



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 281 of 2012

CHRISTOPHER RAWAYO OKELLO.....APPELLANT

VERSUS

MOLYN CREDIT LIMITED.....RESPONDENT

J U D G M E N T

The appeal arises from the ruling delivered on 11th May, 2012 by Honourable T.W.C Wamae, Chief Magistrate in which the Defendant's statement of defense was struck out following an application dated 12th October 2011. The Appellant being aggrieved by the said decision appealed in this court on the following grounds:

1. That the honorable magistrate erred in law and in fact in striking out the defense of the Appellant while there were 3rd party proceedings in place when the case of the Appellant relied almost entirely on the role of 3rd party.
2. That the honorable magistrate erred in law in striking out the defense of the Appellant against the provisions of the law as to 3rd party proceedings and the government proceedings Act especially in closing out the evidence of the 3rd party.
3. That the honorable magistrate in arriving at her decision locked out the Appellant and 3rd party and did not apply the overriding objectives of the law which are meant to ensure justice is done.
4. That the learned magistrate erred in law in failing to see that there were triable issues raised by the Appellant in his defence and supporting documents which issues should have gone to trial.
5. That the honourable magistrate erred in law and in fact by failing to balance the prejudice occasioned to the Appellant against any that would have been occasioned to the Respondent by waiting for full trial of the case.
6. That the honourable magistrate erred in law and fact in disregarding the evidence of the Appellant for want of replying affidavit whereas the Appellant had filed grounds of opposition, list of documents and written statements all setting out the facts that the Appellant's defense had triable issues to be canvassed at trial.
7. That the honorable magistrate misdirected her mind in her ruling and judgment by failing to address the relevance or otherwise of the Defendant's primary document, a memorandum of

understanding made between the Respondent Appellant and the 3rd party.

8. That the decree being appealed against manifests a significant error apparent on the face of it and such is inconsistent with the judgment that it seeks to decree.

9. That the learned magistrate erred in fact and law by entering judgments summarily against the Appellant and as such did not hear the evidence of the Appellant and the 3rd party who had identical view.

10. That the judgment of the honourable magistrate is unbalanced and reeks of justice denied.

In written submissions the Appellant submitted that the whole process leading to the judgment was unfair. The Appellant stated that it is not conceivable how a court can strike out a defense for want of evidence where a Defendant has filed his list of documents and written statements challenging the Plaintiff's position and also seeking indemnity through 3rd party proceedings.

The Appellant submitted that the Plaintiff was suing for money allegedly accruing from some agreement with the Defendant. The Defendant filed his defence, written statement and made an application to have his employer enjoined as a 3rd party to that suit, which application was allowed. The Appellant submitted that the most important document was the memorandum of understanding or the loan agreement found at page 49 of the record which was signed by both parties. The Appellant has also filed copies of his pay slip showing deductions towards the loan advanced to him. That full payment had been effected and nothing remained to be paid. This was the Appellant's evidence which he submitted, was ignored by the trial court. That the Appellant had also applied for Kshs.100,000/= school fees loan but the Plaintiff approved Kshs.99,000/=, of which the Appellant collected a Cheque of Kshs.94,050/= after the recovery of administrative and bank charges. The recoveries schedule of NSIS of Kshs.198,000/= was recovered at Kshs.8,256/= per month for a period of 24 months from his salary beginning November 2008. That the said recoveries were done by the salary section of the Appellant employer with the last installment of Kshs.12,128 being affected on his September 2010 payroll which reflected a nil balance on his loan.

The Respondent on the other hand, submitted that the learned magistrate acted properly and said judgment was sound and considered all the issues addressed by parties herein. The Respondent also stated that parties are bound by the terms and conditions of their relevant contract. That the applicant was granted a loan in his personal capacity and that the agreement contract pertaining to this matter was between the applicant and the Respondent herein and it was not subject to a third party. The Respondent averred that the Appellant did not remit any payments towards the loan.

The Respondent submitted that the defense is plainly a denial and does not raise any triable issue. The Respondent cited the case of **Nairobi Golf Hotels (Kenya) Limited Vs Lalji Bhimji Sanghani Builders and Contractors (1997) eKLR** where the court dismissed the Appellant's appeal for failing to raise any triable issue.

The Respondent also submitted that the Appellant did not plead any issue of accounts in his defense; he attempted to raise the issue at appellate stage although he did not do so in the lower court. The Respondent finally submitted that the appeal did not raise any substantial grounds to warrant interference from this court.

I have carefully perused the record including the lower court pleadings and the ruling. I have also perused the grounds of appeal all of which carefully I have considered.

The Appellant is challenging the ruling in which the lower court allowed an application for striking out of the defense and entering summary judgment. The power to strike out pleadings, and in the process deprive a party of the opportunity to present his case, has been held over the years to be a draconian measure which ought to be employed only as a last resort and even then only in the clearest of cases. The power should only be exercised after the court has considered all facts but not the merit of the case. See

DT Dobie & Company (Kenya) Ltd VS Muchina (Supra). The power is also discretionary which should be exercised with a lot of caution. The Court of Appeal in **Crescent Construction Co. Ltd Vs Delphis Bank Ltd Civil Appeal 146 of 2001 [2007] eKLR** observed that:

“However, 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 drug a person to the seat of justice when the case purportedly brought against him is a non-starter.”

The Plaintiff’s application is premised on **Order 2 Rule 15 of the Civil Procedure Rules, 2010** which provides:-

“(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.

b. Its scandalous, frivolous or vexatious; or

c. It may prejudice, embarrass or delay the fair trial of the action; or

d. It’s otherwise an abuse of the Court process and may order the suit be stayed or dismissed or judgment to be entered accordingly as the case may be.”

The court power to strike out pleadings is on the basis that discloses no reasonable cause of action or defense in law, is scandalous, frivolous or vexatious or It may prejudice, embarrass or delay the fair trial of the action or that it is otherwise an abuse of the Court process it. Under the aforementioned provision, the Court has the discretion to either dismiss, stay or enter judgment as it may deem fit for the ends of justice.

In the instant case the defense was struck out on the ground that the Defendant, now the Appellant, did not file a replying affidavit and to that extent all facts in the supporting affidavit have not been explained. The Appellant filed ground of opposition dated 24th October 2011 stating that the application was premature since it was in the process of instituting 3rd party proceedings. The Appellant also opposed the application stating that it was not justified since the application was filed on the very day pleadings close. In my view under **Order 51 Rule 14 of the Civil Procedure Rules** a party challenging an application can either choose to file a Notice of Preliminary Objection, statement of grounds of opposition or a replying affidavit. Failure to file a replying affidavit in my view does not amount to admission of the facts and a ground for striking out the defence. An admission would arise where no substantive answer is given to the claim. In the Court of Appeal in the **Raghib Singh Chatte Vs National Bank of Kenya Limited (1996) eKLR**, Akiwumi JA, quoted with approval the words of Jessel M.R in the case of **Thorn Vs Holdsworth (1876)3 Ch.637** at 640 That:

“When a party in any pleading denied an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum, or any part thereof, or else set out how much he received. And so, when a matter of fact is alleged with divers’ circumstances, it shall not be sufficient to deny it as alleged along those circumstances, but fair and substantial answer must be given.”

In this case the Appellant made denials about the Respondent claim. Under paragraph 7 of the defense the Appellant sought to enjoin its employer as a third party to probably come and explain why he does not owe the Respondent the said amount of money. In the ground of opposition the Appellant also stated that

it was in the process of enjoining a 3rd party to the proceeding. In my view the averments are fair and substantial to warrant the defense to go for full trial.

The general principle is that if the Defense shows *bona fide* triable issue, the Defendant should be allowed to defend. The substance of the Appellant Defense in the instant case has already been discussed does raise *bona fide* triable issue and the magistrate erred in striking out the defense.

This court hereby reinstates the said defence and the lower court should give directions as to how to proceed with other relevant processes towards the trial of the suit. Costs in the cause.

Dated and delivered at Nairobi this 23rd day of July 2015.

.....

D A ONYANCHA

JUDGE