



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A)

CIVIL APPEAL NO. 268 OF 2014

BETWEEN

MUMIAS SUGAR COMPANY LIMITED.....APPELLANT

AND

SYNERGY INDUSTRIAL CREDIT LIMITED... 1ST RESPONDENT

NTULELE ESTATES LIMITED..... 2ND RESPONDENT

(An appeal from the Ruling and Order High Court of Kenya at Nairobi (Ogolla, J.) dated 13th December, 2011 in H.C.C.C. No. 196 of 2008.)

JUDGMENT OF THE COURT

The 1st respondent on 10th April, 2008 initiated a suit in the High Court at Nairobi against the appellant and the 2nd respondent jointly. In the suit the 1st respondent claimed a sum of Kshs.7,493,047/- from the 2nd respondent, and order of specific performance compelling the appellant to forthwith pay a sum of Kshs.4,819,211/-, on behalf of the 2nd respondent and a similar order compelling the appellant to perform its obligations and/or honour the monthly repayment installments of Kshs.193,750/- to the 1st respondent until discharged in writing, costs and interest.

The suit was informed by the fact that the 1st respondent was a financier in the years 2004 and 2006 entered into various hire purchase agreement with the 2nd respondent pursuant to an undertaking given by the appellant to remit all installments to the 1st respondent on behalf of the 2nd respondent during the subsistence of the hire purchase agreements. Towards this end, the 1st respondent financed the 2nd respondent to the tune of Kshs.7,493,047/-, which it utilized to purchase Ford Pick-up motor vehicle registration number KAN 654V, New Holland tractors registration numbers KAQ 145U, KAQ 142U and KAQ 143U and Cane Harvester registration numbers KAS 068Y and KAQ 144J.

One of the terms of the hire purchase agreement was that repayment would be by way of monthly installments to the 1st respondent. However, in breach of the above term of the hire purchase agreement, neither the appellant nor the 2nd respondent remitted the agreed monthly installments towards the settlement of the debt which by then had accumulated to the sum claimed in the plaint.

On the very day that the suit was commenced, the 1st respondent took out a Chamber Summons application seeking an order to compel the 2nd respondent to present or avail the chattels purchased through the hire purchase agreement aforesaid for inspection and preservation by the 1st respondent pending the hearing and determination of the suit.

According to the appellant, the 1st respondent then served it with a copy of the plaint, verifying affidavit, certificate of urgency, the chamber summons application and the supporting affidavit. Those documents were however not accompanied, as required, with summons to enter appearance. The appellant forwarded the aforesaid documents to its lawyers, **Messrs Otieno, Ragot & Company Advocates**. The said advocates upon noticing that no summons to enter appearance were in the batch of the documents sent to them by the appellant, prepared, filed and served a notice of appointment of advocates so as to participate in the application as it waited for the summons to enter appearance to be formally served. When the same were not forthcoming, it wrote to the 1st respondent asking for the summons to enable it file the requisite defence. After more than two years of waiting to no avail, the appellant took out a motion on notice seeking to have the suit against it dismissed with costs on that account.

The 1st respondent opposed the application saying that the 1st respondent's former advocates, **Messrs Bengi Miriti & Associates Advocates** took out the summons on the 11th April, 2008 and served the same upon the appellant on the 18th April, 2008. That in fact they were among the bundle of documents that were served on both the 1st respondent and the appellant on 15th and 18th April, 2008 respectively.

The application was heard by **Ogola, J.** and in a ruling delivered on 13th December 2011, dismissed the application holding that:-

“...In the upshot a doubt exists as to whether or not summons were served. However, it is not a doubt that can cause this court to dismiss a plaint. Such would be an extreme action a court of justice can only resort to in the clearest of the circumstances. In the upshot, using the discretion of this court, I decline to grant the application, I dismiss the same with costs and direct the 2nd defendant to take immediate steps to file defence (if it has not done so) and to participate in the suit as it is already aware of its existence...”

This finding aggrieved the appellant who then moved to this Court by way of an appeal to annul the same. The appellant advanced a total of six grounds to impugn the ruling. But in our view, the appeal turns on or boils down to one key issue; whether the learned Judge exercised his discretion judiciously or properly in dismissing the application.

During the case management conference held on 17th August, 2016 before **Ole Kantai, J.A.**, parties agreed to canvass the appeal by way of written submissions. However, when the appeal came before us for hearing on 14th November, 2016, only the appellant and the 1st respondent had filed and exchanged written submissions. There was no word from the 2nd respondent though served with the hearing notice for that day in good in time. Its advocates too were not in court. Given the circumstances, we directed the appeal to proceed to hearing the absence of the 2nd respondent notwithstanding.

Ms Ouko and **Mr. Azenga**, learned counsel for the appellant and 1st respondent respectively, informed us that they stood by their written submissions and did not wish to highlight them.

The appellant in its submissions reiterated that it was never served with summons to enter appearance. That it even formally requested the 1st respondent through a letter dated 28th April, 2008 to be served with the same which letter elicited no response at all from the 1st respondent. It submitted further that the 1st respondent exhibited delay that was unexplainable with regard to taking out the summons and even ignored the appellant's letter on the subject. The appellant further submitted that there was no evidence of the 1st respondent ever taking out the summons and even if they were taken out, there was no evidence of service of them upon the appellant. In doing so, the appellant submitted that the 1st respondent violated

Order 5 of the Civil Procedure Rules. It was further submitted on behalf of the appellant, that though Ogola, J. noted that indeed there was lack of evidence of service of the summons and though the rules provide for the dismissal of the suit for want of service of summons with certain timelines, the learned Judge erred in not dismissing the suit. For all these submissions, the appellant relied on the following High Court authorities, **John Ngugi Mungai v Family Bank Limited & Others, NBI HCCC No. 23 of 2011, Ephantus Wachira Ngochi v The Co-operative Bank of Kenya, NBI HCCC No. 532 of 2010 and Halima Kasi Tonui & 33 Others v The Board of Trustees Teleposta Pension Scheme & Another, MSA, HCCC No. 111 of 2012.**

Opposing the appeal, the 1st respondent submitted that Ogola, J. was correctly guided by the documents that had been produced as evidence during the prosecution of the application. That there was evidence that the 1st respondent's advocates took out the summons and served both the appellant and 2nd respondent. Further, that there was evidence that the appellant entered appearance in the suit even though summons had not been served on it. That fact alone confirms that the appellant was duly served with the summons. It was further submitted that the appellant could not have acted out of the oblivion by entering appearance in a suit that it had yet to be served with. The 1st respondent further submitted that the court record indicated that the summons were issued on 11th April, 2008 and the appellant was served with the same on the 28th April, 2008. In conclusion, the 1st respondent submitted that even if there was failure to take out and serve the plaint and summons, that omission *per se* would not by itself be sufficient ground to strike out or dismiss a suit. For these propositions, the 1st respondent relied on the following authorities; **Yahya Swabir Bwanamahadhi & Another v Mohammed Alwi & 2 Others [2014] eKLR and Paulina Wanza Maingi v Diamond Trust Bank Limited & Another [2015] eKLR.** In the upshot, the respondent submitted that, considering the fact that the appellant has been aware of the suit since April, 2008 when it filed notice of appointment of advocate, the appeal ought to be dismissed to facilitate the expeditious disposal of the suit in the High Court.

We have considered the appeal, the ruling of the High Court, the memorandum of appeal and the submissions by learned counsel. As we have already intimated, this appeal turns on whether or not in disallowing the appellant's application in the High Court, the learned Judge exercised his discretion judiciously or properly. In the case of **Peter Kirika Githaiga & Another v Betty Rashid, Civil Appeal Number 210 of 2014 (UR)**; we said this with regard to the exercise of discretion by the trial court and when the appellate court may interfere with such exercise:-

“The Supreme Court of Uganda defined exercise of discretion as the faculty of deciding or determining in accordance with circumstances and what is deemed to be just, fair, equitable and reasonable in those circumstances. See Kiriisa v Attorney General [1990-1994] EA 258. In the case of George Gikubu Mbuthia v Consolidated Bank of Kenya Ltd & Another, Civil Appeal No. 72 of 2014 (UR), we expressed ourselves on the issue thus: -

“...Subject to the requirement that discretionary power must be exercised judiciously, this Court will be slow to interfere with the exercise of discretion by a judge of the High Court.”

In **United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] EA 895 Madan J.A.** (as he then was) stated the principles in these terms:-

“...the Court of Appeal will not interfere with discretionary decision of the Judge appealed from simply on the ground that its members if sitting 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, or fifthly, that his decision albeit a discretionary one is plainly wrong.”

The rationale for that cautious and circumscribed approach by the appellate court was

succinctly stated by Justice Ibrahim Tank Mohammad **of the Supreme Court of Nigeria in** Abayomi Babatunde v Pan Atlantic Shipping & Transport Agencies Ltd & Others, S.C. 154/2002 **as follows:-**

“The general law on exercise of discretion is that the discretion is always that of the trial court and not of the appellate court. Hence an appellate court cannot substitute its own discretion.”

In declining the application **Ogola, J.** reasoned that to strike out the suit on the basis of unproven facts was such a drastic step that he was unwilling to undertake. He opted to err on the side of sustaining the suit rather than dismissing it. Although he doubted whether or not the summons were served, that did not mean that the appellant had proved that the summons had not been served on it. Proof in civil matters is on balance of probability and not, as in criminal matters where it is beyond reasonable doubt. So that in this case, the mere fact that the Judge felt in doubt as to whether or not the summons were served, such doubt could not be resolved in favour of the appellant. Whether or not the summons were served could not have been resolved on the basis of affidavit evidence. It could only have been resolved by calling the process server for cross-examination. This was not done. We would in the circumstances agree with the Judge when he observes that it was not the kind of doubt that would push the court to dismiss the suit.

In all that the Judge said in refusing the application, we discern no misdirection in law or misapprehension of facts. In our view the learned Judge sought to do justice to the parties and took into account all relevant considerations. After all, with or without the summons, the appellant was aware of the suit and had in fact actively participated in it through the interlocutory application hearings. Thus, no prejudice was occasioned to the appellant. Finally, we cannot say, given the set of facts, that the Judge was plainly wrong in the exercise of the discretion. His decision was informed by the need to do justice to the parties, which is the hallmark of a court of law.

The decisions relied on by the appellant in support of the appeal are actually inapplicable and distinguishable to the circumstances of this case. In all those decisions, the summons were never issued or taken out. That is not the case here. In this case, there is evidence that the summons were taken out. The contest is whether or not they were served on the appellant.

The upshot is that, we are satisfied that the learned Judge exercised his discretion judiciously and we see no reason to interfere. The appeal thus fails and is accordingly dismissed with costs to the 1st respondent.

Dated and delivered at Nairobi this 3rd day of March, 2017.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR