REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 81 OF 2007

RICHARD MILANDO t/a ROSEMI ENTERPRISES ……..…….…….APPELLANT

VERSUS

DIPTI ENTERPRISES ……....…….RESPONDENT

JUDGMENT

The respondent herein moved to the lower court and filed Winam RMCC number 492 of 2004 seeking recovery of Kshs. 57,850/= costs and interest from the defendant who is the current appellant being money owing and outstanding from the defendant to the plaintiff for petroleum goods supplied worth that amount.

The appellant / defendant was served and he entered appearance and filed a defence dated 3rd day of August 2004, and filed on the 4th day of August 2004. Paragraphs 3, 4 and 5 which are relevant to this appeal read as follows:-

"PW 3 the defendant admits having received diverse quantities of petroleum products from the plaintiff but categorically denies leaving unpaid balance of Kshs. 57,850 as alleged under paragraph 4 of the plaint.

Paragraph 4 the defendant denies in entirety the contents of paragraph 5 and 7 of the plaint and by way of defence avers that plaintiff laces a cause of action as the defendant had paid fully or the petroleum actually received.

Paragraph 5. Further by way of defence, the defendant avers and puts the plaintiff on notice that he shall apply for taking of accounts before the hearing of the suit. The suit is premature and ought to be struck out".

On the 16th September 2004, the plaintiff presented an application dated 16th day of September 2004, under order 21 Rule 13 (1) (b) (c) and (d) of the Civil Procedure Rules and Section 63 (e) of the Civil Procedure Act seeking the following reliefs:-

(i) The honourable court be pleased to strike out the defendant's statements of defence filed in court on the 4th day of August 2004.

(ii) Consequent to striking out the defendants defence, judgment be entered in favour of the plaintiff / applicant in terms of the plaint.

(iii) The costs of this application and of the main suit be borne by the defendant / respondent.

The application was opposed and parties were heard inter partes giving rise to a ruling delivered by the lower court on 12th July 2005. This court has had occasion to peruse the ruling found on page 19 – 21 of the record. At page 20 line 6 from the bottom the learned trial magistrate drew inspiration from the case of **Manginga General Stores =vs= Pepco Distributors Ltd Civil Appeal No. 24 of 1980,** where the Court of Appeal had held "that denial is not a sufficient defence and that the defendant has to show either by affidavit, oral evidence or otherwise that there is a good defence". Then at line 2 from the bottom on the same page 20 the learned trial magistrate went on:-

"In this case the defendant / respondent has failed to show that they have a good defence with triable issues. The defence on record is a mere denial and is only intended to delay justice. In this case from the submissions by both counsels and the pleadings herein stand that the defendant is indebted to the plaintiff in the such claimed. I therefore find that the application dated 16th September 2004 has merit and strike out the statement of defence filed on 4/8/2004".

The appellant became aggrieved and he has appealed to this court citing five grounds of appeal namely:-

(i) The learned magistrate gravely erred in law and in fact by holding that the appellants' defence dated 3rd August 2004 and filed in court on 4th day of August 2004 raises no triable issues.

(ii) The learned magistrate misdirected himself in law and in fact and indeed gravely erred in law by failing to apply his mind to the law and the established principles when exercising the draconian powers of striking out the defence.

(iii) The learned magistrate gravely erred in law and in fact by accepting wholesome and attaching undue weight to the Respondents weak piece of evidence

(iv) The learned magistrate erred in law and in fact by denying the appellant the opportunity to subject the respondents evidence to the test of cross – examination

(v) The learned magistrate gravely erred in law and in fact by wholly discarding the appellants documents and depositions when the same clearly controverted and exposed the disparities in the appellant claims"

On the date fixed for hearing, only counsel for the appellant appeared. There was a return of service filed evidencing service of the hearing notice on to the Respondents' counsel and since there was no explanation for the respondents' counsels non attendance the court allowed the appellants counsel to proceed exparte.

In his oral submissions the learned counsel argued all the ground as one and then stressed the following:-

- **Contends that the defence should not have been struck out as the appellant had avered that he had fully paid.**
- **The appellant had also raised the issue of accounts to be taken.**
- **The court ignored that the numerous documents exhibited needed scrutiny and for this reason it could not be said that the plaintiffs' case was clear and obvious.**
- **Also contends that the defendant was a non legal entity which could not be sued. As such the proceedings were a nullity.**

The appellant had cited for guidance of the court the case of **DT Dobie & Company (K) Ltd =vs= Muchina [1982] KLR 1** where the court of appeal held inter alia that:-

(i) The words "reasonable cause of action in Order VI Rule 13 (1) means an action with some chance of success when the allegations in the plaint only are considered. A course of action will not

be considered reasonable if it does not state such facts as to support the claims prayed.

(ii) The words "Cause of action" means an act on the part of the defendant which gives the plaintiff his cause of complaint

(8) The power to strike out should be exercised only after the court has considered all facts, but the court must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinion should be expressed as such would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.

(9) The court should aim at sustaining rather than terminating of a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, court should not be struck out"

The case of **Vinodeep Investment Property Ltd =vs= Henkel Ploymer Co Ltd, Ruth N. Henkel and Caroline V. Henkel** a ruling delivered by Ojwang J, on the 13th day of February 2004 when refusing to strike out the defendants defence, at page 13 line 1 from the top, the learned judge made the following observations:-

" The statement of defence is a long document of 20 paragraphs, each addressing the specific assertion in the plaint. The statements of defence questions cardinal aspects and premises of the plaint – such as the plaintiffs' locus standi (Paragraph 4) the implied terms of the contract (paragraph 18) the financial responsibility for improvements to the suit premises (paragraph 7) the date of the handing over of the suit premises (pry) the date of the handing over of the suit premises from the lessee to the lessor (paragraph 11), the question whether set off might be effected against rents falling due on account of alleged defects in the suit premises".

The complexity of some of these questions is more than evident from the letters and documents pertaining to the lease of the suit premises attached to the supporting affidavit accompanying the notice of motion application.

Lastly, the case of **Maurice Ooko Otieno =vs= Mater Misericcor Diae Hospital** decided by Ang'awa J on the 12th day of February 2004, in which the learned Judge at page 5 line 7 from the bottom had this to say:-

"The law requires that a suit be brought against a legal entity. This is an individual, a limited liability company, the Attorney General on behalf of government departments certain parastatals, and or corporations. Matter miseviccordiae hospital has not been described as a limited liability company. It therefore has no legal capacity to be sued"

This court has given due consideration to the exparte submissions of the appellants' counsel, and considered the same in line with this courts appellate mandate donated by Section 78 of the Civil Procedure Act, principles of case law cited both from the courts of concurrent jurisdiction and the court of appeal as well as the reasoning of the learned trial magistrate in the ruling which led to this appeal and in its opinion the following are findings on the appeal:-

(i) A reading of both pleadings namely the plaint and the defence reveals that indeed there were business transactions between both parties whereby some payments exchanged hands from the appellant / defendant to the plaintiff / respondent in respect of the said transactions which appear to have taken a period of time evidenced by the existence of numerous documents between them. Parties have landed in court because the respondent / plaintiff argues that he has not been fully paid whereas the appellant / defendant argues that the he has fully paid.

(ii) It is evident that parties were not heard on merit as the respondent / plaintiff moved to

forestall the proceedings by seeking to strike out the defence which move was successful

(iii) It is the success of the striking out order plea in favour of the respondent which led to this appeal.

(iv) The reason for striking out of the defence is because the defence disclosed no triable issue and that it was a mere denial

(v) The appellant became aggrieved because he argues that the defence is not a mere denial because it raises a triable issue of full payment and issue of taking of accounts. The appellants' counsel further raised the issue of nullity of proceedings though not argued before the lower court.

(vi) It is not disputed that the learned trial magistrate made observations that deponements and arguments of both sides reveal that money was owned.

(vii) There is no doubt that case law cited demonstrate that the law with regard to striking out of a pleading is now very clear.

A pleading which is a clear candidate for striking out is one which is weak, hopeless and cannot be cured by any amendment when the above findings are applied to the conclusions reached by the learned trial magistrate, this court makes a finding that those conclusions cannot stand because of the following reasons:-

(i) The appellants averment that he has fully paid and that they will take accounts is a triable issue. This is so because accounts are usually the best way of resolving disputes relating to exchange of money between transacting parties.

(ii) As observed here in, the learned trial magistrate opined that deponemnets and submissions of both sides showed that the respondent / plaintiff was owed money by the appellant but did not specify what it was that went to demonstrate that money was indeed owed.

(iii) There is also issue raised about the legal status of the appellant. An issue not addressed by the lower court and since the respondents' counsel did not have an opportunity to address the court on the same, it is unsafe to have it count as one of the reasons for allowing the appeal. The appellant will not be denied his remedy on this as it can be raised as a preliminary point once the matter is reopened for them to be heard.

For the reasons given in the assessment, the court is satisfied that the appeal has merit. The appellant should have been allowed to be heard so as to prove full payment and the issue of accounts. The appeal is allowed in its entirety.

(1) The orders of the learned trial magistrate of 12th July 2005 striking out the defence are set aside and or quashed.
(2) The defence is restored.
(3) The appellant will have costs of both the appeal and the lower court.
(4) The appellant is at liberty to pursue the issue of nullity of the proceeding once the lower court proceedings are reopened.
(5) Parties are at liberty to regularize the lower court proceedings and then proceed according to law.

Dated, signed and delivered at Kisumu this 8th day of July 2011.

R. N. NAMBUYE
JUDGE