IN THE COURT OF APPEAL
AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI, JJ. A)

CIVIL APPEAL NO. 168 OF 2011

BETWEEN

DAKIANGA DISTRIBUTORS (K) LTD….....APPELLANT

AND

KENYA SEED COMPANY UMITED) ……..……RESPONDENT

(Appeal from a Decree and Judgment of the High Court of Kenya at

Kisii (Hon. Justice Asike MakhandiJ) dated 31st March, 2011

in

KISII HCCC No. 146 OF 2005

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JUDGEMENT OF THE COURT

The suit was originally filed at the High Court of Kenya, Milimani Commercial Courts, Nairobi, but was later transferred to the High Court of Kenya, Kisii, where it was heard and determined by Asike-Makhandia, J (as he then was) who in the judgment delivered on 31st March, 2011 allowed part of the claim.

In the plaint the respondent, Kenya Seed Company Limited, claimed a sum of Kshs. 12,104,180/= from the appellant Dakianga Distributors Limited, in respect of several consignments of seeds the respondent claimed to have delivered to the appellant in the ordinary course of a business relationship where the appellant distributed the respondent's products. It was claimed, in the alternative, that the appellant had issued cheques for the said claimed sum which upon presentation for payment had been returned unpaid because there were insufficient funds in the appellants' account. Particulars of those cheques were set out in the plaint. During the hearing the respondent admitted that a sum of Kshs. 1,000,000/= had been paid by the appellant since inception of the suit and the sum claimed was reduced accordingly.

The appellant delivered a defence where the respondents claim was denied and it was claimed, without prejudice, that the dishonoured cheques were replaced by other cheques which were paid. Particulars of the said replacement cheques were set out in the defence as cheque No. 006854 dated 9th December, 2004 for Kshs. 642,000/=; Cheque No. 006911 dated 3rd January, 2005 for Kshs. 2,881,500/= and a bankers cheque No100962 dated 18th January, 2005 for Kshs. 1,605,000/=. It was also claimed in the defence that the respondent received a sum of Kshs. 2,448,000/= through a cheque No.-006866 dated 31st

December, 2004 for maize seeds which the respondent did not deliver.

In the respondents' List of Documents filed in Court on 19th July, 2007 a summary of sales made to the appellant for the period July 2004 to January, 2005 was given as were a bundle of copies of cash sales for the same period; copies of the dishonoured cheques were tendered; a copy of the appellants cheque for Kshs. 1,000,000/= was given as were copies of the three cheques pleaded in the defence and other relevant documents were set out.

In the appellants List of Documents filed on 13th November, 2007 copies of bankers cheques were given as was a bank statement.

Meshack Kiprop Sawe, an accountant, testified on behalf of the respondent. He produced various documents set out in the List of Documents. He admitted that the respondent had received from the appellant a cheque for Ksh. 2,448,000/= but that seeds had not been supplied as this sum was withheld to offset the appellants indebtedness to the respondent.

Charles Mageto, a director of the appellant, admitted in evidence before the trial Judge that cheques issued by his company to pay for seeds sold and received by the appellant had been dishonoured upon presentation for payment. He stated that those dishonoured cheques had been replaced by other cheques which were not reflected in the statement of account produced by the respondent. He admitted that there was an outstanding debt of Kshs. 1,211,935/= owing to the respondent.

In cross-examination the witness confirmed that the cheques he claimed to be replacement cheques were not the ones set out in the defence but were other cheques. The cheques set out in the defence were not produced at all. He said:

> **"..These three cheques listed in the defence were not replacement cheques but payment of the three transactions.."**
>
> **and**
>
> **"...1 have nothing to show that they were replacement cheques.."**

The witness changed his position in re-examination and claimed that the same cheques he had admitted as not being replacement cheques were actually replacement cheques.

Eight grounds of appeal are set out in the appellants Memorandum of Appeal drawn by its advocates. In the first ground the appellant states that the learned judge having held that the suit rested on reconciliation of accounts erred in law and fact in awarding a sum of Kshs. 8,776,580/= without any reconciliation of the accounts having been done to determine the precise sum due and payable to the respondent. In the second ground it is stated that the learned judge erred in awarding the respondent a sum more than what was the just debt. In the third ground the learned judge is faulted for holding in favour of the respondent when there was no proof to support the claim. In the fourth ground the learned judge is faulted for not holding in favour of the appellant while in the fifth ground the learned judge erred in making undeserved remarks in the judgment thus putting the appellant **"... on a pedestal."**

The appellant contends in the sixth ground that the learned judge erred and misdirected himself in not holding that invoices and cash sale receipts produced in evidence by the respondent contained erroneous and/or incorrect entries **"... with clear suspicion of false dealings apparent."** In the penultimate ground it was claimed that the learned judge erred in not holding that the sum of Kshs. 2,448,00/= **"..claimed as a set of (sic) was not traversed from the pleadings by way of a reply to defence."** In the final ground the appellant faults the learned judge for arriving at a decision which was against the weight of evidence adduced at the hearing of the case.

The respondent filed a cross-appeal in which it is urged that the judgment of the High Court be varied and reversed to the extent that it awarded the respondent a sum of Kshs. 8,776,580/= only and that a sum

of Kshs. 11,104.180/= be awarded being the sum claimed in the plaint after giving credit of the sum of Kshs. 1,000,000/= acknowledged by the respondent as having been paid after institution of the suit.

In submissions before us when the appeal came for hearing on 24th November, 2014 Mr. Bosire Gichana, learned counsel for the appellant, combined grounds 1- 5 and urged them together; grounds 6 and 7 were combined while the last ground was taken independently. Learned counsel submitted that the learned judge erred in failing to give credit for bankers cheques which had been paid to replace dishonoured cheques. Counsel thought that although copies of cheques introduced in evidence had not been pleaded in the defence the learned judge was duty bound to consider them and it was not necessary to amend pleadings. According to counsel, there was a set-off of Kshs. 2,448,000/= in the defence and because there was no reply to the set off it became an admitted claim by way of a counter-claim. Counsel admitted that some of the bankers cheques produced in evidence had not been pleaded in the defence. According to him this totalled Kshs. 2,329,600/=. Counsel finally submitted that the judge erred in awarding a sum more than the just debt.

Mr. Kimamo Kuria, learned counsel for the respondent, in opposing the appeal and urging the cross-appeal submitted that a sum of Kshs. 11,104,180/= should have been awarded being the total sum claimed less the credit acknowledged and shown in documents tendered in evidence before the learned judge. Counsel thought that the learned judge erred for holding that cheques worth Kshs. 2,327,600/= though tendered through inadmissible evidence the appellant was entitled to that sum being knocked off.Counsel further submitted that cheques produced by the appellant as replacement cheques were for other transactions shown in documents produced in evidence before the learned judge. Reliance was laid on the case of **Independent Electoral and Boundaries Commission and Leonard Okemwa (Returning Officer) v Stephen Mutinda Mule & others Civil Appeal No. 219 of 2013** for the proposition that parties are bound by their pleadings.

In reply learned counsel for the appellant submitted that the set-off should have been considered and finally submitted that the respondent had not proved its case to the required standard.

This is a first appeal and we are duty bound to re-evaluate the evidence to reach our own conclusions remembering always that the trial court had the advantage of hearing and observing the demeanour of witnesses. It was held by this Court in **Mwanasokoni v Kenya Bus Service Limited [1985] KLR 931** that this Court will interfere with a finding of fact by the High Court where the finding is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the finding.

The learned trial judge in the judgment appealed from, adopted as the issues for his determination issues that had been drawn by the appellant. Those issues were firstly whether the appellant had issued replacement cheques in respect of its dishonoured cheques; secondly whether the appellant was indebted to the respondent as claimed in the plaint or at all and if so, the amount outstanding and, thirdly, whether the respondent received a cheque for Kshs. 2,448,000/= as was alleged in the statement of defence and whether the appellant was entitled to set-off of that sum.

In determining those issues the learned judge found that the appellants' witness was not a truthful person at all. He further found that the three cheques listed in the statement of defence were not replacement cheques but were cheques issued by the appellant in respect of other transactions. The judge held that:

> **"... Finally, parties are bound by their pleadings. As already stated, the defendant claimed in its defence that it issued the 3 cheques in replacement of the dishonoured cheques. However during the trial, it tendered into evidence six additional cheques namely 011077, 100953, 100955, 100 with a grant (sic) total of Kshs. 10,892,245/= as opposed to the total amount of Kshs. 5,128,500/= in replacement cheques pleaded in defence. Clearly this was a complete departure from its pleadings. Nor are they supported by the pleadings. I may even go further and state that the evidence led by the defendant on this aspect of the matter was completely at variance with its pleadings which is not permissible.."**

The learned judge also found that the appellant had not listed the cheques produced in evidence during trial as part of its list of documents nor had they been made part of the issues agreed by the parties as issues for determination by the court.

The appellant had thus run foul of the rules of discovery where parties were bound to make full disclosure before hearing to avoid surprise to the opposite party. The judge however held that:

> **".. since the plaintiff did not object to that evidence being adduced and allowed the said cheques to be introduced in evidence and are therefore on record, this court cannot simply ignore or overlook them. They must be taken into account more so considering the contrasting evidence tendered on the same by both the plaintiff and defendant..."**

The learned judge analysed the evidence tendered by both sides and found that the cheque for Kshs. 2,448,000/= pleaded in the statement of defence was in respect of a transaction independent of the sum claimed in the plaint and that the appellant was not entitled to a set-off of that sum. Having found that sums totalling Kshs. 2,327,600/= comprised in two cheques not captured in the respondents records and a sum paid by a party called Ombega Enterprises and giving credit for a sum of Kshs. 1,000,000/= paid by the appellant to the respondent after the institution of the suit the learned judge entered judgment in favour of the respondent for Kshs. 8,776,580/=.

Counsel for the appellant submitted before us that although the appellant did not amend its pleadings the learned judge was right to give credit for the sums allegedly not captured in the respondents' records and not pleaded in the defence.

As already stated the statement of defence gave particulars of three cheques allegedly issued by the appellant to the respondent as replacement cheques of the dishonoured cheques set out in the plaint. When the appellants' witness testified before the learned judge he admitted that those were not replacement cheques at all but were cheques issued in respect of other transactions. The witness instead produced other cheques with a grand total of Kshs. 10,892,245/= which were not pleaded in- the defence at all and were not even in the list of documents filed by the appellant in court.

Order 2 Rule 2 of the Civil Procedure Rules on requirement on pleadings provides that:

> **"(1) Every pleading shall be divided into paragraphs numbered consecutively, each allegation being so far as appropriate contained in a separate paragraph.**
>
> **(2) Dates, sums and other number shall be expressed in figures and not words.**

And **Order 7** on the effect of a set-off or counterclaim provides at **Rules 3, 7 and 8:**

> **"(3) A defendant in a suit may set-off, or set-up by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counter-claim shall have the same effect as a cross -suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counter-claim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof.**
>
> **(7) Where any defendant seeks to rely upon any grounds as supporting a right of counter-claim, he shall, in his statement of defence, state specifically that he does so by way of counter-claim.(emphasis ours)**
>
> **(8)Where a defendant by his defence sets up any counter- claim which raises question between himself and the plaintiff, together with any other person or persons, he shall add to the title of his defence a further title similar to the title in a plaint, setting forth the names of**

> **all persons who, if such counter-claim were to be enforced by cross action, would be defendants to such cross -action, and shall deliver to the court his defence for service on such of them as are parties to the action together with his defence for service on the plaintiff within the period within which he is required to file his defence."(*emphasis ours*)**

Learned counsel for the respondent submitted before us that the learned Judge erred in allowing the appellant the benefit of sums not pleaded in the defence.

A useful discussion on the importance of pleadings is to be found in **Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5)** where the learned authors declare:-

> **"The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial."**

Sir Jack Jacob in an article entitled **"The Present Importance of Pleadings"** published in (1960) Current Legal Problems and which article was quoted with approval by the Supreme Court of Malawi in **Malawi Railways Limited v Nyasulu [1998] MWSC 3** states of the importance of pleadings:

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves.It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.. In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

In **Libyan Arab Uganda Bank for Foreign Trade and Development & Anor v Adam Vassiliadis [1986] UGCA 6** the Court of Appeal of Uganda cited with approval the dictum of Lord Denning in **Jones v National Coal Board [1957] 2 QB 55** that:

> **"In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries."**

This Court in **Independent Electoral and Boundaries Commission & Anor v Stephen Mutinda Mule & 3 others (supra)** cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) Limited v Nigeria Breweries PLC** SC 91/2002 where Pius Adereji, JSC expressed himself thus on the importance and place of pleadings:

> **"... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the**

pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

The judges in that case also stated:

"In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

Mr. Kimamo Kuria, for the respondent, faulted the learned judge for giving credit of sums alleged in evidence as having been paid by the appellant to the respondent Mr. · Bosire Gichana, for the appellant, while supporting that part of the judgment believed that the learned judge was entitled to give such credit and that it was not necessary to amend the defence.

We are of the respectful opinion that the learned judge, after holding correctly that parties were bound by their pleadings erred in holding that the appellant was entitled to credit on sums which were not pleaded in the defence at all. The appellant was bound by its pleading in the defence where it claimed that it had issued three cheques in replacement of dishonoured cheques which its witness admitted, and the trial court so found, that they were cheques issued in respect of other independent transactions.

Learned counsel for the appellant is with due respect to him, wrong in his submission that the appellant was entitled to proceed on a case that ran contrary to the pleading in its defence. The appellant was bound by the pleading in the defence which was not amended to allow for the learned judge to consider issues that the appellants witness was introducing through evidence in court.

The upshot of our findings is that the appeal has no merit and is dismissed with costs. The cross -appeal succeeds and we enter judgement for the respondent in the sum of Kshs. 11,104,180/= after giving credit for Kshs. 1,000,000/= paid by the appellant to the respondent after institution of the suit and as per the amendment of the plaint recorded by the trial judge. The respondent will also have costs of the cross - appeal.

Dated and Delivered at Kisumu this 25th day of FEBRUARY, 2015

D.MARAGA

…….

JUDGE OF APPEAL

F.AZANGALALA

…….

JUDGE OF APPEAL

S. ole KANTAI

…….

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR