REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 8 OF 2020

CIRCUIT BUSINESS SYSTEMS LIMITED.....APPELLANT

VERSUS

COUNTY GOVERNMENT OF SIAYA.....RESPONDENT

(Appeal from the Ruling and order in Siaya PM Civil suit No 19 of 2019 delivered on by

Hon James O. Ongondo, Principal Magistrate on 30th April 2020)

JUDGMENT

Introduction

1. The appellant herein being dissatisfied by the ruling and order of the Hon. James O. Ong'ondo made on 30th April 2020 in Siaya PMCC 19 of 2019 appealed the entire ruling seeking the entire ruling be set aside and be substituted with an order striking out the statement of defence filed by the respondent and entering judgement in favour of the appellant. The said appeal was based on the following grounds:

a) ***That the learned magistrate erred in law and in fact in failing to strike out the respondent's statement of defence from the court record whereas the respondent had admitted the appellant's claim and made payment after the suit was filed.***

b) ***That the learned magistrate erred in law and in fact in disregarding the issues raised in the appellant's oral and written submissions in respect to the appellant's notice of motion application dated 2nd May 2019.***

c) ***That the learned magistrate erred in law and in fact in holding that the parties withheld and/or failed to disclose material facts.***

d) ***That the learned trial magistrate erred in law and in failing to hold that the respondent's statement of defence did not disclose any triable issue.***

e) ***That the learned trial magistrate erred in law and in fact in holding that the respondent was entitled to cost.***

2. A brief history of the matter is that the appellant filed an application before the Principal Magistrate's Court at Siaya in Civil Suit No. 19 of 2019 seeking to have the defence filed by the respondent therein struck out on the grounds that the statement of defence did not disclose a reasonable defence in law. The trial magistrate Hon. Ong'ondo upon finding that both parties had withheld material facts, ruled that in order to determine the matter fully, it was necessary to have the matter proceed to full trial.

3. The parties agreed to canvass the appeal through written submissions but there were no submissions on record for the respondents as at the time of writing this Judgment.

Appellant's Submissions

4. It was submitted that the statement of defence raised no legal issues, questions or disputed facts and contained mere denials and was therefore bad in law and ought to have been struck out. The appellant relied on the cases of **Savings & Loan (K) Ltd v Kanyenje Karangata Gakombe & Another [2015] eKLR** and that of **Kenya Commercial Bank & Suntra Investment Bank Ltd [2015] eKLR** that set the threshold for striking out of defences.

5. It was submitted that during the pendency of the suit and despite their defence, the respondent made part payment which signalled that the subject of the suit had been admitted and as such the defence was not merited. It was further submitted that there was no finding by the trial

court that the respondent's statement of defence raised a triable issue and as such the only fate of the defence was dismissal.

6. The appellant submitted that the trial court failed to consider both its oral and written submissions wherein the appellant had clarified that the amount owed was Kshs. 678,478.31 and thus the trial court wrongly arrived at the conclusion that the parties in the suit had withheld material facts.

7. On the issue of costs being awarded to the respondent, it was submitted that the trial court having found that both parties had withheld material facts from the court, it ought to have condemned each party to bear its own costs.

Analysis & Determination

8. The role of this court on first appeal is to re-evaluate all the evidence availed in the lower court and to reach its own conclusions in respect thereof, as was restated in **Oluoch Eric Gogo v Universal Corporation Limited [2015] eKLR.**

9. The principles guiding the striking out of pleadings and cases are now well settled. These principles, as set out in **D T Dobie & Company (K) Ltd v Muchina [1982] KLR 1**, and reiterated in the case of **Madison Insurance Company Limited v Augustine Kamanda Gitau [2020] eKLR** are 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. The rationale for this is due to a realisation that the exercise of the powers for summary procedure are draconian, coercive and drastic. And because a party may thereby be deprived of his right to a plenary trial, the court exercises those powers with the greatest care and circumspection and only in the clearest of cases as regards the facts and the law. The summary procedure should therefore only be adopted when it can be clearly seen that a claim or case is clear and beyond doubt unarguable and the judicial system would never permit a party to be driven from the judgement seat without any court having considered his right to be heard, except in cases where the cause of action was obviously and almost incontestably bad.

10. The application before the trial court was principally brought under Order 2 rule 15 of the Civil Procedure Rules. Sub rule (1) of the said provision 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—***
>
> ***(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."***

11. In the exercise of its powers under the said provision, there are certain well established principles that a court of law is to adhere to. Whereas the essence of the said provisions is the striking out of an action or defence, that is a jurisdiction that must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit tried by a proper trial. 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 or striking out a defence for not disclosing a reasonable cause of action defence for being otherwise an abuse of the process of the court.

12. The power to strike out pleadings must thus be sparingly exercised and it can only be exercised in clearest of cases. If a pleading raises a triable issue even if at the end of the day, it may not succeed then the suit ought to go to trial. However, where the suit is without substance or is groundless or fanciful and or is brought or instituted with some ulterior motive or for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process, the court will not allow its process to be a forum for such ventures.

13. The grounds upon which the appellant's application before the trial court was based were that the defence filed did not raise any triable issues and consisted of mere denials, prejudiced, embarrassed and delayed the fair trial of the matter and was otherwise an abuse of the process of the Court. The application was supported by an affidavit sworn by Godfrey Owino on the 2nd May 2019 wherein he deposed that the total amount for the contract amount was Kshs. 18,977,771.68 out of which the respondent had settled Kshs. 12,636,732.65 leaving a balance of Kshs. 6,341,039.03 accruing.

14. The respondent opposed the application vide a replying affidavit sworn by one Hezron Mariwa on the 30th May 2019 wherein he denied the appellant's averment and urged the court to give the respondent an opportunity to defend the suit.

15. In the **Raghbir Singh Chatte v National Bank of Kenya Limited Civil Appeal No. 50 of 1996**, the Court of Appeal held:

> ***"If a general traverse…were held to be sufficient and effectual, that would render meaningless provisions such as Order VI Rule 9(3) of the Civil Procedure Rules and even the decisions of this Court such as Magunga General Stores vs. Pepco Distributors Limited [1988-92] 2 KAR 89. The position of the law…is that a mere denial or general traverse in defence is not sufficient and a defendant who does not specifically plead to all the issues raised in a plaint risks the probability of his defence being struck out***

or being held to Constitute an admission of the issues raised in the Plaint."

16. In **Magunga General Stores v Pepco Distributors Ltd. [1987] KLR 150; [1988-92] 2 KAR 89 [1986-1989] EA 334** the same Court held:

> ***"Mere denial is not a sufficient defence in a claim for breach of contract for goods sold and delivered and cheques issued in settlement thereof. There must be a reason why the defendant does not owe the money. Either there was no contract or it was not carried out or failed. It could also be that payment had been made and could be proved. It is not sufficient therefore to simply deny liability without some reason given."***

17. However, in **The Co-Operative Merchant Bank Ltd. v George Fredrick Wekesa Civil Appeal No. 54 of 1999** the Court of Appeal stated 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...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court. The defence raises a fundamental issue, namely, whether there was any misrepresentation as alleged by the respondent, a question which, cannot possibly be answered at the stage of an application for striking out; nor will it be competent for the court of appeal to try to answer it as its jurisdiction only extends to identifying whether, if any, there are issues which are fit to go for trial. The court has no doubt whatsoever, that the above is a fundamental triable issue...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment. The appellant's defence cannot be said to fall into that category and had the trial Judge considered fully all the matters alluded to, he would not have come to the same conclusion as he did."***

18. In **Yaya Towers Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000** the same court expressed itself thus:

> ***"A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved...If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits...It is not the length of arguments in the case but the inherent difficulty of the issues, which they have to address that, is decisive... The issue has nothing to do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the Court or is unarguable...Where the plaintiff brings an action where the cause of action is based on a request made by the defendant he must allege and prove inter alia, both the act done and the request made for doing such an act. In the absence of any request shown to have been made by the defendant in the particulars delivered of such allegation, it would not be possible for the plaintiff to prove any request made by the defendant and without this the essential ingredient of the cause of action cannot be proved and the plaintiff is bound to fail...No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment."***

19. This court observes that prior to the trial court delivering the impugned ruling, the parties engaged in negotiations in an attempt to settle the matter out of court and it subsequently emerged that the respondent had made payments of Kshs. 5,959,677 in settlement of the amount owed. Having failed to agree on the balance of the amount to be settled, the parties left it to the trial court to make a determination on the merit of the application to strike out the respondent's defence. In their submissions, the appellant submitted that the respondent still owed it Kshs. 679,478 whereas the respondents submitted that they had paid a total of Kshs. 5,652,019.68 but that the appellant sought an additional payment of Kshs. 306,515 being filing fees, legal fees and travelling fees.

20. In my humble view, the defence filed by the respondent disclosed at least one triable issue regarding the issue of what monies were owed to the appellant by the respondent. The same was demonstrated above when the parties failed to reach an agreement when they were given an opportunity to negotiate and settle the matter out of court. The respondent submitted that the nature of the tax regime allowed them to pay the appellant less the taxed funds, a fact disputed by the appellant. In my view this is a triable issue that should be allowed to proceed to full trial.

21. Accordingly, it is my finding that it is only fair and just that the matter hereby proceeds to full hearing before the trial court on its merits specifically on the issue as to what funds are owed less funds already admittedly settled.

22. Regarding costs, it is worth noting that the issue of costs is in the discretion of the court as provided under Section 27 of the Civil Procedure Act and further that the basic rule on attribution of costs is that costs follow the event. See **Republic v Rosemary Wairimu Munene, Ex-Parte Applicant v Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review Application No 6 of 2014.** The respondents having been successful in opposing the application to strike out their defence, I see no error in the trial magistrate awarding them costs as stipulated in law as there were no special circumstances to warrant exemption of costs. I find no reason to interfere with the trial court's discretion and decision.

23. The upshot of the above is that this appeal must fail. It is hereby dismissed with an order that each party shall bear their own costs of the dismissed appeal. The trial court record to be forthwith transmitted to the lower court for conclusion of the pending suit on its merits.

24. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 30TH DAY OF MARCH, 2021

R.E. ABURILI

JUDGE