



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT KISUMU  
CIVIL APPEAL NO. 32 OF 2003**

**KISII FARMERS CO-OPERATIVE UNION LIMITED ..... APPELLANT**

**AND**

**SANJAY NATWARLAL CHAUHAN T/A ORIENTAL MOTORS..... RESPONDENT**

*(Appeal from the ruling of the High Court of Kenya at Kisii (Commissioner of Assize, P.K.K.A. Birech)  
dated 3<sup>rd</sup> December, 2002*

*in*

**H.C.C.SUIT NO. 78 OF 2000)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

The appellant, *Kisii Farmers Co-operative Union Limited (appellant)*, sued the respondent, *Sanjay Natwarlal Chauhan t/a Oriental Motors (respondent)*, by way of a plaint filed at the *High Court at Kisii as Civil Suit Number 78 of 2000* in which it sought judgment in its favour for **Kshs.10,400,000** together with interest at the then prevailing rates of 32% per annum with effect from 3<sup>rd</sup> February, 2000 until payment in full; general damages for breach of contract with interest at Court rates, and costs of the suit. **Paragraphs 4, 5, 6 and 7** of the same plaint state as follows:-

**“4. By an agreement in writing between the plaintiff, the defendant and the Co-operative Bank of Kenya Ltd., made on or about January 1999 the defendant offered to sell and the plaintiff agreed to purchase 2 (two) FUSO Trucks Model 657 of 10(ten) Tonnage each at a consideration of Kenya Shillings Ten Million, Four Hundred Thousand Only (Kshs.10,400,000/=). The plaintiff will at the hearing hereof refer to the said agreement for its full terms and the true purport thereof.**

**5. The plaintiff through their bankers, Co-operative Bank of Kenya Limited, Kisii Branch duly paid to the defendant the sum of Kshs.10,400,000/= being the full purchase price/consideration as per the agreement as follows:-**

**Date      Amount**

3<sup>rd</sup> January 1999    Kshs. 7,400,000/=

1<sup>st</sup> February 1999    Kshs. 2,000,000/=

3<sup>rd</sup> February 1999    Kshs. 1,000,000/=

**TOTAL**      **Kshs.10,400,000/=**

**6. However, the defendant in breach of the said agreement proceeded to deliver defective motor vehicles whose specifications were totally different from those agreed upon under the agreement, in particular;**

**(a) The defendant delivered Trucks Model 615 instead of FUSO Trucks Model 657.**

**(b) The defendant delivered Fuso Trucks of 8 tonnes each instead of 10 tonnes each.**

**7. Further, the defendant in breach of contract delivered motor vehicles that were of unmerchantable quality in particular:-**

**(a) The Motor Vehicles had the same Chassis Number, hence could not be transferred to and registered in the name of the plaintiff.**

**(b) The Motor vehicles were not operational or alternatively were unfit for the purpose for which they were purchased.**

The respondent filed a statement of defence to that plaint. In that statement of defence, the respondent while admitting receipt of **Kshs.10,400,000** being the agreed consideration sum and while agreeing further that the applicant agreed to purchase two Mitsubishi Fuso motor vehicles from it, denied the contents of **paragraphs 4, 6 and 7** of the plaint. The respondent maintained in that defence that he had delivered motor vehicles of which specifications were as per agreement and further contended that, the appellant had in any event received the same motor vehicles; used them and that being so, it has lost the right to reject the vehicles even if it had any such right. Added to all the above, the respondent also pleaded fraud on the part of the appellant contending that the appellant in collusion with a third party – **Shabana Motors Limited**, fraudulently conspired in permitting **Shabana Motors** to attach one of the motor vehicles and to sell the same. The respondent maintained in the defence that as the appellant had acted as the owner of the vehicle **KAL 570S**, the appellant was estopped from denying due delivery and acceptance of the same motor vehicle. As to defects, the respondent's position was that the appellant had not notified him of any defects and averred that the two motor vehicles were delivered brand new to the appellant. The appellant filed a reply to the defence to which it denied any collusion with Shabana Motors Limited and denied all particulars of fraud in the statement of defence and further pleaded that the respondent was notified of the defects in the motor vehicles.

The record shows that the plaint was filed in the superior court on **10<sup>th</sup> August, 2000**. Before the defence was filed, the respondent was charged in the subordinate court with three criminal offences, the first charge being that of obtaining by false pretences. The subject matter in that charge was apparently one of the vehicles which was the subject matter of the civil suit, and the victim or complainant in that charge was the appellant in the civil suit. That case was heard in the Subordinate Court and the respondent was acquitted under **Section 215** of the **Criminal Procedure Code**. In acquitting him, the learned Magistrate stated in part as follows:-

**“The accused delivered the truck as contracted by the complainant. There was therefore no demonstration of intent to defraud without which the whole charge fails. The court therefore finds the accused not guilty as charged and acquits him under Section 215 Criminal Procedure Code.**

That decision was made on **7<sup>th</sup> December, 2001**. Perhaps encouraged by that acquittal in the criminal case, the respondent armed with that judgment filed Chamber Summons dated **18<sup>th</sup> June, 2002** in the superior court. It was filed under **Order VI rules 13(1) (b) and (d)** of the Civil Procedure Rules. Only one order was sought in that Chamber Summons and that was:-

**“1. That the suit herein be struck (sic) and dismissed with costs.”**

The grounds for that application were:-

- “1. *That this suit is scandalous, frivolous and/or vexatious.*
2. *That it is otherwise an abuse of the process of the Honourable Court.*
3. *That the applicant/defendant supplied two Fuso Trucks.*
4. *That the respondent acknowledged the delivery of the same and uses the same.*
5. *That the contract to supply two Fuso Trucks was performed by the applicant/defendant to the latter.*
6. *That the respondent/plaintiff did not reject, raise any complainant or terminate the contract.*
7. *That this suit was filed and heard in the criminal trial which criminal trial evidence is in favour of the applicant/defendant.*
8. *That for the ends of justice and fair play.”*

It was also supported by an affidavit. The appellant in this appeal vehemently opposed the application and filed grounds of opposition as well as a replying affidavit. The application came up for hearing before the superior court (Birech, Commissioner of Assize, as he then was) who after full hearing allowed the application stating inter alia as follows:-

***“The plaint not being able to exhibit on the face of facts put forward in their applicants (sic) affidavit a triable issue, the claim stands out to be an abuse of the process of the Court. Consequently, the application succeeds for the reasons stated and the plaintiff’s suit is hereby ordered struck out with costs to the defendant. That means the suit is hereby dismissed with costs.”***

Earlier in the same judgment, the learned commissioner had made a finding that the suit was founded on a contract and not on misrepresentation because had it been founded on misrepresentation, the appellant could have claimed for the difference on the purchase price. He argued that if that had been done, then the claim could have made sense and there could have been an issue which could be allowed to go for trial.

The appellant felt aggrieved by that ruling and hence this appeal. We have perused the memorandum of appeal which contains twelve grounds of appeal. We have also heard rival arguments by the learned Counsel for the appellant and for the respondent. We have perused the record and considered the law.

The application that was before the learned Commissioner of Assize was premised upon ***Order VI rules 13 (1)(b)(d)*** of the ***Civil Procedure Rules***. That rule provides as follows:-

***“13.(1) At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that***

- (a) .....
- (b) *It is scandalous, frivolous or vexatious; or*
- (c) .....
- (d) *It is otherwise an abuse of the process of the Court.”*

We have anxiously considered the pleadings, particularly the points that we have set out above in this judgment. There were, in the pleadings, clear issues raised by the plaint, statement of defence as well as the reply to the defence, which, in our view, could not be resolved by affidavit evidence. Issues such as that the vehicles supplied were of the same chassis number and were therefore unmerchantable, that the vehicles were unfit for the use for which they were purchased; that the model of the vehicles delivered

and their tonnage were different from what was spelt out in the agreement of sale were all matters that required ventilation by way of a full hearing in open court and in our view, were not scandalous nor were they vexatious, frivolous or otherwise an abuse of the Court process.

It is now well settled law, that the power to strike out a pleading or any part of a pleading is a power that courts must exercise with a lot of restraint. Normally it is better to allow a weak case to go to trial than to invoke the guillotine process. In the case of ***DT. DOBIE & COMPANY (KENYA) LTD. VS. MUCHINA*** (1982) KLR 1 Madan J.A. (as he then was) though specifically dealing with a matter that was premised on **Order VI Rule 13(1)(a)** made salient comments on the power to strike out. The comments were of general application when courts are considering **Order VI Rule 13**. He stated:-

***“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Sellers LJ (supra)). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.***

***If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.***

***No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”***

We do not find it proper to say any more lest the hearing of the entire case is prejudiced. We note, however, that there is and has always been a difference in the standard of proof required in civil cases and that required in criminal cases. That, in effect means that the acquittal in criminal cases could have only been adduced as part of the evidence in the civil case but could not mean that the civil case stood for striking out.

The totality of all the above is that this appeal succeeds with costs. The decision of the superior court in the ruling delivered on 3<sup>rd</sup> December, 2002 is hereby set aside and the application thereto is dismissed with costs to the appellant. ***Judgment accordingly.***

***Dated and delivered at Kisumu this 24<sup>th</sup> day of November, 2006.***

***P.K. TUNOI***

.....

***JUDGE OF APPEAL***

***E.M. GITHINJI***

.....

***JUDGE OF APPEAL***

**J.W. ONYANGO-OTIENO**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**