REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 4 OF 2019

KEFAH NYABWOGI MINYONG'A.....PPELLANT

-VRS-

PETER ORINA CHRIS.....RESPONDENT

{Being an Appeal against the Ruling of Hon. S. K. Arome – SRM Keroka dated and delivered on the 12th day of February, 2019 in the original Keroka Principal Magistrate's Court Civil Suit No. 308 of 2016}

JUDGEMENT

By a judgement of the lower court in Keroka Principal Magistrate's Court Civil Case No. 52 of 2011 the appellant was ordered to pay the respondent a sum of Kshs. 450,000/= which together with accrued interest and costs culminated in a sum of Kshs. 854,250/=. The appellant purported to issue a cheque for Kshs. 450,000/= in full settlement which the respondent rejected and when no payment was forthcoming the respondent instituted execution proceedings by taking out a notice to show cause. The appellant did not respond and so the respondent obtained a warrant of arrest to commit the appellant to civil jail for the decretal sum then standing at Kshs. 855,800/=. According to the appellant he had not been served with the notice to show cause and being of the view that the warrants of arrest were fraudulently obtained he filed a suit in the lower court against the respondent for general damages for wrongful arrest and unlawful detention as well as the costs of that suit.

On 26th March 2018 the respondent filed a Notice of Motion seeking orders to strike out the appellant's suit for not disclosing a cause of action and for being frivolous, vexatious and scandalous. That application was vehemently opposed by the appellant who argued inter-alia that it was frivolous, incompetent and utterly misconceived and that the same had not disclosed the details of a consent order entered between the parties on 31st July 2014 and its effect to the judgement; whether or not that consent order was complied with and further whether indeed the court had issued warrants of arrest after the notice to show cause.

The application afore-stated was canvassed by way of written submissions and by a ruling delivered on 12th February 2019 the trial Magistrate allowed the application with costs of Kshs. 50,000/= to the respondent. The trial Magistrate ruled that the suit did not disclose a cause of action. Being aggrieved by that ruling the appellant filed this appeal. The appeal is premised on grounds that: -

> **"1. The learned trial magistrate's erred in law and infact in not holding that the appellant's case disclosed tangible triable issues.**
>
> **2. The learned trial magistrate erred in law and misdirected himself fundamentally in denying the Appellant a hearing on merit.**
>
> **3. The learned Magistrate failed to administer substantive justice."**

The appeal which is vehemently opposed was canvassed through written submissions which I need not reproduce here. Suffice it to say that I have carefully considered those submissions and the record of the lower court so as to arrive at my own independent conclusion.

The principles that guide a court in determining whether to strike a suit are well settled. The power is a discretionary one exercisable sparingly and only in plain cases. In **Co-operative Merchant Bank Ltd v George Fredrick Wekesa Civil Appeal No. 54 of 1999** the Court of Appeal stated: -

> ***"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……..

A court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment…….”

Again in **Crescent Construction Co. Ltd v Delplus Bank Ltd [2007] eKLR** the same court stated: -

“…… 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 drag a person to the seat of justice when the case purportedly brought against him is a non starter.”

As enunciated in the cases above, my jurisdiction as an appellate court is limited as I can interfere with the trial Magistrate's exercise of judicial discretion only if I am satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or that it is manifestly clear from the case as a whole that the lower court was clearly wrong in the exercise of its discretion as a result of which there was a miscarriage of justice.

In this case the appellant sued the respondent for taking out a notice to show cause and warrants of arrest against him an act he averred was actuated by malice for reasons that the warrants were issued on the basis of the notice to show cause which was not served either on himself or his Advocate; causing his arrest while knowing the hearing date had not been communicated to him; failing to disclose that they had entered into a consent on 31st July 2014, causing his arrest while knowing that he had rejected the decretal sum and giving false information to court. The trial Magistrate gave the reason for striking out the case as: -

“non-service of warrants of arrest cannot be a cause of action based on a lawful exercise of the right of execution. It is just a procedural technicality curable under article 259 of the constitution of Kenya 2010…….”

I do agree with the Learned trial Magistrate that the appellant's suit against the respondent was a non-starter. Firstly, the respondent was merely exercising his right of execution having obtained judgement against the appellant. The consent order alluded to by the appellant was not one of the documents the appellant had annexed to his plaint and it is instructive that it was also not annexed to the record of appeal herein. Its purport is therefore not clear. What is clear however is that the appellant was indebted to the respondent as per the decree and the respondent was therefore entitled to execute. Secondly the notice to show cause and the warrants of arrest were issued by the court a fact that was admitted by Counsel for the appellant at paragraph 2.6 of his submissions in that application. They were not therefore fraudulent. Thirdly and more importantly the appellant was never committed to civil jail because when he was taken before a Magistrate he raised the argument that the notice to show cause had not served upon him and he was released on his own recognisance of Kshs. 20,000/= pending arguments before the trial court.

At the court appearance his Advocate queried how the date of 18th December 2014 for the notice to show cause had been taken. It is clear from the notice to show cause that the said date had been given by the court hence no malice was disclosed. My view of the appellant's case is that it was intended to delay the execution proceedings and to ultimately deny the respondent of the fruits of his judgement. In **Jevaj Sharrif & Co. v Chotail Pharmacy Stores [1960] EA 374** the court held as follows in regard to this issue: -

“The question whether a plaint discloses a cause of action must be determined upon a perusal of the plaint alone, together with anything attached so as to form part of it, and upon the assumption that any express or implied allegations of fact in it are true.”

The plaint herein did not disclose a reasonable cause of action and the trial Magistrate did not err in so finding. This appeal has no merit and it is dismissed with costs to the respondent. It is so ordered.

Signed, dated and delivered in Nyamira this 28th day of November 2019.

E. N. MAINA

JUDGE