



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 110 OF 2012

BETWEEN

MARGARET NJERI MBUGUA.....APPELLANT

AND

KIRK MWEYA NYAGA.....RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi in HCCA No. 574 of 2010 (Hon. Lady Justice M. Angawa) given on 28th July, 2011)

JUDGMENT OF THE COURT

[1] This is a second appeal originating from the ruling made by the **Principal Magistrate's Court**, in **CMCC NO. 5982 of 2010** at Nairobi (Milimani Commercial Courts). Margaret Njeri Mbugua who is now the appellant before us lodged the suit in the magistrate's court through a plaint dated 27th September, 2010 in which she sued Kirk Mweya Nyaga who is now the respondent, claiming Kshs 760,000 being a personal friendly loan that she had advanced to the respondent but which the respondent had refused or failed to pay. The appellant also claimed Kshs 100,000/= being interest that the respondent had committed to pay on the loan. The respondent having been duly served with the summons entered appearance and filed a defence denying the appellant's claim.

[2] Subsequently, on 21st October, 2010 the appellant filed a chamber summons application under **Order VI Rule 13 (1) (a) & (b)** of the former edition of the **Civil Procedure Rules** (*now repealed*) praying that the defence filed by the respondent be struck out and judgment be entered in favour of the appellant as prayed in the plaint. In the ruling delivered on 19th November, 2010 the trial court overruled the respondent's objection, allowed the appellant's application, struck out the defence and entered judgment in favour of the appellant as prayed in the plaint.

[3] Being dissatisfied with that ruling, the respondent preferred an appeal to the High Court. Upon hearing the appeal The High Court (Angawa, J) allowed the appeal, set aside the trial court's decision and directed that the appellant's suit be subjected to a full trial in the subordinate court. That is the decision that triggered the current appeal to this Court.

[4] It is worthy of note that the chamber summons that was before the trial court was brought under the former **Order VI Rule 13(1) (a) & (b)** of the **Civil Procedure Rules** that states as follows:

"13. (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; or

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

(c);

(d)

And may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be

(2)No evidence shall be admissible on an application under sub rule (1)(a) but the application shall state concisely the grounds on which it is made”

[5] In his ruling the trial magistrate ruled that the defence filed by the respondent was a mere denial and raised no triable issue, and that it was frivolous and vexatious because the respondent was truly and justly indebted to the appellant. He accordingly allowed the application, struck out the statement of defence and entered judgment in favour of the appellant as prayed in the plaint dated 27th September, 2010.

[6] In his appeal to the High Court, the respondent faulted the trial magistrate for entertaining a fatally defective application purportedly made under **Order VI Rule 13(1)** of the **Civil Procedure Rules** but supported by an affidavit contrary to **Order VI Rule 13(2)** of the **Civil Procedure Rules**; contended that the trial magistrate erred in finding that the respondent was indebted to the appellant in the sum of Kshs. 760,000/=; and in striking out the respondent’s defence and entering Judgment in favour of the appellant.

[7] In her Judgment delivered on 28th July, 2011 the learned Judge allowed the appeal holding that the appellant should have filed her application under **Order XXXV Rule 2** of the repealed **Civil Procedure Rules** which provided for summary judgments, on grounds that the defence disclosed no triable issues. The learned Judge further held that the appellant should have sought further and better particulars before praying for summary judgment.

[8] In this second appeal before us, the appellant has raised three (3) grounds. In brief these were first that the learned Judge erred in resting her decision on a ground other than that set forth in the respondent’s memorandum of appeal without according the appellant an opportunity to address that ground. Secondly, that the learned Judge failed to appreciate the distinction between jurisdiction to strike out a defence under **Order VI Rule 13** of the **Civil Procedure Rules** and to enter summary judgment under **Order XXXV Rule 2** of the **Civil Procedure Rules** and thirdly, that the learned judge failed to appreciate her role as a first appellate court.

[9] In his submission before us learned counsel for the appellant Mr. Mwanthi argued that by dint of **Order 42 Rule 4** of the **Civil Procedure Rules 2010**, the High Court was confined to the grounds set out in the memorandum of appeal; that as the first appellate court the High Court could not rest its decision on grounds other than those set out in the memorandum of appeal; that the High Court could only entertain any other ground if the parties had been given adequate opportunity of being heard on the same; that the learned Judge dismissed the appeal on the ground that a wrong procedure was used to apply for summary judgment which was not a ground included in the memorandum of appeal.

[10] Further, Mr. Mwanthi submitted that the reasons for the decision of the learned Judge were unclear; that the learned Judge misdirected herself in treating the appellant’s chamber summons as an application for summary judgment; that the learned Judge appeared not to understand that there were two jurisdictions one for striking out pleadings under **Order 6 Rule 13 (1)** and another for entering summary judgment under **Order 35 Rule (1)** of the **Civil Procedure Rules**.

[11] Mr. Mwanthi appreciated that the appeal before us was a second appeal but noted that the first

appellate court failed to evaluate the application and matters in support, and therefore urged this Court to do so and to arrive at its own conclusion. To this end, counsel argued that the defence filed by the respondent was a bare denial and did not amount to a defence as it is a general traverse. In this regard counsel argued that the trial magistrate did not need to consider the affidavit evidence. Further, that there was an admission that money was deposited into the respondent's account. In the end counsel urged the court to allow the appeal, set aside the judgment of the superior court and substitute thereof an order dismissing High Court Civil Appeal No. 574 of 2010.

[12] On his part, Mr. Jaoko, learned counsel for the respondent, submitted that **sections 72 and 79 (d)** of the **Civil Procedure Act** defines the grounds that may form the basis of a second appeal. He argued that other than mere assertions that the High Court acted contrary to law the appellant had not demonstrated a particular law that the High Court had contravened, nor any substantial error in procedure. Mr. Jaoko posited that the appeal did not fall within the ambit of **section 72** of the **Civil Procedure Act**. Counsel argued that the trial court erred in confining itself to the statement of defence since the application was composite and included **Order VI Rule 13 (1)(b)** of the **Civil Procedure Rules**, and that it was not proper for the subordinate court to look at the defence subjectively. Counsel relied on the case of **DT. Dobie & Co (Kenya) Limited V Muchina [1982] 1 KLR** arguing that the subordinate court did not exercise caution. Counsel maintained that the learned Judge was right in holding that the application ought to have been brought under **Order XXXV** of the **Civil Procedure Rules**.

[13] We have considered the record of appeal, the submissions by learned counsel and the law. As this is a second appeal, **Section 72 (1) of the Civil Procedure Act, Chapter 21 Laws of Kenya** restricts this Court to consideration of matters of law only. In **Kenya Breweries Ltd V Godfrey Oduyo, Civil Appeal No. 127 of 2007**, Onyango Otieno, J.A expressed himself as follows:

“In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court in a second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”

[14] The appellant argued that under **Order 42 Rule 4** of the **Civil Procedure Rules** the first appellate court was confined to the memorandum of appeal and therefore could not rest its decision on grounds other than those set out in the memorandum of appeal. The appellant further argued that where the first appellate court considers a ground of appeal outside the memorandum of appeal it should give sufficient opportunity to the party who may be affected by that ground of contesting the case on that ground.

[15] **Order 42 Rule 4** of the **Civil Procedure Rules 2010** provides that:-

“The appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule:

Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.
(Emphasis added).

[16] A plain reading of the above provision clearly shows that a first appellate court in rendering its decision has the necessary power to consider grounds of appeal other than those set out in the memorandum of appeal provided that the parties are given sufficient opportunity to address the court on the new grounds. The learned Judge was therefore quite right in considering a ground other than those to be found in the memorandum of appeal. However the proviso to **Order 42 Rule 4** had to be complied with.

[17] The learned judge in arriving at her decision rendered herself thus:

“Before the trial magistrate was an application under the former order VI r 13 (1) r (2) for summary judgment. The rules provide that summary judgments are to be applied for under order XXXV r 2 Civil

Procedure Rules. It is not the striking out of the defense that is applied for but the element that the summary judgment should be entered on grounds that the defense discloses no triable issues.”

[18] We have examined the memorandum of appeal that was lodged in the High Court by the respondent and it is true that the issue of procedure for summary judgment was not raised by the respondent nor was there any reference to an application under **Order XXXV** of the **Civil Procedure Rules**. We have also looked at the proceedings in the superior court regarding the hearing of the appeal. The appeal was argued orally before the superior court. At no point did the learned Judge inquire or ask the parties to argue the issue of wrong procedure for summary judgment. We therefore agree with the appellant that the learned Judge erred in determining the appeal on a ground other than those set out in the memorandum of appeal without affording the appellant sufficient opportunity to contest the ground.

[19] The appellant also argued that the learned Judge misdirected herself in construing the appellant’s application as one for summary judgment whereas it was actually an application for striking out the defence. The appellant argued that the learned Judge did not understand that there were two jurisdictions one for striking out pleadings under **Order VI Rule 13 (1)**, and another for entering summary judgment under **Order XXXV Rule 1** of the repealed **Civil Procedure Rules**.

[20] The appellant’s chamber summons application was brought under **Order VI Rule 13 (1) (a) & (b)** of the repealed **Civil Procedure Rules**. These provisions provide for the striking out of pleadings and empowers the court upon striking out the pleadings to order the suits to be stayed or dismissed or judgment to be entered. Therefore in hearing the application under **Order VI Rule 13 (1)**

(a) & (b) of the repealed **Civil Procedure Rules** the trial magistrate had the power to both strike out the pleadings and enter judgment where appropriate.

[21] This position may be contrasted with the position under **Order XXXV** of the **Civil Procedure Rules** that states as follows:-

In all suits where a plaintiff seeks judgment for-

(a) a liquidated demand with or without interest; or

(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profit.

[22] Under **section 79 (D)** of the **Civil Procedure Act** a second appeal from a decree passed in an appeal by the High Court can only lie on grounds mentioned in **section 72** of that **Act**. The grounds mentioned under **section 72** of the **Civil Procedure Act** are as follows:

(a) The decision being contrary to law or to some usage having the force of law;

(b) The decision having failed to determine some material usage of law decision or usage having the force of law;

(c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force which may possibly may have produced error or defect in the decision of the case upon the merits.

[23] In the case of Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, this court said the following with regard to the duty of a first appellate court:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held, *inter alia*, that:-

“On a first appeal from the High Court, the Court of

Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

[24] The above is also true for the High Court sitting on a first appeal. The learned Judge should have reconsidered the evidence, evaluate it herself and drawn her own conclusions. In doing so she should have therefore considered the application to strike out the defence, the affidavit and evidence in support as well as the reply by the respondent. She failed to do this and therefore failed to consider matters she should have considered.

[25] It is clear that **Order XXXV** provides for a procedure for summary judgment in a suit for a liquidated demand or recovery of land. In this case the appellant did not opt for the summary procedure but simply brought her application under **Order VI Rule 13** for striking out the defence as disclosing no reasonable defence and also being scandalous, frivolous or vexatious. Having found the defence to be disclosing no reasonable defence, and also frivolous and vexatious, the trial magistrate properly exercised his discretion in entering judgment in favour of the appellant as in the absence of a defence the appellant’s claim remained unchallenged.

[26] The learned judge was therefore with respect wrong in holding that:-

“It is not the striking out of the defense that is applied for but the element that the summary judgment should be entered on grounds that the defense discloses no triable issues.”

[27] In hearing the appeal the issue for determination before the learned judge was whether the trial court was right in allowing the application for striking out the defence taking into account the claim by the respondent that the application was fatally defective for failing to comply with **Order VI Rule 13 (2)** of the repealed **Civil Procedure Rules**.

[28] In this regard it is appropriate to refer to Delphis Bank Limited v Caneland Limited [2014] eKLR, where the Court outlined the cases dealing with applications for striking out and summary judgment as follows:-

“The leading local case on interpretation of Rule 13 of Order VI of the Civil Procedure Rules on which the application for striking out the defences was based is perhaps D.T. Dobie & company (Kenya) Ltd vs Muchina which counsel for the appellant referred to us. In the case, Madan JA, as he then was, opined in an obiter dictum that;

“The power to strike out should be exercised only after the court has considered all the facts, but it

must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice the fair trial and would restrict the freedom of the trial judge in disposing the case.'

In Kenindia Assurance co. Ltd vs Commercial Bank of Africa Ltd & 2 others (Nbi C.A. Civil Appeal No.11 of 2000) this court (differently constituted) stated;

'The law on summary judgment procedure is now well settled. This is a procedure to be resorted to in the clearest of cases. In Dhanjal Investments Ltd vs Shabaha Inv. Ltd. Civil appeal No. 232 of 1997, (unreported) this court stated'

'The law on summary judgment procedure has been settled for many years now. It was held as early as 1952 in the case of Kandnlal Restaurant v Devshi & Co. (1952) EACA 77 and followed by the Court of appeal for Eastern African in the case of Sonza Figuerido & Co. Ltd v Mooring Hotel Limited (1952) EA 425 that if the defendant shows a bona fide triable issue he must be allowed to defend without conditions.....'.

And in ***Provincial Insurance company of East Africa Limited*** now known as ***UAP Provincial Insurance Limited v Lenny M. Kivuti*** (SCivil Appeal No. 216 of 1996) (unreported), this court again stated:-

'In an application for summary judgment even one triable issue, if bona fide, would entitle the defendant to have unconditional leave to defend.'

Lastly in ***Kenya Trade Combine Ltd vs M Shah*** (Civil

Appeal No.193 of 1999) (unreported), this court said:

'In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed.'

These are the principles that ought to guide the court while considering a decision on an application for summary judgment under Order VI Rule 13."

[29] In ***D.T. Dobie & Company (K) Ltd vs Muchina*** (*supra*) Madan JA, further expressed himself thus -

"As the power to strike out pleadings is exercised without the court being fully informed on the merits of the case, through discovery and oral evidence, it should be used sparingly and cautiously."

[30] This Court in ***Melika vs Mbuvi*** (Civil Appeal No 267of 1997) (unreported), stated as follows:-

"We accept that the particular sub-rule of rule 13 of order VI of the Civil Procedure Rules, under which the application to strike out is made, should be specified and that, when the application has been brought to strike out a pleading on the only ground of it disclosing no cause of action, no affidavit evidence may be relied upon. We at the same time note that there is no bar to such an application to strike out a pleading being based on any or all of the grounds mentioned in the rule, provided that such grounds have been specified."

upon. We at the same time note that there is no bar to such an application to strike out a pleading being based on any or all of the grounds mentioned in the rule, provided that such grounds have been specified."

[31] From the above it is clear that an applicant can bring an application to strike out a pleading relying

on any of the grounds listed in **Order VI Rule 13 (1)**.

The appellant brought his application in the court under ground (a) and (b) of **Order VI Rule 13(1)** of the **Civil Procedure Rules**. Under **Order VI rule 13 (2)** of the **Civil Procedure Rules** an application under ground (a) cannot be supported by evidence. However, the appellant also brought his application under ground (b) and under that ground he could adduce evidence. There is nothing to prevent an applicant from combining his application under grounds (a) and (b) as the appellant did. We would thus overrule the contention that the application was defective because it was supported by evidence.

[32] As regards the question whether the defence filed by the respondent ought to have been struck out, we wish to refer to ***Magunga General Stores v Pepco Distributors Ltd [1986-89] EA 334***, where this court held as follows: -

“A mere denial is not a sufficient defence and a defendant has to show either by affidavit, oral evidence, or otherwise, that there is a good defence.”

[33] In ***Thorn v Holdsworth (1876)3 Ch.637 at 640***, which was quoted with approval in ***Raghibir Singh Chatte v National Bank of Kenya Limited [1996]***

eKLR, the court held:-

“When a party in any pleading denied an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum, or any part thereof, or else set out how much he received. And so, when a matter of fact is alleged with diverse circumstances, it shall not be sufficient to deny it as alleged along those circumstances, but fair and substantial answer must be given.”

[34] In ***Raghibir Singh Chatte (supra)*** the court also quoted with approval ***Magonga General Stores (supra)*** where Plat JA (as he then was) stated as follows:-

“First of all a mere denial is not a sufficient defence in this type of case there must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given.”

[35] From the above case it is therefore clear that a mere denial or general traverse is not sufficient in an action for a debt or liquidated amount and to that extent the appellant’s defence did not provide a reasonable defence.

[36] Applying all the principles stated in the above quoted cases to this appeal we are of the view that the trial court was right in striking out the defence. The plaint contained details of the transaction that took place, however, the respondent rather than giving a fair and substantial answer gave a general denial of the facts. In the replying affidavit sworn by the respondent he more or less admitted having received the money yet demanded proof. In the circumstances there was no reasonable defence proffered, and the striking out of the defence was proper. In the absence of the defence the logical consequence was the entering of judgment in favour of the appellant.

We believe we have said enough to show that this appeal must be allowed. Accordingly, we set aside the judgment and order of the learned Judge and reinstate the order of the trial magistrate striking out the respondent’s defence and entering judgment in favour of the appellant as prayed in the plaint.

We award costs of the appeal in the High Court and in this Court to the appellant.

Dated and delivered at Nairobi this 12th day of August, 2016

E.M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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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