REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 14 OF 2021

KIPKEBE LIMITED.....APPELLANT

=VRS=

1. JACKSON ONDARI ARIANDE.....1ST RESPONDENT

2. FRANCIS NYAMAGWA OTARA.....2ND RESPONDENT

(Being an Appeal against the Ruling of Hon. W. C. Waswa (Mr.) – RM Nyamira dated and delivered on the 15th day of

February 2021 in the original Nyamira Chief Magistrate's Court Civil Case No. 96 of 2020)

JUDGEMENT

This appeal is against the ruling dated 15th January 2021 by which the trial Magistrate struck out the appellant's statement of defence for reason that it did not disclose any reasonable defence and proceeded to enter summary judgement in favour of the respondents for a sum of Kshs. 307800/-, costs of the suit and interest. The appeal is premised on the following grounds: -

> **"1. That the Learned Trial Magistrate erred in law and in fact by misapprehending the applicable law & principle governing striking out of Pleadings as captured by the Provisions of Order 2 Rule 15 of the Civil Procedure Rules and Order 35 (1) of the Civil Procedure Rules.**
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> **2. That the Learned Trial Magistrate erred in law in failing to consider whether both the statement of Defence and the replying Affidavit filed by the Appellant were raising triable issues thus entitling the Appellant a right to defend the suit as mandatorily required under the Provisions of Order 36 Rule 2 of the Civil Procedure Rules thus arriving at erroneous determination.**
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> **3. The Learned Trial Magistrate was plainly wrong in resorting to striking out the Defence thus breaching the Appellant's constitutional right to fair hearing and contravening the principle of Natural Justice besides the fact that there were triable issues and the case was not one of clearest situation where Judgement must be entered at once without hearing a party.**
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> **4. That the Trial Magistrate failed in his role of properly evaluating and addressing his mind to all material on record before resorting to draconian measure of striking out the Defence.**
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> **5. The Learned Trial Magistrate failed to appreciate that the Respondent's claim, albeit quantified, was not liquidated claim and as such, no summary judgement could issue under Order 36 Rule 1 (a) of the Civil Procedure Rules.**
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> **6. That the Learned Trial magistrate erred in law by failing to appreciate that the Appellant had not admitted at all any part of the Respondents claim and having joined issues with the claim mounted against it and in the absence to reply to the Defence, the Defence was replete with triable issues and was thus not a candidate for striking out."**
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> **7. The Learned Trial Magistrate erred when he chose to ignore weighty submissions fronted by the Appellant and recent authorities touching on striking out of pleading thus reaching absurd decisions which has occasioned miscarriage of justice.**

By the appeal it is proposed to ask this court for orders that: -

> **"(a) The Ruling and/or Order of the Learned Trial Magistrate dated 15th day of February 2021, be set aside, varied and/or quashed.**

(b) The Court be pleased to dismiss the Application dated the 10th day of December 2020, and reinstate the Defence struck out and direct that the suit herein be heard on merit.

(c) Costs incurred in the lower court and those of the Appeal herein, be borne by the Respondent.

(d) Any such and/or further Orders that the Honourable Court shall deem just and expedient in the circumstance."

The background of the case is that the respondents sued the appellant vide a plaint dated 18th February 2020 but filed in court on 11th September 2020 seeking the following prayers: -

(a) General damages.

(b) Special damages – Kshs. 307,800/-.

(c) Costs of the suit.

(d) Interest on (a), (b) and (c).

The appellant duly entered appearance and subsequently filed a statement of defence disputing the claim. Shortly thereafter on 10th December 2020 the respondents filed a Notice of Motion seeking to strike out the appellant's defence and for summary judgement in the sum of Kshs. 307,800/- with interest at court rates from 28th December 2020 and the costs of the application. That Notice of Motion was expressed to be premised on **Order 2 Rule 15 and Order 51 Rule 1 of the Civil Procedure Rules** and **Sections 3A** and **3B** of the **Civil Procedure Act.**

The gist of the application was that the respondent's suit was for a liquidated amount and that the appellant's defence did not disclose any and/or a reasonable defence. The application was vehemently opposed but by a ruling delivered on 15th February 2021 the trial Magistrate allowed the application and granted the orders sought.

This appeal proceeded by way of written submissions. Relying on a long line of cases among them **Desbro (Kenya) Limited v Polypipes Limited & another [2018] eKLR** and **Jubilee Insurance Company Limited v Grace Anyona Mbinda [2016] eKLR,** Learned Counsel for the appellant submitted that this was not a proper case for striking out of the defence and entry of summary judgement. Counsel submitted that the defence filed by the appellant raised triable issues and the appellant ought to have been afforded unconditional leave to defend the claim. Counsel contended that the orders granted occasioned a miscarriage of justice and the appellant's constitutional right to a fair trial was violated. Counsel urged this court to allow the appeal and accord the appellant an opportunity to defend the suit before a Magistrate other than the one whose ruling is impugned.

Counsel for the respondents on his part urged that the appellant's statement of defence contained mere denials and did not raise any reasonable defence or triable issues and hence was justifiably struck out. Counsel submitted that the law is that a mere denial is not a sufficient defence and a defendant has to show either by affidavit, oral evidence, or otherwise that there is a good defence. Further, that it is trite law that if the appellant does not raise new issues of law or fact that were overlooked by the trial court the appellate court should endeavour not to interfere with the decision of the lower court. To buttress his submissions Counsel cited the following cases: -

- **Margaret Njeri Mbugua v Kirk Mweya Nyaga [2016] eKLR.**
- **Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR.**
- **Mercy Nduta Mwangi t/a Mwangi Keng'ara & Co. Advocates v Invesco Assurance Company Limited [2019] eKLR.**
- **Mbogo v Shah [1968] EA 93.**
- **Jackson Kaio Kivuva v Penina Wanjiru Muchere [2019] eKLR.**
- **Africa Merchant Assurance Co. Ltd v Herman Kiarie Mwaura & another [2020] eKLR.**

Counsel contended that the striking out of pleadings and entry of judgement is discretionary and that as the trial Magistrate properly exercised his discretion this court ought not to interfere. Counsel further invited this court to find that: -

"(i) The Applicant's application is made in bad faith, has no merit and is only calculated to delay the Respondent from enjoying the fruits of a Judgement, which they deserve.

(ii) The Applicants have not offered an explanation on the reasons why their defence does not capture a response to the allegations in the plaint and should thus not expect the court to exercise discretion in their favour as Equity does not aid the indolent.

(iii) The Appeal herein is not merited as the Defence does not disclose a reasonable defence in law and the Applicants have not demonstrated how the Learned Judge erred in his discretion.

(iv) The Applicants have not demonstrated that they would not be able to recover the decree sum from the Respondent in the event they succeeded in their Appeal herein.

(v) We pray that you find that the Application is neither merited nor maintanable and that it be dismissed with costs.

(vi) The striking out of pleadings is centrally premised on the authoritative principle that in an action a mere denial or general traverse will not do for it is not a sufficient defence and also discloses no reasonable defence for the purposes.

(vii) That the Appeal be dismissed with costs."

On the issue of costs, Counsel for the respondents reiterated the principle that costs follow the events and hence the appellant ought to be condemned to the costs of this appeal. In support of this submission Counsel cited the case of **Morgan Air Cargo Limited v Everest Enterprises Limited [2014] eKLR** where it was held: -

"The law of costs as it is understood by the courts in Kenya, is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part – no omission or neglect, and no vexatious or oppressive conduct is attributable to him, which would induce the court to deprive him of his costs – the court has no discretion and cannot take away the plaintiff's right to costs. If the defendant, however innocently, has infringed a legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course;

ORIX OIL (KENYA) LIMITED v PAUL KABEU & 2 OTHERS [2014] eKLR where the court stated: -

"….the court should have been guided by the law that costs follow the event, and the plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied the costs or the successful issue was not attracting costs. None of those deviant factors are present in this case and the court would still have awarded costs to the plaintiff, which I do."

I have considered the rival submissions, the record of the lower court and the law. It is not lost to this court that the power to strike out a pleading is a discretionary one and that an appellate court will not interfere with the exercise of that power unless it is clear that there was either an error on principle or that the trial court was plainly wrong – ***see the case of Africa Merchant Assurance Co. Ltd v Herman Kiarie Mwaura & another [2020] eKLR.*** There is also a long line of cases to the effect that striking out a pleading is draconian and may only be resorted to in the plainest of cases and where the pleading discloses no semblance of a cause of action or defence and is incurable by amendment. It is also trite that a mere denial or a general traverse is not a sufficient defence in an action for a debt or liquidated amount as was held by Akiwumi JA in the case of **Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR**: -

"This rule enforces a cardinal principle of the system of pleadings, that every allegation of fact in a statement of claim or in a counterclaim must be traversed specifically, otherwise it is deemed to be admitted. It thus prescribes how the pleader should answer his opponent's pleading, by providing that the penalty for not specifically traversing an allegation of fact is that it will be taken to be admitted, whether this was intended or not. The effect of a traverse, if properly pleaded, is that the party who makes the allegation has to prove it; the effect of an allegation which is treated as admitted is that the party who makes it need not prove it.

The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in Thorp v Holdworth (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him."

In the case of **Crescent Construction Co. Ltd v Delphis Bank Ltd [2007] eKLR** the Court of Appeal also observed that: -

"However, one thing remains clear, and that is that the power to strike out a pleading is a "discretionary one". It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time honoured legal principle. At the same time, it is unfair to drug (sic) a person to the seat of justice when the case purportedly brought against him as a non-starter."

I have applied all the aforestated principles to this case. The respondents' case was that on 28th December 2019 a tractor which was green in colour like those owned by the appellant was seen carting away tree stumps worth Kshs. 307,800/- belonging to the respondents. The appellant vehemently denied the averment and put the respondents to strict proof. The denial in the defence was reiterated in the replying affidavit of Silas Juma Njibwake dated 15th January 2021 sworn in opposition to the application.

It is my considered fi nding that by denying that the tractor belonged to it the appellant specifically traversed the allegation by the respondents and that therefore this was not a proper case for striking out. It is instructive that the application was made and was granted under **Order 2 Rule 15 (a) of the Civil Procedure Rules.** The application was supported by an affidavit sworn on 10th December 2020 by Jackson Ondari and the affidavit had several annextures yet **Order 2 Rule 15 (2) Civil Procedure Rules** provides that: -

"No evidence shall be admissible on an application on that ground."

The fact that the respondents adduced evidence in support of the application discloses that first, on the merits theirs was not a plain and obvious case and second, that procedurally their application was rendered incompetent by reason of **Order 2 Rule 15 (2)** of the **Civil Procedure Rules**. Moreover, a closer scrutiny of the respondents' claim reveals that this was not a liquidated claim as they would have been required to prove that indeed what was unlawfully carted away were **"half of the trees all 144 in total and worthy Kshs. 307,800/-."** There was also a prayer for general damages that would also have been required to go to full hearing. It is my finding therefore that the trial Magistrate erred in striking out the defence yet it raised a triable issue the issue being whether the tractor(s) that carted away the trees in fact belonged to the defendant.

As for the summary judgement, **Order 36 Rule 1 (1) (a)** of the **Civil Procedure Rules** makes it clear that the same applies only where the suit is for a liquidated demand with or without interest where the defendant has appeared but not filed a defence. The appellant herein had not only entered appearance but had also filed a defence and summary judgement could not therefore issue. The trial Magistrate could of course after striking out the defence entered judgement under **Order 2 Rule 15 (1) of the Civil Procedure Rules** which states at the tail end: -

> ***"…….and may order the suit to be stayed or dismissed or judgement to be entered accordingly, as the case may be."***

He however elected to enter summary judgement against a party that had filed a defence contrary to the express provisions of **Order 36 Rule 1 (1) (a)** of the **Civil Procedure Rules** hence falling into error. For this and the reasons aforestated this appeal is found to be merited and is allowed and the appellant's defence in the trial court is reinstated and the lower court file remitted to the lower court for hearing by a Magistrate other than the one who had dealt with it earlier.

As costs follow the event the costs of this appeal and of the application in the lower court are awarded to the appellant. It is so ordered.

JUDGEMENT SIGNED, DATED AND DELIVERED AT NYAMIRA ELECTRONICALLY VIA MICROSOFT TEAMS ON THIS 23RD DAY OF SEPTEMBER 2021.

E. N. MAINA

JUDGE