



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), J. MOHAMMED & KANTAI, J.J.A.)

CIVIL APPEAL NO. 132 OF 2016

BETWEEN

LANDBANK REAL ESTATE

INVESTMENT TRUST LIMITED.....APPELLANT

AND

STANDARD CHARTERED

BANK KENYA LIMITED.....RESPONDENT

(Being an appeal from the ruling of the High Court of Kenya at Nairobi (Ogola, J.) dated 16th May, 2016

in

H.C.C.C No. 543 of 2015)

JUDGMENT OF THE COURT

This appeal and cross-appeal arising from an interlocutory order raises a single issue; whether the learned Judge (Ogola, J.) properly exercised his discretion in declining to enter summary judgment in H.C.C.C No. 543 of 2015 against the respondent as prayed by the appellant and to strike out the appellant's suit as sought by the respondent.

We trace the genesis of the two applications giving rise to the decision, the subject of the appeal and cross appeal to a tender invited in May, 2015 by the appellant for the construction of a boundary wall and a guard house on L.R No. 8529/1 in Kamulu, Machakos County. Sichuan Huashi Enterprises Corporation (EA) Ltd (the bidder) was awarded the tender. A construction contract was however never concluded between the appellant and the bidder. Instead, they pointed fingers at each other for this failure. The details of that controversy is not directly relevant to the matters canvassed before the court below and indeed in this appeal.

Apparently, as a pre-condition of acceptance of any bid by the appellant, bidders were required to furnish Bid Bonds from reputable banks to act as tender guarantees, pursuant to which the bidder had tendered a Bid Bond dated 9th July, 2015 wherein the respondent had guaranteed to pay the appellant a sum of Kshs.15,018,493 upon demand and on occurrence of any of the conditions set out thereunder. On account of the aforesaid dispute between the bidder and the appellant, the latter, by a demand dated 29th July, 2015 called upon the respondent to pay the amount guaranteed. The bidder, however, saw no basis for the appellant to do so, and to challenge the demand instituted **H.C.C.C No. 381 of 2015** against the appellant. Contemporaneously, the bidder also took out an application under a certificate of urgency pursuant to which *ex-parte* orders were issued on 4th August, 2015. Of relevance is the following part of the orders:-

“ ...

4. Until 11 August, 2015 the Standard Chartered Bank should withhold payment to the respondent (the appellant herein) in respect of the Bid Bond No... In effect the subject matter of the application is to be conserved until 11th August, 2015...”

Subsequently, the respondent was served with the said orders before it could make any payment to the appellant as demanded by the latter.

The aforementioned orders were extended from time to time until Sewe, J. granted the following orders on 2nd October, 2015 after hearing the bidder's application *inter partes*:

“

1. THAT a temporary injunction be and is hereby issued barring the defendant (the appellant herein) from illegally and irregularly calling and/or receiving any payment from Standard Chartered Bank Kenya Ltd. in respect of Bid Bond Number 201020115846 issued by Standard Chartered Bank Kenya Ltd. on 9th July, 2015 pending the hearing an determination of the suit in the following terms:

2. THAT the entire sum of the Bid Bond of Kshs. 15,018,493 which Standard Chartered Bank was poised to pay to the Defendant as at 3rd August, 2015 be deposited in an interest earning account in the joint names of the parties hereto within 7 days of this order.

3. THAT the plaintiff/applicant to furnish an undertaking as to damages within 7 days hereof, failing which the order of temporary injunction will automatically lapse...”

Precisely one month later, on 2nd November, 2015 the appellant filed the subject suit in the High Court against the respondent. It sought, *inter alia* an order compelling the respondent to pay the amount under the guarantee and damages for breach of undertaking. By its statement of defence, the respondent explained that it was prevented from paying the guarantee on account of the above orders issued in **H.C.C.C No. 381 of 2015**.

In turn, the appellant filed an application dated 20th November, 2015 seeking summary judgment on the basis that the suit was for a liquidated demand; and the respondent's defence was a sham and a façade. The respondent opposed the application on similar grounds that it had raised in its statement of defence, as set out above. Likewise, based on the very same grounds of opposition, the respondent too filed an application dated 6th January, 2016 urging the High Court to strike out the appellant's suit for being frivolous, vexatious and an abuse of the court process.

Before the learned Judge, therefore were 2 applications. It is the ruling in the two applications that has precipitated the appeal and cross appeal. The learned Judge by a ruling dated 16th May, 2016 dismissed both applications and stayed the subject suit pending the determination of **H.C.C.C No. 381 of 2015**. Both sides were aggrieved and filed the appeal and cross appeal as explained above.

Before the appeal could be set down for hearing, the respondent repeatedly reminded the appellant that a certified copy of the order against which the appeal was brought had not been approved by the respondent's advocates and further that the order in question did not form part of the record. When all else failed the respondent took out a motion asking that the record of appeal be struck out for those reasons. A single Judge of the Court in allowing the appellant's application for leave to file a supplementary record of appeal, to bring on record the omitted certified copy of the order, observed that the application for the striking out would be canvassed before the bench hearing the appeal. This became part of the Deputy Registrar's directions during case management conference; that the issue be canvassed in the main appeal.

Ideally the hearing of an application to strike out the appeal ought to be heard ahead of the appeal itself. The position we take of the matter, that notwithstanding is that, first the order having been admitted along with the supplementary record of appeal, it is too late in the day to look back. Secondly, we cannot see any prejudice the respondent is exposed to by the late service and filing of the certified order.

The appellant, through Mr. Miyare condensed the nine grounds it had raised in the memorandum of appeal into three and asked, whether the learned Judge erred in linking H.C.C.C No. 381 of 2015 and the subject suit; whether the learned Judge lawfully and judiciously exercised his discretion in staying the subject suit; and whether the appeal was meritorious.

In the appellant's opinion, the two suits were distinct in that, on one hand, H.C.C.C No. 381 of 2015 was concerned with the tender between the appellant and the bidder. On the other hand, the subject suit was in respect of the demand guarantee between the appellant and the respondent.

It was argued that, by staying the suit, the learned Judge went against the universally accepted principle that a demand guarantee is independent of the primary contract or relationship. Applied to this dispute, the tender arrangement between the appellant and the bidder is independent of that subsequently executed guarantee between the the parties in this appeal; that regardless of any dispute between the appellant and the bidder, the respondent had an absolute obligation to honour the demand guarantee if the terms in doing so had been met. The appellant relied on a number of authorities, for example, **Articles 2 & 5(a) of the International Chamber of Commerce Uniform Rules for Demand Guarantees No. 758 (URDG 758); Edward Owen Engineering Ltd. vs. Barclays Bank International Ltd.** [1978] 1 ALL ER; **Power Curber International Ltd. vs. National Bank of Kuwait SAK** [1981] 3 ALL ER 607; and **Donholm Rahisi Stores vs. Barclays Bank of Kenya Limited & Another** [2005] eKLR.

The appellant found fault in the decision if the learned Judge staying the proceedings pending the determination of H.C.C.C No. 381 of 2015 without being moved by an application pursuant to **Section 6** of the Civil Procedure Act; that in the absence of an application for stay of proceedings, the learned Judge denied the parties an opportunity to address him on the issue of stay which was not, in the first place before him; and that an order of stay not only unlawfully barred the appellant from pursuing its rightful claim under the guarantee but also conduced delay and non-compliance with the demand guarantee on the part of the respondent. For these reasons Mr. Miyare urged that the learned Judge did not exercise his discretion judicially rather he should have entered the summary judgment as prayed. He further invited us to disregard the orders in **H.C.C.C No. 381 of 2015**, which were subsequently vacated

Mr. Fraser, SC., appearing for the respondent started by addressing the procedural question of the certified order which we have already

disposed of. He understood the dispute to revolve around the single question: whether the orders issued in **H.C.C.C No. 381 of 2015** had any effect on the subsequent suit for the enforcement of the Bid Bond. Put differently whether the respondent could rely on the orders issued in a different suit, in which it was not a party, as a defence to the appellant's claim.

In answer, the respondent maintained the position that it was expressly barred by those orders from making payment under the Bid Bond; that by a subsequent order it was directed to invest the funds in an interest bearing account in the joint names of the parties within 7 days from 2nd October, 2015; that without the orders being vacated it would have been in breach of those orders if it proceeded to honour by paying out to the appellant the Bid Bond; and that, though it was not a party to the suit in which the order was made, the orders were an unequivocal notice to the appellant that the court wished to preserve the funds subject of the Bid Bond and that the appellant was prohibited from demanding or receiving payment from the respondent.

On the cross appeal, the respondent faulted the learned Judge for not striking out the appellant's suit as it had no chance of success, since it sought to compel an act prohibited by an order of the court; that the appellant's suit was clearly in contempt of court orders and an abuse of the court process, making it a plain and obvious case for striking out. To stay the proceedings, in the face of what the learned Judge himself found to be an obvious abuse of the process was itself a grave error on his part.

In considering this appeal and the cross appeal we bear in mind that they are from a decision made pursuant to a summary procedure, in which case we cannot make any conclusive determinations on the matters in controversy.

Since the two applications invited the learned Judge to exercise his judicial discretion by, on one hand entering a summary judgment and on the other hand, striking out the suit, as an appellate Court we will only interfere with the exercise of that discretionary power if we are satisfied that the learned Judge materially misdirected himself and as a result, arrived at a wrong decision; or that, given the material presented by both parties, the learned Judge was clearly wrong in the exercise of the discretion leading to a miscarriage of justice. See **Mbogo & Another vs. Shah** [1968] EA 93.

In determining the two applications, the learned Judge was convinced that he could not determine the matter before him in isolation of **No. HCCC No. 381 of 2015**. He also appreciated that both applications turned on the effect of the orders which have been made in HCCC No. 381 of 2015; that Ochieng, Kamau and Sewe, JJ. all had made or extended orders in that cause, to the effect that the respondent

“should withhold payments”.

In conclusion the learned Judge stated;

“It must be emphasized that while those orders were in force there was indisputable prohibition on the Defendant herein making any payment on the bid Bond.....I agree with the Defendant's submissions that the issue in the present case is the effect of the Orders and whether the defendant was obliged to obey those orders. The Order which Sewe J made on 2nd October, 2015 is addressed to the plaintiff, but specifically prohibits the plaintiff from calling or receiving any payments from the Defendant on the Bid Bond.....I agree with the Defendant that the effect of this order was firstly that the plaintiff was barred from illegally and irregularly calling and/or receiving any payments from the defendant in respect of the Bid Bond and secondly that the amount of the Bid Bond was to be deposited in the joint names of the plaintiff and the plaintiff in HCCC 381 of 2015....It is submitted that the action of the defendant in withholding payment on the bid bond was in compliance with the Orders of the Court. That submission makes sense to me in the context of this application.... It is the finding of this court that the filing of this suit, while the HCCC No. 381 of 2015 is still pending was an abuse of the process of this court”. (Our own emphasis).

From this passage the learned Judge explicitly found that, because of the orders issued and variously extended by the court below, the respondent was restrained from releasing the funds to the appellant, and conversely, the latter from receiving the funds from the former.

We may also add that in the subsequent order, and specifically, one of the conditions for the injunction issued on 2nd October, 2015 in **H.C.C.C No. 381 of 2015** was that the entire sum of the Bid Bond of Kshs. 15,018,493 be deposited in an interest earning account in the joint names of the parties, the compliance with which the appellant itself has confirmed.

The learned Judge also, in no uncertain terms, declared that the suit amounted to an abuse of the process of this court. After making such a clear statement, we are unable to reconcile that declaration with the ultimate conclusion the learned Judge reached in the following statement, that;

“...it is clear to this court that there are triable issues raised in both the plaintiff and the defence. The two applications before the court therefore must both fail. However, this court in exercise of the discretion given to it under S 3 A of the Civil Procedure Act, to do justice, hereby stays this suit pending the hearing and determination of the said HCCC No. 381 of 2015”. [Our own emphasis].

With respect, the learned Judge, as it were, elected to sit on the fence on the prayer for striking out the suit, when he had set the stage to do just that. Judging is to be certain. Having made the twin determinations, that the respondent was expressly prohibited from making the payment to the appellant for purposes of preserving the subject matter; and that the institution of the suit during the pendency of another related suit was an abuse of the court process, the final order on the application for striking out ought to have been obvious; that a suit brought in abuse of the process was incompetent and was for striking out. That is what the Court has always encouraged. For example, in **Kivanga Estates Limited vs. National Bank of Kenya Limited** [2017] eKLR, the Court as much explained that:

“It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction, capable of bringing a suit to an end before it has even been heard on merit, yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations.” (Our own emphasis).

On the application for summary judgment, we think there was a plausible and triable defence advanced by the respondent; that it had been prohibited from making any payment under the Bid Bond by an order of the court, in addition to an order directing the investment of the entire sum of the Bid Bond in an interest earning account.

The learned Judge for that reason properly rejected the invitation to enter summary judgment. We are guided by this passage from **Gupta vs. Continental Builders Ltd.** [1976- 80] 1 KLR 809 where Madan JA said that:

“The first thing to say is that this was an application for summary judgment. If a defendant is able to raise a prima facie triable issue he is entitled in law to unconditional leave to defend... Prima facie triable issues ought to be allowed to go to trial just as a sham or bogus defence ought to be rejected peremptorily...”

Consequently, we find that the appeal lacks merit and is hereby dismissed. However, from what we have said earlier, we allow the cross appeal by setting aside the impugned ruling and substituting it with an order allowing the respondent’s application for striking out the suit. We award costs in the High Court and in this appeal to the respondent.

Dated and delivered at Nairobi this 19th day of March, 2021.

W. OUKO, (P)

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR