IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OMOLO, BOSIRE & O'KUBASU JJ.A

CIVIL APPEAL NO. 193 OF 1999

BETWEEN

KENYA TRADE COMBINE LTD……..APPELLANT

AND

N. M. SHAH……RESPONDENT

(An Appeal from a Ruling/Order of the High Court of Kenya at Nakuru (Hon. Mr. Justice D. M. Rimita) dated 22nd day of October, 1997)

In

H. C.C. NO. 355 OF 1997)

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JUDGMENT OF THE COURT

This is an appeal from the Ruling of the superior court (Rimita, J) delivered on 22nd October 1997. When the appeal came up for hearing before us in Nakuru on 23rd February, 2001, Miss B.A. Ouma appeared for the appellant while Mr. R.D. Sheth appeared for the respondent. There were 19 grounds of appeal but Miss Ouma decided to reduce or consolidate all these grounds of appeal into one which was to the effect that the learned Judge of the superior court erred in law in barring the appellant from being heard.

Miss Ouma pointed out that the claim was for Shs. 34 million plus general damages and that the appellant filed a defence and counter-claim. It was Miss Ouma's contention that the Learned Judge should have looked at the pleadings already filed as these, indeed, disclosed triable issues.

In reply to Miss Ouma's submission Mr. Sheth stated that the same were misleading and misconceived. It was his contention that there was a contract for 2,000 tons of sugar and that there was only partial judgment. Mr. Sheth was of the view that that there were no triable issues, and that as the judgment was ex parte, the appellant ought to have applied for the same to be set aside in the superior court rather than come to this court by way of appeal.

The dispute herein started in the superior court in which the respondent (as the plaintiff) filed a suit against the appellant (as the defendant) seeking judgment for:-

"1. The said sum of Shs. 34 million

2. General damages for non-performance of the said agreement

3. Interest

4. Cost of this suit.

5. Interest in such cost

6. Such other or further relief that this Honourable Court may deem fit"

The plaint was filed in the superior court on 6th August, 1997 and the appellant entered appearance on 21st August, 1997. Then on 8th September, 1997, a defence and counter-claim was filed. The respondent filed a notice of motion (on 2nd September 1997), stated to be under "Order XXXV Rules 1 and 2 and Order L Rule 15(2) of the Civil Procedure Rules and all other provisions of the law and procedure", seeking the following orders:-

"1. THAT judgment be entered against the defendant for Shs. 34 million with costs and interest.

2. THAT the residue of the claims in the plaint including that for general damages be determined at a hearing.

3. THAT the costs of this application be provided for".

That application came up for hearing before Rimita J on 23rd September, 1997. It should be pointed out that when that application came up for hearing, the appellant (as the defendant) had already filed its defence and Counter-claim (the same as having been filed in court on 8th September, 1997). Since the appellant's counsel had failed to file grounds of opposition in accordance with Order L. r. 16 of the Civil Procedure Rules, he was not allowed to address the superior court during the hearing of the application for summary judgment. In the end, it was Mr. Sheth for the respondent (plaintiff) who was heard and subsequent thereto the learned Judge proceeded to grant the prayers as sought in the notice of motion. In his ruling which is being appealed from Rimita J stated inter alia:-

"After his submissions Mr. Sheth prayed that his application be allowed as the defendant/respondent had failed to comply with provisions of Order L. r 16 CPR. They had failed to file their grounds of opposition and a replying affidavit within the stipulated time. I made a ruling which shut out the grounds of opposition and the replying affidavit as I was not convinced that the advocate for the defendant should have been heard. Unfortunately that left the plaintiff's averments uncontroverted".

The learned Judge realized that he had shut out the appellant's counsel from being heard. In our view, the learned Judge had discretion to shut out the appellant's counsel from being heard but that did not mean that the defence and the counter-claim already filed could be ignored. In The Central Bank of Kenya v. Uhuru Highway Development Limited and Others – Civil Appeal No. 75 of 1998 (Unreported) Kwach JA made the following observations:-

"In the case of Gibbings v. Strong (1884) Ch D 66 the Court of Appeal in England held that on a motion for judgment for want of defence if a defence has been put in though irregularly, the court will not disregard it, but will see whether it sets up grounds of defence which if proved will be material and if so, will deal with the case in such a manner that justice can be done".

And in Gupta v. Continental Builders Ltd (1978) Kenya L. R. 83 at p. 87 Madan JA (as he then was) said:

"The appellant has appealed to this court against this ruling. The first thing to say is that this was an application for summary judgment. If a defendant is able to raise a prima facie triable issue he is entitled in the law to unconditional leave to defend. On the other hand, if no prima facie triable issue is put forward to the claim of the plaintiff, it is the duty of the court forthwith to enter summary judgment for it is as much against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a plaintiff out of his dues in a proper case. Prima facie triable issues ought to be allowed to go to trial just as a sham or bogus defence ought to be rejected peremptorily".

In this appeal, it is clear that by the time the application for summary judgment was being heard, there was already a defence and counter-claim on the file. Since there was a dispute as regards the contract for the delivery of sugar, it cannot be said that the defence on record was a sham. In view of what we are to say at the end of this judgment, it is not our wish to go into great details as regards the facts before the superior court. Suffice is to say that having considered the plaint vis-a-vis the defence and the counter-claim we are unable to say that had the learned Judge considered these without shutting them out he would have found that the respondent was not entitled to the orders in the notice of motion dated 2nd September, 1997.

We have carefully considered the authorities cited by Miss Ouma but we are of the view that we not need to refer to each of them since the issues raised are the same. In a matter of this nature, all that a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed.

In view of the foregoing reasons, we allow this appeal, set aside the ruling of the superior court and order that the notice of motion dated the 2nd September, 1997 be remitted back to the High Court for a re-hearing and determination on merits by a judge other than Ramita J. We order that the costs of this appeal be awarded to the appellant.

Dated and delivered at Nairobi this 16th day of March, 2001.

R. S. C OMOLO

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR