IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, KIAGE & SICHALE, JJ.A)

CIVIL APPEAL NO. 128 "A"OF 2014

BETWEEN

ASHANA RAIKUNDALIA

T/A A. RAIKUNDALIA & CO. ADVOCATES …..... 1ST APPELLANT

NISHIT RAIKUNDALIA ……..... 2ND APPELLANT

SAPPHIRE TRADING & MARKETING LIMITED .....3RD APPELLANT

AND

ARUN C. SHARMA ……..…….…..... RESPONDENT

(An appeal from the Ruling and Decree of the High Court of Kenya at Nairobi, (Kimondo, J.) dated 8th December, 2011

in

H.C. CIVIL SUIT NO. 802 OF 2010)

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JUDGMENT OF THE COURT

The central question we are called upon to decide in this appeal is whether Kimondo, J. exercised his discretion properly in granting the respondent's motion dated 24th February 2011 which sought the striking out of the appellants' statement of defence and the entry of summary judgment against them.

That motion charged that the defence filed before the High Court was fit for striking out as it;

(a) was scandalous , frivolous or vexation and/or

(b) might prejudice, embarrass or delay the fair trial of the action and/or

(c) was an abuse of the court process.

The grounds on which it was founded appeared on the face of the motion to the effect that;

(a) This is a liquidated claim which has been acknowledged by the defendant

(b) The defendant guaranteed to pay the sum claimed.

(c) The defendant issued a cheque as guarantor to the plaintiff which remain unpaid for (sic).

(d) The defendant issued a cheque knowing she had or had reason to know the account was closed.

(e) Such other grounds to be adduced at the hearing of this application.

The affidavit in support of the motion was sworn by the respondent

Aman Sharma who focused on the fact that the 1st respondent issued cheques amounting to Kshs. 7,045,000 falling due on various future dates between 12th March and 6th July 2009 but which, on presentation, were returned unpaid for **"insufficiency of funds"** in the case of the first and "account closure" for the rest. Copies of the said cheques were exhibited. The respondent averred that the appellants were truly and justly indebted to him to the extent claimed and that their defence was a sham and consisted of bare denials. He therefore sought judgment as prayed in the plaint.

The application was opposed, with all the appellants each filing a replying affidavit. The one by the first appellant Ashana Raikundalia sworn on 5th April 2011 was the more comprehensive. She averred, in essence, that the circumstances surrounding the respondent's claim revolved around her former private practice as an advocate and that she issued the various cheques subject of the litigation not as a guarantor but merely as a facilitator between her client, one Amit Singh Satpal, and the respondent. The money subject of the cheque was agreed to be sent by her client's uncle one Tilly Singh Suri but never came. She swore further that the respondent meanwhile informed her to deal with his son Aman Sharma while he travelled abroad for heart treatment. That son informed the appellant on 20th March 2009 that the cheques had been lost or misplaced and it was agreed that the 1st appellant stop their payment which she did and then reported the matter to Parklands Police Station on 16th March 2009 as OB NO. 44 of that day. She exhibited a copy of the Police Abstract of records. As the respondent and his son insisted that she pay the money, since there was a hospital bill to pay, the 1st appellant sold two family vehicles and money to raise money by four instalments which she paid to the respondent's son. This was acknowledged by Amit Singh who executed a clear settlement in the presence of Mr. Kibera Maina Advocate. The respondent later confirmed to the 1st appellant having received the monies only to subsequently deny payment of the very cheques supposed to have been lost with threats to disown the deed of settlement and have her arrested. She was indeed arrested, charged and prosecuted over the cheques but was acquitted on 4th February, 2011. She was categorical that she did not owe the respondent the monies claimed.

The replying affidavits attracted three further affidavits from the respondents.

The learned Judge after considering the said application, the affidavits from the rival parties and a preliminary objection by the appellants dated 7th April, 2011 based on alleged inadmissibility of the documents in support of the motion for non-compliance with the Stamp Duty Act on the one limb, and for being premised on two mutually exclusive provisions of the Civil Procedure Rules, granted the application, provoking this appeal.

The memorandum of appeal raises some fifteen grounds of appeal but all boil down to the single issue we have identified that the matter before the learned Judge was not a proper case for summary judgment. It is thus complained that he erred in allowing the respondent to produce evidence at interlocutory stage that was fit for trial; failing to find that the capacity in which the respondent's son received money on behalf of the respondent was a triable issue; the appellants having pleaded payment the whole debt was a triable issue; conducting the trial through highly contested affidavit evidence without the benefit of cross examining the deponents as the appellants' had sought by notice which he ignored; failing to find that the

appellant's defence need not have been definite, complete and absolute; failing to give any weight to the deed of settlement acknowledging full payment of the amount due and owing; disregarding the evidence, pleadings and other material placed before him and misapplying and mis-construing the principles governing summary judgment.

As this is a first appeal, we proceed by way of re-hearing and are required to re-evaluate and scrutinize all the evidence and other material that was before the learned Judge as captured on the record and arrive at our own independent conclusions. See ***SELLE & ANOR vs. ASSOCIATED MOTOR BOAT CO. LTD*** **[1968] EA 123**. We are slow to interfere with the findings of the trial Judge who had the benefit of hearing and observing the witnesses as they testified but where, as here, the matter proceeded by way of affidavits only without live testimony, our latitude for departure is a lot wider although we do treat any such findings with respect.

We have duly subjected the pleadings, affidavit evidence and other material that was before the learned Judge as we have set it out in some detail earlier in this judgment, to that fresh and exhaustive scrutiny. We have done so bearing in mind that the learned Judge in allowing the motion before him was acting within his discretion and we would not interfere with such exercise unless satisfied, in the words of Sir Clement De Lestang V.P. of the predecessor of this Court in ***MBOGO & ANOR vs. SHAH*** **[1968] EA 93;** ***"that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account."*** Sir Charles Newbold rendered the threshold for interference as being when ***"it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."***

The law on striking out pleadings, is well-settled. The principles applicable were considered in D.T. DOBIE & CO. (KENYA) LTD vs. MUCHINA [1982] KLR with Madan, JA speaking to the need for caution and circumspection thus;

> ***"No suit ought 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. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of the case before it."***
>
> (Emphasis supplied)

In so saying Madan JA, was echoing what other judges have stated to the effect that the power ought to be exercised sparingly to obviate the appearance of usurping a role properly reserved to a judge at the a full trial, or, as put rather bluntly by Sellers LJ in ***WENLOCK vs. MOLONEY*** [1965] 1 WLR 1238;

> ***"This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge and to produce a trial of the case in chambers, on affidavits, only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power." (emphasis supplied)***

This Court has on numerous occasions spoken to the need to move with deliberate caution as opposed to enthusiastic speed when invited to strike out pleadings be they plaints or defences. In ***CRESENT CONSTRUCTION CO. LTD***

vs. DELPHIS BANK LTD **[2007] eKLR**, for instance, it stated;

> ***"However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant***

however weak his case may be from the seat of justice. ***This is a time-honoured legal principle …." (Our emphasis)***

Applying those principles to the matter before us, we are far from satisfied and definitely do not share in the learned Judge's confidence that the appellant's defence was frivolous or so week as to have no legs to stand on as expressed in ***WAMBUA vs. WATHOME*** **[1968] EA 40**, which he quoted. We have anxiously considered this analysis at paragraphs 8 to 12 of his judgment, which we set out *in extenso*;

"8. The defendants have not denied issuing the dishonoured cheques. Certainly, the 1st defendant acknowledges that fact but states he did it purely as a condition to secure the release of a third party Amit Singh Satpal from spring Valley Police Station. He then says he countermanded the payment in cash.

9. But from the deed of settlement annexure "AR 2" of the 1st defendants replying affidavit, that payment was made, not to the plaintiff, but to a son of the plaintiff

Aman Sharma. The plaintiff is not a party to that agreement and the said Aman Sharma has not sworn an affidavit to confirm that he was either authorized to receive such payment or that he received the payment on behalf of the plaintiff.

10. The guarantee by the 2nd defendant would seem to have arisen from that deed of settlement. This is the pleading at paragraph 5 of the defence. The only other key averment there is that here was an understanding that cheque number 066101 not be banked until approval or instructions of the 3rd defendant.

11. In all this and as acknowledged in the deed of settlement, the debtors do not deny their indebtedness to the plaintiff as captured in the 5 cheques issued by the 1st defendant. The 2nd defendant does not deny, in paragraph 5 of the defence, issuing cheque number 066101 for Kshs. 500,000 save that it was not to be banked until the 3rd defendant issued instructions. That contradicts his averments at paragraphs 3 and 4 of his replying affidavit.

That cheque was drawn on the account of the 3rd defendant number 0018922002 and was dishonoured. That in my view places all the defendants within the parameters of the plaintiffs claim. So what defence for the dishonor is before the court? An allegation that the cheques were countermanded by payment in cash. I have already stated that the deed of settlement with a third party cannot provide the answer to the plaintiff's claim.

12. There is also another matter. The 1st defendant closed its account. It states at paragraph 3 of the defence that it did so because the plaintiff misplaced the cheques and because of the deed of settlement. There are allegations of duress or fraud in the statement of defence. And there is no element of a counterclaim. The joint defence after that is a plain denial of the debt. Granted all of those circumstances, I am of the view that the joint statement of defence dated 26th January 2011 does not traverse the plaintiffs claim adequately or at all. To that extent it would merely stand in the way of expeditious disposal of this claim and to that extent, it would prejudice embarrass or delay trial of the action. It is a frivolous defence. I would also say that in view of the dishonoured cheques, the plaintiff has established on a balance or probability a case for grant of summary judgment."

With great respect to the learned Judge, we think that he went into a depth that was impermissible at an application to strike out a defence or for summary judgment. What the learned Judge had before him were averments in the defence.

The defence only needed raise a single *bona fide* triable issue. Unless the defence was plainly a sham and a shadow and so weak and emaciated, indeed comatose and beyond resuscitation by amendment or other injection of life, it would not be open to a court of law to strike it out. It must always be remembered that

parties are entitled to their day in court. They seek to be heard in a setting that upholds procedural and substantive fairness. In the instant case, the issuance of cheques was not the whole story. In the defence and in the 1st appellant's replying affidavit were averments explaining the issuance and eventual dishonour of the cheques.

There were averments and documents speaking to the monies having been paid in full. What is more, the appellants had in fact applied to have the respondent and the deponents of the further affidavits summoned for cross-examination on their depositions. We raise these issues, not with the intention of taking any concluded view of them but only to show that the learned Judge ought to have reserved the interrogation of those contested narratives to a trial.

In not doing so he fell into error in our respectful view as this was not a plain and obvious case that would embolden a Judge to slam the door shut on a litigant who wishes to have his day in court at a hearing.

It will be noted from the above excerpt from the learned Judge's judgment, that the motion before him combined the plea of striking out of the defence with the one for summary judgment. Whereas both processes are essentially summary in character, the principles applicable are not entirely the same and we deem it improper for an application to be brought that combines and conflates the two distinct jurisdictions under Orders 2 and Order 36 of the Civil Procedure Rules. The learned Judge himself appreciated this but went as far only as referring to the omnibus application as "untidy" but not prohibited by the rules, thus disposing of the first limb of the preliminary objection mounted against the application. The appellants criticize the judge for taking such a lenient view of the omnibus character of the application when he had himself previously held, correctly in the appellant's view, that such an application is for striking out. This was in ***PYARAL MHAND BHERU RAJPUT vs. BARCLAYS BANK OF KENYA & OTHERS*** **HCCC No. 38 of 2004** where he rendered himself thus;

> ***"There is no doubt the application is an all-cure, omnibus application. It is a wide net cast over a large body of water, and out of all the lake or sea, creatures caught in it, there will be one or two edible crabs or fish. It is not quite so. An omnibus application is incapable of proper adjudication by the court for each of the reliefs sought apart from being governed by different rules, is also subject to long established and different judicial principles which counsel need to bring to the attention of, and the court needs to consider before granting the entire relief sought. This alone makes the plaintiff's application incurably defective, and a candidate for striking out."*** (Emphasis supplied)

We need not express any definite view on this question, beyond stating that omnibus applications are a nuisance at the very least and can vex and embarrass, because we think the more critical question is the substantive one of summary judgment the learned Judge's consideration of which seems to have been lost or subsumed in the consideration of striking out thanks, in part, to the inauspicious omnibus application. The law on the grant of summary judgment is itself not in doubt. Madan JA in ***GUPTA vs. CONTINENTAL BUILDERS LTD*** **[1976-80] 1 KLR 809** expressed the view that whether or not summary judgment would be entered depends on the existence or otherwise of a triable issue. He expounded on this thus;

> ***"As a general principle, where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that the has a bona fide defence, he ought to have leave to defend. Leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to the facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment."*** (Emphasis added)

Having looked at the joint defence that was filed and perused the 1st appellant's replying affidavit, we cannot agree that the case was a fit and proper one for summary judgment. It was rather neither plain nor obvious and

the appellants ought not to have been deprived of their right to have their case

***"tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross examination."* See *ICDC vs. DABER ENTERPRISES LTD* [2000] 1EA 75.**

We have said enough to show that this appeal is for allowing. The ruling and decree of the learned Judge is set aside and substituted with an order that the respondent's application dated 24th February 2011 be and is hereby dismissed with costs. The suit at the High Court shall be subject to the usual pre-trial processes and thereafter listed for full hearing before a Judge of the High Court other than Kimondo, JA.

The appellants shall have the costs of this appeal.

Dated and delivered at Nairobi this 31st day of March, 2017.

P. N. WAKI

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JUDGE OF APPEAL

P. O. KIAGE

……...

JUDGE OF APPEAL

F. SICHALE

……...

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR