Ecobank Kenya Limited v JP Holdings Limited (Civil Appeal 185 of 2019)
[2024] KEHC 12997 (KLR) (Civ) (25 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12997 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 185 OF 2019

JN NJAGI, J

OCTOBER 25, 2024

BETWEEN

ECOBANK KENYA LIMITED ..... APPELLANT

AND

JP HOLDINGS LIMITED ..... RESPONDENT

(Being an appeal from the ruling and order of Hon. A. N Makau, SRM, in Milimani CMCC No. 1355 of 2018 delivered on 8th March 2019)

JUDGMENT

1. The appellant herein had filed an application before the lower court dated July 11, 2018 seeking that the respondent/defendant`s defence be struck out and judgment be entered for them with costs. The trial court dismissed the application thereby provoking the instant appeal.

2. The grounds of appeal are that:

    a. That the Learned Trial Magistrate erred in law in failing to appreciate that the respondent had in in a pre-action letter dated 8th August 2011 admitted to being indebted to the appellant in the sum of Kshs. 1, 505,740/= which it sought to liquidate by way of monthly installments of Kshs. 200,000/=;

    b. That the Learned Trial Magistrate erred in law by contriving reasons and grounds to sustain an otherwise hopeless defense that could only be for striking out;

    c. That the Learned Trial Magistrate erred in law in failing to consider the material placed before her in support of the application dated 11th July 2018 and more particularly;

        a. List of documents;

b. Supplementary list of documents date 24th September 2018 not proved its case on a balance of probabilities as required by law;

d. That the Learned Trial Magistrate erred in law in failing to hold that a defense denying and at the same time pleading as an alternative unconstitutionality of a term of the contract embarrassing and an abuse of the court process;

e. That the Honourable Court erred in failing to interrogate the plaint and the defence filed and determining whether the defense did raise any reasonable defense; and

f. That the Learned Trial Magistrate erred in law and fact in dismissing the Appellant's Notice of Motion Application to strike out defense dated 11th July 2018.

3. The background facts of this case are that the respondent was a customer for the appellant. That on the 30/4/2009, the appellant advanced the respondent an overdraft loan facility of Ksh 300,000/- which the respondent failed to pay. The appellant sued claiming a sum of Ksh. 3,308,702.07 with interest at the rate of rate 35% per annum from 1st April 2012 until payment in full. The respondent/defendant filed a defence denying the claim. The appellant subsequently filed the application stated above that the trial court dismissed.

4. The appeal was disposed of by way of written submissions.

Appellant's submissions

5. The appellant submitted that the issue for determination is whether the trial court erred in failing to strike out the defence filed in the trial court.

6. It was submitted that the court has discretion to strike out pleadings that disclose no reasonable cause. The appellant referred the court to the decision in Janaco International (K) Limited vs Simba Metals Ltd (2013) eKLR where while referring to D.T Dobie & Company vs. Muchina & another (1982) KLR it was held that:

> If the pleadings does not disclose any reasonable cause of action or defence or that the pleadings is scandalous, frivolours and vexatious or that such pleading may prejudice, embarrass or delay the fair hearing of the suit or that it is an abuse of the process of the court, then it ought to be dismissed.

7. The appellant submitted that the trial court erred in finding that there was no admission by the respondent when the respondent had prior to the filing of the suit admitted the debt in a letter dated 8th August 2011 where he had submitted a settlement proposal. The appellant cited the case of Maseno University v Bubble Engineering Company Ltd (2009) eKLR where the Court of Appeal while dealing with an issue of admission referred to the case of Agricultural Finance Corporation v Kenya National Assurance Company Ltd (2019) eKLR where the court held that:

> Final judgment ought not be passed on admissions unless they are clear, unambiguous and unconditional. A judgment on admission is not a matter of right rather eit is a matter of discretion of the court and where the defendant has raised objections which go to the very root of the case, it would not be proper to exercise this discretion"

8. The appellant also cited the case of Choitram vs Nazari (1984) KLR 327 where it was observed that:

> Admissions of fact under XII rule 6 need not be on the pleadings. They may be in correspondence or documents which are admitted or they may even be oral. The rules used

words "otherwise" which are words of general application and are wide enough to include admission made through letters, affidavits and other admitted documents and proved oral admissions."

9. It was submitted that though the respondent was contesting the interest in his defence, he did not contest the same when executing the agreement between him and the appellant nor while admitting and proposing to settle the debt. It was submitted that the respondent is bound by the terms set out in the agreement. The appellant in this respect relied on the case of Pius Kimaito Langat Co-Operative Bank of Kenya Limited (2017) eKLR where it was stated that:

> "We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts unless coercion, fraud or undue influence are pleaded and proved".

10. The appellant stated that it was curious that although the respondent had admitted to the debt previously, he had changed tune and denied existence of any draft facility.

11. The appellant submitted that the trial court erred in failing to consider the documentary evidence presented by the appellant in support of its liquidated claim to wit, statement of accounts and the letter dated 8th August 2021 when its respondent admitted the debt. It was submitted that the respondent`s defence contained mere denials and he did not provide substantial rebuttal to the claim holding that appellant filed statement of accounts documenting the overdraft facilities.

12. In conclusion this court was urged to find that the appellant had provided enough documentary evidence as proof of the respondent's indebtness and given that there was an admission, the defense did not raise any triable issues.

13. The appellant equally filed supplementary submissions and submitted that no appeal had been filed by the respondent in line with Section 79G of this Court's rules against the ruling delivered on 23rd November 2018.

Respondent's submissions

14. The respondent submitted that he denied in his defence that overdraft facility was extended to him. That he pleaded that the interest rate applied was unreasonable, non-contractual, unconscionable and illegal. It was submitted that these are triable issues that can only be dealt with by way of oral evidence. The respondent relied on the case of Gupta v Continental Builders Ltd (1976-80) 1 KLR 809 as quoted with approval in the case of Commercial Advertising and General Agencies Ltd v Fauz Ahamed Qureishi (1985) eKLR where Madan JA held that:

> If a defendant is able to raise prima facie triable issue, he is entitled in law to unconditional leave to defend. On the other hand, if no prima face 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"
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> A triable issue is said to exist if there is a dispute in facts which dispute can only be resolved after ventilation in a full hearing. In the case of Giciem Construction Company Vs Amalgamated Trade & Services LLR No. 103(CAK) this court stated:
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> "As a general principle, where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide

> defence, he ought to have leave to defend. Leave to defend must be given unless it is clear that there is no real substantial questions to be tried; that there is no dispute as to the facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment."

15. It was submitted that allowing the appeal will be locking out the respondent from ventilating its defence and condemning it unheard. The respondent in this regard cited the case of Yauri (SIC) Onyalo Yambo & another v Housing Finance Company (K) Limited & another (2014) eKLR where the court held that:

> It is trite law that a party must be given a fair and reasonable opportunity to present its case. This is to afford such party that fair and reasonable opportunity to ventilate its case. The averments in the 2nd Defendant's defence can in no way be deemed to have been mere denials. They are weighty and triable issues that would require ventilation in a full trial. The court is therefore in agreement with all the parties' written submissions and case law in support thereof that striking out of pleadings is a draconian move and ought to be used as a last resort. The court's objective ought to sustain rather than terminate a suit on technicalities.

16. It was submitted that the appellant's suit was incurably defective having been filed out of time and without leave. Reliance was placed in Attorney General & another vs. Andrew Maina Githinji & another (2016) eKLR, Lydia Pamela Nyangala vs. Royal Media Services Ltd (2016) eKLR and Justine S. Sunyai vs. Judicial Service Commission (2017) eKLR. Therefore, that this court has no jurisdiction to extend or allow for execution of limitation period in a civil matter as the Civil Procedure Code does not provide for the same. The respondent cited the case of Divecon v Samani (1995)-1998) EA 48 as quoted with approval in the case of Peter Nyamai & another v M. J. Clerke Limited (2013) KLR that:

> to us, the meaning of the wording of section 4(1) .....is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action.....A perusal of Part III shows that its provisions do not apply to actions based on contract. In light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that "the wording of section 4(1) of the *Limitation of Actions Act* (Chapter 22) suggests a discretion that can be invoked".

17. The respondent urged the court to dismiss the appeal with costs.

Analysis and Determination

18. This being a first appeal, the duty of the Court is as stated by the Court of Appeal in Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR

> This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

19. I have carefully considered the pleadings and submissions filed herein. The issue for determination in this appeal is whether the trial court was in error in failing to strike out the respondent`s defence.

20. The power of the trial court to strike out pleadings is stipulated in Order 2 Rule 15(1) of the Civil Procedure rules which provides as follows:

> "At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—B.it discloses no reasonable cause of action or defence in law; orC.it is scandalous, frivolous or vexatious; orD.it may prejudice, embarrass or delay the fair trial of the action; orE.it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

21. This power to strike out pleadings is a discretionary power of the trial court. It is trite that an appellate court's interference with the exercise of judicial discretion is limited and for it to do so it must be satisfied either that the trial court misdirected itself in some matter hence arrived at a wrong decision or that it is manifest from the case as a whole that the magistrate was clearly wrong in the exercise of its discretion and that as a result there has hindered access to justice. In Pithon Waweru Maina v Thuka Mugiria [1983] eKLR it was stated:

> "Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. Mbogo v Shah [1968] EA 93."

22. Though the appellant brought his application under Order 2 Rule 15 (1) (c) and (d) of the Civil Procedure Rules 2010 – i.e, the defence was scandalous, frivolous or vexatious; or it may prejudice, embarrass or delay the fair trial of the action, it is clear to me that the application was pegged on grounds that the claim was admitted and there were no triable issues for consideration by the Court.

23. The manner in which a court ought to apply itself when invoking its discretionary power to strike out pleadings was highlighted by this Court in Crescent Construction Co Ltd v Delphis Bank Ltd [2007] eKLR as follows:

> "Be that as it may, in all cases brought under Order VI rule 13(1) (a), the court is obliged in law to look at no evidence i.e. no affidavit or any evidence from the bar in considering whether or not a plaint or a pleading raises a cause of action. The court must look at the pleadings only and not go beyond the pleadings. The predecessor to this Court stated in the case of Jevaj Shariff & Co. v Chotail Pharmacy Stores (1960) EA 374 as follows:
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> "The question whether a plaint discloses a cause of action must be determined upon a perusal of the plaint alone, together with anything attached so as to form part of it, and upon the assumption that any express or implied allegations of fact in it are true."
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> This is proper because once the court incorporates evidence in its consideration of the pleading at this stage, then the aim of the rule which is to dispose of unnecessary and baseless litigation speedily will be defeated."

24. It is therefore trite that in considering whether a pleading raises triable issues, the court is mandated to stick to the pleadings and its accompaniments. In essence, pleadings should in themselves be capable of raising triable issues. This procedure is as well compatible with the rule that parties are bound by their pleadings. That which is not in the pleadings is not triable in the course of a case.

25. Further, when dealing with a statement of defence, the court in Kenya Trade Combine Ltd v N M Shah [2001] eKLR, stated thus:

> " 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."

26. The applicant contends that the respondent admitted the claim. In Synergy Industrial Credit Limited v Oxyplus International Limited & 2 others [2021] eKLR Mativo J. (as he then was) considered what amounts to an admission and held as follows:

> .....Admission of a fact has to be clear from the facts and it should not be left to interpretative determination of court.....
>
> A decree can be passed only to the extent of admitted claims for which admissions are clear, unequivocal and unambiguous. There is no specific form of admission required for a court to pass a decree. It may be contained in pleadings or otherwise. It may be in writing or may even be oral. Even in cases where some dispute has arisen over any admission, judgment on such admission can be passed unless there is sufficient material on record to prove the admission is vague. Moreover, if an admission can be inferred from the facts and circumstances of the case without dispute, the court can pass a judgment on such admission.

27. Though the respondent seems to have admitted that claim in her letter dated 21/8/2011, she subsequently in her defence denied owing the money claimed by the appellant. Upon considering the issues raised in the appeal, I do agree with the findings of the trial court that the statement of defence filed by the respondent raised triable issues. I do not think that the whole suit was to be determined on the single issue of whether there existed an admission letter or not when other issues were also raised in the defence such as the interest charged being unconscionable, the claim being made up of items/ entries which the respondent was a stranger to and that the payments made by the respondent had not been factored into. In my view these were triable issues which required further interrogation by the court.

28. It is trite that a suit can only be struck out only in the clearest of the cases and where the same is hopeless. The Court of Appeal in the case of Ramji Megji Gudka Ltd –vs- Alfred Morfat Omundi Michira & 2 others [2005] eKLR held as follows:

> " In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in Dt Dobie & Company (Kenya) Ltd. v. Muchina [1982] KLR 1 in which Madan J.A. at page 9 said: -
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> "The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way." (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it

> uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right."

29. Similarly, in D.T. Dobie & Company Kenya Limited v Joseph Mbaria Muchina & Another [1980] eKLR, Madan JA, stated:

> No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.

30. I do not think that the defence of the respondent in this matter was hopeless. I accordingly find no reason to interfere with the order of the trial court declining to strike out the defence.

31. The respondent argued that the suit is time barred as it was filed in 2018 while the cause of action arose in 2012. However, it appears to me that the suit was initially filed in 2013 as Civil Suit No. 5219 of 2013. It is not clear why it was given another number 1355 of 2018. I am thereby unable to say that the suit was time barred.

32. The upshot is that I find no merit in the appeal and the same is dismissed with costs to the respondent.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 25TH OCTOBER 2024

J. N. NJAGI

JUDGE

In the presence of:

Miss Musau for Appellant

Mr Kabui for Respondent

Court Assistant – Amina

30 days Right of Appeal.