REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 193 OF 2019

BRUCE LULE.....APPELLANT

VERSUS

MULKI A. ISSA.....RESPONDENT

Being an appeal from the ruling and order of the Resident Magistrate Court at Nairobi (Hon. A.N. Makau) delivered at Nairobi on 8th March 2019 in CMCC No. 7645 of 2013)

JUDGMENT

The appellant filed a suit in the lower court claiming of sum of GBP £ 3,297.58 said to have been advanced to the respondent as a soft loan which the respondent defaulted in payment. Upon service to enter appearance and file a defence, the respondent filed a defence denying the appellant's claim and sought the dismissal of the suit.

The appellant then filed an application by way of Notice of Motion seeking an order that the respondent's defence be struck out and judgment be entered in his favour, and in the alternative judgment be entered on admission.

The lower court heard the application and in a ruling dated 8th March, 2019 dismissed the application with costs for lack of merit. It is that ruling that prompted the present appeal.

In the memorandum of appeal the appellant has faulted the lower court both in law and fact for failing to consider the admissions of the claim by the respondent in the correspondences and affidavit, and for holding that the defence raised triable issues. The lower court was also faulted for ignoring evidence availed by the appellant in support of that application and the established principles and the relevant factors applicable to striking out of pleadings and or judgments on admission.

As the first appellate court, it is my duty to evaluate the record of the lower court and arrive at independent conclusions. Both parties have filed submissions and cited some authorities which I have considered. Some of the submissions delve into the merits of the claim as if the court were to consider the evidence adduced and subjected to cross-examination in a trial.

In dismissing the appellant's application the lower court said as follows,

> **"I have seen and considered the defence statement. The defendant denies the clam and pleads that if any money was given to her it was a gift and there was no agreement to reimburse the money. It was a gift given with love and affection. Having considered the parties pleadings and what is herein argued by the parties it is my finding that the defence statement raises triable issues which can only be determined in trial where the parties will present their respective evidences and the court would thereafter determine if any debt is owing or it was gift or otherwise. There are issues raised that calls for trial. I do not find the defendant made any admission in her defence statement to warrant entering judgment on admission or even striking out the defence."**

In the submissions filed by the appellant titled "Issues for determination", the appellant wishes to have the court determine the issues at the centre of the dispute before all evidence is heard and weighed by the court. It is now settled that striking out of any pleadings should be a step of last resort because, any party who approaches the court either as a plaintiff or defendant should have their day in court. Further, for a pleading to be struck out it must be so hopeless that, even an amendment or consideration may not redeem its status.

Order 2 Rule 15 (1) of the Civil Procedure Rules provides at (a) and (d) as follows,

> **"Order2, rule 15.] Striking out pleadings.**

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)……..

(c)……..

(d) it is otherwise an abuse of the process of the court."

On the other hand, Order 13 Rule 2 of the Civil Procedure Rules provides as follows,

"2. Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court admissions for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just."

In the exercise of powers conferred upon the court by the above provisions, caution must be exercised so that parties may not be locked out of the justice system and thereby dim their legitimate expectations. Decided cases point to the maintenance of pleadings rather than striking them out. In the exercise of that authority the courts exercise discretion which however should be applied judicially.

In the case of **Co-Operative Merchant Bank vs. George Fredrick Wekesa – Civil Appeal No. 54 of 1999** cited in **GBM Kariuki vs. Nation Media Group Limited and 3 others (2012) e KLR** the court of appeal observed as follows,

"The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. If a pleading raises a triable issue even if at the end of the day it may not succeed then the suit ought to go to trial. However where the suit is without substance or groundless of fanciful and or is brought or instituted with some ulterior motive or for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process, the court will not allow its process to be used as a forum for such ventures. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

In The Co-Operative Merchant Bank Ltd. vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999 the Court of Appeal 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...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court."

The above citation speaks for itself and I need not expound further. See also **Rift Valley Water Services Board vs. Oriental Construction Company Limited (2018) e KLR and DT DOBIE & Co. (Kenya) Limited vs. Muchina & Another (1982) KLR 1.**

In yet another case of **Blue Shield Insurance company Limied vs. Joseph Mboya Ogutu (2009) e KLR** the court of appeal stated as follows,

"The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-

"The power to strike out should be exercised after the Court has considered all facts, but it 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 this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case."

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 506, where the Lord Justice said:-

"The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading."

We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable."

Having considered the material presented before the lower court and the authorities cited, I am persuaded that the lower court cannot be faulted for dismissing the appellant's application and therefore this appeal must fail. The same is dismissed with costs to the respondent. The lower court file shall be remitted for trial before another magistrate of competent jurisdiction.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY, 2021.

A. MBOGHOLI MSAGHA

JUDGE

In the presence of:

Mr. Seko holding brief for Abidha for the Appellant

Ms. Kala for the for the Respondent