REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 22 OF 2018

FEDELE GRASSI...1ST APPELLANT

JUDITH BIGISA OENGA ....2ND APPELLANT

EASTFORD MANAGEMENT LIMITED ....3RD APPELLANT

VERSUS

EMMILY MUKONYA MUSAU ....1ST RESPONDENT

WINNIE KAMENE PETER .... 2ND RESPONDENT

(Being an appeal from the Ruling of the Chief Magistrate's Court at Malindi dated 11th September, 2018 in CMCC No. 115 of 2017 by Hon. Dr. Julie Oseko,)

CORAM: Hon. Justice R. Nyakundi

Mr. Gicharu Kimani for the appellants

Mr. Katsoleh for the respondents

JUDGEMENT

This appeal is based on the statement and dictum by the renowned Jurist of our time, none other than **Lord Wolfe** in **Swain v Hillman (2001) 1 ALL ER 91** where he gave guidance on how a judge can exercise discretion in deciding whether or not to grant summary judgement in the following passage.

> ***"It enables the court to dispose summarily of both claims and defences which have no real prospect of being successful. The words no real prospect of succeeding do not need any implication, they speak for themselves. The word real distinguishes fanciful prospects of success. They direct the court to the need to see whether there is a realistic as opposed to a fanciful prospect of success. It is important that a judge in appropriate cases should make use of powers contained in part 24 of the English Civil Procedure Rules, which presumably has similar provisions with our Order 36 of the Civil Procedures.***
>
> ***In so doing he or she gives effect to the overriding objectives contained in part 1. It saves expenses, it achieves expedition. It avoids the court's resources being used up on cases where this serves no purpose and I would add, genera rally that it is in the interest of justice"***.

Procedural History

In this case the plaintiffs **Emily Mukunyo Masau** and **Winnie Kamene Peter** filed a plaint dated 9th June, 2017 seeking the following reliefs against the defendants **Fedele Firassi, Judith Bigisa Oenga** and **EastFord Management** for:

a) An order to rescind the agreement dated 23.12.2016.

b) A refund of the sum of Kshs. Seven million one hundred thousand (Kshs.7.1 million paid to the defendants by the plaintiffs.

c) Costs of the suit on (b) (c) thereon at 14% P.A. until payment I full.

Instantaneously, on the same day the plaintiffs filed a notice of motion pursuant Section 1A, 1B, 3, 3A of the Civil Procedure Act and Order 36 rule 1 (1)(a) (2) and Order 51 rule (1) of the Civil Procedure Rules for orders that:

1) Judgement be entered for the plaintiffs as prayed in the plaint for outstanding sum of Kshs. Seven million one hundred thousand only (Kshs.7,100,000).

2) The costs of tis application. And the suit be borne by the defendants.

In support of the notice of motion was an affidavit sworn by **Winnie Kamene Peter** who in her evidence argued and urged the trial court to grant the relief on summary judgement. The affidavit objects and reasons subtended to each averment was to the effect that the defendants have no defence to the claim to warrant the court expend its resources to hear and determine on the merits.

From the affidavit it I important to bear in mind that the crux of the dispute as pleaded in the plaint is based on a transaction on advancement of money by the plaintiffs to the defendants between 23rd December, 2016 and 3rd February, 2017 in respect of and as part payment for 30% shares in the 3rd defendant to the suit.

Applying the approach and the general principle under Order 36 Rule (1)(a) (2) of the Civil Procedure Rules the learned trial magistrate in her ruling dated 11th April, 2018 ordered as follows:

1) The summary judgement is allowed and entered against the defendant for the sum of Kshs.4,100,00 with interest at court rates as form the date of this ruling.

2) That the issues in dispute aforementioned are referred to arbitration in accordance with clause 3 of the Agreement dated 23.12.2016.

3) That in the interim, these proceedings are stayed pending the Arbitration Clause per (2) above.

4) Each party to bear their own costs.

Being aggrieved with this decision the appellants filed a memorandum of Appeal filed in court on 13th April, 2018 to give operative meaning to the appeal as follows:

1. The Honourable Chief Magistrate erred in law in allowing the 1st and 2nd Respondents' Application dated 18th December, 2017 and dismissing the Appellants' application dated 22nd January, 2018.

2. The Honourable Chief Magistrate erred in law in awarding the Respondents a sum of Kshs.4,100,000/= as summary judgment despite the Appellants demonstrating the desire to Def3end the suit against them.

3. The Honourable Chief Magistrate erred in law in partly determining the Respondents' application and at the end of the Ruling referring the matter to arbitration.

4. The Honourable Chief Mgistrate erred in law in disregarding the draft defence as annexed by the Appellant in their application dated 22nd January, 2018 seeking unconditional leave to file a Defence out of time.

5. The Honourable Chief Magistrate erred in law in totally disregarding our application dated 22nd January, 22018 and failing to determine and make a ruling on the said application.

6. The Honourable Chief Magistrate erred in law aby holding that the Appellants Notice of Motion dated 22nd January, 2018 was a response to the Respondents application dated 18th December, 2017 and yet the Appellant had filed a Replying Affidavit sworn by the 1st Appellant on 22nd January, 22018.

7. The Honourable Chief Magistrte erred in law by failing to take into considerations the reasons explained by the Appellants explaining the delay in filing a Defence.

8. The Honourable Chief Magistrate erred in law in condemning the Appellant unheard.

By way of written submissions learned counsel **Mr Gicharu Kimani** for the appellants argued and submitted that the learned trial magistrate did acknowledge existence of triable issues between the appellants and respondents but unfortunately went ahead to make a summary judgement for Kshs.4,100,000 plus cost and interest. He only submitted that the replying affidavit answered the alleged claims raised in the supporting affidavit, but no such appreciation of the evidence was factored in the impugned ruling by the learned trial magistrate. Learned counsel emphasized that the appellants did demonstrate that there are outstanding issues as premised in the defence that the matter could not be summarily disposed off under Order 36 of the Civil Procedure rules.

Further and where a litigant is accorded a fair trial under Article 50 (1)(2) of the Constitution submitted learned counsel, the question

whether a claim should be summarily granted or not as did the learned trial magistrate should weigh in on guaranteeing that right to a fair hearing. Learned counsel cited and relied on the various principles and legal propositions in the following cases: **Industrial & Commercial Development Corporation v Daber Enterprises Ltd (2000) 1 E.A. 75, Continental Butchery Ltd v Ndhiwa (1989) 573, Dhanjal Investments Ltd v Shabana Investments Ltd Civil Appeal No. 232 of 1997, Kandhal Restaurants v Devehi Co. 1952 (EACA 77, Souza Fiqurendo & Cotled v Mourning Hotel Ltd E.A. 425, Kenya Trade Company Ltd v shah Civil Appeal No. 193 of 1999, Job Kilach v National Media Group Ltd, Salaba Enterprises Ltd (2015) eKLR, Kenya Shell Ltd v Kobil Petroleum Ltd CA Appeal No. 57 of 2006** and **Sebu District Administration v Gaysil & others 1968 E.A 300.**

Learned counsel reiterated that it was incumbent upon the trial court to grant the defendants leave to defend the claim of Kshs.4,100,000 which found its way to summary procedure under Order 36 of the Rules.

Looking at the whole appeal this way it behoves on me to make findings on matters of fact and law, whether the appellants have made a case for overturning the decision by the learned trial magistrate.

Analysis and Decision

It is important to ascertain the scope of summary Judgment procedure provided under Order 36 of the Civil Procedure Rules. This is a first appeal. The approach is that this court must be guided by the principles in **Pandya v R (1957 E.A. 336 Ann Wambui Nderitu v Joseph Kiprono Ropkoi & another CA No. 345 of 2000**. The appellate court has the mandate to re-appraise the evidence of the trial court and on account of it come up with its own findings and conclusions. The greatest cautionary principle being that the trial court judgement or order should not be interfered with unless clear evidence emerges during the evaluation and scrutiny or misdirection, error on the face of the record and or application of wrong principles of the law to the decision. **(See Plan Farm Co. Ltd v Paul Kimani Mungai {2002} LLR HCK).**

In this appeal **Mr. Gicharu** delved into the alleged errors and misdirections created by the learned trial magistrate broken down to eight grounds of appeal. However, in those circumstances without purporting to step into the shoes of **Mr. Gicharu** who had instructions to prosecute the appeal, to me the elephant in the appeal is whether the relevant test under Order 36 rule (1) and (2) of the Civil Procedure Rules on summary judgement was satisfied by the respondents.

The nature of the application for summary judgement order is such that the defendant ought to discharge the burden of proof that there are compelling reasons why the matter should proceed to full trial. On the other hand, the rule which is of general application presumably and directly by way of affidavits and other documentary evidence calls upon the applicants to satisfy the criteria for grant of summary judgement.

The Lord Justices in **Three Rivers District Council v Bank of England No. 3 (2003)2 AC 1 259-261 (2000)3 ALL ER 1 and ED8F Man Highland Products Ltd v Patel (2003) EWCA** made the following elementary professions:

> ***a) It is for the applicant for summary judgement to demonstrate that the respondent has no real prospect of success in his claim or defence as the case may be.***
>
> ***b) A real prospect of success is one which is more than fanciful or merely arguable.***
>
> ***c) If it is clear beyond question, that the respondent will not be able at trial to establish the facts on which he relies, then his prospects of a success are not real, but the court is not entitled on application for summary judgement to conduct a trial on documents without disclosure or cross-examination. The defendant faced with an application for summary judgement must show that the defence has real prospects of success at the trial to compel the benefit of a trial imposed by the statute.***

That is the position the court took in **Nairobi Golf Hotels (Kenya) Civil Appeal No. 5 of 1995)** when it observed as follows:

> ***"It is now trite that the applications for summary judgement, the duty is cast on the defendant to demonstrate that he should have leave to defend the suit.***
>
> ***His duty is however limited to showing prima facie the existence of bonafied triable issues or that he has an arguable case. On the other hand, it follows that a plain tiff who is able to show that a defence raised by a defendant is shallow or a sham is entitled to summary judgement."***

*(See also **Kenya Trade Combine Ltd v Shah Civil Appeal No. 193 of 1999, Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono (2015) eKLR.)***

In this regard the power of the court settling to consider a notice of motion pursuant to Order 36 rule (1)(2) of the Civil Procedure Rules should at this stage be able to distinguish the provisions under Order 2 Rule 15 of the Rules **"that is concerned with a pleading which does not disclose a reasonable cause of action, or defence, in law, it is vexatious, frivolous or scandalous or it may prejudice, embarrass or delay the fair trial of the action."**

In summary judgement applications, the court is required to examine the affidavit evidence and the statements of the claim and the defence on record to decide whether they are competent to have a real prospect of success at the trial, on cross-examination. For arguments sake there appears to be an overlap on this two provisions given the commonality of their 'draconian' measure to summarily deal with the prayer to strike out pleadings.

In **Coghlan v Chief Constable of Cheshire Police 2002 ALL ER 397** the court observed with regard to Order 2 Rule 15 in the English Civil Procedure apparently similar with our Order 36 rule 1 and 2 of the Civil Procedure Rules that:

> ***"While applications to strike out under Rule 3, 4(2) and for summary judgement have in common, the core assertion that the other party cannot succeed on its pleaded case, there is of course a difference in approach. Whereas the focus of the enquiry under Rule 3.4 is upon the pleading, part 24 requires analysis of the evidence. That said, the court should be wary of any invitation to weigh compelling evidence and make findings upon the papers. Summary judgement is only to be given in clear cases."***

Mr. Gicharu gave various reasons why the exercise of discretion in favour of the respondents was wrong as its reflective from his submissions. In the context of jurisdiction and discretion Learned counsel in reference to the pleadings took the position that the respondents case was not clear to entitle them summary Judgment. That it qualified for the test of serious triable issues as held in **Hasmani v Banque De Cong Beige 1938 5 EACA 89 and Patel v EA Cargo Handling Services Ltd 1974 EA 75 at 76**

That being so, I think, on my part on review of the material placed before the trial court the test for summary Judgment is whether the record is such that it is fair and just for the Learned trial Magistrate to have decided the issue summarily.

The indicators I perceive and conceive are that it was a case well suited to summary Judgment: That what the court stated in **Industrial & Commercial Development Corporation v Daber Enterprises Ltd (200) 1 E.A. 75** when it stated as follows:

> ***That the purpose of the pleadings in an application for summary judgement is to enable a plaintiff to obtain a quick judgement where there is plainly no defence to the claims so to justify summary judgement, the matter must be plain and obvious and where it is not plain, and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where if necessary there has been discovery and oral evidence in subject to cross-examination."***

(Civil Appeal No. 232 of 1997 Dhanjal Investments Ltd v Shabana Investment Ltd)

The real question in the case at the time is whether in exercising discretion the Learned trial Magistrate point of view and her interpretation of the rule fid occasion an injustice. It is certainly the courts discretion in favour of summary Judgment which is at stake. In **Kimani v Mcdonnel 1966 EA 547**, though premised on an ex-parte Judgment trajectory the principle applies **Mutatis Mutandis** to the present facts. The court observed that:

> ***"when the court draws from <u>the fountain of discretionary power</u> it should consider among other things, the facts and their circumstances both prior and subsequent, and all the respective merits of the parties together with any material factor, which appears to have entered into the passing of the Judgment which would not or might not have been present had the Judgment not been <u>summary.</u>*** *(emphasis mine)*

The other identical vital point that summary procedure courts have to be forced to question is whether the claim as pleaded is simply a mere matter of arithmetic and the evidence in effect is incapable of according unquestionable interpretation of Order 36 Rule 1 of the Civil Procedure Rule based on the following;

> ***(1) There is no dispute over material facts.***
>
> ***(2) There is no issue with the credibility of the deponent and the affidavit evidence.***
>
> ***(3) A trial was unlikely to result in a better legal and evidential material.***

May be the appellant special considerations is the need to be given an opportunity raise 'a trite' defence at the trial but even on the brief pleadings in the draft, it appears there is no real issue with a prospect of success on the quantum of Kshs.4,100,000/=.

The courts are encouraged pursuant to the oxygen principle under Section 1A of the Civil Procedure Act to infuse culture shift in resolution of disputes and be reluctant to enter into issues of academic or pastoral Judgment where there is clarity of evidence for entry of summary Judgment. The test in Order 36 of the rules is founded on the principle that the court is empowered to give Judgment for the party to a suit against another in relation to the whole or any part thereof, once the requirements for summary Judgment are satisfied.

As in the case of an appeal court, I have carefully considered the pleadings and the evidence at that trial court with a critical eye in order to satisfy myself whether there was sufficient material for the respondents to surmount the criteria in Law. The logic of the situation is that the threshold issue on the real prospect of success with regard to the Kshs.4,100,000 claim I am in concurrence with the Learned trial Magistrate.

In the instant case there are four broad and interlocking approaches the trial court took to exercise discretion under Order 36 rule 1 and 2 of the Civil Procedure Rules.

Firstly, whether the plaintiff suit and subsequent notice of motion pleaded a liquidated amount as part of the declaration and relief to be awarded against the defendants.

As far as possible on reflections made from the plaint and affidavit evidence as far as possible the plaintiff major relief was for a claim of Kshs.7,100,000 plus costs and interest. The learned trial magistrate affirmed the essentials of the consolidated claim and its support from the documentary evidence.

Secondly, was the interpretation and or the application of the rules of evidence on triable issues. When the court below considers this question on summary judgement its duty is to construe the application by the applicant in view of the defence fronted by the defendant to

establish whether these are real issues with a prospect of success to controvert prima facie evidence on record in favour of the plaintiff. In light of the material availed in this case the applicants made good their claim that Order 36 rule (1) of the Civil Procedure rules was applicable qualitatively on part of the claim amounting to Kshs.4,100,000 plus costs and interest.

To this claim the learned trial magistrate was satisfied that the defendant did not put up a defence with real prospect of success to warrant leave of the court extended to them to defend.

Thirdly, the court considered whether, from the pleadings and affidavit evidence furnished to the court that so far there is any part of the claim with a prospect rather than real which would involve further evidence including viva voice and an opportunity to test it in cross-examination at the main trial. Again there is little difficulty in what the learned trial magistrate said in her ruling, the threshold for Kshs.4,100,00 for the relief under summary proceedings was met whereas the balance of the claim was to be determined on the merits at the trial.

Fourthly, that arguable claim as a whole, the Arbitration clause should assume jurisdiction by reason of the matters set out in the agreement. Although summary judgement is not always favoured by the litigants who at the behest of the claimants the application under Order 36(1)(2) has been pursued as a device of adjudicating the claim without a trial, is designed to secure the just speedy and in expensive determination of every cause of action.

For one as emphasized in the above cited dictum even with the new constitutional dispensation under Order 50 on right to a fair trial, the summary judgement calculus is only obtainable by discharging the burden of proof on the issues so pleased.

In my view true to order 36 Rule 1 of the CPR may it be known to all men that the purpose of the rule is not to cut litigants off from their rights of a fair trial. If there are real issues identifiable for trial however insignificant they may be in the eyes of a judge, a trial shall proceed.

Unfortunately for the appellant contention the learned trial magistrate had exercised discretion broadly on the disputed facts on record and established there are no elements essential to the Kshs.4.1 million claim for them to bear the burden of proof at the trial.

The test whether the appellate court has the jurisdiction to interfere with the exercise of discretion by the lower court is only amenable to the principles in **Shah v Mbogo 1967 EA 116**, where it is settled that an appellate court will not highly interfere with exercise of discretionary jurisdiction of the trial court unless it is based on a wrong premise, error application on the face of the record, misapprehended the evidence and more importantly an appellate court should be slow to substitute its discretion with that of the trial court.

To my mind, the onus was on the appellant to fault that discretion, that statutorily under Order 36 rule (1) of the Civil Procedure Rules, the learned trial magistrate misdirected herself in the matter of summary judgement.

Having failed to do so and in absence of any compelling reasons for this court to deal otherwise, the appeal as presented fails in its entirety.

In the above circumstances I come to the conclusion that the appeal lacks merit and it's for dismissal with costs to the respondent. The judgement and orders of the court dated 11th April, 2018 continue to carry the day unless stated otherwise by the Court of Appeal. It so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF APRIL, 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Kariuki holding brief for Kariuki for the appellant

2. Mr. Mwania holding brief for Katsoleh for the respondent