



**Kamara v Galana Oil Kenya Ltd (Civil Appeal 333 of 2015)
[2023] KEHC 21537 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21537 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL 333 OF 2015**

**JN NJAGI, J
JULY 28, 2023**

BETWEEN

NELSON KAMARA APPELLANT

AND

GALANA OIL KENYA LTD RESPONDENT

*(Being an appeal from the ruling of Hon. M. Chesang, Resident Magistrate,
in Nairobi CMCC No. 6512 of 2014 delivered on 12th June 2015)*

JUDGMENT

Introduction

1. The Respondent instituted a suit in the lower court against the Appellant on 9th October 2014 seeking damages in the amount of Ksh. 1,649,109.99 plus interest being the outstanding balance of supplies made to the Appellant in a dealership agreement entered into between the parties.
2. It is common ground that the parties had entered into a dealership agreement on or around March 2013 where the Appellant was appointed as a dealer for the Respondent's petrol station located in Athi River. The appellant was required to sell the products supplied to it by and on behalf of the respondent. Pursuant to the said dealership agreement the respondent handed over the said petrol station to the appellant on 24th April 2014 which he operated till 2nd July 2013. The Respondent sued to recover unpaid balance in the aforementioned sum.
3. The suit was opposed by the appellant in a defence dated 5th January 2015 where he denied the allegations and put the respondents to strict proof.
4. On 27th February 2015 the appellant filed a motion seeking for the suit to be struck out on the ground that the court lacked jurisdiction to adjudicate the matter by virtue of there being an arbitration clause signed between the parties. That the parties on 9th July 2013 discharged each other from liability,



entitlements and claims under the marketing license agreement signed by the parties and as a result the suit is fatally defective and an abuse of court process.

5. The application was supported by the appellant's supporting affidavit where he averred that he entered a marketing license agreement with the respondent in the year 2013 for the running of a petrol station under the respondent's Delta brand at Athi river. The business failed to perform as expected and led to its closure. At the time of the closure both parties conducted a detailed reconciliation of the accounts in relation to the period of business had been in operation after which they entered into an agreement where each party was discharged from any further and future liabilities arising from the marketing and licensing agreement signed between the parties. That at page 14 clause (iv) on settlement of disputes in the marketing and licencing agreement clearly stated that all disputes would be settled through arbitration and no recourse was to be heard in a court of law save for legal interpretation. The said clause being part of the agreement automatically ousted the jurisdiction of the court. That the signing of the discharge between the parties released each other from all liabilities arising out of the said marketing licencing agreement and made the suit against the appellant an abuse of court process.
6. In response to the application the respondent filed a preliminary objection dated 13th march 2015 indicating that the appellant's notice of motion filed on 27th February 2015 is a nullity in law and not maintainable. It was argued that it is now established that if a party wishes to take the benefit of an arbitration clause it is obliged to apply for a stay after entering appearance and before delivering of any pleading. That by the filing a defence the applicant lost its right to rely on the arbitration clause.
7. The respondent additionally filed their grounds of opposition dated 29th April 2015 where they indicated that the reliefs sought are not available under order 51 rule 1, 2 & 3 of the Civil Procedure Rules 2010. That there is no defence to the respondent's suit, the appellant having not complied with order 7 rule 5 of the civil procedure rues 2010. That in any event the prayers sought are not available to the defendant as there is joinder of issues. That the plaint gives basis to the plaintiff claim and takes away the substratum of the application and therefore the application is an abuse of court process.
8. The application was heard and the lower court in its ruling dated 14th September 2016 found that the application by the appellant had no merit and dismissed the same.

The Appeal

9. Being aggrieved by the said ruling the appellant has now proffered this appeal raising the following grounds;
 1. The learned trial magistrate erred in law and in fact in making a finding that the defendants application dated 27th February 2015 was not merited.
 2. The learned magistrate misapplied the law as concerns striking out of suits in dismissing the said plaintiff's application.
 3. The learned magistrate erred in law and in fact in failing to make a finding that, the existence of a discharge of the contract signed by the parties which fact was not disputed by the plaintiff made the plaintiffs case a non-starter
 4. The learned magistrate erred in law and in fact in dismissing he defendant's application

Appellant's Submissions



10. The appeal herein was disposed by way of written submissions. The appellant in his submissions argued that the omission by the learned magistrate of the ground raised by the appellant on discharge signed between the parties was a glaring omission as it meant that the court dealt with the application partially and the purported to render a ruling.
11. The wording of the said discharge is explicit that all claims and entitlements under the contract entered between the parties have been discharged. That proceeding with the case as filed by the respondent at the lower court is akin to parties expecting the court to re write contract between then an exercise which courts have numerously stated they are hesitant to be involved in. To support that proposition the Appellant relied on the Court of Appeal decision in Civil Appeal 147 of 2005 Trinity Prime Investments Limited Vs Lion of Kenya Insurance Company Limited [2015] eKLR. The appellant argued that applying the above decision to this case it was clear that each party complied with its obligation under the discharge signed between them hence the suit by the plaintiff was always a non-starter but the lower court failed to address the said aspect of the appellant's application.

Respondent's Submission

12. On the other hand the respondents in their submissions reiterated their submissions on the application and indicated that in filing a defence the appellant lost his right to rely on the arbitration clause. That according Order 2 Rule 15 of the civil procedure rules 2010, which provides for striking out of pleadings is clear that the court can do the same if; the case or Défense is so weak that it is beyond amendments and that the weakness and insufficiency of the case and the defense must be such that it is plain and obvious. That in *Ramji Megji Gudka Ltd v Alfred Morfat Omundi Michira & 2 others* [2005] eKLR the court of appeal held that:

“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 p. 9 said:-

“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.”

In dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient. A Court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham. A defence on merit does not mean a defence which must succeed but it means a defence which raises a triable issue to warrant adjudication by the court. In *PATEL V. E.A. CARGO HANDLING SERVICES* [1974] E.A. 75 at p. 76 Sir William Duffus P put it thus:-”



Analysis and determination

13. The duty of a first appellate court was explained in the case of *Selle and Another Versus Associated Motor Boat Company Ltd & Others* [1968] EA 123, thus:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence on the case generally.”

14. This being a first appeal the court is required to evaluate the evidence afresh before drawing its own conclusion. The issues for determination are:

- (1) Whether the lower court was correct in dismissing the application for striking out of the suit.
- (2) Whether the trial magistrate erred in failing to make a finding that the existence of a discharge of a contract made the Respondent's case a non- starter.

15. The submissions for the advocates for the Appellant did not touch on the first issue but were only confined to the second issue. On the other hand the submissions for the advocates for the Respondent were confined to the first issue and did not touch on the second issue.

16. Order 2 Rule 15 of the Civil Procedure Rules, has established clear principles which guide courts in the exercise of the power to strike out suits. It provides that:

“ 15.

- (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
 - a) it discloses no reasonable cause of action or defence in law; or
 - b) it is scandalous, frivolous or vexatious; or
 - c) it may prejudice, embarrass or delay the fair trial of the action; or
 - d) 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.”

17. The law in regard to striking out of suits is that striking out should be done as a last resort in the plainest of the case where the case is hopeless and is not sustainable. The Court of Appeal in *D. T. Dobie & Co Ltd v Muchina and Another* [1982] KLR 1 held that the power to strike out suits is drastic and should



be exercised with great circumspection and only in the clearest of cases where amendment cannot cure the defect. Madan JA., observed that,

“No suit ought to be summarily dismissed unless it appears so helpless that it plainly and obviously discloses no cause of action and is so weak as to be beyond redemption and incurable by amendments.”

18. In *Kivanga Estates Limited v National Bank of Kenya Limited* [2017] eKLR, Asike-Makhandia JA. considered the principles for striking out suits and observed that:

Order VI rule 13 of the repealed Civil Procedure Rules has been construed over the years in a long line of cases, both by this Court and the courts below. For instance in *Co-Operative Merchant Bank Ltd. vs George Fredrick Wekesa Civil Appeal No. 54 of 1999* the Court summarized the principles as follows;:

“The power of the Court to strike out a pleading under Order 6 rule 13(1) (b) (c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong.....Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact....A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment.”

19. In *D.T. Dobie & Company Limited v Joseph Mbaria Muchina & Another* [1980] eKLR, Madan JA (as he then was) held that:

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.

20. It was the appellant’s case that the respondent’s case was an abuse of court process since the parties had entered into an agreement where they were both discharged of any liabilities and that there existed an arbitration clause and therefore the court had no jurisdiction to hear the matter.

21. Section 6 of the *Arbitration Act* provides that:

“A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds-

- (a) That the arbitration agreement is null and void, inoperative or incapable of being performed; or
- (b) That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”

22. On the issue of jurisdiction it was argued by the respondents that if a party wishes to take the benefit of an arbitration clause it is required to apply for a stay after entering appearance and before delivering of any pleading. In *Safaricom Ltd v Flashcom Ltd* [2012] eKLR it was held that:

“The second issue for determination is whether the Defendant has submitted to the Jurisdiction of this court by entering appearance and filing a defence and counterclaim. The



Plaintiff cited several authorities regarding to this issue. In the case of Corporate Insurance Co. v. Wachira (1995-1998) 1EA 20 it was held that the arbitral clause in the contract in question was in the nature of a Scott-v-Avery clause which provides that disputes shall be referred to arbitration. The Court went to on to hold that;

“In the present Case, if the appellant wished to take the benefit of the clause, it was obliged to apply for a stay after entering appearance and before delivering any pleading. By filing a defence, the appellant lost its right to rely on the clause.”

23. In the case of Fairlane Supermarket Limited v Barclays Bank Limited Nai HCCC No. 102 Of 2011 Odunga J held that: -

“The option to refer the matter to arbitration was sealed when the defendant herein entered appearance and followed it with a defence. In the case of CORPORATE INSURANCE CO. VS. WACHIRA (1995-1998) 1EA 20, it was held that if the appellant had wished to invoke the clause, it ought to have applied for a stay of proceedings after entering appearance and before delivering any pleading and that the appellant had lost its right to rely on the arbitration clause by filing a defence.....any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration”

24. The holding in these two authorities provide the law in cases where there is an arbitration clause. The Appellant herein did not make an application for reference to arbitration before filing a defence. In filing a defence he submitted to the jurisdiction of the court and lost his right to have the matter referred to arbitration. The matter was rightly before the court.

25. On whether the matter should have been struck out because of the existence of discharge of contract, the Appellant relied on the case of Trinity Prime Investment Limited v Lion of Kenya Insurance Company Limited [2015] eKLR where the Court of Appeal considered the effect of a discharge of contract and held that:

The execution of the discharge voucher, we agree with the learned judge, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other. The appellant was thus fully discharged. Ananda took that money “on an indemnity basis” (a phrase he himself added) as a rateable share of the total loss of Sh.12.8m. Had he used that money to finalize the purchase from Standard by operation of section 49 of the Transfer Act, the appellant could have benefitted. Madison did pay Standard at last, whether as ex gratia or not, but still because of the fire.

In the end, we take it that the appellant’s case falls under the principle stated in Halisbury’s Laws of England (4th Edition) Vol. 9(1) paragraph 1043

“1043. In general accord and satisfaction is the purchase of a release from an obligation, whether, arising under contract or tort, by means of any valuable consideration, not being in performance of the obligation itself. The accord is the agreement by which the obligation is prima facie discharged: it no longer needs to be in any particular form. The satisfaction is the consideration which makes the agreement operative ---.”

In this matter, the appellant through Ananda (PW1), reached an accord and by signing the discharge voucher, contracted that it was receiving the paid sum in lieu of the whole total of the loss Sh.12.8m. The appellant did not want to wait to know the final position of Madison in the matter or even use the payment to complete the purchase and expect benefit



from Standard. By accepting Sh.6,023,529/= in full and final settlement of the loss, the respondent was released from its obligation, even as we have found that because its rateable proportion clause was not applicable, it was liable to pay the full sh.12.8m We therefore find that the execution of the discharge voucher by the appellant and the receipt of the sums therein stated, no more liability by way of any balance of the loss remained with the respondent.

26. The Appellant also relied on the Court of Appeal decision in the case of Coast Bottlers Limited v Kimathi Mithika, Civil Appeal No.21 of 2017 where it was held that:

21. In our minds, it is clear that the parties had agreed that payment of the amount stated in the settlement agreement would absolve the appellant from any further claims under the contract of employment and even in relation to the respondent's termination. It is instructive to note that the respondent never denied signing the said agreement or questioned the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent's part at the time he executed the same. It did not matter that the amount thereunder would be deemed as inadequate. As it stood, the agreement was a binding contract between the parties. In Trinity Prime Investment Limited vs. Lion of Kenya Insurance Company Limited [2015] eKLR this Court, while discussing the import of a discharge voucher which is more or less similar as the agreement in question observed:

"The execution of the discharge voucher, we agree with the learned judge, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other. The appellant was thus fully discharged."

22. All the ELRC was required to do was to give effect to the intention of the parties as discerned from the settlement agreement. Our position is fortified by the sentiments of Sir Charles Newbold P in Damondar Jihabhai & Co Ltd and another vs. Eustace Sisal Estates Ltd [1967] EA 153 that:-

"The function of courts is to enforce and give effect to the intention of the parties as expressed in their agreement. In the English Court of Appeal case above - Globe Motors Inc & Others vs TRW Lucas Electric Steering Ltd & Others (supra) – Lord Justice Beatson stated as follows:-

'Absent statutory or common law restrictions, the general principle of the English law of contract is [that parties to a contract are free to determine for themselves what obligations they will accept]. The parties have the freedom to agree whatever terms they choose to undertake, and can do so in a document, by word of mouth, or by conduct.'

23. Giving effect to the parties' intention meant that the ELRC could not entertain the suit filed by the respondent. This is because the respondent had waived his rights to make any further claim in relation to his relationship with the appellant.

24. Having expressed ourselves as herein above, we see no reason to delve into the other grounds of appeal. In the end, we find that the appeal has merit and is hereby allowed with costs. We set aside the judgment dated 29th July, 2016 in its entirety and substitute the same with an order dismissing the respondent's suit with costs.

27. In this matter the discharge signed between the parties was explicit that all claims and entitlements under the contract had been discharged. In my considered view, the discharge of the contract signed by the parties meant that the Respondent could not bring suit to make further claims on the matters



agreed upon. It is the duty of the court to give effect to the intention of the parties as expressed in the discharge agreement as courts cannot re-write a contract for the parties. As such the court could not entertain further claims from the Respondent on matters agreed upon in the discharge of contract. The suit filed by the Respondent was therefore a non-starter. I therefore find that the trial court erred in dismissing the Appellant's application.

28. In view of the foregoing, the appeal is allowed with costs to the Appellant.

DELIVERED VIRTUALLY, DATED AND SIGNED AT MARSABIT THIS 28TH JULY 2023

J. N. NJAGI

JUDGE

In the presence of:

Mr. Webale for Appellant

Miss Anyango H/B Mr. Kipkorir for Respondent

Court Assistant – Jarso

30 days R/A.

