REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

Civil Suit 1 of 2001

RAGHBIR SINGH CHATTHE.....PLAINTIFF

versus

MIWANI SUGAR COMPANY (1989).....DEFENDANT

RULING

By a chamber summons application dated 5th February, 2001 brought under the provisions of Section 3A of the Civil Procedure Act Order 6 Rule 13(a)(b)(c) and (d) of the Civil Procedure Rules, the applicant is praying that the written statement of defence filed in this court by the defendant be struck out and that hereafter judgment be entered for the plaintiff in terms of law plaint plus costs of the application.

The grounds upon which the application is based are that:-

(a) That the written statement of defence filed does not disclose any reasonable defence.

(b) That the written statement of defence is frivolous and or vexatious.

(c) That it may prejudice, embarrass or delay the speeding and fair trials of the action.

(d) That it is otherwise an abuse of the process of the court.

(e) That the written statement of defence is a bare denial of the plaintiff's claim.

The said is also supportive by the affidavit of Raghbir Singh Chatte and the annextures attached thereon.

The respondent has resisted the said application and has put in a replying affidavit and annexed to it is one annexture with eleven documents in it.

Mr Menezes has opened up his submissions by stating that the applicant has put in a claim of 236,500 sterling pounds against the respondent being his remuneration for 21½ months he worked for the respondent first being in charge of agricultural operations and later as the acting chief executive of the respondent company.

That against the claim the respondent has put in a defence which is a bare denial.

The whole relationship between the applicant and this respondent relates to 16th May, 1997 when he was appointed the person in charge of the agricultural operations from that date upto 31st December 1998. Then on 21.3.98 the applicant was appointed the director of the respondent, then in May 1999 the applicant was appointed as the acting chief executive of the respondent company.

It is Mr Menezes' contention that from annexture 1-10 annexed to the affidavit of the applicant, the kind of activities the applicant mastered during the period in question clearly demonstrate that it is not in doubt that the applicant was in the employment of the respondent until the time he tendered his resignation and by the contents of annexture RSC 18 there was an handing-over and taking-over exercises.

He has also argued that among the minutes of the respondent, there is one where there is a resolution being minute no 39 of 1999 where it is stated that Mr RS Chatthe continues acting as the chief executive until his replacement is found.

Equally important is minute 3/2000 where the same indicates the applicant was present in that meeting as the acting chief executive and he had expressed his wish to discontinue day to day management until 31st March, 2000.

It is Mr Menezes' argument that in most of the meetings being the exclusive meetings of the Board of the respondent company, the applicant was attending recognized as having been employed and there was no complaint about his performance. But when it came to the issue of meeting his remunerations, the respondent begun using delaying tactics as though they did not know the amount due yet. That one was preparing provided for in the agreement between Vanessa Associated Incorporated and Miwani Sugar Company (1989) Limited.

It is under that background that when the applicant found the respondent was employing delaying tactics and not ready to pay his remunerations that he filed the present suit and when the respondent was served with the plaint, it filed a defence which Mr Menezes argues is based in law because the averments in the plaint have been brushed aside as the defence denies everything that is contained in the plaint.

The other matter in which Mr Menezes has raised issue is the replying affidavit. It is his contention that the same is a nullity and should be struck out because there is only one annexture which has been certified and the same carried eleven other different documents which have not been identified.

That although the replying affidavit in the court file talks of a specialist, the agreement referred to elsewhere in this ruling do not give the specifications of the chief executive offices of the respondent company. In any case the applicant had measured upto the job. It is his further argument that in so far as the said employment is concerned, the respondent was the principal and Vanessa Associates Incorporated was its agent and so the question on priority of content do not arise.

On the issue raised by the respondent on arbitration, Mr Menezes has argued that that issue was confined between the respondent and Vanessa Associates Incorporated and has nothing to do with the issues raised by the applicant and if anything that should have been raised immediately the appearance had been entered.

He has said thee is an inconsistency between the defence and the replying affidavit for in paragraph

9 thereof admits the applicant was employed yet in the defence there is a denial of employment.

On the question of a counterclaim to be raised he has discounted that as speculated as it is not part of the defence nor is there an application to amend the defence so far made either to include the counter claim or so made it more amendable rather than the current bare denial.

Again, on the issue of receivers having been appointed to run the affairs of the respondent, it is his contention that there is no arrangement from the registered companies on the document laid before the court.

Finally, that the defence is not consonant with the replying affidavit and the two are parallel and for those reasons the defence should be struck out.

On the question of striking out the defence, Mr Menezes has relied on the following authorities (1) Raghbir Singh Chatte vs National Bank of Kenya

Kisumu C.A. No. 50 of 1996 (2) Corporate Insurance Company Limited vs Nyali Beach Hotel Limited, Nairobi C.A. No. 270 of 1996 (3) Magumba General Stores vs Pepco Distributors Limited (1987) 2 KAR 89. These cases were decided on the basis of the application made to court for a summary judgment but the principles behind them is the same as in an application for striking out a defence. I shall be coming back to these cases later.

The other point raised by Mr Menezes is that the respondent has benefited from the services of the applicant and should pay for them. He has relied in the decisions in the cases of Riddoch Motors Ltd vs Coast Region Co-op (1971) EA 438 and Emco Plastica International Ltd vs Freebern (1971) EA 432. These two cases are authorities on benefiting from the services of the document and acceptance of the documents by the Board of Directors respectively.

In replying to all these, Mr Regeru who is appearing for the respondent, has submitted that the application has no basis at all and he has relied on the contents of the replying affidavit sworn by Joseph Kamau and his first reply is that the replying affidavit of Joseph Kamau is not offensive at all to the rules of the court. That each exhibit is identified by a number and page and it is therefore easy to identify each document. That Order 18 Rule 6 of the Civil Procedure Rules talks of the things that can be struck out and the provisions of Order 18 Rule 7 of the said Rules allows the reception of affidavits and according to him if the exhibits are wrongly attached that goes to the form and not the substance.

He has further argued that in the agreement annexed to the same requires that the agent Vanessa Associates Incorporated was to serve to the principal workers with specialized skills and on that same the applicant had failed to display he had such specialized knowledge or skills.

That though there was talk of the two engagements of the applicant as the person in charge of agricultural operations and as the acting chief executive of the respondent, the applicant had failed to produce primary documents of his employment in that there is no letter of employment and that is why the respondent is saying the applicant has no cause of action and he only wants to gate crush into an agreement he is not a party as he has never been employed by the respondent, and if he was ever employed at all then his recourse is to Vanessa Associates Incorporated.

That as the agreement provides for arbitration in case of disputes, the applicant cannot be allowed to reprobate and approbate at the same time. The applicant cannot be allowed to take advantage of some of the provisions of the agreement which are reasonable to him and run away from those which are not

in his favour and in any case the arbitration of disputes is an issue which should go for trial.

Mr Regeru has further submitted that although it is conceded the applicant was engaged on two occasions and appointed a director in the respondent company, the minutes of the respondent company show that the applicant had no professional qualifications. That some of the minutes will show that at the departure of the applicant the incoming person should be a man with professional qualifications and have no interest in the respondent company.

Further the minutes will show that the applicant was employed by the respondent and not Vanessa Associates Incorporated and hence he should not look into the agreement and terms.

As far as the remuneration is concerned that is an issue which has never been agreed upon and that is why when it came to the Board it was deferred.

On the question of the handing over exercise, there was contention precedent that the resignation was tied down to the applicant providing details about a transaction involving Nyanza Enterprises Limited and once the details on that transaction are out then a counter claim may be lodged by the respondent against the applicant. That according to him is a triable issue which should go for trial.

There is also an issue of whether the applicant had effectively resigned or whether he had been released and these are matters which will go into the counterclaim. He has further argued that since receivers have now been appointed the urgency of the matter is no longer there. The other matter he has argued on is that in paragraph 18 of the replying affidavit there are ten triable issues raised therein in that paragraph.

Mr Regeru has further submitted that the application is defective as the same is brought under Order 6 Rule 13 which is non-existent. But if it was meant to be brought under the provisions of Order 6 Rule 13(1) it still remain defective because under Order 6 Rule 13(1)(a) evidence is not permissible yet the submissions have been made on the grounds that there is no reasonable defence and the other prayers have not been put in the alternative.

Mr Regeru has relied on Bullen and Leake on the court's power to order amendments and on the proposition that it is only on the clearest of cases that a defence can be struck off.

Other cases he has quoted are (1) Republic of Peru vs Peruvian Guano Company 36 Ch Div 489. (2) Dyson vs Attorney-General (1911) 1 KB 410. (3) Jane Wanjiru vs George K Waruhiu & Others HCCC No 2460 of 1996 (UR). The point which he wants to drive home is that the power to strike off should not be exercised lightly.

It is his submissions that the cases quoted by Mr Menezes can be distinguished.

Before embarking on the analysis of the legal arguments put in any both learned counsels I have to look at the defence the subject of this application.

The contents of the defence apart from paragraph 1 and 9 are all denials. In particular the respondent has denied that the applicant was in its employment.

It further denies being a privy to any agreement; content or understanding or other arrangement between the applicant and Vanessa Associates Incorporated. However, these averments are considered by the contents of paragraph 9 of the replying affidavit; the spirit and the tenor of it is an admission that

the applicant had been engaged to step in as acting chief executive.

In fact in one of the minutes of the Board it is said that the applicant was to continue acting as the chief executive meaning he had been acting as such. If that was the case, why deny in the defence the appointment of the applicant to that position in the first place.

All that is means as Mr Menezes has submitted is that the contents of the defence and the replying affidavit are not consonant and are parallel to each other.

One issue which must also be resolved first is that in an application made under Order 6 Rule 1(a) of the Civil Procedure Rules evidence is not allowed to be filed for the application should be resolved on the pleadings as they are and based on points of law.

However, an application made also under the other limps of Order 6 Rule 1(b)(c) and (d) will allow the reception of evidence by way of affidavits and anextures.

It is true as stated by Mr Regeru quoting the passages in Bullen and Leake that a pleading can only be struck out in the clearest of cases. But this court cannot lose sight of what was stated by Akiwumi JA in Raghbir Singh Catthe vs National Bank of Kenya Limited Civil Appeal No 50 of 1996 where he said:-

“A mere denial is not a sufficient defence in the type of action that had been brought against the defence.”

In that case the Court of Appeal restated the principle set in Magunga General Stores vs Pepco Distributors Limited (1987) 2 KAR 89 where it has enunciated that:-

“In an action for added or liquidated demand a mere denial or general traverse will not do for all purposes”.

What however must be guarded is that a summary procedure should not be allowed to become a means of a genuine judgment. The principles regarding applications for summary judgment and for striking out a pleading for failing to comply with the provisions as stated in Order 6 Rule 13(1) are the same and Gicheru JA said in the case of Corporate Insurance Company Limited v Nyali Beach Hotel Limited Civil Appeal No 270 of 1996 that:-

“But proceedings for summary judgment should not … be allowed to become a means of obtaining, in effect an immediate trial of an action, which will be the case if the court lends itself to determining on (such) applications points of Law which may take months or days and citation of many authorities before the court is in a position to arrive at a final decision.”

In making that quotation he picked on the observations of Parker LJ in Home and Overseas Insurance Co Ltd vs Mentor Insurance Co UK in (liquidation) (1990) 1 WLR 153 at page 158.

It is equally important to note the alternatives the court has in place of striking out a pleading.

It is true as Mr Regeru has submitted that an amendment can be ordered instead and that is what the decision in Republic of Peru vs Peruvian Guano Company (1887) Vol 36 489 say where at page 496 Chitty J said:

“If notwithstanding defects in the pleading which would have been fatal on a demurrer, the court sees

a substantial case is presented in court should, I think decline to strike out that pleading; but when the pleading discloses a case which the court is satisfied will not succeed then it should strike it out and put a summary end to the litigation."

Similarly in the case of Dyson vs Attorney General (1911) 1 KB 410 it was held that:

"Order 25 Rule 4 which enables the court or a judge to strike out any pleading on the ground that it discloses no reasonable clause of action was never intended to apply to any pleading which raises a question of general importance, or serious question of law."

It has been argued on behalf of the respondent that there are triable issues which should entitle them to default but as stated earlier, the defence is a bare denial on the claim made against the defendant and it is against that base ground that it must be decided whether the defence should stay or not.

I have not taken into account the submissions that the said defence might be amended to contain a counter claim as that application is not yet field nor is there an application for an amendment to make it more compliant.

The respondent know why they had employed the applicant and the only term available were in the agreement. They cannot be expected to receive the benefit of the services of the applicant and fail to pay for it and when pressed, behave as though they know nothing about the applicant.

The kind of defence in the court file is frivolous and vexatious and is merely meant to delay the fair trial of the action.

To bring in a bare denial in the hope that it will be amended in the future to contain a counterclaim or to be more compliant amounts to an abuse of the process of the court as all along the respondent had all the materials it required, they, having employed the applicant, to mount an effective defence.

It is artistic of course can be gauged for its later minutes, when instead of paying out the remunerations begun pulling off the item whenever it came before the Board of Directors for discussion.

The other matter which was raised regards the annextures to the affidavit where any one of claim is sealed and the rest merely marked.

Although I do not intend to make a finding on this in view of the fact that no authorities were quoted to me by either counsel concerning the issue raised therein, I would like to point out that Rule 9 of the Oakes and Statutory Declarations Rules provides that "all exhibits to affidavits should be securely sealed thereof under the seal of this Commissioner and shall be marked with serial letters for identification."

The need to seal all exhibits is thee, but the full efficiency of the rule will amount another day at an appropriate application.

Coming back to the application, for the reasons which have been advanced hereabove, the said application is allowed and the defence is struck out being frivolous and vexatious and may mark delay the fair trial of the action and is otherwise an abuse of the process of the court as it is a bare denial.

Judgment shall be entered for the applicant as prayed in the merit with costs and interest.

I award the costs of this application to the applicant.

Dated and delivered at Kisumu this 19th day of April, 2001.

(P.K.K. ARAP BIRECH)

COMMISSIONER OF ASSIZE, KISUMU

19/4/2001

Coram: PKKA Birech, Commissioner of Assize, Kisumu

Nyang'wara - Court Clerk

Menezes for the applicant

Siganga for Regeru for respondent