REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CIVIL APPEAL NO.11 OF 2017

(FORMERLY HCCA.53/2016)

(Appeal Originating from Nyahururu CM's Court

Civ.No.195 of 2015 by: Hon. A.P. Ndege – S.R.M.)

HANNAH WANJIKU MUTURI.....1ST APPELLANT

MARY WANGUI.....2ND APPELL.ANT

V E R S U S

PAMOJA WOMEN DEVELOPMENT PROGRAMME.....DEFENDANT

J U D G M E N T

The appellants **HANNAH WANJIKU MUTURI** and **MARY WANGUI (1st and 2nd appellants)** are aggrieved by the ruling of Hon. Ndege that was delivered on 21/4/2016, striking out their defence in Nyahururu C.C.195/2015. The suit had been filed by the respondent, Pamoja Women Development Programme against the appellant.

The respondent had by a plaint dated 14/10/2015 claimed against the appellants, Kshs.98,133/= being balance of an account in respect of money paid to the appellants for their use at their request during the year 2010.

The appellants filed a defence on 20/11/2015 in which they denied owing the said sum and at paragraph 5, stated without prejudice, that in 2009, the respondent approached the appellants together with others with an intention of constructing green houses in their farms for growing tomato crops and the cost of construction was to be offset from the sale of produce collected by the respondent after sale of the appellants' tomato crop; that the respondent dutifully supplied the respondent with tomatoes for over 2 years whereby all records were kept by the respondent and deductions for the construction of the green houses were made as agreed without fail but that the respondent failed to supply them with statements of account for the sale of tomatoes and the project eventually failed due to the respondent's fault. The appellants sought full particulars of the claim from the respondent including records of tomatoes supplied.

Thereafter on 20/1/2016, the respondent filed a Notice of Motion seeking the striking out of the defence filed by the appellants and that judgment be entered for the claimed sum plus interest and costs as prayed in the plaint.

The application was opposed by way of grounds of opposition filed in court on 16/3/2015.

The court found the defence to be an abuse of the process of court that it may prejudice or embarrass and delay the fair trial of the case. The court struck out that defence and entered judgment for the respondent.

The said order was to apply to similar matters that had been stayed to await the court's ruling i.e. Nyahururu CMCC 196/2015, 199/2015 - 2/4/2015.

It is the court's ruling that has aggrieved the appellant that provoked the filing of this appeal which is based on the following grounds:

> ***1. That the trial magistrate erred in finding that the appellant's defence was meant to prejudice and or delay fair trial and was meant to frustrate the respondent's claim;***

2. That the court erred in finding that the appellants had no issue with the respondent's capacity to sue;

3. That the court erred in finding that the appellant's statement of defence was abusive and meant to delay a fair trial and that the trial would be a waste of time;

4. That the court erred in finding that the appellants were indebted to the respondents and by striking out the defence;

5. That the court erred in entering judgment in favour of the respondent.

I have given due consideration to the issues raised in the appeal and submissions filed by the rival sides. The appellants are represented by Mr. Nderitu while the respondent was represented by Mr. Kihara.

Order 7 Rule 17 Civil Procedure Rule 2010 requires that a plaintiff do file a reply to defence in default, there is joinder of issue as stated in Order 2 Rule 12 Civil Procedure Rules. In this case, the defendant pleaded at paragraph 3 of the defence that the plaintiff is an unknown entity which lacks capacity to sue and that the defendant would raise a Preliminary Objection on that point. In the court's ruling, the magistrate decided that the description given by the respondent as an NGO (Non-Governmental Organization) registered under the Co-ordination Act of 1990 could not be disputed at that stage when the appellants did not dispute the respondent's capacity to loan money.

In my view, now that the issue was raised in the defence, the trial court should have allowed the respondent to demonstrate that indeed they are a registered NGO. It is possible that the appellants may have discovered the anomaly after dealing with the respondent.

I echo the decision of J. Gacheche in ***Unga Millers v James Munene Kamau (2005) e KLR*** where the judge said:

"But that was not all for as aforementioned, there was no reply to the appellant's claim that the respondent acted negligently and he was thus to blame.

It is trite law that he who has not filed a reply to such a defence is deemed to have admitted the said allegations."

The respondent having failed to file a reply to the allegation that the respondent had no capacity to file this suit, is deemed to have admitted that fact. That also applies to the allegations regarding the claim that the appellants supplied tomatoes to the respondent in repayment of the loan.

As to whether the defence was meant to prejudice and delay the fair trial and elusive;

The courts have repeatedly held that the court should be slow to strike out a pleading unless the pleading is so hopelessly untenable. In ***Saudi Arabia Airlines Corporation v Premium Petroleum Co. Ltd Nairobi HCC.79/2013***, the court said:

"I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the court in determining whether to strike out a pleading. Except, I can state comfortably that these principles now draw not only from judicial precedent, but from the principles of justice enshrined in the Constitution especially Articles 47, 50 and 159. The first guiding principle is that, every court of law should pay homage to its core duty of serving substantive justice in any judicial proceedings before it, which explains the reasoning by Madam J.A. in the famous DT Dobie case that the court should aim at sustaining rather than terminating a suit. That position applies mutatis mutandis to a statement of defence and counter claim.

Secondly and directly related to the foregoing Constitutional principles and policy, courts should recognize the act of striking out a pleading (plaint or defence) completely directs a party of a hearing, thus, driving such party away from the judgment seat, which is a draconian act comparable only to the proverbial drawing of the "sword of damocles". Therefore, the power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is 'demurar' or something worse than a 'demurer' beyond redemption and not curable by even an amendment.

Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that is a sham; it raises no bona fide triable issues worth a trial by the court."

In ***DT Dobie & Co. Ltd v Muchina (1982) KLR I Madam J.A.*** said:

"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 the case before it."

The respondent's counsel relied on the decision in ***HCC.110/2012 Margaret Njeru Mbugua v Kiriuki Mwenje Nyaga*** where the Court of Appeal held:

"Applying all the principles stated in the above quoted cases to this case, we are of the view that the trial court was right in striking out the defence. The plaint contained details of the transaction that took place, however, the respondent rather than giving a fair and substantial answer gave a general denial of the facts. In the replying affidavit sworn by the respondent he more

or less admitted having received the money yet demands proof. In the circumstances there was no reasonable defence preferred and the striking out of the defence was proper in the absence of the defence the logical consequences was the entering of judgment in favour of the appellant."

In the present case, it is not true that the claim in the plaint was very clear. Paragraph 4 of the plaint containing the claim reads ***"The plaintiff's claim against the defendant is for Kshs.98,133/= (Ninety Eight thousand, one hundred and thirty three shillings only) being the balance of an account now due and owing by the defendant at the request and instance during the year 2009 full particulars are within the knowledge of the defendant."***

The above is not clear at all as to how the claim arose. It is vague. The case of ***Margaret Njeri Mbugua*** is not similar to the present for being vague and that alone should have led to the rejection of the invitation to strike out the defence.

Paragraph 3 – 8 of the defence gives a detailed account of the relationship that the respondent had with the appellant. The same is captured in the reply to the demand letter written before this suit was filed dated 28/8/2015 (SKM.3). The same account of the events flows in the appellants' statement filed in court on 14/4/2016. I have no doubt in my mind that the defence raised triable issues. The trial court should not have only looked at the exhibited contract when no reply to the defence had been filed. The appellants should have been allowed their day in court to present their case and be subjected to cross examination to enable the court consider both versions of the alleged contract.

I find that the trial court erred in finding that the defence was elusive and meant to delay a fair trial or that the appellants owed the sums claimed.

The respondent urged that the appellants failed to comply with the court's order on the application dated 13/6/2016 whereby the appellants were directed to deposit ½ the decretal sum within 14 days or the stay would lapse. If the appellants did not make the deposit, it meant that the stay lapsed after 14 days and the respondent had the right to proceed and execute if it so wished. If the respondent did not proceed to execute they missed that opportunity.

In the end, I find that the appeal is merited and is hereby allowed.

Consequently, I make the following orders;

(1) The ruling delivered on 21/4/2016 is hereby set aside together with all consequential orders;

(2) The defence statements filed in Nyahururu CMCC.196/2015, 199/2015, 200/2015, – 214/2015 be and are hereby reinstated;

(3) The respondents will bear the costs of this appeal;

(4) The lower court file will be remitted back to the lower court for hearing and determination of the suits.

Dated, Signed and Delivered at NYAHURURU this 29th day of March, 2019.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Wangeci holding brief for Mr. Waichungo for appellants

Kihara Ndiba - absent

Soi - Court Assistant