REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 433 OF 2012

SURESH RUGNATH RANIGA.....1ST APPELLANT

RAJIV SURESH RANIGA.....2ND APPELLANT

-VERSUS-

SAGAR MOHAN SOHANLAL M. RAM.....RESPONDENT

(Being an appeal from the ruling and order of Honourable T.W.C. Wamae (Mrs.) (Chief Magistrate) delivered on 3th August, 2012 in CMCC NO. 780 OF 2012

JUDGMENT

1. Sagar Mohan Sohanlal M. Ram, the respondent herein, instituted a suit vide the plaint dated 22nd February, 2012 claiming special damages in the sum of Kshs.2,250,000/ against the appellants jointly and severally plus costs of the suit and interest thereon.

2. The respondent pleaded in his plaint that on various dates in 2006 he transferred sums of money equivalent to Kshs.3,000,000/ to the 1st appellant's account No. 52xxxx held in Citi Bank to ensure the importation of gold and jewelry by the 1st appellant on the respondent's behalf and through a partnership agreement in which the 1st appellant was to invest a sum of Kshs.10,000,000/.

3. The respondent pleaded that the proposed partnership transaction did not materialize, at which point he demanded a refund of his money from the 1st appellant.

4. It was the respondent's averment that it was agreed between the parties herein vide the agreement dated 20th February, 2011 that the 1st and 2nd appellants would repay the respondent a total sum of Kshs.3,000,000/, out of which they only paid Kshs.750,000/ leaving a balance of Kshs.2,250,000/ which the respondent sought in his claim.

5. Upon being served with summons to enter appearance, the appellants entered appearance and filed their joint statement of defence dated 16th April, 2012 to deny the respondent's claim.

6. Soon thereafter, the respondent filed the application dated 25th May, 2012 seeking to have the appellants' statement of defence struck out and for summary judgment to be entered. To oppose the application, the appellants put in Grounds of Opposition dated 28th June, 2012. Subsequently, the parties filed written submissions on the application.

7. In the end, the trial court vide its ruling delivered on 3rd August, 2012 allowed the respondent's application and entered summary judgment against the 1st appellant while dismissing the suit against the 2nd appellant.

8. Being aggrieved by the aforesaid ruling, the appellants have preferred an appeal against the same by filing the memorandum of appeal dated 16th August, 2012 constituting the four (4) grounds hereunder:

> ***(i) THAT the learned trial magistrate erred in law and fact by striking out the appellants' statement of defence and thus denying the appellants a chance to canvass their defence on full trial.***
>
> ***(ii) THAT the learned trial magistrate erred in law and fact by striking out the appellants' statement of defence when the same was not vexatious, scandalous and raised triable issues in law.***
>
> ***(iii) THAT the learned trial magistrate erred in law and fact in failing to consider and appreciate the appellants' Grounds of***

Opposition in response to the respondent's application for summary judgment.

(iv) THAT the learned trial magistrate erred in law and fact in taking a draconian measure by striking out the appellants' statement of defence when the circumstances did not call for such a measure.

9. The appeal was dispensed with through the filing of written submissions. The appellants first submitted that the trial court failed to appreciate that their statement of defence raises triable issues such as the issue of whether there existed a partnership relationship between the parties as pleaded in the plaint and whether the purported funds were transferred to either of the appellants. The appellants also argued that whether the purported agreement was entered into at will is also a triable issue which ought to go for trial. In support of their arguments, the appellants referred this court to *inter alia*, the case of **Olympic Escort International Co. Ltd & 2 others v Parminder Singh Sandhu & another [2009] eKLR** in which the Court of Appeal defined a triable issue in a defence as one which is bona fide and one that need not necessarily succeed on trial.

10. The appellants also drew this court's attention to the legal principle that a party should not be driven out of the seat of justice through the striking out of pleadings unless the circumstances are crystal clear. On this submission, the appellants cited the case of **Kenindia Assurance Co. Ltd v Laban Idiah Nyamache [2011] eKLR** where the court held thus:

"It is trite law that striking out pleadings is such a drastic remedy which can only be resorted to sparingly and in the clearest of cases and appreciating that the right to a hearing is a constitutional right."

11. It was the appellants' submission that in striking out their statement of defence, the trial court essentially condemned them without hearing their side.

12. Furthermore, the appellants faulted the respondent for failing to file a reply to their defence and therefore admitting to the allegations pleaded in the defence. In so submitting, the appellants relied on the following analysis in **Unga Millers v James Muenen Kamau [2005] eKLR**

"…It is trite law that he who does not file a reply to such a defence is deemed to have admitted the said allegations."

13. In conclusion, it was the appellants' contention that the impugned ruling ought to be dismissed and the appellants granted an opportunity to defend the suit at full trial.

14. In contrast, the respondent in supporting the decision of the trial court submitted that the defence does not raise any specific triable issues but raises mere denials, citing **Order 2, Rule 4** of the **Civil Procedure Rules** which provides that:

"(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant

Statute of limitation or any fact showing illegality—

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading."

15. From the foregoing, the respondent argued that the appellants ought to have pleaded the particulars of illegality pleaded in their defence, adding that the appellants did not put in a counterclaim to claim the sums paid to the respondent under purported duress or coercion.

16. The respondent also referred to the case of **Peeraj General Trading & Contracting Company Limited, Kenya & another v Mumias Sugar Company Limited [2018] eKLR** in which it was held that a mere denial does not constitute a reasonable and proper defence to a claim.

17. It was the respondent's argument that the appellants' statement of defence is an abuse of the court process within the meaning set out in the authority of **Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009** when the court rendered the following:

"…the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue."

18. According to the respondent, the appellants are abusing the court process by wasting the court's time in submitting that they have a defence which raises triable issues yet the said issues have not been established. It is on this basis that the respondent urged this court to dismiss the appeal and uphold the ruling of the trial court.

19. I have considered the rival submissions on appeal. I have likewise re-evaluated the evidence placed before the trial court. It is noted that the four (4) grounds of appeal encompass the trial court's analysis and decision to strike out the appellant's defence and to enter summary

judgment. In that case, I deem it appropriate to deal with the grounds of appeal contemporaneously.

20. As I mentioned earlier on, the respondent through his Motion dated 25th May, 2012 sought for an order striking out the appellants' joint statement of defence. The grounds upon which the Motion was brought were that the defence does not disclose any reasonable defence in addition to being scandalous, frivolous and vexatious and an abuse of the court process. In his affidavit in support of the Motion, the respondent reiterated the facts pleaded in his plaint and which facts I summarized hereinabove.

21. In their Grounds of Opposition, the appellants by and large argued that their defence raises triable issues and which issues were set out in the Grounds.

22. Upon hearing the Motion, the learned trial magistrate reasoned that the 1st appellant did not deny being the holder of the account to which the respondent transferred the funds in question hence any averments that the said sums were not transferred to his account amounted to mere denials. The learned trial magistrate also reasoned that the 1st appellant failed to explain the purpose for which the funds were transferred to his account, hence terming the denial of any partnership between the parties a mere denial and not a triable issue.

23. From the foregoing, it was the learned trial magistrate's finding that the 1st appellant was truly indebted to the respondent in the sum of Kshs.2,250,000/ and that the defence is a sham intended to delay the fair trial of the suit and which ought to be struck out. The learned trial magistrate further held that no case was made out against the 2nd appellant.

24. Upon reconsidering the above, I refer to the guiding provisions on the striking out of pleadings which is **Order 2, Rule 15(1)** of the **Civil Procedure Rules, 2010** and which express the following:

> ***"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."***

25. From my study of the respondent's Motion, I established that he did not demonstrate the manner in which the appellants' statement of defence is scandalous, frivolous or vexatious; or prejudicial to a fair trial; or an abuse of the court process. Be that as it may, it is apparent from its contents that the Motion was premised on the position that the defence does not disclose any reasonable defence.

26. What then constitutes a reasonable defence? In my view and in tandem with previously decided cases, a reasonable defence is understood to mean a defence which raises triable issues and not mere denials. The appellants cited a few authorities which have defined what is meant by a 'triable issue.' In addition thereto and on the one hand, I also considered the Court of Appeal's definition of the term in the case of **Ternic Enterprises Limited v Waterfront Outlets Limited [2018] eKLR** as follows:

> ***"…a triable issue" is an issue which raises a prima facie defence and which should go to trial for adjudication."***

With the Court going ahead to render that:

> ***"The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend."***

27. On the other hand, the courts have unanimously held that a mere denial does not constitute a sufficient defence. For reference purposes, I will quote the Court of Appeal's decision in the case of **Mugunga General Stores v Pepco Distributors Ltd [1987] eKLR** when it pronounced the following:

> ***"…a mere denial is not a sufficient defence in this type of case…It is not sufficient therefore simply to deny liability without some reason given."***

28. It therefore follows that it fell upon the learned trial magistrate to ascertain whether the appellants' statement of defence raises any triable issues. Upon perusing her ruling, I noted that the learned trial magistrate found that there were no triable issues in the defence. Upon further perusal, however, I noted that the learned trial magistrate determined so after delving into the merits of the suit notwithstanding the fact that the suit had not proceeded for trial. To my mind, it was not only improper but unwarranted for the magistrate to consider the substance of the claim and arrive at a conclusive decision in the absence of an opportunity to the parties to present their cases at the hearing.

29. That being said, upon reconsidering the Grounds of Opposition put in by the appellants and looking at the statement of defence on record, I identified triable issues therein, including the issue on whether the person to whom the funds in question were transferred is a party to the suit; whether the agreement in question was entered into under duress/coercion. These, in my view, are issues which ought to go for trial for proper ventilation and determination. The learned trial Magistrate ought not to have determined these issues at the preliminary stage.

30. On the same note, I took into account the respondent's contention that any illegalities pleaded in the defence ought to have been particularized. I looked at the defence and I noted the pleadings of illegality made therein. In my view, the mere fact that the appellants did not plead the particulars thereof does not make the defence incurably defective and consequently deserving of automatic dismissal. Further to this, the respondent did not demonstrate before the trial court the manner in which the defence is an abuse of the court process and intended to delay a fair trial.

31. The courts that have gone before me have held that the striking out of pleadings is a draconian act which is to say that courts should exercise great caution before deciding to strike out pleadings. The reason behind this is the constitutional right to be heard which is available to all parties without fear or favour and as a matter of principle. Taking the present circumstances into consideration, I find that the learned trial magistrate overlooked the appellants' Grounds of Opposition and misconstrued the legal principles for striking out pleadings, thereby taking an improper course of striking out the appellants' statement of defence in the presence of triable issues and analyzing the merits of the case without first hearing the parties. I therefore find that the learned trial magistrate's ruling ought to be interfered with.

32. In the end, I find merit in the appeal and the same is allowed as prayed. Consequently, the following orders are made:

a) The ruling and order dated 3rd August, 2012 and consequent orders made are hereby set aside.

b) The appellants' statement of defence dated 16th April, 2012 is hereby reinstated.

c) The lower court file to be placed before a different magistrate vested with jurisdiction for further directions and disposal of the suit at the earliest opportunity.

d) Each party shall bear it's own costs of the Appeal

Dated, signed and delivered at NAIROBI this 7TH day of MAY, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

.....for the 1st and 2nd Appellants

.....for the Respondent