



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GICHERU, SHAH & KEIWUA, J.J.A.

CIVIL APPEAL NO. 233 OF 1999

BETWEEN

UNILINK KENYA LIMITEDAPPELLANT

AND

DAVID MERRICK EVANSRESPONDENT

JUDGMENT OF THE COURT

The appellant, *Unilink Kenya Limited*, is a limited liability company incorporated in the Republic of Kenya. The respondent *David Merrick Evans* is a British National at present residing in Kenya. AFCO Holdings Limited (AFCO) is a company incorporated in Jersey, Channel Islands, United Kingdom.

By an agreement in writing, contained in a letter dated 5th May, 1997, AFCO confirmed the appointment of the respondent as a director of the appellant reporting to Board of Directors of AFCO. The terms and conditions of the respondent's employment with AFCO are set out in the said letter which was signed by the respondent on 12th May, 1997. In June, 1998 whilst the respondent was in South Africa AFCO terminated his contract of employment by giving him two calendar months notice to that effect. The terms of termination of the said contract of employment were settled on 20th July, 1998 in a tri-partite agreement made between the respondent, AFCO and the appellant. It is not quite clear why in the termination of employment contract the appellant was involved but it appears that AFCO agreed to pay a sum of US\$16,500/00 plus a bonus payment of US\$2,250,00 as well as leave pay amounting to US\$1,320/00 to the respondent in settlement of his dues. It also appears that the respondent was to resign his position as a director in the appellant company and also to transfer his shares therein to one Otto Karenger.

The respondent filed a suit against the appellant when he was not paid his agreed dues amounting to US\$16,570/=. The respondent alleged that he was at all material times employed by the appellant. The appellant filed a defence to the respondent's claim denying that he was employed by it and stating that he was employed by AFCO. We will revert to other limbs of defence filed by the appellant in the course of this judgment. The appellant lodged a counter-claim against the defendant seeking an account of all contracts entered into by the respondent in breach of his duty as director of the appellant company. A reply to defence and defence to counterclaim was duly filed by the respondent.

In this state of pleadings the respondent applied for striking out of the appellant's counter-claim and for entry of judgment as prayed in the plaint. The Superior Court (Mitey J) struck out the defence and the counterclaim and entered judgment for the respondent as prayed by him, in a ruling dated 12th February, 1999. It is that ruling that the appellant has appealed against.

In its first ground of appeal the appellant says:

"The judge erred in law and in fact in holding that the respondent was employed by the appellant, having referred to the letter of appointment from AFCO Holdings Ltd to the appellant".

We keep in mind the fact that what was before the learned Judge was an application to strike out the counterclaim and to enter judgment for the respondent as prayed in the plaint. Striking out of a pleading is a drastic remedy and ought to be resorted to in the clearest of cases where the claim or the defence (as the case may be) is clearly incontestable and that as far as possible the court should aim at sustaining rather than terminating a suit. It has been stated, and we reiterate, that if an amendment could sustain a claim or defence the court ought to order such amendment rather than strike out the pleading. As we see it there was clearly a triable issue as raised in the aforesaid first ground of appeal. Whether or not the respondent was employed by the appellant was clearly an issue for a trial court rather than a court seized of a summary judgment or a striking out application. The learned Judge ought to have concluded that what was pleaded in paragraph 3 of the defence did raise a triable issue. The said paragraph reads:

" 2. The plaintiff was employed by AFCO Holdings Limited a company registered in Jersey and was paid outside Kenya. No payment to the plaintiff went through its books nor was any PAYE, NSSF or NHIF paid in respect of him."

The agreement for termination of the contract of employment upon which the respondent placed heavy reliance to have the defence and counterclaim struck out is not as clear as it was made out to be and will obviously be the subject of interpretation by the trial court after cross-examination. It does point out that AFCO is to pay US\$16,500 to the respondent. It will be a matter for trial to decide how and why the appellant came to be a party to that agreement.

The learned Judge, concluded that AFCO was a holding Company to which the appellant was a subsidiary. He did so after stating that neither of parties to the suit had clarified the relationship between AFCO and the appellant. Obviously it would be for the trial court to decide how the appellant and AFCO are connected, if at all.

By paragraphs 6 and 7 of the defence (which paragraphs are reiterated to base the appellant's counter-claim) the appellant pleaded that the respondent formed a parallel company to compete with the appellant and used his position as director of the appellant to solicit and obtain orders for the other company he formed. In paragraph 7 of the defence the appellant states that after discovery it will plead the extent of the respondent's "breach of trust". Other matters as pleaded are not of a nature which could be the subject of a striking out application. Whilst paragraph 9 of the defence is not articulately worded the purport thereof is to say that the respondent contacted several companies on behalf of the appellant but to its detriment. Perhaps amendments thereto could clarify the issue better.

All in all we think that the learned Judge reached his conclusion rather hastily and without due regard to the principles applicable in allowing a striking out application.

The upshot of this is that this appeal is allowed with costs. The Orders made by the Superior Court on the 12th day of February, 1999 are set aside with the result that the respondent's application in the Superior court dated 16th October, 1998 is dismissed with costs. The suit in the Superior court must proceed to trial in the normal manner. Those are our orders.

Dated and delivered at Nairobi this 24th day of May, 2002

J.E. GICHERU

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JUDGE OF A PPEAL

A.B. SHAH

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JUDGE OF APPEAL

M. Ole KEIWUA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR