



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPEAL NO. 15 OF 2014

BETWEEN

DOMINION FARMS LTD.....APPELLANT

AND

DIMOND SHIELD INTERNATIONAL.....RESPONDENT

*(Appeal from a Ruling of the High Court of Kenya at Kisumu*

*(Hon. Justice Chemitei, J) dated 21<sup>st</sup> January, 2014*

in

HCCC No. 163 OF 2012

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**JUDGEMENT OF THE COURT**

This appeal arises from a ruling on an interlocutory application filed by the appellant, Dominion Farms Limited, against the respondent, Diamond Shield International Limited, which application was dismissed by Chemitei, J, on 21<sup>st</sup> January, 2014 after he found triable issues arising from the defence and counter-claim filed in the matter. Because the suit before the High Court is still pending we shall tread carefully so that we do not trespass into areas that belong to the trial judge.

By the plaint filed at the High Court of Kenya at Kisumu, the appellant alleged that it entered into contract with the respondent for the supply and delivery of rice by the appellant to the respondent and that rice worth Kshs. 32,760,000/= had been supplied but that the respondent paid only a sum of Kshs. 3,500,000/= leaving an unpaid balance of Kshs. 29,260,000/= due and owing. This sum was thus claimed with interest at the commercial rate of 20% per annum from the date of filing the suit to the date of full payment.

The respondent delivered a statement of defence and counter-claim in which the claim was denied. The respondent admitted that a contract had been entered into between the two parties but stated that of the 6,000 bags of rice contracted for only 2,000 bags had been supplied and were paid for. The counter-claim was for 4,000 bags allegedly undelivered by the appellant to the respondent. The appellant applied for summary judgment stating that the sum claimed in the plaint was truly and justly owing and that there was no reasonable defence to the claim. In the affidavit in support of the Motion it was also stated that 5,600 bags of rice had been delivered to the respondent.

The learned judge heard the application and held that:-

**“.....it is now trite law that for any party to succeed in an application for summary judgment the issues in dispute must be very clear and should leave no room for ambiguity.**

**Any party looking at it should be able to clearly make an informed decision without the necessity of demanding any further evidence be it oral or documentary. Further, any application that shall require any iota of evidence should as of necessity be disallowed...”**

This is a first appeal and we are therefore duty bound to re-evaluate the evidence on record and interfere with the findings of fact of the trial court only if those findings are based on no evidence, or are based on a misapprehension of the evidence, or if the trial court is shown demonstrably to have acted on wrong principles – See Mwanasokoni v Kenya Bus Services Limited [1985] KLR 931 and the earlier decision in Selle & Anor v Associated Motor Boat Co. Limited & others [1968] E. A. 123. In addition, and as already stated, the ruling was from an interlocutory application and the matter in the High Court is still live and we should not prejudice the mind of the trial judge who will handle the matter.

The Memorandum of Appeal faults the learned judge for allegedly exercising his discretion wrongly; that the learned judge erred in not entering summary judgment when there was an admission in the defence; that the learned judge erred in not giving reasons for dismissing the application for summary judgment; that it was wrong not to enter summary judgment when the appellant had complied with Order 36 Rule 1 Civil Procedure Rules; that the learned judge erred in giving the respondent unconditional leave to defend the claim and that the respondent should not have so benefited when it was in breach of a consent order.

Mr. E. O. Ojuro, learned counsel for the appellant, in submissions before us, thought that there was an admission in the defence and that the unit price per bag of rice was Kshs. 5,850/= although this price was not pleaded in the plaint. Counsel submitted that the learned judge should have ordered trial on the balance only but not on the whole sum. Reliance was laid on the case of Vamos & Partners v Gitonga [1982] KLR 32 for the proposition that where it was satisfied on a balance of probabilities that a defendant had received the services it had requested then it would have no reasonable defence to the claim.

Mr. Ouma Mulanya, learned counsel for the respondent in opposing the appeal submitted that the unit price per bag of rice was not agreed and was unpleaded; that there was a valid counter-claim and that the learned judge was right in finding the claim not fit for summary determination.

The principles which guide our courts on applications for summary judgment are well settled. It was stated by this court in Industrial & Commercial Development Corporation v Daber Enterprises Limited [2000] 1 E A 75 that the purpose of proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. To justify summary judgment the matter must be plain and obvious and where it is not plain and obvious a party to a civil litigation is not to be deprived of the right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subjected to cross-examination.

In Dhanjal Investments Limited v Shabaha Investments Limited Civil Appeal No. 232 of 1997 it was held that:

**“The law on summary Judgement procedure has been settled for many years now. It was held as early as in 1952 in the case of Kandial Restaurant v Devshi & Company [1952] EACA 77 and followed by the Court of Appeal for Eastern Africa in the case of Souza Figuerido & Company Ltd v Mooring [1959] EA 425 that, if the defendant shows a bona fide triable issue, he must be allowed to defend without conditions...”**

This court stated the following as regards what constitutes a triable issue – Kenya Trade Combine Limited v Shah Civil Appeal No. 193 of 1999:-

**“In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go to trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed...”**

And in Dedan Kinging'i Thiongo v Mbai Gatuma Civil Appeal No. 292 of 2000 it was held that a defendant is at liberty to show, by whatever means he chooses, whether by defence, oral evidence, affidavit or otherwise, that his defence raises bona fide triable issues.

Learned counsel for the appellant submitted that there was an admission in the defence. The relevant paragraphs of the defence said to constitute admission are paragraphs 5 and 6 which state that:

**“5. The Plaintiff in breach of the said agreement failed to honour the same and only supplied to the Defendant 2,000 bags of rice and the balance thereof was 4,000 bags of rice.**

**6. The Defendant duly paid to the Plaintiff the sum of Kshs. 3,500,000/= through the Plaintiff's Bank Account held at Kenya Commercial Bank, Siaya Branch towards the purchase of the said 2,000 bags of rice.”**

As we have already observed the unit price per bag of rice was not pleaded in the plaint at all.

In “**Delivery Note Gate Pass**” dated 28<sup>th</sup> August, 2012 unit price is given as Kshs. 280/= while in Delivery Note dated 27<sup>th</sup> August, 2012 unit price is given as Kshs. 540/=. A Delivery Note of 26<sup>th</sup> August, 2012 gives unit price as Kshs. 200/= while a unit price of Kshs. 520/= is given for the Delivery Note dated 24<sup>th</sup> August, 2012.

It was claimed in the statement of defence that only 2000 bags of rice were supplied and that the same were paid for by the payment acknowledged by the appellant in the plaint.

In a situation where the unit price of a bag of rice was not pleaded and in the face of the documents presented before the learned judge showing different prices the learned judge was clearly right to find that the defence and counter-claim required further interrogation. There were triable issues and the respondent was entitled to a trial to determine the obvious triable issues arising from the pleadings.

There was no admission at all in the defence as the respondent was claiming that it had paid for the goods it had received. There is no merit in this appeal and we accordingly dismiss it with costs to the respondent.

**DATED AND DELIVERED AT KISUMU THIS 10<sup>TH</sup> DAY OF DECEMBER , 2014**

**D. K. MARAGA**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**