



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MWILU & AZANGALALA, JJ.A)

CIVIL APPEAL NO. 62 OF 2012

BETWEEN

EQUITY BANK LIMITEDAPPELLANT

AND

NEPTUNE CREDIT MANAGEMENT LIMITED..... RESPONDENT

(Being an appeal against the ruling and order of the High Court of Kenya at Nairobi (Honourable Apondi J.) dated 24th January 2012 and delivered on 3rd February, 2012)

in

HCCC NO. 871 OF 2009)

JUDGMENT OF THE COURT

1. Equity Bank Limited (the appellant) filed suit before the High Court and concurrently filed an application under the then **Order XXXIX rules 2,3,and 9, Order L rule 1 of the Civil Procedure Rules, sections 3A and 63(e) of the Civil Procedure Act** and all other enabling provisions of the law seeking, *inter alia*, orders of injunction restraining Neptune Credit Management Limited (the respondent) from presenting to court, advertising, or in any way filing, or taking up winding up proceedings against the appellant in respect of a claim of Shs.10,200,000/= or any other claim pending the determination of the application and the suit. In the suit filed by way of plaint, the appellant sought a permanent injunction in the same respects as those sought in the interlocutory application. At the first instance, the appellant's prayer for interim injunction was granted *ex parte* on 1st December 2009 by Muga Apondi, J. (as he then was).
2. Before the matter proceeded for *inter partes* hearing, the respondent filed a notice of preliminary objection. In the said notice of preliminary objection, the respondent sought to strike out the plaint and application with costs, on the grounds that the plaint contravened the mandatory provisions of the law, specifically **Order VII rule 1(e) of the Civil Procedure Rules**. The respondent also filed a replying affidavit and statement of defence. However, only the preliminary objection was canvassed before the learned judge by both parties. By a ruling dated 24th January, 2012 and delivered on 3rd February, 2012, the trial judge upheld the preliminary objection and dismissed the

appellant's suit and application with costs.

3. This is thus an appeal against the ruling upholding the preliminary objection whilst dismissing the appellant's suit and application, the appellant not being satisfied with the trial judge's decision. The appellant in its memorandum of appeal dated 3rd April, 2012 lists the following four grounds of appeal in summary:-

“ a. The learned judge had no jurisdiction to dismiss the suit and application for interlocutory injunction under the provisions of Order VII Rule 1(e) of the Civil Procedure Rules;

- b. The learned judge erred in law by dismissing the suit and application for interlocutory injunction under the provisions of Order VII Rule 1(e) of the Civil Procedure Rules yet there was in fact no suit and or proceedings pending between the parties over the same subject matter;**
- c. The learned judge erred in law and fact by disregarding the provisions of Article 159(2)(d) of the Constitution that calls for the determination of suits on their merits without undue regard to technicalities.**
- d. The learned judge erred in his exercise of judicial duty by failing to consider and take into account the overriding objective of the Civil Procedure Act and Rules set out in sections 1A and 1B of the said Act.”**

4. In its filed submissions, the appellant reduced the issues into three as follows:-

“a) Whether the word „shall? as used in Order VII rule 1(e) of the Civil Procedure Rules imposed a mandatory obligation;

- b. Whether the court had jurisdiction to dismiss the suit in its entirety for failure to comply with Order VII rule 1(e) of the Civil Procedure Rules;**
- c. Whether in dismissing the suit, the Court took into consideration the overriding objective of the Civil Procedure Act and Rules.**

The said submissions by the appellant were made under the above heads.

5. **Mr. Kiragu Kimani, Advocate** leading **Mr. Duncan Akhulia, Advocate** appeared on behalf of the appellant. In highlighting the appellant's case, counsel reduced the grounds of appeal into two - first, that the court lacked jurisdiction to strike out the plaint and secondly, even if the court had jurisdiction, the same was improperly exercised. In his submissions, Mr. Kiragu argued that **Order 2 rule 15 (formerly Order VI rule 13)** was very particular on instances when a suit could be struck out. Counsel argued that the word “*shall*” as used in a statute ought to be interpreted according to the circumstances. Counsel cited several authorities to support his submissions. He cited, **In the matter of the principle of gender representation in the national assembly and the senate [2012]eKLR;**

Henry N Gichuru v The Minister for Health, the Kenyatta National Hospital Board [2002] eKLR and **Godfrey Ngotho Mutisio v Republic [2010]eKLR** where the courts construed the word “shall” to also mean “may” as per the context therein.

6. Counsel further submitted that the trial court had disregarded emerging jurisprudence from the Court of Appeal that, rules of procedure are not to be disregarded but must not be allowed to become harsh mistresses of justice. In addressing the omission in the plaint, counsel urged us to consider the mischief of multiplicity of suits that sought to be addressed by the then **Order VII rule 1(e) Civil Procedure Rules**, which required an averment to the effect that there is no other suit or proceedings pending between the parties over the same subject matter. Counsel admitted

that there were other proceedings and the omission to have the averment was regrettable but not fatal. Accordingly, the trial court should have allowed an amendment of the plaint and in the absence of allowing such an amendment, this Court could do so under **section 3A** of the **Appellate Jurisdiction Act**.

7. Counsel was categorical that three issues arose in the plaint and the defence as filed by the parties. The issues are the disputed debt, the respondent was seeking to wind up a substantial public bank and the appellant had offered a bank guarantee to secure the alleged debt owed to the respondent. Secondly, counsel pointed out that though the suit was filed in 2009, the ruling was delivered after the promulgation of the constitution in the year 2010. In essence, counsel argued that each party should be allowed to have its day in court. Lastly, counsel submitted that the trial judge was required to give reasons for his ruling in terms of the provisions of **Order 20** of the **Civil Procedure Rules** which he failed to do. Counsel thus faulted the judge for following and adopting decisions made before the promulgation of the constitution in the year 2010 which, in counsel's view, were in any event wrong.
8. In response, **Apollo Mboya** holding brief for **Appel Kwengu** adopted the written submissions, further submissions and list of authorities filed on behalf of the respondent. In counsel's submissions, the entire appeal turns on the oxygen principle, the appellant trying to breathe life to a plaint that was "dead on arrival". Mr. Mboya argued that this Court has observed severally that the oxygen principle is not a panacea in all situations and courts have insisted on full compliance with rules to obtain consistency and certainty. Counsel relied on the case of **Hunkar Trading Company Limited v Elf Oil Kenya Limited [2010]eKLR** and **Ramji Devji Vekaria v Joseph Oyula [2011] eKLR**. In his view, the appellant's actions were opportunistic, the appellant having admitted that they did not abide with clear legal provisions. He referred us to **Joseph Njuguna Mwaura & 2 others v Republic [2013]eKLR** where the court interpreted „shall“ to mean mandatory.
9. Concerning **Article 159(2)(d)** of the Constitution which embodies the oxygen principle, counsel relied on **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR** where it was held by the Supreme Court that the article was not meant to overthrow the rules of procedure as was also held in **Stanley Ng'ethe Kinyanjui v Tony Ketter & 5 Others [2015] eKLR**). In urging us to dismiss the appeal, counsel argued that the provisions of the Civil Procedure Rules are not inconsistent with **sections 1A** and **1B** of the **Civil Procedure Act** and placed reliance on **Maxwell on the interpretation of statutes 10th edition London, Sweet &Maxwell Limited** for that proposition.
10. In reply, Mr. Kiragu argued that the appeal did not turn on the oxygen principle but rather the consistency between **Order 2 rule 15 (formerly Order VI rule 13)** and **Order 4 rule 1 (f) (formerly Order VII rule 1(e))**. Admitting the omission by the appellant, counsel urged us to consider if the respondent would have suffered any prejudice if the suit were not struck out.
11. Having set out the proceedings above, it is worth pointing out that our determination focuses on the preliminary objection without the need to extend to the merits of the case at this early juncture. As submitted by the appellant's counsel, our determination will be on the dual substantive points argued before us by Mr. Kiragu Kimani, to wit, that the trial court lacked jurisdiction to strike out the plaint and even if the court had jurisdiction, the same was exercised improperly. We have merged the issues and shall deal with them concurrently.
12. It is trite law that there are several ways of interpreting the provisions of a statute. In contention are the provisions of **Order 2 rule 15 (formerly Order VI rule 13) Civil Procedure Rules** and **Order 4 rule 1(f) (formerly Order VII rule 1(e))** of the **Civil Procedure Rules** and the powers of the courts under the said provisions.

Order 2 rule 15 provides instances in which the court may order to be struck out or amended any pleading. These are that:-

- a. It discloses no reasonable cause of action or defence in law; or
- b. it is scandalous, frivolous or vexatious;
- c. it may prejudice, embarrass or delay the fair trial of the action; or
- d. it is otherwise an abuse of the process of the court.

In the event case of the above circumstances being proved, the court may order the suit to be stayed or dismissed or a judgment being entered accordingly.

13. **Order 4 rule 1(f) Civil Procedure Rules** on the other hand provides as follows:-

“(1) The plaint shall contain the following particulars —

(f) an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint.”

The use of the word „*shall*? in the above provision was the subject of a lot of arguments before us and in the authorities cited. Without repeating the arguments we take the view that the word „*shall*? should be construed both in the textual and contextual form. It is clear that the provisions of **order 4 rule 1 Civil Procedure Rules** are not linked to those of **order 2 rule 15 Civil Procedure Rules** whether by text or context. The respondent in its arguments before the trial court never sought to invoke the provisions of **order 2 rule 15 Civil Procedure Rules** to strike out the suit. If anything and following from the decisions adopted by the trial judge, failure to abide by the prescribed procedure set out in **Order 4 rule 1 Civil Procedure Rules** resulted in a nullity. A declaration of nullity has the effect of negating the action or steps so taken and put the parties in a position before the steps were taken. Striking out as set out under **order 2 rule 15 Civil Procedure Rules** has the effect that whereas the suit itself may be valid, it fails to meet the threshold on any of the grounds listed and thus fails.

14. The provision in **order 4 rule 1(f) Civil Procedure Rules** does not have a consequence for non compliance. This can be juxtaposed with the provision of **order 4 rule 6 Civil Procedure Rules** which provides as follows:-

“(6) The court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rules (2) (3), (4) and (5) of this rule. (emphasis ours)”

This is evidence of a deliberate intention on the part of the legislature to exclude **sub rule (1)** from the consequence of striking out of proceedings as contemplated in **sub rule (6)**. This inevitably leads us to ask, what then should happen when the provisions of **order 4 rule 1(f)** are not complied with? The appellant argues that recourse should not be had to **Order 2 rule 15** and the trial court thus lacked jurisdiction to dismiss the suit while the respondent insists that the suit should be struck out as was done by the trial judge.

15. In answering the above question, we look at the place of the Civil Procedure Rules. These rules are made by the Rules Committee under **section 81(1)** of the **Civil Procedure Act**. This section provides:-

“There shall be a Rules Committee . . . which shall have power to make rules not inconsistent with this Act and, subject thereto, to provide for any matters relating to the procedure of civil courts” (emphasis ours)

We emphasize that the rules made should not be inconsistent with the Act. Consequently, in

considering the provisions of the rules and where they are unclear, recourse is had to the **Civil Procedure Act** itself. **Section 1A** on the overriding objective of the **Civil Procedure Act**, **section 3** on special jurisdiction and powers of the court and **section 3A** on the inherent powers of the court come into play to fill the void. We are therefore not persuaded by the appellant's argument that the court lacked jurisdiction to make a decision on the preliminary objection as raised by the respondent before the trial court, concerning a specific provision of the rules, to wit **Order VII rule 1(e) Civil Procedure Rules**.

16. It is worthy of note that **Order 4 rule 1(2) Civil Procedure Rules** provides that the plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in **rule 1(1)(f) Civil Procedure Rules**. This means that not only was the plaint supposed to contain the averment contained in **rule 1(1)(f) Civil Procedure Rules**, the verifying affidavit was also supposed to contain the same averment. As seen in **sub rule (6)**, the rules expressly provided for striking out of a plaint that did not conform with **sub rule (2)**. Our perusal of the verifying affidavit reveals that the same is wanting in this respect as it contains no averment in terms of **rule 1(1)(f) Civil Procedure Rules**. To this extent therefore, the trial judge had power under in terms of **sub rule (6)** including power to dismiss as he did.
17. Our mandate on a first appeal is set out in **Rule 29(1)** of this Court's Rules namely to re-appraise the evidence and to draw inferences of fact. As was held by this court in **Selle v Associated Motor Boat Company Ltd [1968] EA 123**, this court is empowered to subject a matter on a first appeal to a retrial and come to its own conclusion. Where the exercise of judicial discretion is involved the exercise of which is called to our interrogation, we remain guided by the principles enunciated in **Coffee Board of Kenya v Thika Coffee Mills Limited & 2 others [2014]eKLR** that we will not interfere unless we are satisfied that the judge misdirected self in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice by such wrong exercise. The authority of **Selle v Associated Motor Boat Company Ltd. [1968] EA 123**; empowers this Court to subject the matter to a retrial and come to its own conclusion.
18. There is no doubt that we are being called upon to interfere with a judge's exercise of discretion arising from the inherent powers of the court, the special jurisdiction and overriding objective of the provisions of the Civil Procedure Act. This is a role we have to exercise sparingly. Just like the trial judge, we are being called upon to interpret the rules made pursuant to statute and not the statutory provision itself.
19. **Section 3(1) of the Judicature Act** gives full jurisdiction to courts exercising civil jurisdiction. The said section gives hierarchy of laws in the manner in which the jurisdiction is to be exercised. Accordingly, the **Constitution** ranks highest followed by local statutes and certain applied English Acts, doctrines of equity and statutes of general application in force in England as at the reception clause of 12th August 1897. The **Civil Procedure Rules** and Rules of Practice are therefore a creation of statute whilst the court's jurisdiction is constitutional.
20. From the provisions of **section 81(1)** of the **Civil Procedure Act** reproduced above, if a rule is inconsistent with the Act, it is to that extent *ultra vires*; and if the Act confers unfettered power, a rule which limits the exercise of the power is prima facie inconsistent with the Act. If however, a rule is capable of two constructions, one consistent with the provisions of the Act and one inconsistent, the court should lean to the construction which is consistent with the Act based on the principle „*ut res magis valeat quam pereat?* – it is better for a thing to have effect than to be made void. (See **Kuloba R (2011) Judicial Hints on Civil Procedure 2nd Edition Law Africa p.304**).
21. The appellant concedes the failure to abide by the express rules of procedure and we do not by any means condone or applaud such actions. A literal application of the rules would lead to the judge's decision to strike out the suit as he did.

However, what were the trial judge's options in the circumstances? A purposive approach to the

dispute should have sufficed in our view rather than the literal application of the rules. This is in line with the overall objective of promoting the interests of justice as enshrined both under **section 1A** of the **Civil Procedure Act** and **Article 159(2)(d)** of the **Constitution**. The appellant asked us to consider the mischief behind the rule while the respondent wants us to strictly enforce and uphold the rule as it is. Whereas all the parties are correct in their positions, we have time and again insisted that each case is to be considered on its own circumstances and no straightjacket application suffices. We are therefore not seeking to redefine the position but merely considering the particular circumstances of this case.

22. Looking at the circumstances, the mischief sought to be avoided was that of multiplicity of suits, as rightly conceded by Mr. Kiragu for the appellant during his submissions. A „suit“ is defined under **section 2** of the Civil Procedure Act as any civil proceeding commenced in any manner prescribed. This in our view does not include winding up proceedings which has its own special procedure. The steps taken in the course of a winding up action however amount to proceedings within the ambit of **order 4 rule 1(f) Civil Procedure Rules** particularly where they relate to the same course of action.

23. The genesis of the proceedings before the High Court was the notice of intention to commence winding up proceedings pursuant to **section 220** of the **Companies Act**. To avert the said winding up proceedings, the appellant filed suit and application before the High Court seeking to bar the respondent's intended action.

There is little doubt that both the intended winding up by the respondent and the filing of suit by the appellant accrued from the same course of action which is the alleged debt due to the respondent from the appellant.

24. In our view and so as to enable of access to justice, the appellant was entitled to access the court through the many avenues available to it in the same manner as the respondent's entitlement to pursue its alleged debt through any option available to it. The respondent contends that the appellant should have waited to contest the winding up proceedings once they were instituted. In our view, such waiting would amount to indolence and the appellant could as well have been reprimanded for such action if he opted for that course. At the hearing before the trial court, it came out that there were proceedings being the intended winding up and the proceedings before the court and the appellant affirmed the position. This affirmation therefore acceded to the objective of **Order 4 rule 1(f) Civil Procedure Rules**. Pleadings have been amended orally in court even during hearings and the appellant's actions should not have been treated adversely in the circumstances.

25. Of interest is that the proceedings were filed before the High Court which has the power to determine both the suit under the **Civil Procedure Act** and Winding Up proceedings under the **Companies Act**. The trial judge as has been held before in the cases cited by the appellant, had jurisdiction to entertain such an application and issue orders cutting across the provisions of the Companies Act and the Civil Procedure Act having noted that both courses arose from the same cause of action. The ultimate intention under the overriding objective is speedy and just determination of the dispute subsisting between the parties. The main issue in dispute is the claim of Shs.10,200,000/- against the appellant by the respondent. The claim is hotly contested and without going into the merits of the same, this is an issue that could be conclusively determined at full trial. From the zeal and contest exhibited at the various stages of trial including that before us, we did not need any further persuasion that the dispute should be ventilated in full at the trial as the parties here seem to have a long standing dispute. In **Continental Butchery Limited v Nthiwa [1978]KLR** this Court held that a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination. We re-emphasize this position.

26. From the foregoing, we hold that this was not a proper case for striking out the appellant's plaint and application. With respect, we fault the judge's view of the matter with a single lense yet the

scenario afforded a multifaceted approach. The respondent would still be able to challenge the prayers sought on merit before the trial court and we would do not want to pre-empt the same by commenting on the issues raised in that regard. Needless to say, the final decision of the trial court can still be challenged on its merit by way of appeal.

27. Accordingly, and for all reasons above, we allow the appeal, set aside High Court ruling and order of Apondi, J dated 24th January, 2012 and delivered on 3rd February 20102. We order that the appellant do within 21 days from the date of this judgment file and serve an amended plaint to rectify the anomaly and the matter do proceed before the High Court. We order that the costs of this appeal shall abide the determination of the suit.

Dated and delivered at Nairobi this 22nd day of July, 2016.

W. KARANJA

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR