IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KIAGE, JJ.A)

CIVIL APPEAL NO. 93 OF 2018

BETWEEN

MOHAMED MOHAMED HATIMY.....APPELLANT

AND

LAMECK OLOUCH t/a LAMATHE HYGENIC FOODS.....RESPONDENT

(An appeal from the Ruling of the Environment and Land Court

at Mombasa (Yano, J.) dated 8th May, 2018

in

E.L.C No. 278 of 2017.)

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JUDGMENT OF THE COURT

1. In as much as the power to strike out pleadings by a court is discretionary, it should be exercised sparingly and only in the clearest cases. This is because the consequence of striking out a pleading is that a court does not subject the parties' dispute to a full hearing. It follows, therefore, that whenever a court is faced with the question of whether or not to strike out a pleading, it has to strike a balance between two competing rights; on one hand, a party's right to have his/her case determined in a full trial and on the other, an opposing party's right not to be unduly burdened with a suit which is otherwise a non- starter. This much was appreciated by this Court in ***Kivanga Estates Limited vs. National Bank of Kenya Limited [2017] eKLR***.

2. This is the position that the learned Judge (**Yano, J**.) found himself in when the appellant by an application dated 6th April, 2017 in E.L.C No. 278 of 2017 sought, *inter alia*, an order striking out the respondent's statement of defence and entry of judgment in the terms of his plaint.

3. The facts which culminated in the application were that the appellant had leased out his premises situated on Mombasa/Block XXI/451 (suit premises) to the respondent who ran his restaurant business therein. Of contention between the parties were the terms of the said lease. On the appellant's part, the lease was for a period of 5 years 3months effective from 1st December, 2009 up to 28th February, 2015. The rent payable was on a graduated rate as set out in the written lease which was executed on 16th March, 2010.

4. According to him, when the lease period was about to come to an end, he wrote to the respondent vide a letter dated 6th February, 2015 notifying him as much and demanding for vacant possession on the expiry date. Subsequently, he sent reminders of the impending determination of the lease but the respondent was not keen on giving vacant possession. As a result, by letters dated 24th February, 2015 and 19th March, 2015 the appellant brought to the respondent's attention that his continued possession after the expiry of the lease would attract *mesne* profits at the rate of Kshs.121,000 per month (which was double the amount of rent he paid at the tail end of the lease).

5. The respondent's version was that they had entered into a two years lease agreement from the year 2002. Nonetheless, in March, 2015 the appellant unilaterally and arbitrarily increased the rent payable in a bid to evict him. Therefore, he sought protection under the provisions of the ***Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*** on the basis that the tenancy in question was a controlled tenancy within the meaning of the said Act. Towards that end, he filed a reference at the Business Premises Tribunal (BPRT) being Tribunal Case No. 54 of 2015 and prayed for, amongst other orders, an injunction restraining the appellant from evicting him which was granted

pending the determination of that suit.

6. It seems that the appellant then instituted E.L.C No. 278 of 2017 at the Environment and Land Court against the respondent. He sought vacant possession of the suit premises and *mesne* profits at the rate of 121,000 per month as from 1st May, 2015 until delivery of vacant possession. His cause of action was anchored on the lease over the suit premises which he maintained had come to an end leaving the respondent without any justifiable reason to continue his possession of the suit premises. In his statement of defence, the respondent denied the existence of the lease alluded to by the appellant and also relied on the BPRT suit which was still pending.

7. Before the above suits were concluded the parties herein moved back and forth the court corridors by commencing suits and applications with respect to the suit premises. In particular, it appears that the appellant engaged one Peter Simiyu t/a Beyond Auctioneers to levy distress on the respondent. Pursuant to the said instructions, the said auctioneer filed Misc. Applic. No. 256 of 2015 in the Chief Magistrate's Court (subordinate court) and obtained orders to levy distress. Apparently, the auctioneer evicted the respondent from the premises thus the respondent approached the subordinate court to review its orders in light of the suit before the BPRT. The subordinate court acceded and directed the appellant to reinstate the respondent back in possession of the suit premises.

8. This time around the appellant was not amused with the turn of events and preferred an appeal in the High Court being Misc. Civil Appeal No. 185 of 2015. Initially, the High Court stayed the execution of the subordinate court's order of reinstating possession of the suit premises to the respondent. Thereafter, the High Court vacated the stay orders and directed, like the subordinate court, reinstatement of the respondent.

9. Be that as it may, after hearing and considering the evidence tendered by the parties the BPRT struck out the respondent's reference on 3rd March, 2017. In doing so, it found that contrary to the respondent's allegation the tenancy over the suit premises was not a controlled tenancy; the tenancy was subject to the lease agreement produced by the appellant which was for a period of 5 years 3 months.

10. The foregoing decision was what instigated the appellant to file the application dated 6th April, 2017 pursuant to ***Order 2 rule 15(b)(c) & (d)*** of the ***Civil Procedure Rules***. He sought for the respondent's statement of defence to be struck out on the ground that his defence to the effect that his possession of the suit premises was on the basis of a controlled tenancy was untenable and frivolous on account of the dismissal of the BPRT suit. All in all, that the defence was an abuse of the court process.

11. Resisting the application, the respondent deposed that despite the BPRT suit being struck out, the BPRT's decision was not final since he had lodged an appeal against the said decision being H.C.C.A No. 50 of 2017 and the same was yet to be determined. He maintained that the lease agreement between the parties was for a term of two years.

12. Before the application for striking out was heard, the respondent filed an application for leave to amend his statement of defence and include a counter-claim against the appellant. In the counter-claim, the respondent was seeking special and general damages against the appellant for loss he allegedly suffered as a result of his unlawful eviction from the suit premises.

13. Both applications were canvassed before the learned Judge, who in a ruling dated 8th May, 2018 dismissed the appellant's application and allowed the respondent's application by granting him leave to amend his statement of defence. It is this decision and more specifically, the dismissal of the appellant's application that has provoked this appeal. In a nutshell, the appellant has faulted the learned Judge for not striking out the respondent's statement of defence.

14. In his opening remarks, Mr. Mwakisha, learned counsel for the appellant, argued that it was clear that the lease agreement over the demised premises had expired and as such, there was no defence with respect to the continued possession by the respondent. He faulted the learned Judge for finding that the issue of whether a lease for a period of 5 years 3 months existed between the parties was a triable issue which should go for hearing. To him, that issue was answered in the affirmative and conclusively dealt with by the BPRT.

15. He went on to state that the prayer for vacant possession was severable from the other prayer of *mesne* profits. Hence, the learned Judge was capable of striking out the defence and entering judgment in favour of the appellant in respect of possession while leaving the determination of *mesne* profits and the counter-claim to go to trial. To support that line of argument, counsel placed reliance on this Court's decision in ***Continental Butchery Limited vs. Nthiwa – Civil Appeal No. 35 of 1997***.

16. Furthermore, in promoting the expeditious disposal of justice as enshrined under ***Sections 1A & 3A*** of the ***Civil Procedure Act***, the learned Judge should have entered judgment on the issue of vacant possession which did not call for evidence to be adduced at trial.

17. In response, Mr. Anaya, learned counsel for the respondent, argued that the learned Judge correctly applied his mind to the application for striking out the defence and dismissed the same within the confines of the law. The long and short of his argument was that the appellant's application was based on facts which are highly contested. Therefore, the learned Judge could not strike out the defence and enter judgment on the basis of those facts which required to be tested at trial. Taking everything into consideration, the respondent's defence raises triable issues.

18. As far as the BPRT decision was concerned, counsel urged that the respondent had since lodged an appeal against the same which is still pending before the High Court. Therefore, if the defence was struck out it would be tantamount to the learned Judge determining the appeal against the BPRT's decision which was not before him. Besides, the issue of *mesne* profits, though denied, could only be established through evidence adduced in a trial.

19. Having considered the record, submissions by counsel and the law, our view is that this entire appeal is hinged on one issue; that is, whether the learned Judge properly exercised his discretion in declining to allow the appellant's application. In other words, what the appellant is asking of us, is to interfere with the learned Judge's exercise of discretion, a matter we must approach with caution and reluctance. This is because it is not our place as the first appellate court to oust the learned Judge's discretion, and substitute it with our own. We must be slow to interfere and only do so in the circumstances aptly enunciated in the case of ***United India Insurance Co. Ltd vs. East***

***African Underwriters** (Kenya) Ltd [1985] EA 898* wherein Madan, J.A stated:

> ***"The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting as at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of consideration of which he should have taken account of; or fifthly, that his decision albeit a discretionary one is plainly wrong."***

20. It clear from the record that the respondent's defence for continuing in possession of the suit premises was predicated on the grounds that the tenancy was a controlled tenancy and that the issue of his possession was pending before the BPRT. In that respect, the BPRT was clear that there was no such tenancy and in its own words, which were extracted as per the order dated 3rd March, 2017, it held:

> ***" …***
>
> ***AND UPON THE RULING DATED 3.3.2017- IT IS HEREBY ORDERED THAT:***
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> ***1) The tenant's (respondent's) reference dated 8th May, 2015 and the notice of motion of the same date are struck out as incompetent as there is no controlled tenancy relationship between the tenant and the landlord the tenant having executed a lease for 5 years 3 months dated 16th November, 2010.***
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> ***2) ..."*** *[Emphasis added]*

21. To us, the aforementioned decision amounted to a finding on the issue of the terms of the lease between the parties. Notwithstanding the fact that the respondent has filed an appeal against the said decision it is not in dispute that as it stands, there is no order of the court setting aside the BPRT's finding. Consequently, we agree with the appellant that issue of whether the parties' relationship was regulated by a lease for a period of 5 years 3 months had been considered and determined by the BPRT.

22. Accordingly, we find that the respondent's defence with respect to the prayer for vacant possession is frivolous since there is no reason to justify his continued possession in light of the BPRT's finding. In other words, we are convinced that there was no substantial question to be tried with respect to the issue of the respondent's tenancy and/or vacant possession sought by the appellant. Our finding is reinforced by ***Bullen & Leake and Jacobs Precedents of Pleadings, 12th Edition*** wherein the learned authors at page 145 define a frivolous pleading in the following terms:

> ***"A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense."***

23. In the end, we concur with the observations made by this Court in ***Delphis Bank Limited vs. Caneland Limited [2014] eKLR*** to the effect that:

> ***"Where there is no plausible defence and it is plain that the defence is a sham or cannot be sustained, it would be pointless to put the parties through a trial that would inflate costs to the disadvantage of the debtor and delay delivery of justice to the prejudice of the claimant."***

24. For the aforementioned reasons, we find that the learned Judge erred in declining to strike out the respondent's defence and entering judgment in favour of the appellant with regard to vacant possession of the suit premises. To that extent, we interfere with the learned Judge's discretion and strike out the respondent's defence and enter judgment granting the appellant vacant possession of the suit premises. As for the counter-claim and the appellant's prayer for *mesne* profits, we direct the same to go to the Environment and Land Court for full trial where evidence will be tendered by the parties.

25. The upshot of the foregoing is that the appeal herein succeeds and is hereby allowed to the extent hereinabove stated. Costs of this appeal as well as for the application for striking out the defence in the Environment and Land Court shall abide by the outcome of the determination of the appellant's prayer for *mesne* profits and the respondent's counter-claim.

Dated and delivered at Mombasa this 7th day of March, 2019

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR