IN THE COURT OF APPEAL

NAIROBI

(CORAM: MAKHANDIA, OUKO & M?INOTI, JJ.A)

CIVIL APPEAL NO. 369 OF 2014

BETWEEN

DIAMOND TRUST BANK KENYA LTD. ....…….....APPELLANT

AND

KAJULU HOLDINGS LTD (*In receivership)* ….....…...1ST RESPONDENT

COMMERCIAL BANK OF AFRICA LTD. ……..…….... 2ND RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at

Nairobi (Fred Ochieng, J.) dated 26th day of November, 2014

in

H.C.C.C. NO. 497 OF 2013)

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JUDGMENT OF THE COURT

Although the memorandum of appeal raises seven grounds, in our own estimation the only question we gather from the totality of those grounds and the arguments contained in the parties' written submissions, is whether the learned Judge, (**Ochieng, J**.), in rejecting the appellant's notice of motion for striking out of the respondents' suit improperly exercised his discretion.

This, briefly is how the question arose.

Kajulu Holdings Limited (the 1st respondent), as a customer to Diamond Trust Bank Limited (the appellant) operated several bank and loan accounts with the latter. By a debenture dated 18th December, 2007 the 1st respondent charged to Commercial Bank of Africa Limited (the 2nd respondent) property and assets ***"of whatsoever nature both present and future"*** to secure a sum of Kshs.620,000,000. By a supplementary debenture dated 8th July, 2009 the original amount secured was enhanced by Kshs.82,754,000.

When the 1st respondent began to experience financial difficulties and falling behind schedule in

servicing the loans with the 2nd respondent, the latter appointed two receiver managers who immediately took over the management of the 1st respondent and its assets and at the same time informed the appellant of this fact. They also instructed the appellant to freeze any of the 1st respondent's accounts and pay over any credit balance in any of those accounts to the receiver managers.

Subsequent to these events, the 1st respondent took out a notice of motion in Nairobi HCCC No. 732 of 2010 praying for temporary restraining orders against the 2nd respondent, specifically to stop it from interfering with its operations, whether through a receiver manager or otherwise in purported enforcement of securities and pending the determination, first, of the application and subsequently of the suit, and that the receiver managers be restrained from interfering with the 1st respondent's business.

Apondi, J. allowed these prayers with the result that the receiver managers having been restrained, the management of the 1st respondent reverted to the directors temporarily. Aggrieved, the 2nd respondent moved to this Court under **rule 5(2)(b)** of the Court's Rules to stay the orders of Apondi,J. The Court, **Omolo**, **Aganyanya** and **Nyamu, JJ.A** allowed the application by staying those orders pending the outcome of the 2nd respondent's intended appeal. In the same breath the Court ordered that the receiver managers be reinstated forthwith.

From the time Apondi, J. made the orders restraining the receiver managers from conducting the affairs of the 1st respondent on 9th December, 2010 to 13th May, 2011 when this Court reinstated them, it would appear the directors accessed the 1st respondent's bank account with the appellant and made withdrawals.

On 15th November, 2013 the respondents filed another suit against the appellant, being Nbi HCCC No. 497 of 2013 alleging that with full knowledge of the appointment of the receiver managers, the appellant permitted the directors of the 1st respondent to operate its two accounts with the appellant; and that in total Kshs.89,502,424 was paid out unlawfully to the directors. In that suit the respondents, asked the court to enter judgment against the appellant in the sum of Kshs.89,502,424, and as an alternative, render account of all funds in those accounts. The appellant, in defence conceded that it was formally notified of the appointment of receiver managers and in fact instructed to suspend operations of the 1st respondent's accounts. But that hardly a week after the exchange of the aforesaid mail, the appellant was served with an order issued in Nbi. H.C.C.C No.732 of 2010 whose effect, as we have said was to temporarily suspend the appointment of the receiver managers. Those orders, though temporary, were later extended to await the hearing and determination of the main suit. It took several months from that moment to the time the receiver managers were reinstated. For these reasons the appellant denied any wrongdoing or liability for the withdrawals of funds from the 1st respondent's accounts by the directors; that those withdrawals were made possible by the restraining orders issued by the court, which effectively removed the receiver managers from the 1st respondent and created a window for the directors to make the withdrawals; and that to avoid being cited for contempt, it allowed the directors, who were also the authorized signatories to the accounts to withdraw funds from them.

Taking these depositions together with the respondents' claim, the appellant believed that the suit was hollow and applied to have it struck out under **order 2 rules 15(1)(a)**,**(b)** and **(d)** of the Civil Procedure Rules for being frivolous, vexatious and an abuse of the court process. The main reason why the appellant wanted the suit struck out was that it could not be blamed for the withdrawal of funds when there were orders suspending the receiver managers; and that any attempt to block the directors from operating the accounts would have amounted to contempt of court. The appellant concluded that;

> **"In view of the injunctive orders issued ……, it is clear that the plaintiff?s suit is a non-starter, frivolous and vexatious…..In addition, the suit herein is an abuse of the court process as it effectively seeks to obtain a remedy by challenging, disregarding and or canvassing for a favourable interpretation of the injunctive orders……."**

The affidavit sworn in reply on behalf of the two receivers, is to the effect that the appellant was fully aware of the existence of the receivership of the 1st respondent; and that there were even instructions to

the appellant to suspend operations of those accounts. That being the case the appellant knew or ought to have known that during the period of receivership, the 1st respondent's assets, including book debts and cash deposits in the appellant bank constituted a fixed charge and only the receivers managers were permitted to deal with the 1st respondent's assets.

It fell upon Ochieng, J. to hear arguments on the application to strike out the respondents' plaint in Nbi HCCC No. 497 of 2013. The learned Judge addressed himself to the main grounds upon which the application was premised, that is, whether the plaint disclosed no reasonable cause of action or that it was scandalous, frivolous and vexatious or that it was an abuse of the court process. He found that the suit did not deserve to be struck out, explaining that the matter was complex and concluded that;

> **"In the event that the court should conclude that the directors did not have the requisite legal authority to give instructions to the bank after the floating charge had crystallized over the assets of the company, consequences would follow. And whether or not one of those consequences might be to hold the bank liable for the funds which were debited against the account of Kajulu Holdings, it is only a full trial which can determine.**
>
> **In the result, the plaintiff?s suit appears to raise a reasonable cause of action. The case raises serious issues of law that need to be determined on merit. It would therefore be wrong to strike out the suit, summarily.**
>
> **Accordingly, the defendant?s application is dismissed, with costs to the plaintiffs."**

The appellant has proffered this appeal and urged us to overturn the decision above on the grounds that the learned Judge ought to have found that the respondents' action raised no triable issues, no reasonable cause of action because he had established that *prima facie* the appellant acted on the instructions of the directors; that he failed to appreciate that the actions of the directors were not attributable to the appellant; that the learned Judge did not appreciate that in allowing the directors to operate the 1st respondent's bank accounts, the appellant was merely complying with an order of the court, a fact which was confirmed by the Court of Appeal in its ruling on a **5(2)(b)** application; and that the learned Judge erred in expressing the view that the appeal over which the said **5(2)(b)** application was premised was still pending.

The appeal was canvassed through written submissions with the appellant reiterating these averments. But because of its relevance to this appeal, we briefly set out below part of those submissions. Learned counsel for the appellant submitted that the facts in the dispute were not contested and that;

> **"24 ….there was <u>only one issue on which both parties were</u> <u>diametrically opposed,</u> and that issue was the effect of the court order of 24th November,2010 and 9th December, 2010"**(Our emphasis).

He went ahead to explain the interpretation of those orders as understood by both sides of the dispute. That while the appellant understood the order to have lifted the receivership, the respondents, for their part were of the view that the receivers were merely stopped from running the 1st respondent which was different from the receivership being lifted.

Counsel urged us to find that if that was the only issue, it was an issue of law the construction of which, according to the authorities he cited, did not deserve to go to trial; and that the court below ought to have applied its wisdom to make a finding on the law or interpretation of the issue at hand. For this proposition he relied on **<u>Cassam</u> <u>V Sachania</u>** (1982) KLR 91 where this Court (**Law, Potter JJA** & **Hancox Ag JA**) followed the dictum by Lord Denning in **<u>Tiverton Estates Limited V Wearwell Ltd</u>** (1974)1 All ER 209 and a treatise by Richard Kuloba, ***Summary Judgment,* Law Africa (2nd Edn.) 2010.** Learned counsel set out the following passage from the former to persuade us that where the only question in an application such as the one giving rise to this appeal is about construction of documents or the law, it would be pointless to go to trial. Lord Denning MR said;

"These courts are masters of their own procedure and can do what is right even though it is not contained in the rules…...

There is no point in going formally to trial when the discussion at the trial would be merely a repetition of the discussion on the summary procedure. We have often decided cases under RSC Order 14 when the only point is one of construction, even though it is a difficult and arguable point. So also under RSC Order 86, in regard to which Russell LJ said in Bigg v Boyd Gibbins Ltd:

„... if one has simply a short matter of construction, with a few documents, the learned judge on this summary application should simply decide what is in his judgment the true construction.?

Both the treatise and the case of **Tiverton Estates Limited** (supra) did not deal with an application for striking out. All Lord Denning MR is quoted as saying in the foregoing passage related to what a court will consider in an application for judgment on admission which under our Civil Procedure Rules would have been anchored on **order 13.**

Unlike that case, here we are dealing with an application brought pursuant to order **2 rule 15 (1)(a)(b)** and **(d)** of the Civil Procedure Rules that provides for the striking out of pleadings as follows;

"15. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) ……..

(d) it is otherwise an abuse of the process of the court".

The above carefully chosen language demonstrates the nature of the court's discretionary powers which has variously been described by courts as discretionary but drastic, draconian, summary, a guillotine process, and an order of last resort. It is a procedure that is to be resorted to sparingly and only if an amendment cannot save the pleadings in question. The guidelines for grant or refusal of such application are now old hat as can be seen from such well known cases as, **Co-operative Merchant Bank Ltd. vs. George Fredrick Wekesa** Civil Appeal No. 54 of 1999 where the Court summarized those guidelines as follows;

"The power of the Court to strike out a pleading under Order 6 rule 13 (1) (b) (c) and (d) is discretionary and an appellate court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong.....Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact....A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment.."

But the widely cited passage is that drawn from the dictum of **Madan, JA** (as he then was) in **D. T. Dobie & Co** (supra) where he said;

"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, there should be no opinion 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 right.

If an action is explainable as a 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.

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 a case before it."

The Court in **Kivanga Estates Limited V National Bank of Kenya**, Civil Appeal No. 217 of 2015, recently observed how powerful the jurisdiction of striking out pleadings is but explained that its objective is to do justice to both sides in a dispute, by, on the one hand ensuring that a party to civil litigation is not lightly deprived of his right to have his suit determined in a full trial, while at the same time recognizing the futility of dragging a person to the seat of justice when the case brought against him is a hopeless one.

With these principles in mind, we ask the only question the learned Judge was expected to answer in considering the application before, that is, whether the respondents' case was so hopeless, so weak as to be beyond redemption, so plainly and obviously without a semblance of a cause of action that it would be a waste of judicial time and resources to allow it to go forward. For our part, our role is to consider whether, in dismissing the application the learned Judge properly and judicially exercised his discretion.

We revert to submissions by the appellant which we reproduced earlier and in which it conceded that there was only one bone of contention about which the positions of the parties were diametrically opposed. It correctly identified the issue in controversy as the effect of the court order of 24th November, 2010 which was extended on 9th December, 2010 upon *inter partes* hearing.The effect of the orders of 24th November, 2010, as shown earlier, was to temporarily restrain the receiver managers from interfering with the 1st respondent's business in purported enforcement of securities given by the appellant to secure various banking facilities..

It was during the subsistence of those orders that the directors of the 1st respondents operated account held in the appellant bank resulting in withdrawals amounting to Kshs. 89,502,424/-.

We reiterate that the appellant's position was that it was not responsible for the activities of the directors since it was simply complying with an order of a court of law; and that, although it was aware of the appointment of receivers to manage the business of the 1st respondent, it would have been in contempt of court had it tried to stop the directors from operating the bank accounts.

The respondents do not agree and argued that having notified the appellant of the appointment of receivers and instructed them to freeze the 1st respondent's accounts, the latter was in violation of its fiduciary duty by letting the directors withdraw funds from the 1st respondent's accounts without recourse to the receivers managers. They further contended that from the date the receivers were appointed all charges contained in the two debentures became fixed charges in favour of the 2nd respondent; and that the orders of 24th November, 2010 and 9th December, 2010 did not change that fact.

It cannot be in doubt, from these rival arguments that the issue raised in the suit as summarized above, cannot be described as hopeless or weak without life as to be beyond redemption, plainly and obviously

without merit. That single issue identified by the appellant itself is the heart of the dispute and ought to go forward for determination.

This Court, Omolo, Aganyanya and Nyamu, JJA, in their consideration of the **rule(5) (2)(b)** application repeatedly explained why they could not comment on the aspects of the suit dealing with the effect of the orders of 24th November, 2010 and 9th December, 2010, being fully aware that their resolution lay with the trial court. They were instead emphatic that;

> **"Taking into account the contents of affidavits in support and in opposition, submissions of counsel, authorities cited and the grounds set out in the draft memorandum including the observations of the learned Judge as reproduced above, our view is that the grounds relied on by the applicant cannot be said to be frivolous and therefore we consider that the requirement of arguability of the appeal has been established"**.

We cannot find fault with the learned Judge's decision to reject the invitation to strike out the suit. In the result and for the reasons given,the appeal fails and is dismissed with costs.

Dated and delivered at Nairobi this 24th day of March, 2017

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR