IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, OKWENGU & AZANGALALA, JJ.A)

CIVIL APPEAL NO. 122 OF 2012

BETWEEN

ECOBANK KENYA LIMITED……...……APPELLANT

AND

AMREEN KUTBUDDIN MUKADAM…...……1ST RESPONDENT

NOREEN ASHIQ HASSAN SHEIKH……..…2ND RESPONDENT

(An appeal from the Ruling and Order of the Hon. Justice J.B. Havelock made and delivered on 17th November, 2011

in

CIVIL CASE NO. 775 OF 2009

****

JUDGMENT OF THE COURT

By a plaint dated 15th October, 2009 and filed in the High Court at the Milimani Commercial and Tax Division on 19th October, 2009 the respondents, **Amreen Kutbuddin Mukadam and Noreen Ashiq Hassan Sheikh** (hereinafter **"the Respondents"),** claimed against the appellant **Ecobank Kenya Limited** (hereinafter **"the bank"**), the sum of Kshs 3,628,597/83 plus interest at 7% per annum from 29th September, 2005 until the date of the suit and further interest at court rates from the date of filing suit until payment in full. The respondents also prayed for costs and such other and/or further relief the court would deem fit to grant.

The foundation of the claim was a fixed term deposit made by the respondents at the appellant's Fedha Towers, Muindi Mbingu Branch and acknowledged by the appellant and which deposit had, from time to time, been rolled over upon maturity in accordance with agreed terms. The respondents alleged that the appellant had refused or neglected to pay them the sums so deposited together with accrued interest.

The bank entered appearance and delivered a defence. It also raised a counter-claim and set off. At paragraph 4, the bank averred as follows

4. ***In the alternative and without prejudice to the foregoing the Defendant avers that even if its***

predecessor issued to the Plaintiffs the facility disclosed at paragraph 5 of the Plaint, which is denied, the same was so issued in consideration of facilities issued at the request of Messrs Impress

Printers Limited (hereinafter referred to as "the Principal") particulars of which facilities are well known to the plaintiffs."

The bank further averred, at paragraph 5(b) as follows:-

"5 (a)……

b. ***In further response to paragraph 7 of the Plaint, the Defendant avers that even if the sums on the fixed Deposit Account were so deposited the proceeds thereof were, in terms of the instruments respecting the facilities advanced to the Principal, uplifted and utilized to partly satisfy the then liabilities due from the Principal to the Defendant. The Defendant shall at the hearing hereof crave leave of this Honourable Court to refer to the documents evidencing such indebtedness for their full meaning, tenor and effect."***

In the counter-claim and set off, the bank introduced the said principal debtor , **Impress Printers Limited,** as the 3rd defendant to the counterclaim and set off, in addition to the respondents who were the 1st and 2nd defendants respectively. In summary, the bank claimed that its predecessor, **Akiba Bank Limited**, had, at the request of the said Principal debtor, advanced the latter Kshs.3,000,000/= on the security of a number of items including the following:-

"(iii) Joint & Several Guarantees and Indemnity for Kshs.3,000,000.00 of the 1st and 2nd Defendants to the Counterclaim.

iv. ***Lien over Fixed Deposit Receipt in the name of the 1st and 2nd Defendants to the Counter-claim.***

v. ***Letter of lien and set off in respect of (iv) hereinabove."***

The bank expressly averred as follows at paragraph 15 of the Counter claim and set off:-

"15. By an agreement in writing the 1st and 2nd Defendants to the counter claim in consideration of the Plaintiff agreeing to advance the Company the financial facilities as aforesaid AND having duly accepted terms on the basis of which the facilities were being advanced as stated hereinabove undertook jointly and severally to pay and to satisfy the Plaintiff on demand all or any sum of money which would be owing to the Plaintiff from the 1st Defendant to the Counterclaim under the Credit Agreement. The Plaintiff shall crave the leave of this Honourable Court to refer to the said Guarantee and Indemnity for its full terms, meaning and effect."

The bank further pleaded that the principal debtor defaulted and it recalled its securities which included the amount in the Fixed Deposit Account.

The respondents denied the bank's claim in their joint reply and defence to counter claim and set off. They specifically denied authorizing the lien over the Fixed Deposit Receipt and the existence of other facilities allegedly extended to them or other parties by the bank.

On 23rd December, 2009 the respondents filed a chamber summons of the same date seeking the main reliefs that the bank's defence, counter claim and set off be struck out and judgment be entered for them as prayed in the plaint. The application was brought under the then **Order VI rule 13(1) (b)**

(c) and (d), Order VIII rule 1 (2) and **Order IX rule 2(3)** of the **Civil Procedure Rules**. The application was placed before Havelock J., (as he then was) who, after hearing it, expressed himself thus,

in a ruling delivered on 17th November, 2011.

"I have re-looked at these documents referred to at pages 1-20 attached to Mr. Oroko's said Affidavit. They are all dated (and some undated)in the year 2003, thus, I fail to see the relevance of the same to this suit. However, the copy of the Term Deposit Confirmation Receipt at page 21 of the exhibited bundle has more relevance. It bears the same Receipt No. 01-50101787 as is detailed in the Plaint although the amount differs Shs.3,518,275.98 (maturity value Shs.3,580,894.60) in the Term Deposit Receipt and Shs.3,628,597.83 in the Plaint. Somebody, and there is no evidence as to who, has detailed in handwriting on the exhibited copy the words "Under Lien". Do, such words mean anything and are they evidence of the deposit being charged to the defendant.

I may have presumed so, save for the 2004 correspondence exhibited to Mr. Oroko's Replying

Affidavit starting with the copy Fixed Deposit Receipt at page 27 for Kshs.3,398,716.40. At the top of that certificate is detailed in type "CERTIFICATE UNDER LIEN WITH AKIBA BANK LTD – Kshs.3,398,716.40. At page 32 the Plaintiffs writing to the East African Building Society requests the presumed uplift of the deposit and to issue a cheque in their names drawn on Akiba Bank Ltd. Typed on the copy of that letter at the bottom, are the words:-

"Please place our funds in a fixed deposit account in our names at best available rates."

***At page 34 it appears that the Assistant Manager of the Defendant Bank forwarded the Original Fixed Deposit receipt by letter dated 17th June, 2004 and requests*:**

"a cheque for the principal and interest amount as per enclosed customer instructions."

Can it be presumed that these customer instructions were acted upon in June, 2004? What is the connection between that correspondence, the lien for the lending facility which may have been paid off and the Receipt No. 01-50101787 at page 21 and the Receipt referred to in the Plaint?

Unfortunately, Mr. Oroko's said further Affidavit does not tell us nor does the Counterclaim which concentrates upon its claim against the Company not the Plaintiffs other than to say that they are jointly and severally liable to pay and satisfy the Defendant Bank on demand all or any sum of money which would be owed to the Defendant bank from the company. Unfortunately for the Defendant bank, does not seem to have the documentation to support this contention. The real question before me is whether the Defendant's current pleadings before this court are going to give an opportunity to produce pertinent documentation if this matter was to go for trial."

We observe at this juncture that although the learned Judge raised concerns regarding supporting documents to the bank's alleged lien on the respondents' Fixed Deposit, he furnished no answer. The record shows that he instead commenced consideration of the parties respective authorities. He then referred to the written statement of defence and found that it admitted the Fixed Deposit but stated that the funds so deposited were set off against the account of the principal debtor. In the view of the learned judge, that was not a defence to the respondents' claim. He therefore struck out the defence the counterclaim and set off and entered judgment for the respondents as prayed in the plaint.

The bank felt aggrieved with the decision and hence this appeal before us which is premised on 10 grounds of appeal which **Mr. Luseno,** learned counsel for the bank, argued together. Learned counsel however, emphasized that the learned Judge of the High Court failed to appreciate that the relationship between the respondents and the bank was not merely a customer and bank relationship but was also a guarantor and lender relationship. In addition to that relationship, according to learned counsel, the respondents offered their Fixed Deposit as one of the securities for financial facilities extended to the principal debtor which event restricted the disbursement of funds in the Fixed Deposit account.

Mr. Luseno acknowledged that the respondents indeed challenged the alleged securities offered to secure the financial accommodation to the principal debtor but, in his view, the challenge could only be resolved

in a trial. Learned counsel further submitted that the bank's claim against the principal debtor was not considered by the learned Judge who, according to him, had little appreciation of the matter before him.

Mr. Orina, learned counsel for the respondents, in supporting the respondents' case, submitted that the learned Judge of the High Court properly exercised his discretion when he struck out the bank's defence, counterclaim and set off. In learned counsel's view, the bank was attempting to amend its pleadings through counsel's submissions. He made that submission because, according to him, the bank had not, in its pleadings distinctly brought out the nexus between it and the entities which preceded it. Referring to documents upon which the bank sought to rely to demonstrate its relationship with the respondents, learned counsel submitted that the same pre-dated the said relationship and were, in any event, not signed by the respondents. It was further the respondents' case that the issue of the alleged security was not clearly pleaded by the bank and the learned Judge, in learned counsel's view, was right in rejecting the same.

The application which was before the learned Judge of the High Court, as we have already stated, was brought under the then O**rder VI rule 13(1)**

(b) (c) and (d), Order VIII rule 1 (2) and **Order IX rule 2(3)** of the **Civil Procedure Rules.** The prayers sought under **Orders VIII** and **IX** were refused by the learned Judge and no appeal was preferred against the refusal. The learned Judge determined the application under the then **Order VI rule 13 (1) (b)** and **(c) (**now **Order 2 rule 15 (b)** and **(c)** of the Civil Procedure Rules)**.** We say so, because the learned Judge stated: *"To my way of thinking this is no form of defence*." With regard to the counterclaim and set off he stated: *"the counterclaim seemed to be more directed at the company rather than the plaintiffs.***"**

The principles which guide the court when considering an application such as was before the learned Judge are now well documented and the law is settled by dint of numerous legal authorities. We may, as the learned Judge did, refer to the *locus classicus* of the case of ***D.T. Dobie & Company(Kenya) Ltd -v-***

Muchina [1982] KLR 1, in which ***Madan J.A*** *(as he then was)* rendered himself as follows:

"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 L.J. (supra). As far as possible indeed, there should be no opinions 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 bound 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 of. 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 sentiments expressed by **Madan J.A.** apply with equal force to applications for striking out a defence as in this case. The decision in that case has been followed consistently and, in our view, remains good law. In the case of **Crescent Construction Co. Ltd. –v- Delphis Bank Ltd. [Civil**

Appeal No. 146 of 2001] (UR), this Court 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 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. At the same time, it is unfair to drug a person to the seat of justice when the case purportedly brought against him is a non-starter."

On the same issue **Bullen Leake** and **Jacobs:** Precedents of Pleadings, 12th Edition, states as follows:

"The exercise of the court's powers by "summary process" means that the court may exercise its jurisdiction without a trial i.e. without hearing the evidence of witnesses examined orally and in open court, so that by summary process, the court adopts a method of procedure which is different from the normal plenary trial procedure. The result is of course that where this powers are invoked the action is stayed or dismissed or judgment is ordered against the defendant, the party affected may thereby be deprived of a plenary trial, but this is only because the court has concluded that the proceedings should properly be terminated or disposed of without a trial. For these reasons, the court will exercise its coercive powers by summary process to terminate proceedings without a trial only with the greatest care and circumspection and only in the clearest case."

It is with the above principles in mind that we, propose to consider the appeal before us. We however, bear in mind that we too are not in a position to decide the merits or otherwise of the entire case which was before the High Court because to do so would again dispose of the entire suit either way without the proper court scrutinizing the evidence and the pleadings at a full hearing.

The main reason for the finding that the defence disclosed no triable issues was that whereas the bank admitted the respondent's term deposit, it applied the funds so deposited to satisfy a debt owed to the bank by the principal debtor. The learned Judge treated the relationship between the respondents and the bank as being merely one of customers and their bank. Yet the bank alleged that its relationship with the respondents went beyond customer/bank relationship. It alleged in paragraph 5(b) of the Defence that the respondents had offered the fixed Deposit Receipt as security for financial accommodation extended to the principal debtor which entity they had joined as a defendant to the counterclaim and set off. It further alleged, in paragraph 13 (iii) of the counterclaim and set off, that the financial accommodation extended to the principal debtor was further secured by a joint and several guarantee and Indemnity of the respondents. At paragraph 15 of the same counterclaim and set off, the bank alleged that the respondents had agreed in writing to jointly and severally pay to the bank, on demand, all or any sum of money which would be owing to it by the principal debtor in the event of default by the latter.

It is to our mind not a frivolous issue as to whether the respondents were guarantors with respect to financial accommodation extended to the principal debtor by the bank. It is also not an idle question as to whether the respondents' fixed Deposit was indeed offered as security for the same transaction. Further as to whether the respondents agreed in writing, to pay and satisfy on demand, the principal debtor's indebtedness with the bank, is in our view not frivolous. In view of the relationship pleaded by the bank between it and the respondents, the sums under the Fixed Deposit account would appear not to have been available to the respondents. That view was not outrageous, frivolous or vexatious. Fixed Deposit Receipts are often offered and accepted as security by financial institutions.

In our view, whereas the learned Judge cited the correct authorities on striking out pleadings, with all due respect to him, he lost focus as he considered the bank's response to the respondents' claim. This loss of focus is plain from the manner in which the learned judge treated the documents exhibited in the replying affidavit filed by the bank in opposition to the application for striking out its defence, counterclaim and set off. Referring to the fixed Deposit Receipt exhibited in the said affidavit, the learned Judge, as already observed, concluded that the endorsement thereon that it was *"under lien"* meant nothing.

Further, on correspondence exchanged between the parties, the learned Judge, as already observed, concluded that it was insufficient to demonstrate the bank's interest in the Fixed Deposit.

With all due respect to the learned Judge, he does not seem to have appreciated that the bank had joined the company as a defendant in the counterclaim. He also appears not to have appreciated that the time for conclusive proof of claims alleged in the defence, counterclaim and set off was yet to come and that he was merely considering whether the defence, counterclaim and set off raised *bonafide* triable issues. In our view, the questions raised by the learned judge indeed disclosed some of the triable issues. We do not think that the apology the learned Judge made in his ruling that he had not had the advantage of being closely acquainted with the contents of the court's file, the proceedings and particularly the application, explained his failure to appreciate the entire case put forward by the bank against the respondent's case. Little acquaintance with the court file could not explain why the learned Judge did not appreciate that in striking out the bank's defence, counterclaim and set off, the learned Judge also struck out the bank's claim against the principal debtor without assigning any reason for doing so and even before pleadings had closed.

The power to strike out a pleading is a discretionary one. As we have already stated it is to be exercised with the greatest care and caution as **Madan J.A.** stated in the **D.T. Dobie (supra)** case. In our view, the defence counterclaim and set off put forward by the appellant raised substantial questions to be tried. Without appearing to be deciding those issues, we have identified some of them above and are quick to add that we have not exhausted them but we are certain that the appellant's defence is not a sham.

In the result we have no alternative but to interfere with the learned Judges's exercise of discretion. This appeal is allowed. We set aside the order striking out the appellant's defence, counterclaim and set off and set aside the judgment entered in favour of the respondents against the appellant vide the High Court ruling dated 12th November, 2011. We substitute therefor an order dismissing the respondent's chamber summons dated 23rd

December, 2009. We order that the suit shall proceed to full hearing. The respondents **Amreen Kutbuddin Mukadam** and **Noreen Ashiq Hassan Sheikh** will pay the costs of the appeal and the application in the High Court.

Judgment accordingly.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF

JANUARY, 2016.

E.M. GITHINJI

……

JUDGE OF APPEAL

H.M. OKWENGU

…….

JUDG OF APPEAL

F. AZANGALALA

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR