National Social Security Fund Board of Trustees v Protection Custody Limited (Civil Appeal E311 of 2021) [2024] KEHC 2549 (KLR) (Civ) (12 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2549 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E311 OF 2021

JN NJAGI, J

MARCH 12, 2024

BETWEEN

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES .. APPELLANT

AND

PROTECTION CUSTODY LIMITED ..... RESPONDENT

(Being an appeal from the Order of Hon. LL. Gicheha CM delivered on 14{{^th}} June 2019 in Milimani CMCC No. 7409 of 2018)

JUDGMENT

1. The Respondent herein sued the Appellant seeking a sum of Ksh. 10,114,998/= being the outstanding payment for services rendered to the Appellant by the Respondent on a contract of provision of security services between the years 2010 to 2018. The Respondent claimed a further sum of Ksh. 360,000/= being the amount incurred as debt collection fees thereby making a total claim of Ksh10,475,256/=. The Respondent further claimed interest on the amount owing at compound interest rate of 14% per annum from 15th March 2018 till payment in full and costs.

2. The Appellant filed a statement of defence dated 17th September 2018 in which it denied owing any money to the Respondent. The Respondent then filed an application dated 13th November 2018 seeking to have the Appellant's defence struck out and summary judgment entered against the Appellant on the ground that the defence did not disclose any reasonable cause of action and only contained mere denials, was frivolous, vexatious, scandalous and an abuse of the court process solely aimed at delaying the plaintiff`s right to a quick judgment.

3. The application was opposed by the Appellant through the replying affidavit of the Appellant`s legal officer, Hellen Koech who deposed that the application offended the provisions of Order 2 Rule 15(2) of the *Civil Procedure Rules* in so far as the application required evidence to substantiate the same. That

the evidence that was attached by the Respondent required the matter to go for full hearing. That the services were not fully provided for by the Respondent as per the contract thereby causing breach of the contract leading to the Appellant to terminate the contract.

4. Upon hearing submissions from the Advocates for the parties, the trial magistrate held that the statement of defence did not raise any triable issue and was a mere denial. The court held that the Respondent had proved a sum of Ksh. 7,831,189/=. It consequently allowed the application, struck out the Appellant's statement of defence and entered summary judgment for the Respondent in the sum of Ksh.7,831,189/= (part of the money having been paid after filling of the suit).

5. It is that ruling which prompted the Appellant to file the instant appeal. The grounds of appeal are that:

    1. The Honourable Chief Magistrate erred in law and fact in striking out the defence despite the fact it raised bonafide triable issues among them whether services were rendered and whether the claim is justified.

    2. The Honourable Chief Magistrate erred in law and in fact in failing to apply the overriding objective to do substantive justice by striking out the defence and entering judgment without hearing the parties on merits and evidence.

    3. The Honourable Chief Magistrate erred in law and fact in entering judgment summarily without any documents in support of the claim by the Respondent.

    4. The Honourable Chief Magistrate failed to appreciate that the only documents annexed were Respondent's hence not adequate for the court to enter judgment.

    5. The Honourable Chief Magistrate erred in law and in fact in ruling that the Appellant did not prove payment.

    6. The Honourable Chief Magistrate erred in ruling that the defence was beyond redemption and incurable by amendment which is not the correct position.

    7. The Honourable Chief Magistrate erred in finding that the Appellant only pleaded Breach of contract but did not state the particulars which was extraneous to the application.

    8. The Honourable Chief Magistrate erred in allowing the application despite the fatal defects and the fact that it was not a clear case for summary determination.

    9. The Honourable Chief Magistrate erred in ruling that the statement by the Respondent speaks for itself and not controverted by way of evidence of payment.

    10. The Honourable Chief Magistrate erred in entering judgment for Kshs 7,831,189.00 that is not pleaded in the plaint whereas the Respondent in the application dated 13/11/2018 sought that judgment be entered as prayed in the plaint.

6. The appeal proceeded by written submissions from the parties.

Appellant's Submissions.

7. The Appellant pointed out that the law on striking out of pleadings is provided for under Order 2 rule 15 of the *Civil Procedure Rules*. That the word used in that rule is "may" which shows that the court is clothed with discretionary jurisdiction to allow striking out and also order a party to amend instead of striking out.

8. Counsel submitted that this court can interfere with the discretionary powers of the trial court. In this regard he referred the court to the case of *Mbogo & another v Shah* (1936) EA 93. The Appellant submitted that the learned trial Magistrate did not exercise her discretion properly and judiciously when striking out the defence.

9. It was contended that the dismissal of a suit or striking out a pleading is a draconian act which can only be a last resort even in the clearest cases. To buttress this position, this court was referred to the cases of *D.T Dobie & Company v Muchina & another* 91982) KLR and *Ram'ji Megji Gudka Ltd v Alfred Morfat Michira & 2 others* (2005) eKLR.

10. The Appellant submitted that its defence raised triable issues. The case of *Olympic Escort International Co. Ltd & 2 others v Parminder Singh & another* (2009) eKLR was referred where it was opined that a triable issue is not necessarily one that would ultimately succeed but only needs to be bona fide.

11. It was submitted that the Appellant has denied owing the Respondent money and put the Respondent to strict proof. It was argued that this in itself shows that there is a dispute for trial.

12. It was submitted that in an application seeking to strike out pleadings, the court is barred from considering evidence by Order 2 Rule 15(2) of the *Civil Procedure Rules*. That the magistrate having considered evidence erred in exercised her discretion wrongly.

13. It was submitted that the trial court usurped its powers by striking out the defense without affording the Appellant right to be heard. That the magistrate considered the merits of the parties` respective cases and in essence usurped the powers reserved for the trial magistrate which is not allowed in determining an application seeking to strike pleadings. In support of this counsel referred to the case of *Wenlock v Moloney* (1965) 2 All ER 871 as quoted in *Gladys Jepkosgei Boss v Star Publication Limited* (2021) eKLR where it was held that:

> "There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power. The learned master stated the relevant principles and practice correctly enough, and then, I am afraid, failed to apply them to the case."

14. The Appellant contended that the trial court made its decision on reliance of the Respondent`s documents as it was yet to file its witness statements. That the court did not have the benefit of full facts when it held that the Respondent had proved Ksh.7,831,189/=. That there were no supporting documents such as invoices for the court to arrive at such a conclusion.

15. It was submitted that the trial magistrate entered judgment for the sum of Ksh.7,831,189/= that is not pleaded in the plaint. That it is trite law that parties are bound by their pleadings. That in doing so

the Magistrate travelled outside the parties` pleadings as was stated in the Malawian case of *Malawi Railways Ltd v Nyasulu Co. Ltd* (1998) MWS,3.

16. It was also argued that the supporting affidavit sworn in support of the application to strike out was not dated and hence fatally defective. The court was referred to various authorities on the effect of undated affidavits.

Respondent's Submissions

17. The Respondent submitted that the issue for determination in the appeal is whether the trial court was right to strike out the Appellant`s statement of defence. They submitted that mere denials are not sufficient defence. In this respect they placed reliance in the case of *Magunga General Stores v Pepco Distributors Ltd* (1987) eKLR where the defence to a liquidated claim was by way of mere denial and the Court of Appeal held that:

> First of all a mere denial is not a sufficient defence in this type of case. There must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given.

18. It was also submitted a Respondent in an application for striking out a defence must establish that the defence raises a triable issue. The Respondent cited the case of *Trikam Maganlal Gohil & another v John Waweru Wamai* (1983) eKLR where it was held that:

> The Respondent if he wants leave to defend may show he is entitled to it by affidavit or oral evidence or otherwise. Order XXXV rule 2. So, if the Applicant has set out in his affidavit(s) in support of his motion and exhibits facts which are probably true and sufficient to warrant the granting of his prayer for summary judgment the Respondent must discharge the onus on him of showing his defence(s) raises triable or bona fide issues. They will be ones of law or fact. If they are of fact, then, bare denials by the Respondent or his Advocate in a pleading or a letter will not do because there must be a full and frank disclosure of the facts before the court which will be proper and sufficient for it to rule that those issues are raised.

19. The Respondent also referred to the case of *Mercy Nduta Mwangi t/a Mwangi Kanga'ra & Company Advocates v Invesco Assurance Company Ltd* (2022) eKLR where the Appellant filed an application for entry of summary judgment against the Respondents. The Respondent opposed the application alleging that there was a fee agreement with the Appellant and some payments were made to buttress this point yet did not provide any evidence in support of the averments. The subordinate court dismissed the application but on appeal the court allowed the appeal and stated that:

> With respect, this finding was not only against the weight of evidence before the court, but also manifestation of misdirection concerning the onus placed on the Respondent to demonstrate a reasonable defence... in the words of Gohil's case the Appellant herein had exhibited facts which were probably true and sufficient to warrant the granting of the prayer for summary judgment but the Respndent had failed to discharge the onus of demonstrating triable or bona fide issues of law or fact to entitle it to leave to defend

20. It was submitted that the Respondent`s application was based on Order 2 Rule 15 sub rule (1) (a) to (d). That it is only where the application is grounded on sub Rule 1(a) where no evidence is admissible.

21. The Respondent submitted that Order 7 Rule 5 of the *Civil Procedure Rules* provides that a statement of defence must be filed together with the list of witnesses, witness statement and copies of documents

to be relied during trial. That the Appellant did not file any accompanying documents with the defence. That it did not file any documents with its replying affidavit to the Respondent`s application. That it can only be concluded that it failed to do so because it did not have a defence to the Respondent`s claim.

22. It was argued that although the Appellant purports to argue breach of contract, there were no such particulars in the statement of defence. Further that no documents are provided to show it paid for the services rendered. It was submitted that the trial court exercised its discretion rightly in finding that the defence contains mere denials.

23. The Appellant submitted that the trial court did not err in entering judgment in the sum of Ksh.7,831,189.25 as subsequent to filing of the suit the Appellant has been paying the amount owing thereby reducing the balance from the sum claimed in the plaint to Ksh.7,831,189.25. It was submitted that the court had inherent power to enter judgment in the sum now owing. The Respondent urged the court to dismiss the appeal.

Analysis and Determination

24. It is the duty of this court, as the first appellate court, to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing its own conclusions from that analysis and bearing in mind that the court did not have an opportunity to hear the witnesses first hand - see the Court of Appeal case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR. The same court in *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, stated as follows on the issue:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

25. I have considered the pleadings and the submissions filed by the respective counsels for the parties. The issue for determination is whether the trial magistrate erred in striking out the Appellant`s defence.

26. The motion is expressed to be brought under Order 2 Rule 15 of the *Civil Procedure Code* which deals with striking out of pleadings and provides as follows;

> Rule 15. (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; 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."

27. Order 2 Rule 15 (2) states as follows:

> (2)) No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.

28. The Respondent`s application was made under the whole of Rule15 (1) (a), (b), (c) and (d) whereby no evidence could be called under rule (1) (a) but evidence could be adduced under Rules (b) – (d). In *Jevaj Shariff & Co. v Chotail Pharmacy Stores* [1960] EA 374, the East Africa Court of Appeal stated that:

> 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.

29. The supporting affidavit of the director of the Respondent in paragraph 7 stated as follows:

> That the defendant`s defence is flimsy and clearly an assembly of denials with no substance to raise any issue to go for trial.

30. The Respondent herein called affidavit evidence to show that the defence did not raise any triable issue. This is contrary to the mandatory provisions of Order 2 Rule 15 (1) (a) which prohibits the calling of evidence to show that an application does not raise reasonable cause of action. The Court of Appeal considered such an issue in the case of *Olympic Escort International Co. Ltd. & 2 Others v Parminder Singh Sandhu & Another* [2009] eKLR, where it held that: -

> " ...Mr. Wamalwa reiterated in his submissions before us that it was improper to invoke Order 6 r 13 (1) (a) when there was affidavit evidence on record which the superior court analysed in arriving at its decision. Mr. Sevany on the other hand found no impropriety in combining the two prayers since it was expressly stated in the application that the only basis for seeking the order for striking out was because the defence was a bare denial.
>
> "We think for our part that it was inappropriate to combine the two prayers, one of which requires evidence before a decision is made and one that does not. There was affidavit evidence on record and it was in fact considered by the learned Judge. It matters not therefore that the Applicant had stated that the affidavits should not be considered. As the prayer sought under Order 6 r 13 (1) (a) was in contravention of sub-rule (2) of that order, it was not for consideration and we would have similarly struck out the application on that score..."

31. The Respondent herein combined prayers where evidence was required to be called with one that does not require evidence to be called. The court seems to have relied on rule 15 (1) (a) to strike out the defence. The trial magistrate in the matter considered the affidavit evidence to hold that the defence did not raise triable issues. The court erred in that respect. The appeal should be allowed for that reason.

32. It is trite law that a defence can only be struck out in the clearest of the cases where the defence looks hopeless and no life can be breathed into it. Further that courts of law should endeavor to sustain suits than striking them out. In the case of *Jubilee Insurance Company Limited v Grace Anyona Mbinda* [2016] eKLR, the Court quoted with authority the celebrated case of *Saudi Arabian Airlines Corporation v Premium Petroleum Company Ltd* [2014] eKLR it was held that:

> " 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. 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 "demurer of 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 it is a sham; it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the Shedridan J

Test in *Patel V EA Cargo Handling Services Ltd*. [1974] EA 75 at p. 76 (Duffus P.) that "... a triable issue... is an issue which raises a prima facie defence and which should go to trial for adjudication." Therefore, on applying the test, a defence which is a sham should be struck out straight away."

33. The Court of Appeal in the case of *Blue Shield Insurance Company Ltd v Joseph Mboya Oguttu* [2009] eKLR established that striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham. Similarly, in the case of *Crescent Construction Co. Ltd v Delphis Bank Ltd* (2007) eKLR the same court stated thus: -

> " 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 drag a person to the seat of justice when the case purportedly brought against him is a non-starter."

34. In *D.T. Dobie & Company (Kenya) Ltd. v Muchina* (1982) KLR 1 it was stated as follows:

> " ...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 a case before it..."

35. The Appellant in their statement of defence dated 17th September 2018 in paragraphs 5, 6, 7 and 8 denied being indebted to the Plaintiff/Appellant. The trial court relied on affidavit evidence to hold that the defence did not raise reasonable cause of action when it should only have considered the defence to do so. The trial court did not apply the correct law for striking out defence on the ground that it did no raise reasonable cause of action. The Appellant was yet to file their witness statements in the case before the defence was struck out. In my view, the defence was wrongly struck out.

36. The upshot is that the Appeal herein is allowed and the Appellant's suit is hereby reinstated for hearing and determination on merit. As the appeal has succeeded, I order the Appellant to have the costs of the appeal.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF MARCH 2024.

J. N. NJAGI

JUDGE

In the presence of:

Mr Mugo holding brief Mr Mbaabu for Appellant

Mr Githiri for Respondent

Court Assistant – Amina

30 days R/A.