



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
(COMMERCIAL AND ADMIRALTY DIVISION)
CIVIL APPEAL NO. 392 OF 2015

BETWEEN

MUSA IBRAHIM KIMERIA..... APPELLANT

AND

JACOB JUMA..... RESPONDENT

(Being an appeal from the Ruling and Decree of Hon. C. Obulutsa , SPM at the Chief Magistrates Court at Nairobi in Civil Case No. 4600 of 2014 dated 30 April 2015)

JUDGMENT

Introduction

1. This is an appeal from the decree given by the Senior Principal Magistrate on 30 April 2015 in which he exercised his discretion on a motion by the respondent made under Order 2 Rule 15 of the Civil Procedure Rules. The learned magistrate struck out the appellant's statement of defence. The learned magistrate also entered judgment in favour of the respondent for the liquidated principal sum of Kshs. 5,000,000= together with interest and costs.

2. The appellant through this appeal renews his fight to have the claim in the court below go to a full trial. The appellant faults the learned magistrate in the exercise of discretion and states that the decision was not supported by any fact or law.

3. I heard the appeal on 17 January 2018 and at the end of the hearing, I was convinced that the appeal lacked merit. I announced that the appeal was dismissed with costs. These are now my reasons for dismissing the appeal.

Background

4. This is uncontroversial.

5. The appellant imported into the country a luxury motor vehicle. It was a Range Rover vogue. Its chassis number was SALLMAM 336A. In 2009 he agreed to sell the motor vehicle to the respondent. The agreed purchase price was US\$ 62,500=. The respondent dutifully paid the purchase price and was handed over possession of the motor vehicle.

6. The entire transaction had been reduced into writing and the parties had executed the agreement on 3

July 2009. Under the agreement, the appellant was obligated to hand over the importation documents to the respondent. The respondent in turn was to pay the relevant customs excise and other taxes payable to the local revenue authorities. This was ultimately to enable the respondent register the motor vehicle in his name. As it were, this never happened.

7. The local revenue authorities, some five or so years later, impounded the motor vehicle for non-payment of the requisite duty and want of the importation documents. The seizure prompted the respondent to move to court and seek a refund of the purchase price whilst urging the appellant to collect his motor vehicle.

The claim and decision below

8. It was never in dispute that the respondent was obligated to pay the import duty and, likewise, that to do so he required the importation documents. In his statement of claim before the court below, the respondent stated how, over the years, he had been asking the appellant to avail the importation documents to no avail. In consequence, the respondent claimed failed consideration and sought a refund of the purchase price.

9. In his defence, the appellant did not contest having received the amount of Kshs. 5,000,000= equivalent in United States dollars as consideration for the motor vehicle. The appellant did not also contest any of the terms or conditions in the written agreement. The appellant however accused the respondent of breach of contract by failing to pay the requisite duty and taxes.

10. Having considered the submissions made by the parties and having also considered the pleadings before him, the learned magistrate struck out the defence statement. The learned magistrate found that the defence was scandalous, frivolous and an abuse of the process as the appellant had failed to honour his part of the bargain.

11. To arrive at that decision, the learned magistrate took into account the common cause facts.

12. The learned magistrate took into account the fact that the amount equivalent to Kshs 5,000,000/= had been paid to the appellant as consideration for the motor vehicle and further that respondent was obligated to pay duty. The learned magistrate also took into account the fact that the appellant was obligated to avail the importation documents for the motor vehicle to the respondent. The learned magistrate further looked at and considered the statement of defence alongside the documents filed by the parties in support of their respective cases.

13. In the end, the learned magistrate was satisfied that there was no plausible or tenable defence raised by the appellant worthy of moving to trial.

The Appeal

14. The nine grounds of appeal may be collapsed into two main grounds.

15. First, that the learned magistrate incorrectly exercised his discretion when he struck out the appellant's statement of defence. Secondly, that the learned magistrate erred in entering judgment for the respondent without directing that the amount claimed be formally proven.

Arguments

16. Mr. Ochieng urged the appellant's case and submitted that the learned magistrate erred in principle when he struck out the statement of defence yet the defence raised was a tenable one with triable issues. Counsel pointed to the fact that the respondent had been in possession of the car for five years.

17. Counsel added that the respondent was also in breach of the agreement between the parties as he had failed to pay the assessed import taxes and duty.

18. In a brief response, Ms. Namoli for the respondent submitted that the learned magistrate had not erred either in law or principle.

19. Ms. Namoli asserted the fact that the appellant had never denied receipt of the purchase price and also the fact that he had never supplied the transfer or title documents to the respondent. As to the amount claimed, counsel stated that once the defence was struck out there was no need for the respondent to formally prove the liquidated sum that had been pleaded and prayed for.

Discussion and determination

20. The question in this appeal would thus be whether the learned magistrate properly exercised his discretion and was thus right in allowing the application for striking out of the statement of defence. There is also the corollary issue as to whether the learned magistrate could immediately enter judgment after striking out the defence. The answer to both questions is to be found in the applicable principles in relation to applications for striking out pleadings under Order 2 Rule 15 of the Civil Procedure Rules.

21. This is a first appeal and I am entitled to revisit not only questions of law addressed by the learned magistrate but also review any questions of fact. I am entitled to draw my own conclusions and inferences to such questions.

22. The principles which guide the striking out of pleadings under Order 2 Rule 15 of the Civil Procedure Rules are relatively clear.

23. Applications for striking out must be brought to court with relative expedition once the pleading sought to be struck out is served. The court too must be cautious as it considers such an application since striking out is a “drastic measure” which leads to a party being locked out of the corridors of justice: see **D.T. Dobie & Company (Kenya) Ltd v Muchina [1982] 1 KLR 1**.

24. The court whilst proceeding with caution then considers whether there has been filed before it a statement of defence which is realistic as opposed to a merely fanciful one. In short, a statement of defence needs to carry some degree of conviction to be realistic, it must not be a mere denial: see **Magunga General Stores v Pepco Distributors Ltd [1986] EA 334** and also **Raghubir Singh Chatte v National Bank of Kenya Ltd [1996]**. In my judgment, a guarded and evasive defence is no good. Where liability is denied there ought to be a fairly substantive answer and reason given for that denial.

25. Further, the court is not to conduct a mini trial but the defence is also not to be taken on its face value. If it be a sham and not realistic then it must be struck out. This is more so where there are contemporaneous documents which may out-rightly contradict the factual assertions of the parties.

26. Order 3 Rule 7 as well as Order 7 Rule 5 of the Civil Procedure Rules enjoins parties to file witness statements and possible trial documents alongside their pleadings to support the various factual assertions. In considering an application under Order 2 Rule 15 (striking out of pleadings), the court since 2010 has the benefit of literally the entire case as laid by a claimant and the response to by the defendant. Even without embarking on some sort of mini trial, the court may certainly not ignore documents filed before the court which may point to the factual pleadings being a mere sham.

27. The above is the law. I do not propose to add to the jurisprudence. The principles show that in a plain case, there is no need to keep either party waiting. If the defence is a sham, bare and unrealistic it ought to be struck out. This is the law which the court below was to apply and also equally my duty to apply.

28. Coming back to the instant case, a number of factors which potentially told against the exercise of discretion in the appellant's favour were correctly identified by the court below. There was a pointer that the defence statement was a mere sham and had not been raised in good faith. Besides the common cause facts already alluded to in some of the preceding paragraphs, the uncontested documentary evidence revealed that the appellant never supplied the respondent with the importation documents despite consistent prodding and reminders. One of the telling paragraphs in the ruling by the learned magistrate

read as follows:

“ The defence as filed has been considered and is inconsistent. In paragraph 5 the defendant states the plaintiff failed to pay duty. It was not proper for him to do so when the defendant has never provided the import documents that would facilitate registration. The defendant has not explained why he has never surrendered the import documents.”

29. The appellant never denied this assertion. For so long as the vehicle remained unregistered in the respondent's name both parties were still bound by the contract. The appellant needed to avail the importation documents to satisfy his side of the bargain.

30. It is plain from the ruling that the learned magistrate was not impressed with the defence and arguments advanced. In my view, he had good reason to. The learned magistrate's reasoning displayed no error of law, principle or approach. He was entitled, at the end of the day, to conclude as he did and for the reasons he gave as to striking out of the statement of defence.

31. It brings me to the second issue on this appeal. Should the magistrate have ordered the respondent to prove his entitlement to the claimed Kshs. 5,000,000=? Mr. Ochieng thought and argued that the learned magistrate was duty bound to direct a formal proof. Ms Namoli thought otherwise. Who is right?

32. Again, I make reference to Order 2 Rule 15. The rule reads as follows:

“15 Striking out pleadings.

(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; 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 sub rule (1)(a) but the application shall state concisely the grounds on which it is made.

***(3) So far as applicable this rule shall apply to an originating summons and a petition.
[emphasis is mine]***

33. It is clear that Order 2 Rule 15(1) of the Civil Procedure Rules empowers the court to enter judgment or stay the proceedings or dismiss the claim depending on the facts and circumstances of the case. The discretion is with the court. The learned magistrate entered judgment and he was right as there was no defence to the liquidated claim.

34. In my judgment, the words (of Rule 15) emphasized by me above are determinative. I need not say more. Had the appellant raised a set-off claim, then in my view the defence would not have been struck off to the extent of the claim by the appellant. There was however no set off set up or counterclaim pleaded.

Conclusion and disposal

35. The grounds of appeal are not merited. There is no record that the appellant even offered to amend his statement of defence. He did not do so before me again. In the result, the appeal fails and I reaffirm the decision of the court below.

36. The appeal is dismissed with costs to the respondent.

Signed, delivered and dated at NAIROBI this 22nd day of January 2018.

J.L.ONGUTO

JUDGE