THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 20 OF 2020

LAGOON DEVELOPMENT LIMITED..APPELLANT

VERSUS

PRIME ALUMINIUM CASEMENTS LIMITED.............................RESPONDENT

(*Being an appeal from the Ruling of Hon. J.M. Kituku (SPM) dated 19th February 2020 in SPMCC No. 327 of 2019)*

Coram: Hon. R Nyakundi

Mr. Kihanga Advocate for the Appellant

Mr. Dennis Kiharo Advocate for the Respondent

JUDGMENT

This Appeal arose from the Ruling by **Hon. Kituku (SPM)** dated 19.2.2020 in **SPMCC No. 327 of 2019** whereby in his reasoning he awarded Summary Judgment for the sum of Kshs 12,697,548.24/- plus costs and interest until payment in full against the Appellant.

Being aggrieved with the decision, in his appeal has relied on seven (7) grounds of appeal, namely: -

1. That the Learned Trial Magistrate erred in law and in fact in failing to appreciate the principles governing the entering of summary Judgment and thereby arriving at an erroneous decision.

2. That the Learned Trial Magistrate erred in law and in fact in failing to find that the defence filed on the Appellant's behalf had raised triable issues meriting a full trial of the suit.

3. That the Learned Trial Magistrate erred in law and in fact in entering the summary Judgement for the Respondent for the amount that was contested whilst ignoring the amount that was admitted by the Appellant.

4. That the Learned Trial Magistrate erred in law and in fact in entering the summary Judgment for the Respondent thus denying the Appellant the opportunity to defend and present its case at the full trial of the suit.

5. That the Learned Trial Magistrate erred in law and in fact in completely ignoring and not considering the Appellant's submissions on the objection to the Respondent's suit as captured in paragraph 9 of the Appellant's Statement of Defence and Paragraph 10 of the Appellant's Replying Affidavit as well as paragraph 13 of the Appellant's Written Submissions thereby arriving at an erroneous and unjust decision.

6. That the Learned Trial Magistrate erred in law and in fact in failing to pronounce himself on the objection as raised by the Appellant to the Respondent's suit thereby denying the Appellant a fair hearing which has occasioned grave injustice and miscarriage of justice on the part of the Appellant.

7. That the Learned Trial Magistrate erred in law and in fact in failing to consider the Appellant's cited authorities on the objection to the Respondent's suit thereby arriving at an erroneous and unjust decision.

Submissions on behalf of the Appellant

Learned Counsel Mr. Kinaro for the Appellant argued and submitted that the Learned Trial Magistrate failed to appreciate the governing principles in support of Summary Judgment Applications. That the Affidavit filed by the Respondent and other annexures did not entitle the Respondent to a Summary Judgment before the trial on the merits.

Learned Counsel submitted that it was incumbent upon the Learned Trial Magistrate to direct his mind to the Statement of Defence which raised disputed issues of facts demanding attention for the claim to be heard on the merits. Further, Learned Counsel contended that from the affidavit evidence, the admitted amount was Kshs 4,600,000/- and not the awarded decretal sum of Kshs 12,697,548.12/-.

In deliberating the Appeal to have the court set aside Summary Judgment proceedings, Learned Counsel cited and relied upon the principles in the cases of **Moi University –vs- Visura Builders Limited CA No. 296 of 2004, Postal Corporation of Kenya –vs- Inadder and 2 Others (2004) eKLR, Continental Butchery Ltd –vs- Samson Musila CA No. 35 of 1997. Chania Agricultural Contractors –vs- Mumia Sugar Company Ltd (2019) EKLR, Yale Safaris Ltd –vs- County Government of Samburu (2020) eKLR.**

Considering whether the Respondent application satisfied the criteria on substantive justice to successfully constitute a real prospect for Summary Judgment, Learned Counsel urged the Court to be guided by the principles in **Raila Odinga –vs- IEBC and Others (2013) eKLR.**

In this respect, Learned Counsel submitted that the Appellant's Appeal has merit for the impugned Ruling to be set aside and the Statement of Defence to be heard on the merits.

The Respondent's Submissions in Reply

By way of Written Submissions, Learned Counsel Mr. Kihunga argued and submitted that the Learned Trial Magistrate did not err in finding that the circumstances summoning the claim did warrant entry of Summary Judgment for the sum of Kshs 12,697,548.24/- plus costs and interest. It was contended by the Learned Counsel that the documentary evidence is not best evidence that there was to pursuade the Learned Trial magistrate to exercise discretion in favour of the Respondent. He relied on his part on the principles in **Nairobi ….Hotels (Kenya) Ltd –vs- Lalji Bhireji Sanghani Builders and Contracters (1997) Eklr, Job Kaladi –vs- Nation Media Group Ltdo, Sachesa Agencies Ltd –vs- Michael Rono (2015) Eklr, Kundawal Restaurant –vs- Devish & Company Ltd (1952)-19(EA77), Souca Fiqueeredo & Company –vs Moornings Hotel (1959) EA 425, Choitram –vs- Nazrai (1984) KLR 327, Twiga Chemicals Industries Ltd, Agricultural Development Corporation (2018) eKLR, Debe onter Premises Ltd 92006) 1 EA 75.** According to the Learned Counsel, the appended particulars of claim on the statement by the Respondent required no trial as the defence remained bare denials which was inadequate to call for primary evidence. It was further Learned Counsel's submissions that the document the learned Trial Magistrate relied upon acknowledged the debt and was prima facie proof of the contents and there was no challenge to it by the Appellant. It was Learned Counsel's further contention that the Appellant assertion on the sum of Kshs 4,600,000/- was a proposal to settle the debt due and owing claiming financial hardship. That it was never the intended to be the sum admitted as alleged by the Appellant's Counsel was on act of non disclosure. He pointed out that there was no need for extrinsic evidence in motion for the pleaded issue and the bare denial in the Statement of Defence. Learned Counsel once again made reference to the dicta in the case of ***Equatorial Commercial Bank –vs- Wilfred Nyason Oroko(2015)Eklr.***

For those reasons, Learned Counsel submitted that the Learned Trial Magistrate either mis understood the facts nor the Law on proof of existence of facts in issue to call upon the Appeal Court to interfere with the decision or have it set aside altogether.

Having considered the grounds of appeal broken down into seven by the Appellant, together with both Counsels submissions, I see the following central issues emerging for determination in this appeal.

> ***(1) Whether the Respondent applicant satisfied the rule governing principles under Order 36 of the Civil Procedure Rules.***
>
> ***(2) Whether the underlying facts in the Statement of Defence entitled the Appellant to a trial on the merits.***
>
> ***(3) Whether indeed as alleged by the Appellant the Learned Trial Magistrate erred in fact and law to appreciate the pleadings and authorities cited in opposition to the application for Summary Judgment.***
>
> ***(4) In light of the above whether the grounds of appeal therefore find their way for the defendant to constitute a trial which opportunity was denied by the Trial Court.***

Analysis and Determination

The gist of Summary Judgment is clearly stated under Order 36 of the Civil Procedure Rules. In this case there are no real issues to be tried by viva voce evidence and therefore the Plaintiff's claim is considered an appropriate case for entry of Summary Judgment.

Here, the Plaintiff/Applicant has the sustained initial burden of showing that the Defendant/Respondent defence has no real prospect of succeeding in controverting the liquidated claim pleaded. In essence, those facts as averred in the affidavit must be undisputed and there must be no plausible ground for the Defendant to dispute them. That contrary to the Defendant Counterclaim, there would be no legitimate evidence likely to affect the trial Court assessment of the facts to dismiss the Statement of Defence and entitle an entry for Summary Judgment.

It is therefore well settled that in deciding an application for Summary judgment, the Court is concerned only with the threshold determination of the pleaded liquidated claim and not with the merits of the underlying claim.

First, a Court must determine whether or not the defendant Statement of facts are bare denials and in the circumstances not sufficient to deny

the Plaintiff Summary Judgment relief. Under this test in the case of **Janet Edwards –vs Jamicca Beverages Ltd c.a. 2002/037,** the Court in discussing the physiology of Summary Judgment and the whole rule as a litigation tool held inter alia that:

> ***"The Civil Procedure Rules represents an attempt to modernize litigation by emphasizing efficiency, proportionality and reduction of costs while maintaining principles of fairness. It does this by asking that the parties to plead in a manner which enables the Court to carry out its duty to manage cases actively, by identifying issues early, and deciding which issues need a trial. The vice of the bare denial, defence is that no one knows which issues are joined, which issues can be resolved summarily, which issues do not need resolution. This is the era of cards face-up and on the table litigation so that all can see the cards."***

According to the Respondent, the appraised evidence by the Learned Trial Magistrate did not raise a valid and a creditable trial issue in dispute regarding the sum awarded under Order 36 of Civil Procedure Rules on Summary Judgment. Therefore, the Appellant in failing to meet its threshold burden, the court had an obligation and it did establish by a preponderance of the evidence to grant the relief on Summary Judgment.

Contrary to the Appellant's contention, that the Learned Trial Magistrate determination of the case on Summary Judgment was not governed by the principles under Order 36 of the Civil Procedure Rules, they did not submit evidentiary facts or materials to rebut the Respondent's evidence. Thus failed to raise a triable issue of fact concerning the dispute. As the Court recognized in **Swain –vs- Hillman (2001) 1 ALL ER 92:**

> ***There is no surer way for the court to find out what parties are disputing save from the pleadings and all additional evidence provided earlier way by a documentary evidence or witness statements.***

In as much as contract language is reasonably susceptible to more than one interpretation with respect to the application for Summary judgment, I agree with the dicta on real prospect of success as defined in the line of authority as follows: -

> ***"The words no real prospect of succeeding do not need any amplification. They speak for themselves. The word fanciful prospects of success or as Mr. Bidder QC submits, they direct the court to the need to see whether, there is opposed to a fanciful prospect of success. It is important that a Judge in appropriate cases should make use of the powers contained in PT 24. In doing so he or she gives effect to the overriding objectives contained in PT 1. It saves expenses, it achieves expedition, it avoids the Courts resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interest of justice. If a Claimant has a case which is bound to fail, then it is the position. Likewise, if a claim is bound to succeed, a claimant should know as soon as possible."***

*From the record, I agree with the Respondent that the mot*ion to grant the Summary Judgment was on the sole criteria. That the pleadings from this four corners the factual allegations taken together manifested no issue with real prospect of succeeding at the trial.

Also contrary to the Appellant's contention, viewing the evidence in light of what had been placed before the trial Court, I reject Learned Counsels submissions that the defence raised triable issues on the liquidated sum meriting a full trial of the suit. In the case of **International Fund for Agricultural Development –vs- Ahmad Jacayeri (2001) 1 All ER 161** the Court held that: -

> ***"While recognizing that a fuller picture may emerge at that stage, the Court can only determine an application for Summary Judgment on the material before it. The Defendant cannot ask the Court to allow the matter to go to trial simply on the grounds that something unexpected might turn up to assist him."***

The Courts' exercise of discretion in granting Summary Judgment will not be overturned in absence of arguable points of law and facts which is likely to affect the outcome of the suit. The Appellant made no such showing here in the Three **Rikers DC –vs- Bank of England (2001)2 ALL ER 513**

"Lord Hope concerning need inter alia that the rule on Summary Judgment is a recognized exceptions to the traditional method by which issues of fact are tried in our Courts"

> ***"For example, it may be clear as a matter of law at the onset that even if a party were to succeed in proving all the facts, that he offers, to prove, he will not be entitled to the remedy that he seeks. In that event a trial of the facts used be a waste of time and money, and it is proper that the action should be taken out of Court as soon as it is possible. In other cases it may be possible to say wider confidence before trial that the factual basis for the action is fanciful because it is entirely without substance."***

This fundamental logic could not be more different to that advanced as general principles of jurisprudence. In the interpretation and construction of Order 36 of Civil Procedure Rules, on Summary Judgment. In addition to the provisions of Order 36 of the Civil Procedure Rules, the Respondent's application presumably was also determined in consonant under the scope of order 13 Rule (1) (2) of the aforesaid Rules. This rule provides: -

> ***"That where admission of facts have been made in the pleadings or otherwise, whether oral or in writing, the court may at any stage of the suit either on application or of its own motion and without waiting for a full trial give such Judgment with regard to admissions."***

The discretion is to be invoked and used when there is a clear, and unambiguous admission**. (See the case of Choctram –vs- Nazri (1984) KLR 327, Cassan –vs- Sachania (1982) KLR 121).**

In the instant case, a panoramic view of the contested ruling of the Learned Trial Magistrate opined as follows: -

> ***"That on 16.3.2015 and 11.3.2015 the Defendant had purported to pay Kshs 500, 000/- which would mean the amount due. This would be Kshs 12,697,548.24/-. That is the amount acknowledged on 16.8.2017 two years later by the Defendant Statement thus "I am writing to acknowledge, the outstanding amount due to Prime Aluminium for works completed on Mandarine Project Kilifi. The subsequent offer of 4.6 million., 1.5 Million and 9 Million were efforts to amicably settle the matter."***

It seems to me and correctly so that there was a conscious and deliberate act by the Appellant to be bound by the admission on the amount due and owing. The words acknowledged the outstanding amount due and offers a proposal to settle the amounts amicably is a matter which goes to the root of the claim between the two parties.

It was appropriate for the Learned Trial Magistrate to exercise discretion under Order 13 Rule 1 and Order 36 Rule (1) of the Civil Procedure Rules. This was an admission in whole or in part of the money owed to the Respondent. The clear disposition on this part can be found in the case of **Continental Butchery Ltd –vs- Ndiwa (1989) KLR 573** in which the Court of Appeal held that: -

> ***"The purpose of Judgment on admission is to enable the Plaintiff to obtain a quick Judgment where there is plainly no defence to the claims. To justify such a Judgment, the matter must be plain and obvious and a party to a litigation is not to abide prove of his right to the fruits of Judgment at the expense of having the matter proceed to trial."***

A look at the application for Summary Judgment and subsequent ruling by the Learned Trial Magistrate are such that the conclusions reached resonate well with the settled principles. **In Nairobi Golf Hotel (Kenya) Ltd –vs- Lalji Bhinji Sanghana, Builders and Contractors CA No. 3 of 1997 and ICDC –vs- Daber Enterprises CA No. 41 of 2000.**

Applying the above principles, the statement of defence are indeed sparse to controvert the case for the Plaintiff/Respondent in respect of the sub-contract and the disclosed amount still outstanding. It is significant that the appellant is apparently unable to categorically to read evidence on the intended proposals and the authenticity of the due amount required to be settled.

Here the Court concluded that the Appellant's defence and any material in rebuttal in answer to the motion on Summary Judgment under Order 36 Rule (1) on admission was facially insufficient to entitle it leave to defend the claim. Therefore, the Respondent in meeting the threshold burden of proof, the Court had no option but to exercise discretion to appropriately enter Summary Judgment. (**See the cases of Weldrods Ltd –s- Dass T/A/ Weld on Supplies (1988) KLR, Star line General Suppliers Ltd Vs Discover Cash and carry Ltd (2006) EKLR).**

This settles, the questions in the negative arising in the instant appeal that the Learned Trial Magistrate erred in Law and fact to appreciate the provisions of Section 36 (i) of the CPR and as a consequence entering summary judgment and denying the applicant an opportunity to be heard on the merit.

Secondly, the appellant is aggrieved that the Learned Trial Magistrate inquired the objection to the respondents such and that the defence raised bonafide triable issues. The answer is also found in the same order 36 (1) of the rules that the statement of defence may be struck out and final judgment final may be entered upon the motion and affidavit as herein provided, unless the defendant by affidavit or other proof shall show such facts as may be deemed as if right to entitle the court to order for a hearing on the merit.

The same Civil Procedure Act and Rules provides that sham and irrelevance answers and defences which consists of bare devices are subject to be stricken out. In a motion for summary judgment. This is more so where the contracted sum gives rise to a debt or liquidated demand.

In summary judgment motions with the affidavits before it, the function of the courts to determine whether or not a bonafide issue has been presented for trial. If none is found, an order is made granting the motion for summary judgment. In essence the defendant must set up a bonafide defense, supported by affidavits, in order to bar the motion and expressed to be brought under order 36 Rule (i) of the Criminal Procedure Rule. Partial Failure of the statement of defense or an absolute admission of liability for part of the claim is a necessary condition under order 36 Rule I of the Criminal Procedure Code. There is then enumerated a list of authorities where the courts have given guidance on indicators of the differences between a motion for summary judgement under order 36 Rule 1 and where there exists sufficient and bonafide issue to entitle the defendant leave to defend the claim see **D.T Dobie & Co Kenya Ltd V Muchina (1982) KLR 1. V.K Construction Co. Ltd V. Mpaka Investment Ltd Hcc 2571/2003 Scan House Press Limited v Times New Service Limited (2008) EKLR.** The thread entrenched in the above cases is that the court will exercise its power to strike out pleadings in cases which are playing and obvious and which when appraised from the pleadings are in sufficient to mount any defence to the claim in dispute.

In the instant case the respondent claimed for a liquidated sum under the contract and contended that the sum due and owning is already admitted by the appellant /defendant to the suit.

At the hearing for summary judgment the trial court ruled on the admitted part of the clear and as a consequence exercised discretion under order 36 Rule 1 as read with order 13 Rule 1 to grant the Orders without waiting for a full trial.

My reading of the statement of defence provides what can be described as half wanted demands not capable of a bonafide triable issue to be considered by the court. Those facts as admitted by the appellant/defendant . On 10.3.2015 via email to the respondent as per the accounts subsequent email of on 8.12.2014 and subsequent email of 11.3.2015 with only a variation of Ksh 42,000 rendered the amount admitted to be summary alieved under Order 36 rule 1 as read with order 13 rule 1 of the Criminal Procedure Rule. All that aspects of the requested sum of Ksh. 12,697, 548.24 on the executed contracts entitled the respondent for a refund and containing no need to call for evidence from either side so that the court may decide on the admitted fact. It should be noted that an appeal the applicant has failed to persuade the court that it had a good defence on the merits and there is a question in dispute on the required sum which ought to go for trial. So fundamental is this requirement on reasonable and bonafide grounds of defence that its absence the enquiry ends into a liability and entry of summary judgment.

This was the approach taken by the Learned Trial Magistrate in the impugned ruling dated 19.2.2020.

In the same strength, I find the statement defence unsustainable and no triable issues arise to warrant a variation or setting aside the order by the trial court. The applicant in this appeal challenges the exercise of discretion of the learned trial magistrate in which the court declined to grant leave to defend the claim. I have subjected the rival arguments of both counsels for the parties to sufficient evaluation and scrutiny to establish whether there is merit in the appeal. As was held in **Mbogo v Shah (1968) EA 93,** in appeal, of this nature the court held as follows:

> ***"I think it is well settled that this court will not interfered with the exercise of its discretion by an inferior court unless it is satisfied that cites decision is clearly wrong, because it has redirected itself or because it has acted on matters which should not have acted or it has failed to take into correspondent matters which it should have taken into consideration and in doing so arrived at a wrong decision"***

The onus was on the appellant to satisfy the court that the inferior court was wrong when it declined to admit the defence for hearing on the merits in regard with the liquidated sum of 12,697,548.24. I am in full agreement with the court on this basic principle and I shall be guided by it. As rightly stated elsewhere in this decision the pleadings and averments by the appellant never raised any triable issues worthy. The courts discretion to entitle their leave to defend. If the defence set up is illusory or sham with bare denials in ordinally in such circumstances the defendant would not be entitled for leave to defend it. That is what happened in the instant case.

It is also necessary I mention in this appeal circumstances evident of the applicant counsel prior to this appeal being admitted for hearing. An application was sought for a stay of execution of the decree passed in the Magistrate Court at Kilifi dated 19.2.2020. The appellant petitioned this court to exercise discretion pursuant to order 42 Rule 6 of the CPR for stay of execution. The application was determined and the court ordered inter alia on 3.7.2020 that security for due performance of the decree in the sum of Ksh 12,667,584.21 be deposited in the joint interest earning account of both Counsels within 30 days from the stated date of the ruling. In the event the intended applicant defaults, the order for stay automatically lapses. In this respect, the appellant defaulted in meeting the conditions on depositing security of the decretal sum for due performance of the decree. Following that breach the respondent was at liberty to proceed accordingly to execute and enforce the lower court judgment against the appellant. Nevertheless, as a consequence of the aforesaid breach the appellant constitutional right of appeal never stated extinguished.

In my view the said order entitles the application to effect to offer security for due performance of the decree to sustain an order of stay of execution pending the hearing and determination of the appeal.

In my humble view after the delivery of the ruling, the appellant failure not to deposit the security as ordered by the court only denied the opportunity to stay execution of the decree by the respondent. Thus as held in **Gian Franco Manethi & another v Africa Assurance Company Ltd (2019) EKLR**.

> ***"The objective of the legal provision on security was never intended to fetter the right of appeal"***

Since the purpose of an application is for stay of execution is for the court to preserve the subject matter of an appeal. There is no dispute that non-compliance with the order does expose the appellant to execution and enforcement of the decree appealed against in the lower court. As to what extent the appeal is successful would be rendered nugatory depends on particular circumstances and facts of each case. For the appellant in the event that decree is reversed or altered an appeal and the likelihood of the respondent not able to place him in the same position before the appeal was of minimum consequences.

To this end and having adverted to the appellant's other grounds of appeal as outlined above, I dismiss the appeal with costs to the respondent.

DELIVERED, DATED AND SIGNED AT MALINDI THIS 26TH DAY OF FEBRUARY, 2021

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R. NYAKUNDI

JUDGE

NB: This Judgement has been dispatched electronically to the respective emails of the advocates in the matter

(dennis.kinaro.dk@gmail.com and legal@kihanga.co.ke)