REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CORAM: A.K NDUNG'U, J

CIVIL APPEAL NO. 263 OF 2019

CORALINE PIRON.....APPELLANT

VERSUS

WORLEY LIMITED.....RESPONDENT

(Being an appeal from the whole of the ruling of the Honorable Principal Magistrate D.W. Mburu (Mr.) delivered on 10th May 2019 in CMCC No. 8799 of 2018)

JUDGEMENT

1. The application for consideration in this appeal is the Notice of Motion evenly dated and filed in court on 26th November 2019. The application by Coralie Piron (herein "the appellant") sought orders that;

a. **The Defendant's defence dated 21st November 2018 be struck out;**

b. **The Honourable court be pleased to enter judgment in favour of the plaintiff as prayed in the Plaint; and**

c. **The costs of this application and the suit be borne by the Defendant.**

2. The application was premised on Order 2 Rule 15 (b), (c) and (d), Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 1 A and 3 A of the Civil Procedure Act. It was based on the body of the application and the appellant's affidavit sworn on 26th November 2018. The respondent's director, Ritish Shah, swore an affidavit opposing the application on 15th January 2019. Directions were given to dispose of the application by way of written submissions. Having considered the submissions and averments made, the trial court found that the defence raised triable issues and dismissed the application in its ruling delivered on 10th May 2019.

3. Dissatisfied with the trial court's decision, the appellant filed the instant appeal which was canvassed by way of written submissions.

4. Before I consider counsels' submissions, it is necessary to set out a background to the application in question. The appellant herein had filed the substantive suit claiming a total of Kshs. 7,444,444/=. The sum arose from an oral purchase agreement she had entered into with the respondent for the purchase of two apartments at the Royal Cataleya off plan development project in May 2016. She later on filled a reservation form which stipulated the purchase price for each of the apartments and indicated that a monthly instalment of Kshs. 944,444/= and Kshs. 916,777/= would be paid for apartment 7F and 7C respectively.

5. The appellant claimed that after making four instalments totalling to Kshs. 7,444,444/= she sought to cancel the reservation. She made several requests to the respondent's director for reimbursement but he blatantly refused to refund the money, hence the suit.

6. The respondent admitted that it had received the sums claimed in the impugned statement of defence and set off dated 21st November 2018. It however averred that the appellant was the author of her own loss and was not entitled to a refund. The respondent claimed that the payments made by the appellant were made in anticipation of the construction of residential apartments which were being undertaken by the appellant's own company known as Thomas and Piron Grands Lacs Limited. That the respondent and the appellant's said company had entered into a contract dated 20th April 2016 to construct the apartments on the respondent's land for the sum of Kshs. 450,168,809.45/= and by the time the contract was mutually terminated, the respondent had paid the appellant's company Kshs 134,037,081/=.

7. The respondent claimed that the structure that had been partially built by the appellant's company was unanimously condemned by professionals and had to be demolished due to poor workmanship. It blamed the appellant's company, the appellant and her co-director one Ebenezer Odoom for its loss and averred that it would seek leave to enjoin them in the suit. The respondent further claimed that due to the

breach of their duty of care, it was unable to complete the construction, sale and transfer of the residential apartments. Consequently the appellant could not complete the purchase of the two apartments and was estopped from seeking a refund of her instalments which the respondent sought to set off its larger loss.

8. The respondent also questioned the trial court's pecuniary and statutory jurisdiction to adjudicate the matter and stated that it had commenced legal proceedings under the Arbitration Act to resolve the matter. It therefore urged the court to find that it was entitled to a set off of any claims proved to be payable by the appellant and also sought general damages against her, her company Thomas and Prion Grand Lacs Limited and her co-director Ebenezer Odoom.

9. The appellant dismissed the respondent's defence as a mere refutation only intended to delay the fair determination of her claim. In the affidavit in support of her application dated 6th November 2019, she deposed that the respondent had confirmed being indebted to her and the allegations made concerning Thomas and Prion Grads Lacs Limited, were unrelated to any of the issues raised in the plaint. She averred that the company was a separate legal entity which could be sued in its own capacity if the respondent had any claim against it.

10. In reply to the application to strike out the defence, the respondent's director, Ritish Shah, deposed that the appellant's claim paled in quantum when compared to the loss caused by her company. The respondent contended that since the appellant had admitted being a director of the company, the mere fact that the appellant was a separate personality from her company was not an absolute rule as the court had the power to lift the corporate veil and demand that the directors bear liability for the company.

11. The appellant filed the instant appeal against the trial court's ruling dismissing the application. In his written submissions, learned counsel for the appellant argues that the trial court should have struck out the defence and entered judgment in the favour of the appellant. He contends that the defence raises no triable issues, is a clear admission of liability and is scandalous, frivolous and vexatious and that by admitting the aversions made in the plaint, the respondent acknowledged being indebted to the appellant. As such summary judgment should have been entered in favour of the appellant as stipulated in **Order 13 Rule 2** of the **Civil Procedure Rules**.

12. Counsel also submits that the respondent's set off is misplaced since the allegations made are unrelated to the issues raised in the plaint and are against an independent third party and separate legal entity not privy to the contract between the appellant and the respondent. It is also contended that the mode of dispute resolution in the contract between the respondent and Thomas and Piron Grads Lacs Limited is arbitration which ousts the jurisdiction of the court to hear any dispute between the company and the respondent.

13. Learned counsel for the respondent on the other hand submits that striking out pleadings is a drastic remedy that need not be exercised whimsically and where the defence raises a bona fide issue worthy of trial, it should not be denied the opportunity to be heard. Counsel points out that the appellant did not dispute being involved in the construction which was demolished at great expense to the respondent. He therefore insists that the defence raises genuine triable issues such as whether the appellant, being the director of the negligent building company, should be allowed to benefit from her own wrong doing.

14. At this point it is evident that the sole issue for determination in this appeal is whether the trial court erred in finding that the defence raises triable issues warranting the court's determination by trial.

15. The power to strike out a pleading is a discretionary one. An appellate court will not interfere with the exercise of that discretion unless it is shown that the trial court erred in principle, or that the trial court was plainly wrong. (See ***Co-operative Merchant Bank Ltd. vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999)***

16. The appellant sought to rely on **Order 2 Rule 15 (b), (c)** and **(d) of the Civil Procedure Rules** in support of her application to strike out the defence. That provision of the law was explicated by the Court of Appeal in the case of ***Kivanga Estates Limited v National Bank of Kenya Limited Civil Appeal No. 217 of 2015 [2017] eKLR*** thus;

> *It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction, capable of bringing a suit to an end before it has even been heard on merit, yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations.*
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> *Although the court exercises discretionary powers in striking out pleadings, because of its far reaching consequences,* ***order 2 rule 15*** *of the Civil Procedure Rules, has established clear principles which guide the court in the exercise of that power in the following terms;*
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> ***"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***
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> ***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."*** *(Our emphasis).*

*The language as highlighted demonstrates that, as a drastic measure in litigation, the remedy must be resorted to sparingly. It is only where a pleading cannot be salvaged by an amendment that the court will utilise this procedure, hence the use of the word "may". **Order 2 rule 15** which retains word for word."*

17. The principles applicable to striking out of pleadings were also enunciated in the oft cited case of ***D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another Civil Appeal 37 of 1978 [1980] eKLR*** where Madan JA held;

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, L.J. (supra)). As far as possible, indeed not at all, 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 it right.

If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

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.

18. The appellant's position is that the defence and set off raised by the respondent does not traverse the allegations of fact set out in the plaint is only meant to delay the court process. Undoubtedly, the respondent did admit in its defence and set off that it had received monies from the appellant for the purchase of two apartments as claimed by the appellant. It also admitted that it had not refunded and was not inclined to refund the monies claimed to the appellant but justified its reasons for doing so.

19. According to the respondent, the appellant was involved in the construction of the very apartments she sought to purchase through her company known as Thomas and Piron Grads Lacs Limited. The respondent claims that it had contracted the appellant's company to build the apartments which was mutually terminated afterwards. The respondent claimed that upon terminating the agreement, it emerged that the partially constructed building had significant structural flaws and had to be demolished at great expense. The respondent is therefore adamant that it is entitled to set off the loss it incurred from the monies claimed by the appellant.

20. To the appellant's claim that the defence and set off raised issues against a party that is a stranger to the suit, the respondent averred that it would seek to enjoin the company and the appellant's co- director to the suit. As for the appellant's concern that the issues raised in the defence concerned a separate and distinct legal entity distinct from its members, the respondent answered that the doctrine of corporate personality was not absolute since the court had the power to lift the corporate veil and demand that the directors bear liability for the company.

21. The respondent argues that it has elegantly pleaded a defence of set off arising from the appellant's involvement in the construction of apartments which are serious and weighty issues that can only be determined at full trial and not in a summary manner as proposed by the appellant. I agree.

22. The Court of Appeal dealt with the import of pleading a set off in the case of ***Twiga Chemical Industries Limited v Rotam Agrochemical Co Ltd Civil Appeal No. 16 of 2016 [2019] eKLR*** thus;

In the end, we agree with the finding by the trial court that the appellant was in effect pleading a set-off. However, with respect, we do not accept the conclusion reached, as a matter of law, that the set-off could not amount to a defence, and was hence frivolous and a waste of the court's time. We find no support for such principle. In the case of Kenya Oil Company Ltd vs Kenya Ports Authority [2009] eKLR, Kimaru, J. stated as follows, and we agree:

"It cannot be said that where the plaintiff has established its claim by providing documentary evidence, then the counterclaim and set off by the defendant should be tried separately and judgment be entered for the plaintiff as against the defendant. I think it would be a travesty of justice if the court were to discount a set off raised by the defendant in its defence on the sole ground that the transaction that resulted in the defendant's claim in the set off is a separate cause of action from the set of facts that prompted the plaintiff to file suit against the defendant. The authors of Atkin's Encyclopaedia of Court Forms in Civil Proceedings, 2nd Edition volume I, 1978 Issue, aptly set out the import of a set off in a defence:

"59. Set-off. Where a claim by a defendant to a sum of money (whether of an ascertained amount or not) is relied on as a defence to the whole or part of a claim made by the plaintiff it may be included in the defence and set off against the plaintiff's claim, whether or not it is also added as a counterclaim (h). A set-off is in its nature a defence rather than a cross-claim (j). A right of set-off normally arises where the plaintiff's claim is a debt or liquidated demand and the defendant has cross-claim for a debt or liquidated demand which, if established, will extinguish or reduce the plaintiff's money claim (k), and should be pleaded as such." [Emphasis added]

23. In the present case, the respondent claims that the appellant as well as her co-director and company are heavily indebted to it. Whether or not that is the case is a *bona fide* and triable issue to be dealt with by the trial court. The fact that Thomas and Piron Grads Lacs Limited is not a party to the suit cannot be the basis for striking out the defence as this is a defect curable by amendment. The questions on the

pecuniary and statutory jurisdiction of the trial court are also best dealt with the trial court.

24. In the end, I find that the trial court was right in its conclusion that the defence raised triable issues. Consequently, I find that the appeal is not merited and dismiss it with costs to the respondent.

Dated, signed and **delivered** at **Nairobi** this **27th** day of **February, 2020.**

A. K. NDUNG'U

JUDGE