NILE BANK LTD AND ANOTHER

v

THOMAS KATO AND OTHERS

HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT)

HIGH COURT MISC. APPL. NO. 1190 OF 1999

(Arising from Civil Suit No. 685 of 1999)

(Before: Hon Lady Justice M.S. Arach -Amoko)

August 30, 2000

Contract – Sale Agreement – Sale of private company and assets by shareholders – Indemnity clause incorporated to protect buyer against claims by third parties – Breach of indemnity clause

Civil Procedure – Pleadings – Written statement of defence – Application to strike out – Whether sufficient grounds sufficient for dismissal – Defence of illegality – Whether applicable

Brief facts
The Plaintiffs, Applicants in this matter, filed a suit against the Defendants/Respondents seeking damages for alleged breach of a contract of sale. In their plaint, the Plaintiffs stated that in 1990, the Defendants as shareholders and on behalf of the other shareholders sold a company, Sanyu Properties Ltd and it's assets to the Plaintiffs. It was stipulated in the contract of sale that the Defendants would indemnify the Plaintiffs against any claims of the Departed Asians Property Custodian Board or other claimants. In 1997, the plaintiff discovered that two of the properties had been repossessed and asked the Defendants to compensate them according to the terms of the agreement. The Defendants neglected to do causing the Plaintiffs to file a suit against them. The Defendants filed a statement of defence denying all the Plaintiffs allegations in the plaint, and a defence that that the agreement was illegal.

By notice of motion, the Plaintiffs applied under Order 6 Rule 29 *Civil Procedure Rule*s to Court to have the Defendants written statement of defence struck off on grounds that it did not disclose a reasonable answer to the Plaintiffs claim. The issue for court to decide was whether the defence filed by the Defendants was reasonable, and the legality of the agreement.

Held:

(i) The defence filed by the defendants contained general denials to the plaintiffs' allegations, and did not give clear and specific responses to the plaintiffs' allegations. It thereby offended the provisions of Order 6 rule 7 *Civil Procedure Rules*, which requires each party to specifically deal with each allegation of fact that is denied;

(ii) Basing on the provisions of Order 6 rule 5 of the *Civil Procedure Rules*, the defence of illegality of the sale agreement on grounds that provisions of the Companies Act were flouted could not hold against the Plaintiff, since the issue of illegality was not specifically pleaded, and did not indicate which provision of the Act was breached;

(iii) The written statement of defence would be struck out for failure to disclose a reasonable defence, and judgment entered in favour of the plaintiff.

Cases referred to:

Dever Finance Co. Ltd v Harold G. Cold [1969] 1 WKL at 1877
Kahima & Anor v UTC [1978] HCB 318.
Libyan Arab Uganda Bank v Messrs Intrepco Limited [1985] HCB 73
North Western Salt Co. Ltd v Electrolytic Alkali Co. Ltd [I914] AC
Obidegwu F.v D.B Ssamakadde Civil Suit No. 59 of 1992 (Unreported)
Phillips v Copping [1935] 1 KB 15
Warner v Sampson [1959] 2 WLR 109 at P.114

Legislation referred to:

Civil Procedure Rules Order 6 rules 5, 7, 29
Expropriated Act Sections 4, 5

Counsel for Applicant: Mr. Byenkya.

RULING

ARACH AMOKO, J: This application is by Notice of Motion under Order 6 Rule 29 of the Civil Procedure rules for orders that:

(a) The Respondent's defence be struck out for failing to disclose a reasonable answer to the Plaintiff s claim.

(b) Judgement be entered for the Plaintiffs in the terms of the plaint.

The main grounds for the Application are that the defence filed by the Respondents in HCCS No. 685 of 1999, discloses no reasonable answer to the Plaintiffs claim in so far as it inter alia, constitutes of general denials and does not allege any facts constituting illegality. That it is a frivolous and vexatious defence and an abuse of the process of court.

It is supported by the affidavit of Godfrey Zziwa a legal officer of the 1st Plaintiff/Applicant bank dated September 23, 1999. Patrick Iyamulemye Kato the 1st Respondent swore an affidavit in reply on May 24, 2000 on behalf of both Respondents.

The brief background to this application is that the Plaintiffs sued the Defendants under HCCS

No. 685 of 1999, for damages for breach of contract. In their 20 paragraph plaint filed on the July 14, 1999 the Plaintiffs set out the facts constituting the cause of action as follows:

> “1. On August 17, 1990 the Defendants on their own behalf and on behalf and on behalf of the other shareholders in a limited liability Company known as Sanyu Properties Ltd, Hereinafter referred to as “the company”), entered into a sale if their entire interest in the Company and transferred the Company’s assets to the Plaintiffs at the sum of Shs. 60,000,000/= (Uganda shillings Sixty Million). A copy of the sale agreement is attached hereto and marked Annexture 'A'.
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> 2. In terms of the above-mentioned sale agreement, the Defendants sold all properties known as freehold Register Volume 52 Folio 23 situated at Plot 44 Kampala Road and Freehold Register volume 32 folio 7, Plot 46, Kampala Road to the Plaintiffs and in that regard signed documents transferring title in the said properties to the Plaintiff and delivered the certificates of title relating thereto to the Plaintiff.
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> 3. At the time of the above sale, the Defendants assured the Plaintiff that the above properties were free from any claims and encumbrances. The Defendants undertook to indemnify the Plaintiff against any claims of the Departed Asians Property Custodian Board or any other claimants. Mention thereof was made in clause 9 of Annexture "A".
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> 4. It was explicitly agreed between the parties and mention thereof made in clause 9 of the sale agreement that in the event of a third party having a superior claim to the property than that held by the Defendants, the latter were obliged to refund to the Plaintiff the purchase price together with interest thereon at the Bank rate and they would furthermore pay any damages that the Plaintiff may have suffered or incurred.
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> 5. In April 1997, the Plaintiff was reliably informed that one of the said properties had been reposed by M/S Central Properties & Development Ltd and Certificates of Repossession No. 2890 issued in respect of plot 46 and Repossession Certificate No. 2994 dated 14th January 1997 issued in respect of Plot 44, Kampala Road.
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> 6. Searches in Ministry of Lands confirmed that M/S Central Properties & Development Ltd had been registered on January 16, 1997 as proprietors of both Plot 46 Kampala Road and Plot 44 Kampala Road; vide Instrument Nos. 285089 and 285091 respectively. Copies of the Certificates of title relating thereto are attached hereto and marked Annexture "COO and "C".
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> 7. On 7th May 1997 the Plaintiffs' lawyers wrote to the Defendants to admit liability to indemnify the Plaintiffs. A copy of the letter is attached hereto as Annexture "D".

8. On 14th May 1997, the Plaintiffs' lawyers wrote another demand to the Defendants to give the Plaintiffs a clear and unequivocal commitment to compensate the Plaintiffs in terms of the sale agreement. A copy of the said letter is attached as Annexture “E”.

9. The 1st Defendant, by way of reply in a letter dated May 15, 1997, sought to sideline their contractual obligation to compensate the Plaintiffs by attempting to involve the Ugandan government in the matter. A copy of the said letter is attached hereto as Annexture "F".

10. The Plaintiffs' lawyers by a letter dated May 19, 1997 clarified to the Defendants their contractual obligations to compensate the Plaintiffs and requested the Defendants to indicate clearly whether the Defendants challenged their liability to compensate the Plaintiffs. A copy of the said letter is attached hereto as Annexture "G 1".

11. In a letter dated May 21, 1997 written by the 1st Defendant and addressed to the Plaintiffs’ lawyers, the Defendants omitted to address the issue of liability to compensate the Plaintiffs for the subsequent defect in title to the sold properties.A copy of the letter is attached hereto as Annexture "G2".

12. Efforts to settle the said matter between the parties were rendered fruitless.

13. The Plaintiffs’ entitlement to charge interest at the Bank rate on the contractual sum in terms of the sale agreement obliges the Defendants to pay to the Plaitiffs’ a sum of shs. 250,241.095/= (Uganda Shillings Two Hundred fifty Million Two Hundred forty One thousand Ninety five). A copy of an account prepared by the 1st Plaintiff reflecting this amount as at 2nd February 1999 will be adduced at the hearing hereof and the accompanying letter as Annexture "H2"

14. By a letter dated March 1, 1999, the Plaintiffs' invited the Defendants to have the matter placed before an Arbitrator. A copy of the said letter is attached hereto as Annexture "I".

15. In a letter dated 4th March 1999, the Defendants explicitly declined to have the matter placed for arbitration hence entitling the Plaintiffs to file this suit against the Defendants. A copy of the said letter is attached hereto as Annexture "J".

16. Notice of intention to sue was communicated to the Defendants and this cause of action arose in Kampala within the jurisdiction of this Honourable Court.

17. WHEREFORE the Plaintiff prays for judgment against the Defendants jointly and severally in the following terms:

(a) Payment ofUg.shs. 250,241,095/=

(b) Interest on (a) at the Bank rate from 2nd February 1999 till payment in full.

(c) General damages for breach of contract.

(d) Interest on (c) from date of judgment till payment in full.

(e) Costs of the suit.

(f) Any other and such further relief as the Honourable court deems fit.
Dated at Kampala the 4th day of June 1999.

Signed
Counsel For The Plaintiffs”

By way of a defence, the Respondents filed the written statement of defence:

“Save what is hereinafter expressly admitted, the Defendants deny each and every allegation of fact in the plaint as if the same were set forth verbatim and traversed seriatim.

1. Paragraphs 1 and 2 of the plaint are admitted and the Defendants’ address of service for purposes of this suit shall be c/o Tumusiime, Kabega & Co. Advocates, P.O. Box 21382, Kampala.

2. Paragraphs 3,4,5,6,7,8,9,10,11,12,13,14,15,16,17,18,19, and 20 are denied and the Plaintiffs shall be put to strict proof thereof.

3. Without prejudice to the foregoing, the Defendants shall in answer to paragraphs 3 to 20 of the plaint state that the sale was illegal in so far as the provisions of the Companies act were flouted and hence the Defendants are not in any way liable to the Plaintiffs and the "loss lies where it falls".

4. In the alternative but without prejudice to the foregoing, the Defendants shall aver that they only sold their share holding in the company to the Plaintiffs and the rest of the provisions of the agreement were legally meaningless.

5. Further in the alternative and without prejudice to the foregoing, the Defendants shall aver that there has never been any claim on the property by DAPCB or by any other claimant which the Plaintiffs unsuccessfully defended.

WHEREFORE the Defendants pray that the suit be dismissed with costs.
Dated at Kampala this July 9,1999.

Signed
Counsel For The Defendants.”

In paragraphs 4 and 5 his affidavit in support of the application, Mr. Zziwa deponed that he has read and understood the defence filed by the Respondents and that he verily believes, on the basis of his training as a lawyer and on the advice of his advocates that it does not disclose any reasonable answer to the Plaintiff s claim in so far as it constitutes of general denials and does not allege any facts constituting illegality that it is a frivolous and vexatious defence and an abuse of court process.

Mr. Byenkya, learned counsel for the Applicant argued the application on the basis of the said affidavit; and submitted firstly, the pleadings in paragraph 1 of the Written Statement of Defence where the Defendants deny the allegations in paragraphs 3 to 20 of the plaint is a general denial. It therefore offends the provisions of Order 6 rule 7 of the *Civil Procedure Rules* which provides that a party must deal specifically with each allegation of fact which it does not admit. That this rule is mandatory, and a defence that offends the rule is bad and should be struck off and judgement entered in favour of the Plaintiff. He cited the case of *Obidegwu F.v D.B Ssamakadde* Civil Suit No. 59 of 1992 (Unreported) by TINYINONDI, Ag. J. as he then was, in support of this point.

Secondly, Mr. Byenkya submitted that paragraph 3 of the written statement of defence offends Order 6 rule 5 of the *Civil Procedure Rules* which requires the Defendant to set out the facts constituting illegality. It says that the sale was illegal in so far as the provisions of the Companies Act were flouted. This plea does not tell the Plaintiff anything about the facts or acts which are alleged to be illegal. It is just a general statement which does not disclose what the defence is. It is also a general denial which covers 17 paragraphs of the plaint.

Thirdly, the alternative defence in paragraph 4 of the Written Statement of Defence does not disclose any defence known in law. It says that the Defendants shall aver that they only sold their shareholding in the company to the Plaintiffs and the rest of the agreement were meaningless.

Fourthly, Mr. Byenkya submitted that paragraph 5 of the written statement of defence is not a reasonable defence in light of the copies of the certificates of title in respect of the two plots clearly indicating that the Repossession Certificates were duly registered thereon. The paragraph says that the Defendant shall aver that there has never been any claim on the property by the DAPCB, or any other claimant which the Plaintiffs unsuccessfully defended.

Finally, and in view of the above arguments, Mr. Byenkya submitted that there is no reasonable answer on record and to continue with the trial will just waste the court’s time and delay justice, and he prayed that the written statement of defence be struck out, judgment be entered in favour of the Plaintiff for the purchase price and the suit be set down for formal proof to determine the question of interest and general damages. That he would not object to the Defence participating in the formal proof.

Ms. Khalayi Lilian, learned counsel for the Defendants opposed the application. She maintained

that the written statement of defence filed on behalf of her clients disclose a reasonable answer to plaint. That paragraphs 2 and 3 of the written statement of defence read together are not a general denial because they disclose the defence of illegality based on the *Companies Act*. That details can only be given in evidence, so you do not have to plead specifically, she cited the case of *Dever Finance Co. Ltd v Harold G. Cold* [1969] 1 WKL at 1877.

In the alternative, learned counsel proposed that since the case has not yet been set down for hearing, the Defendant may apply for leave to amend the written statement of defence to include the details of illegality.

As regards paragraph 4 of the written statement of defence, the alternative defence is that the Defendants/Respondents only sold their shareholding in the company. They were therefore not responsible for any indemnity.

In her view paragraph 5 of the written statement of defence is a reply to the Plaintiff's claim denying a set of facts that arose out of the contract.

Finally, counsel submitted that the pleadings were closed in 1999, and the Plaintiff has not made any efforts to set down the suit for hearing. Counsel urged court not to condemn the defendants unheard but to set down the suit for hearing.

Order 6 Rule 29 of he civil procedure Rules under which the application was brought, gives court discretion, upon application, to order any pleading to be struck out of the ground that it discloses no reasonable answer, or where it is shown to be frivolous and vexatious. In the case of *Libyan Arab Uganda Bank v Messrs Intrepco Limited* [1985] HCB 73. ODOKI, J,. as he then was held in a similar application that:

> "The discretion given to the court under Order 6 Rule 29 to strike out pleadings should only be exercised in plain and obvious cases since such applications were not intended to apply any proceedings which raised a serious question of law."

In the case it was further held that;

> "It is well established that in considering applications under Order 6 rule 29 the court should look at the pleadings above and any Annextures thereto, and not any subsequent affidavits"

Mindful of the above authority, I now proceed to examine the pleadings in HCCS No. *685/99* together with the Annextures thereto in order to determine whether the written statement of defence raises any reasonable answer to the plaint. I have reproduced the relevant paragraphs of the plaint and the written statement of defence earlier on, I will not repeat them here.

As can be clearly discerned from the plaint. The Plaintiffs' claim is for breach of contract based on a contract signed between the parties on August 17, 1990; a copy of which is attached to the

plaint as Annexture "A" in particular, Clause 9 thereof which provides:

> "9. The vendors hereby warrant that the titles to the said plots are free of any claims and in cumbrances and they undertake to indemnity (sic) the purchasers against any claims by the Departed Asians Property Custodian Board or any other claimants. Should any claim arise and cannot be successfully defended by the purchasers, the vendors hereby undertake to refund to the purchasers the purchase price together with interest at bank rate and pay any damages the purchaser may have suffered"

The Plaintiffs' case is that in August 1990, the Defendants sold Sanyu Properties Ltd together with its assets including plots 44 and 46 Kampala Road under the said agreement. The Plaintiffs relied on Clause 9 above which entitled them to a refund of the purchase price together with interest thereon at in case the property is successfully claimed by DAPCB or any other claimants. In 1997, April, M/S Central properties & Development Ltd repossessed both properties. The Plaintiffs invoked the provisions of clause 9 and demanded for the refund of their money but the Defendants refused. The sum demanded now is in excess of shs. 250,241,095 inclusive of interest and consequential expenses. The Plaintiffs attached copies of the Certificate of Title in respect of the two properties which indicate that the certificates of Repossession by M/S Central properties Ltd were duly registered thereon.

The issue therefore is, whether the defence filed in court is a reasonable defence under Order 6 rule 29 of the *Civil Procedure Rules*, under which this application is made. Mr. Byenkya, learned counsel for the applicant says it does not amount to a reasonable defence. Ms Khalayi contends that it does.

In the opening statement of written statement of defence the Defendants deny each and every allegation of fact in the plaint as if the same were set forth verbatim and traversed seriatim.

This is known as a general traverse and it is usually allowed at the beginning or at the end of the written statement of defence. The purpose of a general traverse is to deny material facts in the statement of claim which the Defendant inadvertently omitted to deal with specifically; See: *Warner v Sampson* [1959] 2 WLR 109 at P.114 CA.

The Defendants however make a general denial of paragraphs 3-20 of the plaint in paragraph 2; they plead illegality in paragraph 3; in paragraph 4, they admit having sold only their shares, and aver that the rest of the agreement is legally meaningless; and in paragraph 5, they aver that there was never a claim on the properties in question by the DAPCB or any other claimant.

In my view, the written statement of defence in general and paragraph 2, in particular, does indeed offend the provisions of Order 6 rule 7 of the *Civil Procedure Rules* in the it is a general denial. The rule provides:

> "7. It shall not be sufficient for a Defendant in his written statement to deny

> generally the grounds alleged by the statement of claim, or for the Plaintiff in his written statement in reply to deny generally the grounds alleged in the defence by a Counterclaim, but each party must deal specifically with each allegation of fact of which he does not admit the truth except damages."

According to ODGERS PRINCIPLES OF PLEADING AND PRACTICE, 22nd Edition at page 136,

> "It is not sufficient for a Defendant in his defence to deny generally the allegations in the statement of claim, or for a Plaintiff in his reply to deny generally the allegations in a Counterclaim, but each party must traverse specifically each allegation of fact which he does not intend to admit. *The party pleading* must make it *quite clear how much of his opponent's case he disputes.* Sometimes in order to deny the rule and to deal with every allegation of fact of which he does not admit the truth, it is necessary for him to place on record two or more distinct traverses to one and the same allegation. Merely to deny the allegation in terms will often be ambiguous."

The object of pleadings is to bring the parties to a clear issue and delimit the same so that both parties know before hand the real issues for determination at the trial. See: *Kahima & Anor v UTC* [1978] HCB 318.

In the case of *Obidegwu v D.B Ssamakade* (supra) the Plaintiff brought an action against the Defendant for breach of contract by not delivering possession of a house he had leased from the Defendant, for a term of 3 years. The Defendant contended that the non delivery of the said house was because the Plaintiff/lessee had not paid the second installment of rent. TINYINONDI J. held inter alia, that the Defendant's pleadings did not deny the existence of the lease agreement, because they just denied generally the grounds of the claim of the Plaintiff, without specifics as to whether the alleged lease existed or not. The learned Judge held that Order 6 rule 7 is mandatory. He said;

> "I hold that this rule is mandatory as it clearly states so. In the case before me the existence of a lease agreement between the parties was alleged to exist. A photocopy of it was Annexed to the plaint. This was an allegation of fact. If the Defendant did not admit it, he ought to have specifically dealt with it. He did not"

Likewise in the case the subject of the instant application, the Plaintiffs alleged the existence of an agreement of sale between the two parties, and a copy thereof was attached. Furthermore, they alleged an indemnity clause under the said agreement, which entitled them to a refund of the purchase price plus interest and other consequential expenses in case of any claim by 3rd parties and DAPCB. These were allegations of fact.

If the Defendants did not admit them, they ought to have specifically dealt with them. They did not. The second issue is the question of illegality. Under order 6 rule 5, matters to be specifically

pleaded include facts showing illegality either by statute or common law. The rule provides:

> "5. The Defendant or Plaintiff, as the case may be, shall raise by his pleading all matters which show the action or Counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the proceedings pleadings, as, for instance, fraud, limitation act, release, payment, performance, or facts showing: illegality either by statute or common law". (The underline is mine).

On the subject of illegality, ODGER'S PRINCIPLES OF PLEADING AND PRACTICE, 22nd Edition, states at page 185;

> "The defence that a contract is a wager within the Gaming Acts should be specially pleaded; and the facts which are relied on to bring the transactions within those Acts should be stated. However, the court itself will take notice of any illegality of the contract on which the Plaintiff is suing if it appears on the face of the contract or from the evidence brought before it by either party, and even though the Defendant has not pleaded illegality. Illegality once brought to the attention of the court, overrides all questions of pleadings, including any admissions made therein. Otherwise where the contract is not ex facie illegal as a general rule the court will not entertain the Question of illegality unless it is specifically pleaded and the court is satisfied that it has before it all the necessary facts concerning: the contract setting".

In paragraph 3 of their defence, the Defendants plead that: "the sale was illegal in so far as the provisions of the Companies Act were flouted".

The facts which are relied on to indicate that the sale in question contravenes the provisions *Companies Act* are not pleaded. The specific section of the *Companies Act* flouted is not stated; and yet the Companies Act has over 300 sections. This omission in my opinion is likely to take the Plaintiffs by surprise and therefore offends the provisions of Order 6 rule 5 of the Civil Procedure Rules. See: also, *North Western Salt Co. Ltd v Electrolytic Alkali Co. Ltd* [I914] AC; *Phillips v Copping* [1935] 1 KB 15 at page 21 Per SCRANTON LJ.

The alternative defence which says that the rest of "rest of the provisions of the agreement were legally meaningless" also do not disclose any defence known in law, as Mr. Byenkya rightly said. Finally, the defence in paragraph 5 is in my view a 'sham' defence in view of the photocopies of the Certificates of titles in respect of plots 44 and 46, Kampala Road attached to the plaint. They show that Central Properties and Development Limited of P.O. Box 98, Kampala, were issued Certificates Authorising Repossession No. 2890 dated June 26, 1996 Certificate No. 2994 dated January 14, 1997 under the provisions of section 4 and 5 of the *Expropriated Act*; and the said certificates duly registered on the certificates of title. The defence that there has never been any claim on the property by DAPCB or any other claimant which the Plaintiffs unsuccessfully defended is therefore not only a sham but outrageous; and should be treated as such. All in all, I

find that the defence filed does not disclose any reasonable defence to the plaint, it is a general denial and it is frivolous and vexatious and is accordingly struck out. In the result, judgment is hereby entered for the Plaintiffs against the Defendants for the shs. 60 million, being the purchase price paid by the Plaintiffs under the agreement. The rest of the claim and in particular the, issue of interest and general damages shall be set down for formal proof on the October 18, 2000. The defence counsel is free to participate in the formal proof as suggested by Mr. Byenkya.