be made, even though it adds a new cause of action, if it arises out of the same or substantially the same facts.

The trial judge directed himself correctly in his approach to the application to amend, and I see no reason to interfere with the exercise of his discretion in this respect. The appellant had been informed, well within the period of limitation, that the application would be made at the trial, so that there was no prejudice or injustice involved. The causes of action in 1967 and 1968 added by the amendment arose out of substantially the same facts as those pleaded, which related to the alleged sale and delivery of cattle. I would dismiss the grounds of appeal objecting to the amendment.

The main grounds of appeal challenge the judge's finding that the cattle allegedly sold by the plaintiff to the defendant had been delivered. It is common ground that there was no note or memorandum of the various transactions within the meaning of section 6 of the Sale of Goods Act, so that it was incumbent on the plaintiff to prove delivery or part payment.

In one case, involving the sale of cattle invoiced at Shs 190,000, part payment was made to the extent of Shs 160,000. In the other two cases, the appellant was invoiced, and made no objection in writing to the invoices. The surviving partner, Mr W J Faulkner, claimed to have made oral objections, but the judge did not accept him as a truthful witness.

There was also evidence that invoices were not sent until after delivery had been made. The judge accepted this evidence. It has not been shown to my satisfaction that he was wrong in so doing. The transactions between the parties were characterised by much unbusiness-like confusion on both side, and the conclusion drawn by the judge was that the defendant made use of this confusion to try to avoid its legal obligations. He was left with no doubt that the defendant had taken delivery of the cattle in respect of which it was invoiced, and I see no reason to differ from this conclusion.

I would dismiss this appeal.

Sir James Wicks CJ. I have read the draft of the judgment prepared by Law JA and agreed with his conclusions.

The letter sent by the plaintiff's advocate to the defendant's advocate dated 27th September 1971,

contained the following passages:

> The whole of Shs 76,000 claimed is in respect of cattle supplied to your clients. Shs 42,000 is in respect of one hundred head of beef cattle at Shs 420 each supplied in 1968 and the balance is in respect of cattle supplied in 1967.

and -

> We enclose the debtor's ledger card for the amount in 1967 and the invoice for the amount due for 1968. The invoice is dated 11th September 1968.

followed by -

> We shall have to amend the plaint to include the years 1967 and 1968 in paragraph 3. Presumably you will agree to our doing this at the hearing. Will you please confirm this.

The debtor's ledger card showed invoice 0665 dated 26th April 1967 for Shs 2,800 to be outstanding. In the result the defendant not only had notice of the intention to apply at the trial for amendments to the plaint, but also had the specification of the proposed amendment, well within the period of limitation.

That the plaint was subsequently amended in an unrelated respect by an interlocutory proceeding did not prejudice amendments expressly reserved to be applied for at the trial.

Wambuzi and Law JJ A agreeing, the appeal is dismissed with costs.

Wambuzi JA. I agree with the judgment of Law JA which I have had the benefit of reading in draft. I also agree with the orders he proposes. My only comment is on the later amendment of the plaint by inserting the years "1967" and "1968". Mr Cassidy for the defendant submitted that after the letter of 27th September 1971 by which the defendant's advocates were informed of the intention to amend the plaint at the trial to insert these years, there was a formal application by chamber summons to amend the plaint. The summons is dated 30th November, approximately two months after the letter of 27th September. In support of the application counsel deponed:

> 3.It has become clear that the plaint as it stands at present does not contain all the real questions in controversy between the parties.
>
> 4.I verily believed that it is necessary for the plaint to be amended as per the draft amended herein respectfully ask this Court for leave to do so.

The amendments which were allowed did not include those referred to in the letter of 27th September. Mr Cassidy complained, with some justification in my view that this omission was in effect misleading as it implied that the amendments proposed in the letter had been abandoned.

According to the letter these were questions in controversy. For this reason and other reasons counsel submitted that the amendment should not have been allowed. I have some sympathy for the defendant on this aspect of the matter, but it was open to him in view of the letter of 27th September to ascertain whether the proposed amendment had been abandoned altogether. Having failed to do so I agree he had ample warning that the matter would be raised at the trial.

Appeal dismissed.

Dated and delivered at Nairobi this 17th day of March 1978.

SIR JAMES WICKS

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CHIEF JUSTICE

S.W WAMBUZI

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JUDGE OF APPEAL

E.J.E LAW

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR