

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NYALALI, C.J., Makame, J.A. and Kisanqa, J.A.)

CIVIL APPEAL NO. 15 OF 1983

B E T W E E N

JOHN M. BYOMBALIRWA APPELLANT

A N D

AGENCE MARITIME INTERNATIONALE }
(TANZANIA) LIMITED } RESPONDENT

(Appeal from the Ruling and Decree of the
High Court of Tanzania at Dar es Salaam)
(Mapigano, J.)
dated 23rd March, 1982

JUDGMENT OF THE COURT

KISANGA, J.A.:

This is an appeal from the ruling of the High Court dismissing the appellant's claim on a preliminary objection that the plaint disclosed no cause of action because there was no compliance with the requirements of section 6 of the Sale of Goods Ordinance (Cap.214). The plaint had alleged that there was a contract whereby the appellant was to supply to the respondent goods valued at shillings 82,237.50, but that the respondent has refused or neglected to take the said goods. The appellant therefore sued to recover the said sum of shillings 82,237.50 being the agreed price of the said goods or damages for breach of contract.

In a written statement of defence the respondent, among other things, raised the defence that the claim offended against the provisions of section 6 of the Sale of Goods Ordinance and therefore prayed the court to dismiss it for disclosing no cause of action. In a reply to the written statement of defence,

the appellant sought to show that there had been compliance with some requirements of section 6 of the Ordinance. However, at the commencement of hearing the suit, the respondent's counsel took a preliminary objection that the plaint disclosed no cause of action for non-compliance with section 6 of the Ordinance. The objection was upheld and the suit was accordingly dismissed as prayed. In this appeal the appellant was represented by Mr. M. J. Raithatha while the respondent was represented by Mr. F. H. Uzanda. They were the same advocates representing the parties in the lower court.

The question before us and which was also before the court below is a very narrow one. It is whether in a case involving section 6 of the Sale of Goods Ordinance, it is necessary for the plaintiff to aver in the plaint that there has been compliance with the provisions of that section. As indicated earlier, the learned trial judge held that it was. The relevant parts of section 6 of the said Ordinance provide:-

"6. - (1) A contract for the sale of any goods of the value of two hundred shillings or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or by his agent in that behalf.

(2) ...

(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale whether there be an acceptance in performance of the contract or not".

Both counsel are agreed that the provisions of this section are only procedural, and we think that is right. But Mr. Uzanda went further and submitted that those provisions are mandatory.

strenuously contended that in a case involving this section, the plaintiff must plead in the plaint that at least one of the requirements set out in that section has been satisfied. Mr. Raithatha vigorously countered such proposition. He submitted in effect that there was no obligation for the plaintiff to plead in the plaint compliance with the requirements of the section, and that the section only creates a statutory defence which a defendant may rely on if he so wishes. In this connection he referred us to some decided cases and text books. Of particular interest were two unreported decisions of the High Court in the cases of Nazerali Merali trading as Merali & Co. v. S. K. Rajwani trading as United Commercial Co. (Dsm. Civ.App.No. 24 of 1961) and Narsinh Valji v. Dr. D. K. Shukla (Dsm. Civ.App.No.9 of 1955). Both cases were of much assistance to us.

In order to ascertain the validity or otherwise of Mr. Uzanda's argument, it seems desirable first of all to refer to the provisions of Order 7 of the Civil Procedure Code which lay down the particulars that are to be contained in a plaint. Rule 1(e) of the said Order says that the plaint shall contain, inter alia, the facts constituting the cause of action. The expression "cause of action" is not defined under the Code, but it may be taken to mean essentially facts which it is necessary for the plaintiff to prove before he can succeed in the suit. Mr. Uzanda's argument necessarily envisages rule 1(e) as embracing the requirements under section 6 of the Sale of Goods Ordinance. In other words, according to Mr. Uzanda the requirements under section 6 are facts which constitute cause of action and which therefore must be set out in the plaint. It is in that way that Mr. Uzanda is able to maintain systematically and logically that the plaint discloses no cause of action because none of the requirements under section 6 constituting assential facts has been averred or pleaded therein.

We have given much thought to Mr. Uzanda's argument, but we have not been persuaded by it. We do not think that the requirements under section 6 amount to facts constituting cause of action. We think, as argued by Mr. Raithatha, that section 6 only provides a special defence which a defendant may rely on if he so wishes. It should be pointed out however that where a defendant wishes to avail himself of that defence, he has to raise it on the pleadings. The reason for this is clear. It is to avoid taking the other party by surprise at the trial. It is designed to give the opposite party sufficient notice of the case which he is to meet at the trial. Once we hold that the requirements under section 6 only create a special defence open to a defendant, it logically follows that a plaintiff is under no obligation to aver in the plaint compliance with any such requirement. Nor does he have to anticipate it. His obligation in relation to it arises only if and when the defendant has raised it. So that should the defendant choose not to raise it at all, for instance, the trial is to proceed; the plaintiff has no duty to refer to it and even the court is not bound to take judicial notice of it. It is a special defence designed for the benefit of a defendant, but if the defendant does not wish to avail himself of it, the matter is to rest at that.

In the context of the facts of the present case the position amounts to this. The appellant has alleged a contract between himself and the respondent to buy certain goods. The respondent essentially admits the contract but says that he has a defence, namely, that the said contract does not meet the requirements of section 6 and therefore it is unenforceable against him. That is to say, the respondent seeks to avail himself of the special defence created by section

6 of the Ordinance.' But this does not mean that the appellant has no cause of action against the respondent. It is one thing to say that there is ^{no} cause of action against a party, but quite another to say that ^{that} party has a defence to the claim. Cause of action exists quite independently of the defence. Here both parties have admitted a valid contract between them. Section 6 merely says that ^{that} contract shall not be enforceable unless it be proved in a certain way. Thus once the respondent raised the statutory defence as he did, it was for the court to ascertain whether or not the appellant who sought to enforce the contract was prepared to prove it in the manner as required under section 6. If the appellant succeeded to do so, he would be entitled to judgment, and only if he failed to do so would judgment be against him.

It is therefore apparent that the learned judge acted prematurely. He concluded the matter when he ought to have gone on. He was not satisfied that the appellant was not prepared, or had failed, to prove the contract in the manner as required under section 6. Indeed the appellant's reply to the Written Statement of defence indicates that the appellant was prepared to prove compliance with some requirements of that section. We think that in this type of cases once the special defence is raised the trial judge should treat it as an issue to be resolved after receiving evidence on it.

A further word need be said about the appellant's reply to the written statement of defence which, as already stated, indicates that the appellant was prepared to counter the respondent's defence by alleging acceptance of the goods and the existence of a written memorandum of the contract.

Mr. Uzanda contended that the appellant, by alleging a written memorandum, was now departing from the plaint which had alleged an oral contract. He submitted further that this contravened the provisions of Order 6 Rule 7 of the Civil Procedure Code which provide that,

"No pleading shall, except by way of amendment, raised any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same".

He therefore concluded that in considering whether or not the plaint discloses a cause of action only the plaint should be looked at; the reply must be ignored. We agree that for purposes of deciding whether or not the plaint discloses a cause of action the plaint and not the reply should be looked at. But for reasons we have given earlier on, we are satisfied that the plaint as filed adequately discloses a cause of action. The reply merely serves to show that the appellant joins issues with the respondent on the special defence raised in the written statement of defence. In that sense it seems that the reply can hardly be said to be a departure from the allegation made in the plaint.

Before we conclude this matter, it is pertinent to observe that even if Mr. Uzanda's allegation were well founded that the plaint disclosed no cause of action, the relief he asked for was wrong. He asked for an order dismissing the suit and the court granted him accordingly. This contravened the provisions of Order 7 rule 11(a) of the Civil Procedure Code which say that where the plaint discloses no cause of action the plaint is to be rejected. Needless to say, the consequences of rejecting a plaint differ from those flowing from dismissing the suit.

In the result the appeal succeeds. We set aside the decision of the High Court dismissing the suit. The case is remitted back to the High Court with a direction to that court to continue to hear the case in accordance with the law. The appellant is to have his costs.

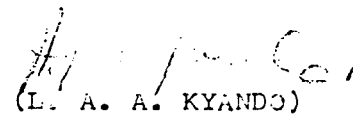
DATED at DAR ES SALAAM this 1st day of December, 1983.

(F. L. NYAMALI)
CHIEF JUSTICE

(L. M. MAKAME)
JUSTICE OF APPEAL

(R. H. KISANGA)
JUSTICE OF APPEAL

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


(L. A. A. KYANDO)
SENIOR DEPUTY REGISTRAR