IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

CIVIL APPEAL NO 9 OF 1968

CORAM: (DE LESTANG. AG.P, SPRY, AG. V-P. AND LAW, J.A.)

BETWEEN

KISKA LIMITED …….APPELLANT

AND

VITTORIO DE ANGELIS …….RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Dalton, J.) dated 16th November, 1967, in Civil Case No. 243 of 1965)

17thJuly, 1968

The following Judgments were read:-

DE LESTANG, Ag -P.

This is an appeal on costs.

On the 19th March, 1965, the respondent who was the plaintiff in the court below (hereinafter called the plaintiff) sued the appellant (hereinafter called the defendant) to recover shs.69,765/20 cents for arrears of salary and for payment of a sum of money received by the defendant on his behalf. The defendant denied the claim and by way of counter claim and set-off claimed damages for breach of contract from the plaintiff. The plaintiff, by his reply, denied the defendant's claim.

Before the case came on for trial the evidence of a witness who was leaving the country was taken on the application of the defendant but not concluded. On the 27th October, 1965, the defendant admitted the plaintiff's claim in full and by consent of the parties the court in effect referred the matters raised in the counter-claim and set-off to a referee for decision. The referee was ordered by clause3 of the reference:

"To transmit the proceedings which he may hold on the enquiry and also to report his own opinion thereon as to any amount due from one party to the other after taking into account the sum of shs.69,765/20 admittedly due by the Defendant to the Plaintiffs".

In due course the referee reported to the court that the plaintiff owed the defendant shs.6, 442*/80* cents, whereupon the learned judge after hearing the parties on the question of costs gave judgment for the plaintiff for shs .*69*, 765/20 cents and for the defendant for *shs.* 76, 408/-

I pause here to remark that having regard to clause 3 of the reference, judgment ought to have been entered for the defendant for shs.6, 442/80 cents and not for both parties as was done here.

It would appear, however, that judgments were entered as they were by consent of the parties and the judge was probably misled by Mr. Sirley is uncontradicted but inaccurate statement that judgment had been entered on the 27th October, 1965, for the plaintiff for shs 69,765/20 cents. Be that as it may, there could not be, and there is no appeal against the form of the judgments.

As regards the costs, the learned judge said:

"As to costs the plaintiff will have the costs of his claim and the defendants the costs of the counterclaim. The costs arising out of the application for the evidence de bene esse of Mr. D. Rocco and the costs of the -hearing are awarded to the plaintiff. Costs of the application to amend the defence awarded the plaintiff. Costs arising out of alleged breach of contract is instruction fees to defend and getting up fees awarded the plaintiff. Concerning the costs of the referee it seems to me that the necessity for the referee did not arise solely out of the conduct of one or other of the parties and I consider that such costs should be shared equally by the parties.'"

The defendant appeals from the order for costs in three respects; namely;

a) *the award of costs to the plaintiff on his claim;*
b) *the award to the plaintiff of the costs arising out of the application for taking evidence de bene esse and*
c) *the sharing of the costs of the reference equally between the parties.*

Before considering the merits of the appeal it is convenient to refer briefly to the law applicable Section 27(1) of the Civil Procedure Act, while giving the court wide discretion as to the costs of a suit, contains the following proviso:

> "*Provided; that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.*

"In ***Devram Nanji Dattani v. Haridas Kalidas Dawda, 16 EACA 35,*** the Court of Appeal held that a successful defendant can only be deprived of his costs when it is shown that his conduct, either prior to or during the course of the suit, has led to litigation which, but for his own conduct, might have been averted. In that case, the following passage from the judgment of Lord Atkinson in Donald ***Campbell v. Pollak, (1927) A.C. 732 at p.81*** was applied.

> *"It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts… If, however, there to, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of the sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance. "*

Thus, where a trial court has exercised its discretion on costs, an Appellate Court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. it will also interfere where reasons arc given if it considers that those reasons do not constitute "good reason" within the meaning of the rule.

I now proceed to consider the three items of costs attacked in the appeal in the light of the above principles.

As regards item (a), the parties, having agreed to judgments for both the plaintiff and the defendant, the learned judge in awarding each party its costs did not, on the face of it, depart from the rule that costs shall follow the event and normally his order in such a case could not be impugned.

It appears, however, that misled by one of the advocates, he failed to realise that the defendant's set-off and counterclaim were defences to the plaintiff's claim and that the proper order to make in such a case is to enter judgment for the balance due, with costs, unless there are good reasons to deprive the defendant of his costs. (**See 34 Halsbury 3rd Edition paragraph 753).**

It seems to me, therefore, with respect, that the learned judge was wrong to allow the plaintiff any costs on his claim and I would set aside that order. As regards (b), the cost of the evidence *de benne esse*, as it solely concerned the counterclaim and set-off on which the defendant was successful, there was a clear departure from the rule for which no reason was given by the learned judge.

With great respect, I can find no ground for depriving the successful defendant of his costs in this matter and in the absence of good reason he is entitled to them.

As regards (c), the cost of the reference. Here again the learned judge gave no good reason for his award. The reference dealt entirely with the counterclaim and set-off and nothing else and the defendant, having been successful, is entitled to his costs.

I would accordingly allow the appeal and order that paragraphs 1 to 4 inclusive of the decree be deleted and replaced by the following new paragraphs 1, 2 and 3:

1. *" By consent, that there be judgment for the plaintiff for shs.69, 765/20 on the claim and for the defendant for shs. 76, 408/- on the counterclaim.*

2. *That the plaintiff do pay to the defendant his costs including the costs of taking the evidence of Mr. Rocco de bene esse and the costs of the reference.*

3. *That the defendant do pay to the plaintiff th6 costs incurred by amending the defence and by that part of the counterclaim alleging breach of contract including instruction fees to defend and getting-up fees in respect of such part of the counterclaim*. "

I would award the appellants the costs of this appeal.

As the other members of the Court agree, it is ordered accordingly.

SPRY, AG. V-P;

I have had the advantage of reading in draft the judgments of de Lestang, Ag. P., and Law, J.A., with which I am in complete agreement and I would only add a few observations.

Under Order VIII, rule 13, of the Civil Procedure (Revised) Rules, 1948,

> *"13. Where in any suit a set-off or counterclaim is established as a defence against the plaintiff's claim, the Court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case."*

This rule was taken verbation from what used to be Order 21, rule 17 of the English Rules of the Supreme Court, of which Kennedy L.J. said, in ***Provincial Bill Posting Co. v. Low Moor Iron Co. (1909) 2 K.B. 344***

> *" Now, however, a counter-claim may in ordinary cases be established, and if it exceeds the amount recovered on the claim the Court has power to give judgment for the defendant for the balance, if it thinks it right to do so; and similarly judgment for the balance may be given for the plaintiff if the amount recovered on the claim exceeds that recovered on the counter-claim. But the Court t must consider in each case whether it would be right to give judgment for the balance, and if it would not be reasonable or right to deal with the claim and counter-claim by a judgment for the balance, then judgment should be given for the plaintiff on the claim and for the defendant on the counterclaim, costs following in each case."*

In that case, there was a good reason for not giving judgment for the balance, because the plaintiff company had gone into liquidation.

The passage I have quoted was referred to by Singleton, L.J. in ***Chell Engineering Ltd. v. Unit Tool and Engineering Co. Ltd. (1950) 1 All E.R. 378.,*** who went on to say that

> *"It is usually better that the judgment should be in the form to which I have been accustomed, namely, judgment for the plaintiff for so much on the claim with costs and for the defendant for*

so much on the counterclaim with costs. That course prevents an involved argument about the difference between set-off and counterclaim."

In that case, however, the court was concerned with the question, the balance being very small, whether it entitled the successful party to costs on the High Court scale.

It may be added that in that case Denning L.J. (as he then was) said

"I would only add that in most of these cases it is desirable that a judge should consider whether a special order should be made as to costs because the issues are often very much interlocked, and the usual order of 'judgment for plaintiff on claim with costs and for defendant on counterclaim with costs' does not always give a just result."

The decision in the ***Chell*** case was explained in ***Childs v. Blacker (1954) 2 All E.R. 243***., which is in some ways comparable with the present case, because it was one where the claim was not contested and the only issue was on the counterclaim.

In the event, the plaintiff recovered a small balance, though less than the defendant had tendered.

Lord Goddard C.J. said

' ...the only question fought was the question of the counterclaim for breach of contract, as it in fact was, whether one calls it counter claim or set-off It is then said that, although the plaintiff has recovered less than the sum that had twice been offered to him, he should have substantially the whole of the costs of the proceedings, because, if he gets the costs on the claim and the defendant the costs of the counterclaim, the general costs of the action will go to him. The learned judge made that order, with the result that the defendant, who had been successful in the matter which was litigated, might have been left to pay very substantial sums of money to the plaintiff for his costs, and her Costs In those circumstances, it seems to me only fair that the defendant should have the costs of the action."

It seems to me that the reasoning in that case applies to the present case, where the balance payable was in favour of the appellant company, and should apply whatever the form of the judgment.

The position is, of course, entirely different where the counterclaim is of the nature of a cross action and different issues arise on the claim and the counterclaim.

I would also comment on the form of the decree extracted.

The learned judge had said that the plaintiff would have the costs of the claim and the defendant ompany the costs of the counterclaim. In the formal decree, however, it was said that the plaintiff was to have "the costs for the sum of Shs.69, 765/20" and the defendant company lithe costs for the sum of Shs.76,408/-".

I think those are most un desirable and misleading expressions.

The amount which a party recovers is only one of the factors, and not necessarily the most important, that a taxing master takes into account when taxing costs in the High Court.

It was this, I think, which led counsel, if I understood them correctly, into arguing that the result of the learned judge's order as to costs would result in their more or less balancing out.

There is no reason to suppose that this would have been so.

I agree with the order that has been proposed.

LAW, J.A.

In the suit out of which this appeal arises, the plaintiff (now respondent) claimed Shs. 69,765/20 for arrears of salary and the defendant (now appellant) counter-claimed for general damages under three heads

(a) failure to account for the proceeds of sale of coffee seedlings,

(b) breach of contract in engaging in paid employment for other employers, and

(c) breach of contract in engaging in the business of an estate agent and the defendant claimed to set-off so much of its claims as would be sufficient to extinguish the amounts found due to the plaintiff.

Before -the suit was heard, the evidence of a defence witness Mr. Rocca was taken on commission. This evidence was in support of the defendant's claim for a share of the proceeds of sale of coffee seedlings, under para (a) above.

On 27th October, 1965 the suit was mentioned before Sherrin Ag. J. in chambers.

On this occasion the defendant admitted the plaintiff's claim for Sh8. 69,765/20, and the dispute as to the proceeds of sale of coffee seedlings was by consent referred to a referee with the instruction that he was to "report his own opinion thereon as to any amount due from one party to the other after taking into account the sum of shs. 69,765/20 admittedly due by the defendant to the plaintiff".

The defendant's claims for damages for breach of contract under paragraphs (b) and (c) above were withdrawn. Contrary to what Mr. Sirley for the plaintiff told Dalton, J. on 16th November, 1967, no judgment was entered for the plaintiff on 27th October, 1965.

It is clear from the extract of the order of reference which I have quoted that the referee was to certify, taking into account the admission of the plaintiff's claim, whether the plaintiff was entitled to anything at all after calculating his indebtedness to the defendant in respect of the sale of coffee seedlings.

In the event the referee found, after giving credit for the whole of the plaintiff's claim, that the plaintiff owed the defendant a balance of 8hs. 6,642/80, a figure which was accepted by the parties.

Thus the defendant's defence by way of counter-claim and set-off was successful, not only in that it extinguished the whole of the plaintiff's claim, but left the defendant with a balance in his favour.

The proper order in such a case was to give judgment for the defendant for shs. 6,642/80, and not to enter judgment for the plaintiff for shs. 69,765/20 on his claim, and for the defendant for Shs. 76,408/- on the counter-claim.

Dalton, J. was misled by Mr. Sirley's statement (which Mr. Hobson for the defendant did not contradict) that there was a judgment on record for the plaintiff for the amount of his claim.

The correct order for costs in a case such as this, where the defendant succeeds in establishing a set-off exceeding the plaintiff's claim, is in my opinion as stated in **Halsbury, 3rd Ed., Vol. 34, para. 753:** the defendant is entitled to judgment with costs on the claim, and to judgment for any balance recovered on his counter-claim with costs, in the absence of circumstances depriving him of costs.

No such circumstances have been shown to exist in this case.

No doubt Dalton, J. would have made such an order, had he not been misinformed by the advocates as to the existence on the record of a judgment in favour of the plaintiff for the amount of his claim.

In the event Dalton, J. entered judgment for the plaintiff on the claim and for the defendant on the counter-claim. There has been no appeal against this part of his judgment, nor could there be as the parties consented. Dalton, J. also gave the plaintiff his costs, and the defendant his costs.

The defendant has appealed against the order for costs made in favour of the plaintiff, and in my view this 6round of appeal must succeed, as the learned judge's order was made as the result of a misapprehension of the true facts.

The defendant has also appealed in respect of two other matters, the award to the plaintiff of the costs of taking Mr. Hocco’s evidence *de bene esse* and the order that the costs of the reference be paid equally by the plaintiff and the defendant.

Mr. Rocco's evidence was taken and used for the purpose of establishing the set-off and counterclaim, in which respect the defendant was wholly successful. The reference was also concerned wholly with ascertaining the defendant's entitlement under his set-off and counter-claim, the plaintiff having pleaded in his reply that the defendant was not entitled to an account or to any damages.

The reference was decided wholly in favour of the defendant, not only to the extent of extinguishing the plaintiff's claim, but also so as to leave a balance in the defendant's favour.

For these reasons I am of opinion, with respect, that the learned judge erred in principle in failing to award the defendant the costs of taking Mr. Rocco's evidence and the costs of the reference.

I consider that this appeal succeeds on all three grounds.

There has been no appeal against the orders awarding the plaintiff the costs resulting from the filing of an amended defence and the costs, including an instruction fee and getting-up fee, incurred by the plaintiff by reason of the counter-claim for damages for two alleged breaches of contract which was not pursued by the defendant.

I would allow this appeal, and I concur in the order proposed by Sir Clement de Lestang, Acting President.