Co-operative Bank of Kenya Limited v X-Treme Electronics Ltd (Civil Appeal 70 of 2019) [2025] KECA 507 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KECA 507 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 70 OF 2019

SG KAIRU, F TUIYOTT & LA ACHODE, JJA

MARCH 21, 2025

BETWEEN

THE CO-OPERATIVE BANK OF KENYA LIMITED ..... APPELLANT

AND

X-TREME ELECTRONICS LTD ..... RESPONDENT

(Being an Appeal from the ruling and orders of the High Court Commercial Division (Kasango. J), delivered on 29th November 2018 in HCCOMM Suit No. 246 of 2016)

JUDGMENT

1. This appeal is an expression of the dissatisfaction of Co-operative Bank of Kenya Limited (the appellant), with the ruling delivered on 29th November 2018 by Kasango J, in HC Comm Suit No. 246 of 2016 at Nairobi. In the impugned ruling, the learned judge allowed an application filed by X-Treme Electronics Ltd (the respondent), to strike out the defence statement, and dismissed the appellant's application to amend the defence.

2. We trace the origin of this appeal to a dispute that commenced when the respondent filed a plaint dated 9th June 2016, against the appellant, claiming a sum of Kshs.12,660,128.60 for contractual works completed under the supervision of the appellant's agent, Synchro-consult Associates Limited.

3. The appellant filed a statement of defence dated 12th August 2016, and denied the content of the plaint. In addition, it denied that a principal – agent relationship existed between it and Synchro-consult Associates Limited and stated that the completion of the work was not to the required standard.

4. This was followed by an application dated 5th October 2016 filed by the respondent, seeking to strike out the appellant's statement of defence on the grounds that it raised no triable issues, was full of mere denials and was frivolous and vexatious.

5. In response, the appellant first filed an application dated 11th May 2017 seeking to amend the statement of defence and introduce a counterclaim. Subsequently, the appellant filed a replying affidavit dated 27th June 2018 and deposed that the defence raises triable issues on: whether there is an agency relationship between the appellant and Synchro-consult Association Ltd; whether the work was successfully completed as per the terms of the contract; and, whether the respondent submitted incomplete and inconsistent Fluke Test results and unsatisfactory works.

6. The court heard the two applications together. Upon considering the two applications, the learned judge allowed the respondent's application striking out the defence and dismissed that of the appellant for amendment of the defence.

7. That ruling grieved the appellant, spurring the filing of a Memorandum of Appeal dated 22nd February 2019, now before us, alleging that the learned judge erred in fact and in law on the following grounds:

    a. In finding that the Application dated 5th October 2016 was opposed through written submissions with no affidavit in reply on record,

    b. In failing to consider the defendant's Replying Affidavit sworn on 27th June 2018 which was filed in response to the Application dated 5th October 2016,

    c. In determining the Application dated 5th October 2016 seeking to strike out the Appellant's defence before determining the Appellant's application dated 12th August 2016 seeking to amend the statement of defence,

    d. In finding that there was clear evidence that the plaintiff concluded the work of the defendant's agent,

    e. In finding that the statement of defence dated 12th August 2016 did not raise any triable issue to the plaintiff's claim ,

    f. In finding that the Application seeking to amend the statement of defence was an abuse of the court process,

    g. In finding that the defendant's application seeking leave to amend the defence was filed in response to the plaintiff's application seeking to strike out the statement of defence.

8. This appeal was canvassed by way of written submissions.

9. The firm of M/s Ochieng', Onyango, Kibet & Ohaga Advocates filed written submissions dated 24th September 2019 on behalf of the appellant and urged that they had filed a reply to the respondent's application, and that the learned judge erred in not considering it.

10. Counsel faulted the learned judge for delving in to the merits of the suit at an interlocutory stage without the benefit of hearing both parties. That the judge observed from the pleadings and affidavits, that the respondent was awarded the contract, completed the same and was issued with a practical completion certificate by the appellant's appointed engineer. The appellant relied on the decision in DT Dobie & Company (Kenya) Ltd vs Muchina & Aother (1982) KLR and Yaya Towers Limited v Trade Bank Limited (In Liquidation) (2000) eKLR to caution that the court should not delve into the merits of the matter at the interim stage.

11. Relying on the case of Milton Mwendwa Kimanzi Kitule v Independent Electoral Boundaries Commission & 2 Others (2017) eKLR, counsel urged that the statement of defence raises triable issues and as such it must be allowed to proceed to hearing. That Order 2 of the Civil Procedure Rules provides for what a statement of defence should contain, and that should be only a summary of the facts

of the claim and not the evidence. It was urged that in the proposed amended defence the appellant introduced a counterclaim in the suit.

12. Counsel contended that the position on amendment of pleadings as observed in the case of St. Patrick's Hill School Limited v Bank of Africa Kenya Limited (2018) eKLR is that:

> " amendment to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other party can be compensated by costs."

It was argued that the learned judge instead, assessed the motives of the appellant in bringing the amendment and found that the amendment was an afterthought filed in response to the respondent's application.

13. In rebuttal, the firm of M/s A.C. Knight and Associates Advocates filed written submissions dated 24th May 2024 on behalf of the respondent. They urged that the learned judge exercised her discretion judiciously and within the legal standards prescribed for striking out pleadings that do not raise any triable issues. Counsel submitted that the appellant did not deny that it agreed to award service work for structured cabling to the respondent. This was communicated by the appellant to its agents Synchro-consult Associates Ltd vide a letter dated 10th November 2011. Further, that the appellant's defence was full of mere denials and was correctly struck out by the court for failure to raise triable issues.

14. Counsel posited that the only result emanating from the pleadings and the affidavit evidence is that the respondent was awarded the contract, completed the contractual work and the practical completion certificate was issued by the appellant's appointed engineer/agent.

15. Counsel asserted that the principal - agent relationship between the appellant and Synchro-consult Associates Ltd is evinced by official communication from the appellant vide a letter Ref No: 1/A/3/CMPSM/COOPHSE/PM dated 10th November 2011 instructing Synchro – consult Associates Ltd to arrange for the award of works to the respondent. Synchro - consult obeyed those instructions and sent a letter Ref No: SCA/DMM/2011/CO-OP HSE LAN/11/05 dated 29th November 2011 to the respondent, setting out the terms and conditions to be met.

16. Counsel submitted further that the learned judge's decision to deny the amendment was well founded, as allowing it would have resulted in unnecessary delays, increased costs, and procedural unfairness to the respondent. Further that the proposed changes would have fundamentally altered the nature of the defence, contravening the principles of justice and equity.

17. Counsel found support in the decision of Abdul Karim Khan v Mohamed Roshan (1965) E.A. 289 where it was held that amendments should not be allowed if they cause injustice, or fundamentally change the nature of the defence. In addition, that the appellant made an application to amend the defence late, only after the respondent had filed an application to strike out its defence.

18. We have considered the record and grounds of appeal as well as the rival submissions before us. As the first appellate Court, our mandate is donated under Rule 31 (1)(a) of the Court of Appeal Rules, 2022 as follows:

> " On appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power to re-appraise the evidence and to draw inferences of fact."

19. Our duty as a first appellate Court was succinctly stated in the often quoted case of Selle & another v Associated Motorboat Co. Ltd.& others (1968) EA 123 in the following terms:

> " I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

20. With that in mind we discern the issues that fall for our determination in this dispute to be:

    i. Whether the superior court was correct in allowing the respondent's application to strike out the defence.

    ii. Whether the court ought to have allowed the application to amend the statement of defence, and

    iii. Whether the superior court delved in to matters that it should not have at an interlocutory stage,

21. The first issue is whether the superior court was correct in allowing the respondent's application to strike out the appellant's defence. At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that it discloses no reasonable cause of action or defence in law: or, is scandalous, frivolous or vexatious: or it may prejudice, embarrass or delay the fair trial of the action.

22. This Court in D.T. Dobie & Company (Kenya) Ltd vs Muchina & Another (1982) KLR considered at length the question of striking out pleadings, and pronounced itself thus:

> " The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits...
>
> "without discovery, without oral evidence tested by cross examination in the ordinary way." (Sellers LJ (supra)).
>
> As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right.
>
> If an action is explainable as likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it."

23. Also, in Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono [2015] eKLR, this Court held that summary judgment should only be resorted to where there are no triable issues raised by the defendant either in the statement of defence, or in the affidavit in opposition to the application. The Court went further to define what a bona fide triable issue is, as follows:

> "What then is a defence that raises no bona fide triable issue? A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term "triable" as, "subject or liable to judicial examination and trial". It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court."

24. The superior court in striking out the appellant's defence pronounced itself as follows:

> " 14. The defendant by its defence filed on 12th August 2026 merely denied the plaintiff's claim and as stated also denied agency with Synchro-consult. Other than merely denying the plaintiff's claim the defendant in paragraph 6 of that defence pleaded:
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> > In further response to paragraph 4 the defendant avers that there were inconsistencies in the Fluke Test Results as submitted by the plaintiff hence incomplete and unsatisfactory works contrary to what was required of the plaintiff."……
>
> 19. The clear evidence that comes out of the pleadings and affidavit evidence is that the plaintiff was awarded the contract, the plaintiff completed the contractual work; and the practical completion certificate was issued by the defendant's appointed engineer. The defendant has not raised any triable issue to that clear evidence. For that reason, therefore, the plaintiff's Notice of motion dated 5th October succeeds."

25. In the submissions in this appeal, the appellant states that they have three triable issues being: whether there exists an agency relationship between the appellant and Synchro-consult Associates Ltd: whether the work was unsuccessfully completed as per the terms of the contract, and whether the respondent submitted incomplete and inconsistent Fluke Test results and unsatisfactory works. The respondent, on the other hand, asserts that the appellant's statement of defence is full of mere denials.

26. We have looked at the statement of defence and we find that it simply denies the contents of the plaint, and also states that there were inconsistencies in the Fluke Test results submitted by the respondent. The statement of defence offers bare denials without particulars.

27. On the other hand the agency relationship between the appellant and Synchro-consult Associates Ltd is captured in the official letter Ref No: 1/A/3/CMPSM/COOPHSE/PM dated 10th November 2011 from the appellant, instructing Synchro – consult Associates Ltd to arrange for the award of works to the respondent. Synchro- consult complied with the instructions and sent a letter Ref No: SCA/DMM/2011/CO-OP HSE LAN/11/05 dated 29th November 2011 to the respondent, setting out the terms and conditions to be met.

28. We note that Synchro –consult Associates Ltd is not impleaded, if it acted outside its mandate in awarding the contract without instruction. Further that the appellant did not deny that it agreed to award service work for structured cabling to the respondent.

In the premise we have no difficulty agreeing with the holding of the superior court that the statement of defence does not raise triable issues.

29. On whether the court ought to have allowed the applicant to amend the statement of defence it was urged for the appellant that the superior court did not consider its response to the application. The respondent's position was that the learned judge's decision to deny the amendment was well founded, as allowing it would have resulted in unnecessary delays, increased costs, and procedural unfairness to the respondent. Further that the proposed changes would have fundamentally altered the nature of the defence, contravening the principles of justice and equity.

30. The power of the court to allow or refuse a party to amend pleadings is discretionary and as with all discretionary power, it must be exercised judiciously and in consideration of the facts of a particular case.

31. In relation to the circumstances of this case we deem as irresistible the decision in Bosire Ogero v Royal Media Services [2015] eKLR where this Court held as follows:

> " In Bullen Leak and Jacobs Precedents of Pleadings, 12th Edition page 127 titled "amendment with leave – time to amend" it is stated that the power to grant or refuse leave to amend a pleading is discretionary and it is to be exercised so as to do what justice may require in the particular case as to cost or otherwise. The power may be exercised at any stage of the proceedings and accordingly amendment may be allowed before or at the trial or after trial or even after judgment or on appeal. As a general rule, however, if an amendment is sought to be made it should be allowed if it is made in good faith and if it will not do the opposite party any harm, injury or prejudice him in some way that cannot be compensated by costs or otherwise."

32. On the question of ascertaining the requirements for exercising the discretion to grant or refuse amendment of pleadings, we find value in the holding in Daniel Ngetich & Anor V K-Rep Limited [2013] eKLR, that:

> " .....Normally the court should be liberal in granting leave to amend a pleading. But it must never grant leave for amendment if the court is of the opinion that the amendment would cause injustice or irreparable loss to the other side, or if it is a device to abuse the process of the court. The power to allow amendments is intended to do justice."

33. Regarding the appellant's application for amendment the judge held as follows:

> " 23. In my view even if the amendment as sought is allowed the defendant needed to explain why it instructed synchro-consult that it awarded the plaintiff to carry out work of structured cabling, if the said synchro-consult was not its agent. If synchro-consult was its agent then the matters stated in the affidavit of its managing director, reproduced above, rings true.
>
> 24. In my view the defendant in seeking to amend their defence were responding to the plaintiff's application and in so doing were hoping the amendment would stop the plaintiff's application in its tracks. That in my view is an abuse of the court process.
>
> 25. There being clear evidence that the plaintiff concluded the work to the satisfaction of the defendant agent the amendment will do nothing but to

delay the conclusion of this suit. For that reason the defendant's Notice of Motion dated 11th May 2017 fails."

34. In the instant appeal it is evident that the appellant filed the application dated 11th May 2017 seeking to amend the statement of defence as a reaction to the respondent's application to strike out the defence. Even then its application for leave came seven months after the respondent's application to strike out.

35. The appellant subsequently filed a replying affidavit dated 27th June 2018 to the respondent's application almost two years later to depose that the defence raises triable issues. There is no indication on record that leave was obtained to file the response out of time, and the inordinate delay in filing the response is not explained.

36. As much as parties can seek to amend their pleadings any time in the life of a case, we agree with the finding of the learned judge in the superior court. It is evident that the appellant's application to amend its pleadings was intended to stop the respondent's application to strike out the defence, or to delay the conclusion of the suit. Consequently, we find that the superior court was correct in dismissing the appellant's application for amendment of the defence.

37. In the last issue Counsel for the appellant faulted the learned judge for delving in to the merits of the suit at an interlocutory stage without the benefit of hearing both parties. That the judge observed from the evidence in the pleadings and affidavits, that the respondent was awarded the contract, completed the same and was issued with a practical completion certificate by the appellant's appointed engineer.

38. Counsel for the respondent on his part posited that the only result emanating from the pleadings and the affidavits was that the respondent was awarded the contract, completed the contractual work and the practical completion certificate was issued by the appellant's appointed engineer/agent, Synchro – consult Associates Ltd.

39. As a rule of the thumb a suit ought not 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. See D.T. Dobie & Company (Kenya) Ltd (supra).

40. Upon examining the record we are satisfied that the learned judge merely stated a fact that it was evident on the face of the pleadings that the statement of defence did not raise triable issues to the respondent's case.

41. In the premise we find no merit in this appeal and dismiss it with costs to the respondent.

It is so ordered.

DATED AND DELIVERED IN NAIROBI THIS 21ST DAY OF MARCH, 2025.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original Signed

DEPUTY REGISTRAR