



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO.18 OF 2020

OMAR SALIM MOHAMED MTAWA.....APPELLANT

VERSUS

SALEH SALIM MOHAMED MTAWA.....RESPONDENT

(Being an Appeal from the Ruling delivered on the 20th January, 2020 of Hon. C. Ndegwa at the in CMCC No. 490 of 2019)

JUDGMENT

1. Before the Court is an Appeal challenging a Ruling dated **20th January, 2020** by **Hon. C.Ndegwa** wherein the Appellant's Plaintiff dated **1st April, 2019** was struck out for not disclosing a cause of action against the Respondent.
2. The Appellant has sued the Respondent in **CMCC No.490 of 2019** vide a Plaintiff dated **1st April, 2019** seeking for the following prayers: -
 1. *A declaration that the Defendant is entitled to pay the Plaintiff his share of the rent derived from suit premises erected on Land Reference Nos. Mombasa/Block XVI/376 and Mombasa /Block XVI/748.*
 2. *An order compelling the Defendant to pay the Plaintiff his full share of rent due from the property from the year 2004 to date.*
 3. *Cost of the suit.*
 4. *Interest on 2 above at court rates from the date of filing until payment in full.*
 5. *Any other relief this Honorable Court deems fit*
3. The Respondent entered appearance on the **30th April, 2019** and filed his Defence on the **20th May, 2019** wherein he denied all the allegations as were set out in the **Plaint**. Thereafter, on the **27th June, 2019**, the Respondent filed a **Notice of Motion** Application seeking for the suit to be struck out with costs for disclosing no reasonable cause of action against him.
4. In response to that application, the Appellant filed a **Relying Affidavit** sworn by himself on **6th August, 2019** and rubbished the claims by the Respondent, maintaining that his Plaintiff dated **1st April, 2019** wherein he raised a reasonable cause of action which he pointed out to be whether he was owed rental income by the Respondent.
5. That application was canvassed by way of written submissions and upon considering the same, the Honourable trial Magistrate delivered his Ruling on **20th January, 2020** and reached a conclusion that the Plaintiff has disclosed no reasonable cause of action since it had not been established there was rent being collected at all.
6. Being dissatisfied with the said Ruling, the Appellant filed the present Appeal before this Court vide a **Memorandum of Appeal** dated **24th February, 2020** raising the following grounds: -
 1. *That the Learned Trial Magistrate erred in finding that the Plaintiff "seemed" to confirm that no rent is collected from the Suit premises without affording an opportunity for this to be canvassed in a full trial and thereby basing the decision on a presumption that was not tested.*

2. *That the Learned Trial Magistrate erred in failing to consider that the Defendant's Tobacco Business was required to account for rents due, paid and/or received by him.*
3. *That the Learned Trial Magistrate erred in failing to take into account the fact that the Defendant was doing business in the suit property and that it was in the interest of justice that the matter go to full trial.*
4. *That the Learned Trial Magistrate erred in fact and in law by issuing draconian orders and preventing the Plaintiff from having the suit tried on merits and curtailing his natural right remedy to be heard.*
5. *That the Learned Trial Magistrate erred in failing to appreciate that the pleadings, affidavits and submissions made disclosed several triable issues which could only be effectively and properly determined at the full trial of the suit.*
6. *That the Learned Trial Magistrate erred in finding that the Appellant had no cause of action against the defendant and the plaint did not raise any reasonable or plausible triable issues.*
7. *That the Learned Trial Magistrate misdirected himself in finding on the basis of the documents before him that the Plaintiff filed by the Appellant was a sham and did not merit being ventilated at full trial.*
8. *That the Learned Trial Magistrate erred in improperly exercising his discretion thereby prejudiced the rights of the Appellant.*
9. *That the Learned Trial Magistrate erred in law and in fact in putting more weight on the Respondent's submissions than those of the Appellant.*

7. The Appellant prayed that the Appeal be allowed, his case reinstated and the same do proceed for hearing and determination on its merits and he be awarded costs of this Appeal and of **Mombasa CMCC No.290 of 2019**.

Directions of the Court

8. On the **8th February, 2021**, the court issued directions that the Appeal be canvassed by way of written submissions. Both parties dutifully obliged and the Appellant's submissions dated **6th April, 2021** were filed on even date while the Respondent's submissions are dated **3rd June, 2021** and filed on the **4th June, 2021**. The Appellant also filed supplementary submissions dated the **8th June, 2021** on the **9th June, 2021**. The parties then elected to rely on their written submissions as presented.

The Appellant's Submissions

9. The Appellant submitted that the subordinate court struck out his Plaintiff in contravention of the mandatory provisions of **Order 2 Rule 15 (2)** of the **Civil Procedure Rules**. The appellant also lamented that the Respondent's arguments were all based on affidavit evidence, an indication that the suit ought to have been heard on merit, with witnesses called and cross examined so as to test the evidence before a final determination being made by court.

10. It has been submitted that the Rules of Natural Justice dictate that the Appellant should be accorded time to present their case and be heard; be given the benefit of a decision that is not tainted by bias and be afforded an opportunity to present evidence and challenge any evidence against him within the traditional approach of a hearing on its merits. The Appellant relied on the case of **Republic –vs- National Land Commission & 2 Others Ex Parte Archdiocese of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kahawa West) [2018]eKLR**, to expound on the principles of natural justice and the right to be heard.

11. Based on his submissions, the Appellant has urged this court to allow his Appeal as the decision of the trial court offends the mandatory statutory provisions of law and cardinal principles of natural justice.

The Respondent's Submissions

12. The Respondent submitted that in his pleadings before the trial court, the Appellant was very contradictory as to whether there was any rental income being collected from the suit properties being **Land Reference Nos. Mombasa/Block XVI/376 and Mombasa /Block XVI/748** which are co-owned by the parties herein. Further, the Respondent submitted that on the **27th June, 2020**, he filed for particulars of some facts in the Plaintiff and the Appellant responded on the **6th August, 2019**. It was clear that the person in occupation was the Respondent.

13. Therefore, the Respondent's contention is that the Appellant did not produce any tenancy agreement before the trial court as proof that the suit properties were being rented for an agreed rental income of **Kshs.20,000/=**. The Respondent thus stated that he was justified to file an Application for striking out of the Plaintiff as he did. The Respondent has relied on the cases of **D T Dobie –vs- Muchina [1980] KLR 1** and **Trust Bank Limited –vs- Amin & Company Ltd & Another [2000] KLR 164** to expound on a reasonable cause of action and when the same should be struck out for being frivolous and vexatious.

14. Further, it has been submitted that under the provisions of **Order 2 Rule 15 (2)** of the **Civil Procedure Rules**, no evidence is admissible on an application similar to the one subject of the present appeal.

15. In the event that the Appeal is successful, the Respondent has urged the court not to grant costs for **CMCC No.490 of 2019** as sought since the suit was yet to be heard before the trial court

16. In the upshot, the Respondent has maintained that the Plaintiff did not disclose a reasonable cause of action, hence the Appeal herein should be dismissed with costs.

Analysis and Determination

17. I have carefully considered the pleadings and submissions filed herein by each party. In my view, the only issue that arises for determination is *whether the trial court erred in striking out the Appellant's suit as against the Respondent.*

18. It is settled law that the court's power to strike out pleadings is meant to be exercised sparingly and cautiously, because the court exercises that power without being fully informed on the merits of a case through discovery and oral evidence. This was the finding in the case of **D.T. Dobie & Company (Kenya) Ltd. –vs- Muchina (1982)KLR 1 at p. 9** where it was stated as follows:

“...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...”

19. The Appellant's main contention is that the Respondent's **Notice of Motion** dated 27th June, 2019 was defective and not compliant with **Order 2 Rule 15 (2)** of the **Civil Procedure Rules** for being supported by an affidavit adducing evidence on why the order sought for dismissing the Plaintiff for lack of reasonable cause of action should issue.

20. **Order 2 rule 15** of the **Civil Procedure Rules** provides as follows:

(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.

(2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.

21. On the other hand, the Respondent submitted that they were justified to file the Notice of Motion together accompanied by an Affidavit as there were other prayers other than the one brought under **Order 2 Rule 15(1)(a)** of the **Civil Procedure Rules**.

22. Having perused the **Notice of Motion** dated 27th June, 2019, it is undisputed that indeed the Application sought to strike out the Appellant's suit for not disclosing a reasonable cause of action. On top of the suit being vexatious, it is meant to embarrass fair trial. The application was indicated to be brought under **Order 2 Rule 15(1)(a),(b)** and **(c)** of the **Civil Procedure Rules** which provides as follows:

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 ..”

23. Under **Order 2 Rule 15 (2)**, a prayer made under **Order 2 Rule 15 (1)(a)** of the Rules should not be accompanied by Affidavit evidence. In this case the Respondent indicates that he made an omnibus application and reiterates that he had the right to bring forth affidavit evidence.

24. On the subject at hand, I have borrowed from the Court of Appeal case of **Olympic Escort International Co. Ltd. & 2 Others –vs- Parminder Singh Sandhu & Another [2009]eKLR**, where it was held that: -

“...Mr. Wamalwa reiterated in his submissions before us that it was improper to invoke Order 6 r 13 (1) (a) when there was affidavit evidence on record which the superior court analysed in arriving at its decision. Mr. Sevany on the other hand found no impropriety in combining the two prayers since it was expressly stated in the application that the only basis for seeking the order for striking out was because the defence was a bare denial.

“We think for our part that it was inappropriate to combine the two prayers, one of which requires evidence before a decision is made and one that does not. There was affidavit evidence on record and it was in fact considered by the learned Judge. It

matters not therefore that the applicant had stated that the affidavits should not be considered. As the prayer sought under Order 6 r 13 (1) (a) was in contravention of sub-rule (2) of that order, it was not for consideration and we would have similarly struck out the application on that score...

25. While being guided by the finding in the case above, it is my view that it was inappropriate for the Respondents to include other prayers together with a prayer under **Order 2 Rule 15(1)(a)** of the **Civil Procedure Rules** which does not require Affidavit evidence in support as provided under the mandatory terms of **Order 2 Rule 15(2)** of the **Civil Procedure Rules**.

26. Further, the trial court only relied on **Order 2 Rule 15(1)(a)** of the **Civil**

Procedure Rules in dismissing the Appellant's Complaint and was thus wrong to consider the Affidavit evidence. It is therefore evident that trial court erred when it struck out the suit without taking into consideration the mandatory provisions of **Order 2 Rule 15(2)** of the **Civil Procedure**

Rules.

27. In the upshot, the Appeal dated **24th February, 2020** is hereby allowed and the Appellant's suit be reinstated. I proceed to direct that the suit proceeds for hearing and determination on its merits before any Magistrate other than **Hon. C. N Ndegwa**.

28. The matter to be placed before the Chief Magistrate by either party on priority basis for directions.

29. Each party to bear their own costs of the Appeal.

It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 15TH DAY OF OCTOBER 2021.

D. O. CHEPKWONY

JUDGE

IN THE PRESENCE OF:

M/S MAIGA COUNSEL HOLDING BRIEF FOR M/S WAIHENYA COUNSEL FOR APPELLANT

NO APPEARANCE FOR AND BY RESPONDENT

COURT ASSISTANT - TURUKI