



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL 90 OF 2010

R.M. PATEL & PARTNERS LTD APPELLANT

AND

THE RECEIVER MANAGER, SONY OUTGROWERS CO. LTD RESPONDENT

(Being an appeal from the judgment of Hon. C.G. Mbogo Esq. Chief Magistrate dated 5 th May, 2010 at Eldoret in CMCC No. 534 of 2009)

JUDGMENT

This is an appeal from the ruling of the Chief Magistrate, (**Hon. Mbogo C.G.**) delivered at Eldoret on 5th May, 2010 in which the learned Magistrate dismissed an application for summary judgment against the respondent herein, the Receiver Manager, **Sony Out growers Co. Ltd (In Receivership)**. The appellant **R. M. Patel & Partners Ltd** filed suit against the respondent as the defendant in the Lower Court seeking judgment for Kshs 1,000,668.70 plus costs and interest being “outstanding unpaid balances for goods supplied and services rendered” and demand notice fee of Kshs 1,740/=.

The respondent filed a defence on 18th August, 2009, in which the appellant’s claim was denied. Paragraph 6 of the defence stated as follows:-

“In the alternative and without prejudice to the above (if which is denied) that any sum is owed to the plaintiff, the defendant avers that the same is due to fraud, misrepresentation, accounting, negligence of the plaintiff employees

PARTICULARS OF FRAUD, MIS-REPRESENTATION AND NEGLIGENCE:

- (a) Not giving credit to the defendant of the items paid for;**
- (b) Using poor accounting practices thus coming up with wrong figures as due;**
- (c) Posting /demanding payment for goods and services not requested for;**
- (d) Using fake delivery notes to demand for payment of services not rendered;**
- (e) Inflating bill invoice with figures not agreed upon;**
- (f) Conspiring with unscrupulous employees to order goods/services not authorized by the management board.”**

The appellant filed a reply in which it reiterated its averments in the plaint. It also specifically denied the fraud, misrepresentation and negligence alleged in the written statement of defence.

On 4th March, 2010, the appellant in its Chamber Summons dated 3rd March, 2010, brought under the provisions of Order VI Rule 13(1) (b) (c) and (d) of the Civil Procedure Rules and Section 3 and 3(A) of the Civil Procedure Act, sought an order striking out the respondent's defence and for judgment as prayed in its plaint. The application was based on the main grounds that:-

- 1). The defence was scandalous, frivolous and vexatious;
- 2). The defence would prejudice , embarrass and delay the fair trial of the action;
- 3). The defence was a gross abuse of the process of the court;
- 4). The respondent acknowledged the debt and undertook to settle the same but did not;

That application was heard by **Hon. Mbogo C.G.** for determination. The learned Chief Magistrate considered all that was placed before him by way of affidavits and submissions and in the end was not persuaded that the respondent's defense should be struck out. In his ruling dated 5th May, 2010, the learned Chief Magistrate concluded as follows:-

“A perusal of annexures ASF – 2 to the supporting affidavit shows that the applicant claims 1,029,728.70 from the respondent. In its plaint the plaintiff /applicant claims for Kshs 1,000,668.70. In the case of Coast Projects Limited versus M.S. Shah Construction (K) Limited (2004) 2 KLR 119, the Court of Appeal held that “ An application to strike out a defence is intended to give quick remedy to a party that is being denied its claim by what may be described as a sham defence. It is a procedure that is to be resorted to in very clear, plain and obvious cases” Applying the above principle to the present case, it is my finding the application before me lacks merit.

There is need to validate the issues of the exact amount the applicant claims to be owed by the respondent. In the circumstances, I dismiss the application with costs to the respondent”

That finding provoked this appeal by the appellant who was the plaintiff in the Lower Court. It has cited four (4) ground of appeal. However, only three (3) of them are substantial. They are as follows:-

- (a) That the learned Chief Magistrate erred in law and in fact in, relying on the appellant's own documents in deciding that there were triable issues;
- (b) That the learned Chief Magistrate erred in law and in fact in failing to hold that the claim having been admitted by the respondent, the defence on record was a sham, scandalous, frivolous and a gross abuse of the court process;
- (c) That the learned Chief Magistrate erred in law and in fact in failing to realize that the debt was incurred after the company was placed under Receivership by the Receiver Managers and not by the Company under Receivership.

That is the appeal which came up before me for hearing on 29th May, 2012. Counsel agreed to file written submissions which were duty in place by 17th July, 2012. The gist of the submissions made on behalf of the appellant is that the sum claimed was admitted by the respondent and the sum attracted a debt collection fee of Kshs 29,070/= which was the difference the learned Chief Magistrate identified as a trial issue which in reality could not be a triable issue.

On behalf of the respondent, it was submitted in the main that the defence delivered raised several triable issues, among them, fraud, misrepresentation, negligence, non-compliance with the provisions of the Companies Act and discrepancy in the sums claimed. I have considered the pleadings, the application, the affidavits filed, the grounds of appeal and the submissions of counsel. Having done so, I take the

following view of the matter.

The appellant sought the striking out of the respondent's defence because in its view, the same was scandalous, frivolous or vexatious (order VI rule 13 (1) (b)); that it would prejudice, embarrass or delay the fair trial of the action (order VI rule 13 (1) (c)) or it was otherwise an abuse of the process of the court (Order VI rule 13, (1) (d)). The appellant did not however, identify the parts of the respondent's written statement of defence which would be described as scandalous, frivolous or vexatious. It did not also identify parts of the defence which would prejudice, embarrass or delay the fair trial of the action or would otherwise amount to abuse of the process of the court.

The thrust of the appellant's application would appear to have been the admissions allegedly made by the respondent in the letter dated 6th April, 2009 addressed to the appellant's counsel. The admission may have been without prejudice and on the face thereof it would appear that the appellant was entitled to judgment. However, the respondent raised issues of fraud, mis-representation and accounting negligence, particulars whereof he enumerated. In the replying affidavit, he averred that the predecessor was removed because of "**under handdealings**" and that the sum due is disputed.

The respondent therefore, prima facie, raised bona fide triable issues. The learned Chief Magistrate may have identified a non-issue, but there is no doubt that he had the correct principles in mind in dismissing the appellant's application to strike out the respondent's written statement of defence. As he correctly stated in his ruling, the power of the court to strike out a pleading should be resorted to in very clear, plain and obvious cases.

(See **Coast Projects Ltd –vrs- M.R. Shah Construction (K) Ltd. (2004] 2 KLR 119**). In **D.T. Dobie & Company (Kenya) Limited =vrs= Muchina [1982] KLR 1**, the Court of Appeal observed (obiter) that:-

"The Court should aim at sustaining rather than terminating a suit ..."

And that

"the power to strike out should be exercised only after the court has considered all facts, but it must not embark on the merits of the case itself as this is solely the reserved for the trial judge"

In view of the foregoing, this appeal is dismissed. Costs shall however abide the results of the trial before the Chief Magistrate's Court.

DATED AND DELIVERED AT ELDORET THIS 5TH DAY OF SEPTEMBER, 2012.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mr. Otieno for the appellant and **Mr. Ngigi** holding brief for

Ragot for the responded.

F. AZANGALALA

JUDGE