IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, GATEMBU & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 270 OF 2012

BETWEEN

AFRICAN BANKING CORPORATION LIMITED.....APPELLANT

AND

JATCO TOURS AND TAXIS COMPANY LIMITED.....1ST RESPONDENT

DANIEL MUTUA MUOKI.....2ND RESPONDENT

DUNCAN MWANGI NJIRAINI.....3RD RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi, Commercial & Tax Division (M.G. Mugo, J.) delivered on 30th September 2011 (but stated to have been dated, signed and delivered on 29th September 2011, and as corrected by the Ruling and Order of the High Court of Kenya at Nairobi, Commercial and Tax Division (E.K.O. Ogola, J.) delivered on 16th November 2011

in

HCCC No. 481 of 2009)

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JUDGMENT OF THE COURT

1. In a ruling delivered on 30th September 2011the High Court (***M.G. Mugo, J.***) rejected the appellant's application to strike out the respondents' defence to the appellant's claim for Kshs.15,360,215.48 on grounds that the defence raised triable issues. However, in the same ruling, the court allowed the appellant's alternative prayer for judgment on admission for an amount of Kshs.4,039,646.00 but imposed terms that "*the said sum is to be paid in full and final settlement*" of the appellant's claim.

2. Aggrieved, the appellant lodged the present appeal asserting that: the respondents' defence comprised of mere denials and ought to have been struck out; that judgment should have been entered in its favour for its entire claim of Kshs.15,360,215.48; that although the learned Judge correctly found that the respondents admitted that an amount of Kshs.4,039,646.00 was outstanding, the learned Judge had no basis for ordering that the payment of that amount would be in full and final settlement of the appellant's claim.

3. The background in brief is that in August 2005 the appellant and the 1st respondent entered into an Asset Finance Agreement under which the appellant financed the 1st respondent in the purchase of a fleet of 21 vehicles. The facility was guaranteed by the 2nd and 3rd respondents under deeds of Guarantee and Indemnity dated 5th September 2005.

4. In its plaint before the High Court, the appellant averred that it disbursed an amount of Kshs.23,908,500.00 to the 1st respondent under that arrangement; that the loan would accrue interest at 8.5 % per annum and was repayable in 36 monthly installments; that an additional default rate of 2% per month would be charged on any overdue instalment; that following default in the repayment of the loan, the appellant repossessed and sold 17 of the vehicles leaving a shortfall of Kshs.15,360,215.48. It accordingly sought judgment against the respondents for that amount, interest and costs of the suit.

5. In their joint defence dated 14th August 2009, the respondents, while accepting that a loan facility had been extended under the Asset Finance Agreement, denied that they were indebted for the amount claimed; that appellant had failed to render a true and proper account; that the repossession and sale of the vehicles was malicious and wrongful and the sale of the vehicles was at a gross undervalue; and that the claim made for Kshs.15,360,215.48 is excessive, unconscionable and amounts to unjust enrichment.

6. The appellant took the view that the defence was a sham. On 2nd July 2010, it presented an application to the lower court seeking orders that: the statement of defence be struck out; that judgment be entered for the appellant as prayed; and that in the alternative, judgment on admission be entered for the appellant in the sum of Kshs.4,039,646.00. That application was made under Order VI Rule 13(1)(b) and (d) and Order XII Rule 6 of the Civil Procedure Rules and Sections 1A, 3A, and 63 of the Civil Procedure and was based on the grounds that the respondents were truly indebted in the amount of Kshs.15,360,215.48 plus interest at 2% per month from 19th June 2009; that the defence filed was a mere denial, scandalous, frivolous and vexatious and that the respondents had "*admitted owing Kshs.4,039,646.00 as at 1st November 2005*." The application was supported by a lengthy affidavit in which the history of the loan facility was detailed leading up to the subsequent sale of the motor vehicles.

7. The application was opposed. In a replying affidavit sworn on 15th September 2010, Daniel Mutua Muoki, the 2nd respondent and also a director of the 1st respondent, deponed that the respondents have a *bona fide* defence to the appellant's suit that merits a full trial for the just and proper determination of the case. He reiterated that proper accounts had not been rendered by the appellant; that the repossession of the vehicles was wrongful and the sale was at gross under value; and that the guarantees by the 2nd and 3rd respondents were invalid.

8. As indicated, the learned Judge in the impugned ruling agreed with the respondents that there are issues that required ventilation at a trial. The Judge stated that this is not a proper case "*where summary judgment on the entire claim can issue*" in favour of the appellant as triable issues had been raised. In that regard, the learned Judge expressed:

> ***"…the defence filed does contain several triable issues and is neither a sham nor an abuse of the process of the court. I do not consider it suitable for striking out. However, in view of the clear admission that a sum of Kshs.4,039,646.00 was outstanding when the motor vehicles were repossessed and sold, and there being no evidence tendered by the defendants to show that the same was ever paid, I hear by enter judgement in respect thereof."***

The learned Judge went on to say:

> ***"Since the judgement in this sum is sought in the alternative, the court takes a legal presumption that the said sum is to be paid in full and final settlement of the plaintiff's claim."***

9. That decision is challenged by the appellant on 12 grounds set out in the memorandum of appeal condensed in the appellant's submissions into two main complaints, namely that the learned Judge erred in concluding that the defence raised triable issues and secondly, that the learned Judge erred in decreeing that the payment of the admitted amount of Kshs.4,039,646.00 would be in full and final settlement.

10. During the hearing of the appeal before us, learned counsel for the appellant ***Ms. Nyangosi***, holding brief for ***Mr. Kimani Kelvin*** relied entirely on the written submissions in which it was urged that the appellant's application met the threshold for striking out pleadings; that the respondents' defence did not raise any triable issues as they admitted having received the loan facility; that given the uncontested facts the learned Judge should have allowed the prayer to strike out the defence and grant judgment as prayed in the plaint. Numerous authorities were cited on the legal principles applicable to applications for summary judgment; judgment on admission including ***Continental Butchery Limited vs. Nthiwa [1978] KLR***; ***Gupta vs Continental Builders Ltd [1976-80] 1 KLR 809***, among others.

11. With regard to the stipulation by the learned Judge that the payment of the admitted amount of Kshs.4,039,646.00, it was submitted that there was no basis for the learned Judge to so order when in fact the claim by the appellant was for a larger amount.

12. In opposition to the appeal, ***Mr. Ngethe***, learned counsel for the 1st and 2nd respondents relied on written submissions which he highlighted. He submitted that the prayer for judgment on admission of the amount of Kshs.4,039,646.00 was framed as an alternative to the prayer to strike out the defence and to enter judgment as prayed in the plaint and the learned Judge was therefore right in awarding that amount in full and final settlement as there was no prayer for the balance of the claim to proceed to full trial; and that the learned Judge was bound by the appellant's pleading in the application and could neither depart nor amend it on behalf of the appellant. Among the authorities cited is the case of ***Olive Mwihaki Mugenda & another vs. Okiya Omtata Okoiti & 4 others [2016] eKLR*** for the proposition that a court has to choose whether to grant the main or alternative relief. The case of ***Agricultural Finance Corporation vs. Banking Insurance & another [2018] eKLR*** was cited for the proposition that the court has no mandate to amend an applicant's prayers.

13. There was no appearance for the 3rd respondent during the hearing of the appeal and neither did he file written submissions.

14. We have considered the appeal in accordance with our mandate on a first appeal. To allow or refuse an application to strike out a pleading under Order VI of the Civil Procedure Rules is a matter of exercise of judicial discretion. As stated in ***D. T. Dobie & Co (Kenya) Limited vs. Muchina & another [1982] KLR1***, it is a power that should be exercised sparingly and with circumspection.

15. Whereas it is not disputed that advances were extended by the appellant to the 1st respondent for the purchase of vehicles, the respondents in their defence contended, among other things, that interest charges were wrongly levied; that no proper statements of account were rendered by the appellant; that the vehicles were wrongly repossessed and sold at under value; and that the balance of the amount claimed is not due.

16. In our view, the issues raised in that defence could not be resolved on the basis of the affidavit evidence that was presented. As stated by this Court in the case of **Kenya** ***Commercial Bank Limited vs. Nicholas R. O. Ombija [2015] eKLR***:

> ***"This summary procedure does not enable the court to hold a trial on the affidavits by engaging in minute and protracted examination of documents and facts of the case. Moreover, the court would not strike out a pleading if it discloses an arguable case or raises a triable issue."***

17. Therefore, we agree fully with the learned Judge that "***the defence filed does contain several triable issues and is neither a sham nor an abuse of the process of the court.".*** There is therefore no merit in the complaint that the learned Judge erred in declining to grant the appellant's prayer to strike out the defence and to enter judgment as prayed in the plaint.

18. We turn to the question whether the learned Judge erred in ordering that the payment of the admitted amount of Kshs.4,039,646.00 would be "*in full and final settlement*" of the appellant's claim. It was clear as day light from the plaint and from the application with which the learned Judge was addressing that the appellant's claim was well in excess of that amount. On the face of the application itself, the appellant averred that the respondents "*are truly indebted to the* [appellant] *in the sum of Kshs.15, 360,215.48*". In the plaint, the appellant sought judgment for the same amount and interest. The appellant did not at any time indicate to the learned Judge that it was abandoning the remainder of its claim. There was no basis, factual or legal, for the learned Judge to effectively summarily dismiss the remainder of the appellant's claim. Moreover, having found, that the pleadings raised triable issues, it was incumbent upon the learned Judge to refer to the balance of the claim, the unadmitted part of the claim, for trial.

19. With respect, the principle in the decision of this Court in ***Olive Mwihaki Mugenda & another vs. Okiya Omtata Okoiti & 4 others*** (above) for which it was cited does not apply in the circumstances of this case. In that case, the Court cited with approval an earlier decision in the case of ***Alex Wainaina t/a John Commercial Agencies vs. Janson Mwangi Wanjihia [2015] eKLR*** where it was pronounced that ***"where relief is prayed for in the alternative, a court of law has to choose whether to grant the main or alternative relief and state the reasons for doing so. Both cannot be granted in blanket form."*** Based on that pronouncement, it would have been wrong, in the present case, for the learned Judge to allow the prayer to strike out the plaint and enter judgment as prayed in the plaint and at the same time allow the alternative prayer for judgment on admission for part of the claim. Having rejected the prayer to strike out, it was open to the learned Judge to grant the alternative prayer. What would have been objectionable was for the learned Judge to grant both prayers. There is, therefore, merit in the complaint that the learned Judge was wrong in ordering that the payment of the admitted amount of Kshs.4,039,646.00 would be "*in full and final settlement*" of the appellant's claim.

20. In conclusion therefore, we uphold the decision of the lower court rejecting the prayer to strike out the respondents' defence and to enter judgment for the appellant as prayed in the plaint. We allow the appellant's appeal to the extent that we hereby set aside the order directing that the payment of the admitted amount of Kshs.4,039,646.00 would be "*in full and final settlement*" of the appellant's claim. We substitute therefor an order that the balance of the appellant's claim is referred back to the lower court for hearing and determination.

The appellant shall have, half the costs of the appeal.

Orders accordingly.

Dated and delivered at Nairobi this 8th day of May, 2020.

M. WARSAME

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR