BIO Food Products Limited v Neoteric Chartered Limited (Commercial Case E091 of 2023) [2024] KEHC 4222 (KLR) (Commercial and Tax) (19 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4222 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E091 OF 2023

MN MWANGI, J

APRIL 19, 2024

BETWEEN

BIO FOOD PRODUCTS LIMITED ..... APPELLANT

AND

NEOTERIC CHARTERED LIMITED ..... RESPONDENT

(Being an Appeal from the ruling and order of the Principal Magistrate Hon. M. W. Murage delivered on 5th May, 2023 in Nairobi Milimani Chief Magistrate's Court MCCOMMSU Cause No. E532 of 2022)

JUDGMENT

1. The plaintiff (respondent) filed a suit in the lower Court against the defendant (appellant) vide a plaint dated 16th June, 2022 wherein it sought judgment against the appellant for payment of Kshs.1,774,092.40, interest thereon, and costs of the suit. The respondent's case was that it supplied and delivered to the appellant various motor vehicle spare parts but the appellant failed to pay for them leading to an accumulated unpaid debt of Kshs.1,774,092.40. The respondent averred that the appellant through emails and correspondence from their lawyers admitted and acknowledged receiving the various motor vehicle spare parts but still failed to pay for them.

2. In opposition thereto, the appellant filed defence and counter-claim dated 15th August, 2022 which were amended on 7th September, 2022, where it denied the averments contained in the plaint. It averred that it contracted the respondent to supply it with various motor vehicle spare parts as well as lubricant products manufactured by Vivo Energy Kenya for its various machines. It however claimed that in blatant breach of the agreement between them, the respondent supplied it with counterfeit lubricants not manufactured by Vivo Energy Kenya, which caused damage to one of its machines, thereby causing it to suffer loss of Kshs.11,000,000/=.

3. The appellant further averred that as a result of the foregoing, a joint meeting was held on 9th March, 2022, between the respondent's Director Mr. Daniel Kabi Wangari, a Vivo Energy Kenya representative Mr. Mathew Kiptalam, and the appellant's Managing Director and Legal Manager Messrs Tom Jansen and Alex Wokabi, respectively, where it was agreed that the respondent had sourced for the lubricant from a company that had been blacklisted by Vivo Energy Kenya Limited for stocking counterfeit products. The appellant averred that the respondent agreed to forfeit the then unpaid invoices as a way to compensate the appellant for the losses incurred as a result of supplying it with counterfeit oil lubricants, and that the respondent will go back to the appellant with a compensation plan over the losses incurred by the appellant as a result of the counterfeit lubricants.

4. The respondent filed a reply to defence and defence to the counter-claim dated 30th August, 2022 where it denied the averments contained in the appellant's defence and counter-claim and averred that it never supplied the appellant with counterfeit lubricants counterfeit or otherwise for its machines. It further averred that the meeting held on 9th March, 2022 was called for by the appellant's new Managing Director after the respondent pursued the outstanding payment, and that on that day, the said Manager promised to issue the respondent with cheques in settlement of the outstanding debt.

5. On 13th December, 2022, the respondent filed a Notice of Motion application dated 11th November, 2022 seeking orders that the appellant's statement of defence be struck out, and for judgment to be entered for the respondent as prayed in the plaint. In opposition thereto, the appellant filed a replying affidavit sworn on 23rd February, 2023 by Tom Jansen, its Managing Director, where he deposed that there are a number of issues for the Court to consider and determine through a full trial since the appellant has raised serious and pertinent issues in its statement of defence. He gave an example of the appellant having denied being indebted to the respondent. He stated that the emails attached to the respondent's supporting affidavit do not show any admission on its part.

6. The Trial Magistrate delivered a ruling on the respondent's application dated 11th November, 2022, in which she struck out the appellant's defence and allowed the said application with costs to the respondent. The appellant being dissatisfied with the said ruling filed a Memorandum of Appeal dated 18th May, 2023 raising the following grounds of appeal -

    i. The learned Magistrate erred in law and fact by allowing the respondent's application of 11th November, 2022 and concluding that the appellant's statement of defence dated 7th September, 2022 lacked merit and did not raise any triable issues;

    ii. The learned Magistrate erred in law and fact by failing to accord the appellant a right to fair hearing and condemned him (sic) unheard contrary to Article 50 of *the Constitution* of Kenya;

    iii. The learned Magistrate erred in law by failing to acknowledge that parties had not completed filing their respective documents and pleadings in full compliance with Order 11 of the Civil Procedure Rules, hence the haste (sic) decision to dismiss the appellant's defence was premature and tantamount to condemning a party without being heard;

    iv. The learned Magistrate erred in law by failing to consider that striking out the defence ought to be exercised sparingly and only in exceptional circumstances; and

    v. The learned Magistrate erred in law and fact by failing to consider all the evidence on record.

7. The appellant's prayer is for the appeal herein to be allowed with costs, for the ruling delivered on 5th May, 2023 by Hon. M. W. Murage, Principal Magistrate, to be set aside and for the matter to proceed to full hearing at the Milimani Chief Magistrate's Court. The appellant also prays for the costs of the appeal as well as those of the Trial Court be awarded to it.

8. The instant appeal was canvassed by way of written submissions. The appellant's submissions were filed by the law firm of Nyaanga & Mugisha Advocates on 8th December, 2023, whereas the respondent's submissions were filed on 1st February, 2024 by the law firm of J. B. Mwangi Advocates

9. Mr. Mugisha, learned Counsel for the appellant cited the provisions of Order 2 Rule 15 of the Civil Procedure Rules, 2010 and the case of Carton Manufacturers Limited v Prudential Printers Ltd [2013] eKLR, where the Court cautioned that when striking out pleadings, Courts should be guided by the principles laid down in the case of D.T. Dobie & Company (K) Ltd v Muchina [1982] KLR 1, and exercise this power sparingly and only in hopeless cases which cannot be cured by amendment. In submitting that the appellant's statement of defence does not amount to sham pleadings since it raises triable issues that should be heard and determined on merit, Counsel relied on the Court of Appeal decision in Ramji Megji Gudka Ltd. v Alfred Morfat Omundi Michira & 2 others [2005] eKLR.

10. He referred to the Court of Appeal case of Blue Shield Insurance Company Ltd v Joseph Mboya Oguttu [2009] eKLR and submitted that by striking out the appellant's defence, it was denied a fair hearing contrary to the provisions of Article 50 of *the Constitution* as well as the laws of natural justice. Mr. Mugisha stated that striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham. He contended that in any event, the respondent's application was filed before close of pleadings denying the appellant an opportunity to file its witness statements and documents in support of its case, hence discovery was not complete

11. Mrs. Kinyua, learned Counsel for the respondent submitted that the appellant at paragraphs *4* & 5 of its statement of defence expressly admitted receiving the goods supplied by the respondent but alleges that the lubricant supplied damaged its machines causing a loss of Kshs.11,000,000/=, but it has not tendered any evidence to support its claim for the alleged loss suffered or any formal admission by the respondent, in order compensate it for the said loss. In urging this Court to find that the appellant's statement of defence lacked merit and did not raise any triable issue, Counsel relied on the case of Ecobank Kenya Limited v Bobbin Limited & 2 others [2014] eKLR. She asserted that the Trial Magistrate was right in finding that the appellant's defence lacked merit and did not raise any triable issues.

12. She referred to the provisions of Order 13 Rule 2 of the Civil Procedure Rules, 2010 which provides for judgment on admission and the case of Choitram v Nazari [1984] KLR 327, which stated that admissions have to be clear and unequivocal, and that it would amount to a waste of judicial time to await the trial. She further stated that the appellant's admission of the debt due to the respondent found at paragraphs *4* & 5 of its statement of defence is plain and obvious, hence awaiting a full trial of the dispute between the parties herein would have only caused delay in the course of justice. Mrs. Kinyua contended that balance must always be struck between the principle of fair hearing and the policy consideration that a plaintiff should not be kept away from enjoying the fruits of his judgment by an unscrupulous defendant who files an unsupported defence which is a sham simply for the purpose of delaying the finalization of the case.

13. She argued that the Trial Magistrate accorded the parties a fair hearing, as the appellant was on 29th September, 2022 directed to comply with the provisions of Order 11 of the Civil Procedure Rules, 2010 within fourteen (14) days but it failed to do so hence its defence was unsupported. Further, the said order for compliance lapsed on 15th October, 2022, thus the respondent acted within its rights when filing the Notice of Motion application dated 11th November, 2022. Counsel contended that the engagement by the appellant in too many unsupported pleadings is a deliberate attempt to prejudice the respondent and abscond from paying the debt that is due and owing from the appellant to the respondent.

Analysis And Determination.

14. This being the 1st appellate Court, I have a duty to analyze and re-evaluate the evidence adduced before the lower Court and reach my own independent conclusion. More often than not, an appellate Court will not interfere with the finding of fact by a Trial Court unless it is based on no evidence, or it is based on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles of fact or law in reaching his conclusion. See Mkube v Nyamuro [1983] LLR, 403-415, at p. 403.

15. I have re-examined the Record of Appeal and given due consideration to the written submissions by the parties' respective Counsel. The issue that arises for determination is whether the appellant's statement of defence ought to have been struck out by the Trial Magistrate.

16. Striking out of pleadings is provided for under the provisions of Order 2 Rule 15 (1) of the Civil Procedure Rules, 2010 which states that -

> "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."

17. In as much as Courts have the discretionary power to strike out pleadings, Courts are often urged to exercise this power with extreme caution and only in the clearest of cases, since striking out of pleadings is considered to be draconian, and drastic. In determining whether or not the Trial Court was right in striking out the appellant's statement of defence, this Court has a duty to carefully examine all the facts placed before the said Court, without necessarily engaging in a trial. In this instance, if this Court finds that the statement of defence raises a triable issue that may succeed at the end of the trial, the suit ought to be allowed to go to trial and be determined on its merits. However, if the statement of defence does not raise any triable issue, or if it is evident that it is only meant to drag out the case and abuse the Court process, then the same ought to be struck out.

18. The respondent herein sought for the appellant's defence to be struck out, and for judgment to be entered in its favour as prayed in the plaint, on the ground that the appellant through their emails and correspondence from its lawyers, and at paragraphs *4* & 5 of its statement of defence as amended on 7th September 2022, admitted the debt that is due and owing from it to the respondent.

19. The respondent's claim against the appellant is for payment of Kshs. 1,774,092.40 for various motor vehicle spare parts supplied to the appellant by the respondent but the appellant has allegedly failed and/or refused to pay for them.

20. In opposition to the said claim, the appellant filed defence and counter-claim dated 15th August, 2022, which were later amended on 7th September, 2021, where it averred that the contract between it and the respondent was for supply of various motor vehicle spare parts, as well as lubricant products by Vivo Energy Kenya Limited for its various machines. The appellant went further to acknowledge the fact that the respondent indeed supplied it with various motor vehicle spare parts and lubricant products,

but the lubricant products supplied were counterfeit, and not manufactured by Vivo Energy Kenya Limited, which resulted in damage of one of its machines. The appellant claims that it suffered a significant loss of Kshs. 11,000.000/=.

21. The appellant averred that as a result of the foregoing, a meeting was held on 9th March, 2022 between the respondent's Director Mr. Daniel Kabi Wangari, Vivo Energy Kenya Limited representative Mr. Mathew Kiptalam, and the appellant's Managing Director and Legal Manager Messrs Tom Jansen and Alex Wokabi, respectively. The appellant contended that in the said meeting, it was agreed that the respondent had sourced for the lubricant from a company that had been blacklisted by Vivo Energy Kenya Limited for stocking counterfeit products, thus the respondent was to forfeit the then unpaid invoices as a way to compensate the appellant for the losses incurred as a result of supplying it with counterfeit lubricants. That thereafter, the respondent was to go back to the appellant with a compensation plan over the losses incurred.

22. The respondent in its reply to the defence and defence to counter-claim dated 30th August, 2022 confirmed that indeed a meeting was held on 9th March, 2022 and averred that the said meeting was called by the appellant after it pursued the outstanding payment. Further, that on that day, the appellant's Manager promised to issue it with cheques in settlement of the outstanding debt. The Court of Appeal in the case of D.T. Dobie & Company (K) Ltd v Muchina (supra), laid down the principles guiding the striking out of pleadings as hereunder -

> " 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."

23. The Trial Magistrate in allowing the respondent's application relied on the provisions of Order 13 Rule 2 of the Civil Procedure Rules, 2010. She also relied on the case of Choitram v Nazari (supra) where it was held that –

> " Admissions have to be plain and obvious, as plain as a spikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admission must leave no room for doubt that the parties passed out of the stage of negotiations on to a definite contract. If matters not even if the situation is arguable even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admission by analysis."

24. The respondent contends that the email correspondence attached to the its list of documents dated 16th June, 2022, contains an admission by the appellant of the debt that is due and owing to it. On perusal of the same, I note that it contains a demand issued to the appellant for the amount of Kshs. 1,774,092.40, plus interest at 14% per month until payment in full. I see no evidence and/or semblance of an admission in the said email correspondence. The respondent also contends that the appellant at paragraphs *4* & 5 of its statement of defence expressly admitted receiving the goods supplied by the respondent.

25. On perusal of the said statement of defence, I note that in as much as the appellant acknowledges receipt of various motor vehicle spare parts from the respondent, it avers that together with the spare parts, the respondent supplied counterfeit lubricants which damaged one of its machines, causing it to

suffer a significant loss of Kshs.11,000,000/=. I thus find that the paragraphs *4* & 5 of the appellant's statement of defence do not meet the threshold of an admission as was laid down by the Court in the case of Choitram v Nazari (supra).

26. On whether the appellant's statement of defence raises triable issues, I am persuaded that it does. That being the case, the Trial Court will have to determine whether the agreement between the parties herein was for supply of various motor vehicle spare parts only, or also for supply of lubricant products by Vivo Energy Kenya Limited. The Trial Court will also have to determine whether or not the respondent supplied the appellant with counterfeit lubricant products not manufactured by Vivo Energy Kenya Limited which damaged one of its machines and caused the appellant to suffer a loss of Kshs.11,000,000/=. The Trial Court will also have to consider what transpired in the meeting that was held on 9th March, 2022 and its effect to the dispute between the parties herein.

27. The respondent submitted that the appellant did not tender any evidence in support of its claims for the alleged loss suffered or any formal admission by the respondent to compensate it for the said loss, thus the Trial Magistrate was justified in allowing its application dated 11th November, 2022 as prayed. It is trite law that the function of this Court at this stage of the proceedings is to peruse the plaint, the statement of defence together with any annexures filed in opposition to the application in the lower Court, as well as the annexures in support of the application in the said Court, so as to satisfy itself of the express or implied allegations of fact in the said documents, and whether they are sufficient or not to sustain a suit on merits.

28. In The Co-Operative Merchant Bank Ltd. vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999 which was cited with authority by the Court of Appeal in Uchumi Supermarkets Limited & another v Sidhi Investments Limited [2019] eKLR, the Court stated as follows:

> " 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."

29. In the end, I am satisfied that the appellant's statement of defence dated 15th August, 2022 and as amended on 7th September, 2022, raises triable issues that out to be subjected to a full trial for hearing and determination on merits. This Court finds that the Trial Magistrate made an error in striking out the appellant's statement of defence.

30. The upshot is that the instant appeal is merited. I make the following orders-

    i. The Trial Magistrate's ruling delivered on 5th May, 2023 is hereby set aside;

    ii. It is hereby directed that Milimani Chief Magistrate's Court MCCOMMSU Cause No. E532 of 2022 shall be heard and determined on its merits before any other Magistrate of competent jurisdiction save for Hon. M. W. Murage, Principal Magistrate; and

    iii. Costs of the appeal and the application before the Trial Court are hereby awarded to the appellant.

    It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 19TH DAY OF APRIL, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Wetunga h/b for Mr. Mugisha for the appellant

Mrs Kinyua for the respondent

Ms B. Wokabi – Court Assistant.