Giro Commercial Bank Ltd v Mwangula (Civil Appeal 87 of 2015)
[2016] KECA 843 (KLR) (14 October 2016) (Judgment)

Neutral citation: [2016] KECA 843 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 87 OF 2015

MSA MAKHANDIA, W OUKO & K M'INOTI, JJA

OCTOBER 14, 2016

BETWEEN

GIRO COMMERCIAL BANK LTD ..... APPELLANT

AND

ALI SWALEH MWANGULA ..... RESPONDENT

JUDGMENT

1. The respondent initially filed a suit against a limited liability company called Mauli Limited and the Land Registrar, Kwale, claiming that the latter had unlawfully registered the former as the owner of a parcel of land known as Number Kwale/Diani Beach Block/202 (the suit property), which the respondent claimed to have acquired by operation of the statute of limitation pursuant to an order of court in Mombasa ELC. No. 177 of 2011. As the suit was pending, some two interested parties, Giro Commercial Bank (the appellant) and Car & General (K) Ltd informally sought to be joined in the suit. By consent of the parties already on record it was ordered that;

    1. The 3rd and 4thinterested parties shall be joined as defendants in this suit and the plaintiff shall accordingly amend the plaint in such manner as may be necessary within 14 days from the date hereof.

    2. Such amended plaint as stated in (1) above shall be served upon M/S Lumatete Muchai & Company Advocates and M/S Anjarwalla & Khanna Advocates for the 3rd and 4th defendants, respectively.

    3. The 3rd defendant be reinstated onto its own properties, namely parcels of land known as Title Nos. Kwale/Diani Beach Block/728, 729, 730, 731, 732, 733, 734, 735, 736, 737 & 738.

    4. The 3rd defendant shall obtain possession of the aforesaid Title Nos. Kwale/Diani Beach Block/728, 729, 730, 731, 732, 733, 734, 735, 736, 737 & 738 until the hearing and determination of the plaintiff's application dated 27th, November 2013; while Title Nos.

Kwale/Diani 739-744, inclusive, shall abide by the order of the Court issued on 27th November, 2013.

5. The OCS Diani Police Station shall ensure compliance of the aforesaid orders.

6. The parties' consents as here-above recorded are adopted as orders of the court.

7. Costs to be in the cause."

2. Only the first two orders above are relevant for purposes of this appeal. The consent order was entered on 23rd December 2013. In terms of order No.1, the respondent was required to amend the plaint within 14 days from that date. He therefore ought to have amended and served the plaint by 15th January 2014. Instead, on 24th March 2014 and 31st March 2014, respectively the appellant and Car & General (K) Ltd filed separate but identical applications for the striking out of the suit against them, arguing that the respondent was in violation of the consent order, by failing to amend the plaint within the time limited by the consent order; that the suit against them did not disclose a reasonable cause of action; and that the suit was vexatious, frivolous and amounted to an abuse of the court process. One month later on 29th April 2014 after the two applications were taken out, the respondent filed an amended plaint.

3. The two applications were heard together and the learned Judge (Omollo, J), on the spot delivered a short ruling comprised on a quarter of a page in which she expressed the view that;

> .....the record indeed shows that both the 3rd and 4th defendants asked the court to be joined as parties to these proceedings. Once they are joined by way of an amendment, they cannot then turn around(sic) that there is no cause of action disclosed in the plaint as against them."

4. Relying on the provisions of Article 159 of *the Constitution* and the overriding objectives and further noting that the appellant would not suffer any prejudice by the late filing of the amended plaint, the learned Judge dismissed the two applications with costs for being an abuse of the court process. We note that a day after this decision the respondent requested and obtained interlocutory judgment in default of appearance.

5. The appellant has challenged the dismissal of its application on five grounds which Mr. Khanna, learned counsel for the appellant condensed into and argued as two, that the respondent having filed the amended plaint out of time without leave the suit was incompetent and ought to have been struck out; and that the learned Judge failed to appreciate that the application for striking out also raised a fundamental issue to the effect that no summons to enter appearance had accompanied the amended plaint. Learned counsel relied on John Kamunya & Another V John Nginyi Muchiri Civil Appeal No.123 of 2007, where the Court decided that, in terms of Order 1 rule 10 (4) of the Civil Procedure Rules, it is mandatory, after the amendment of the plaint to serve upon the newly added parties summons to enter appearance unless the court, in its discretion dispenses with the service.

6. Ms. Nasimiyu, learned counsel representing Car & General (K) Ltd supported the appeal, adopting submissions by Mr. Khanna and reiterated that, without summons to enter appearance, the appellant and Car & General (K) Ltd were not properly invited to join the proceedings.

7. For his part Mr. Kithi, learned counsel for the respondent submitted that, following the recording of the consent order, the appellant and Car & General (K) Ltd were formally joined in the proceedings; that the requirement for the filing of amended plaint was therefore not predicated upon service of summons; that the amendment of the plaint was prompted by the appellant and Car & General (K) Ltd who should not be heard to complain that they were not served with summons; that for that reason

the decision in John Kamunya (supra) is distinguishable from the facts in this case; that, being aware of the existence of the suit and having been made parties it was their responsibility to file their defence; that although the consent order was not drafted in accordance with the terms of the Civil Procedure Rules, like a contract, it bound all the parties; that even before the filing and service of the amended plaint the appellant and Car & General (K) Ltd were under obligation to respond to the original plaint; and that if there was breach on the part of the respondent, the appellant ought only to have applied for the setting aside of the consent order, but not the striking out of the entire suit.

8. The two applications under review were brought pursuant to sections 1A, 1B, 3A of the *Civil Procedure Act* and Order 2 Rule 15 (1a), (b,) (c) & (d) of the Civil Procedure Rules, praying that the suit be stuck out as against the appellant and Car & General (K) Ltd. Although the two applications were heard together and dismissed with costs as alluded to earlier, only the appellant was aggrieved. Car & General (K) Ltd was content with supporting the appellant's appeal and submissions.

9. Pleadings may be struck out pursuant to Order 2 Rule 15 aforesaid, at any stage of the proceedings if any one of the following things are proved;

    a. That the pleading discloses no reasonable cause of action; or defence in law; or

    b. That it is scandalous or frivolous or vexatious; or

    c. That it may prejudice or embarrass or delay the fair trial of the action; or

    d. That it is otherwise an abuse of the process of the court.

10. The applications invoked all the four grounds. That being so it was incumbent upon the appellant to demonstrate each of the four conditions. It must also be remembered that an application under Order 2 rule 15 is itself an invitation of the court to exercise a discretion. The wording of the provision leaves no doubt that that is the case. For instance, it is not mandatory that, where the four conditions are satisfied, the pleading must be struck out. It provides that in such a situation, apart from striking out, which must be last resort, the court can, in the first instance, order the pleading to be amended and direct it to be stayed, dismissed or judgment entered, as the case may be.

11. Striking out pleadings, it has been held in a long line of decisions, is a draconian power that must sparingly be resorted to, resorted to only in clear cases, cautiously and carefully considered without embarking upon trial when considering whether it discloses reasonable cause of action or where it is alleged that it is otherwise an abuse of the court process. Even one triable issue will be sufficient to spare a suit from being struck out. See DT Dobie & Co. (K) Ltd V Muchina (1982) KLR 1.

12. The two questions in this appeal remain, did the learned Judge improperly exercise her discretion when she dismissed the applications. Corollary to this is the question, whether the respondent's suit disclosed no reasonable cause of action, was vexatious, frivolous or scandalous or was it likely to embarrass the fair trial of the action or was it an abuse of the process of the court.

13. Obviously before the amendment of the plaint no cause of action was pleaded against the appellant and Car & General (K) Ltd. In the amended plaint Car & General (K) Ltd is alleged to have illegally entered the suit property, alienated it after subdividing it into 17 plots. The appellants on the other hand are alleged to have provided a loan to Car & General (K) Ltd on the security of the 7 subdivisions; and that Mauli Limited and Car & General (K) Ltd had no title to transfer or to charge to the appellant. Quite apart from the fact that, from this clear cause of action pleaded against each of the two parties, we cannot understand the logic behind the insistence by the appellant and Car & General (K) Ltd, that the amended plaint disclosed no reasonable cause of action against them, when infact it was them, on their own volition, that sought to be joined in the suit. Order 4 rule 5 of the Civil Procedure Rules

only requires that a plaint should show that a defendant to a suit is interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand. The appellant and Car & General (K) Ltd saw the need to be part of the proceedings as any ultimate order made in the suit was likely to affect their interest.

14. The other grounds, for instance, that the suit was frivolous, scandalous and vexatious have no basis at all. Did the suit amount to an abuse of the process of court, or was it likely to prejudice, embarrass or delay the fair trial of the action?

15. These questions arise from the second ground argued before us by learned counsel for the appellant, that the respondent failed to amend the plaint within the time stipulated in the consent order and, secondly that the amended plaint was not accompanied by summons to enter appearance.

16 Order 5 Rule 1 (1) (3) provides that;

(1) When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.

.....

(3) Every summons shall be accompanied by a copy of the plaint."

17. Summons to enter appearance is intended to give notice to the parties sued of the existence of the suit and requires them, if they wish to defend themselves to, first of all enter appearance. The provisions relating to summons to enter appearance are based on a general principle that, as far as possible, no proceedings in a court of law should be conducted to the detriment of any party in his absence. Entry of appearance by a party therefore signifies the party's intention to defend. Under order 10 Rules 4, 5, 6 & 7, where a party fails to enter appearance after being served with summons, an interlocutory judgment may be entered against the party, provided the claim is for pecuniary damages or for detention of goods. In all other instances, where there is default of appearance, the plaintiff, is under Order 10 Rule 9 required to set the suit down for hearing by formal proof of the plaintiff's claim.

18. We reiterate that the amendment of the plaint was necessitated by the application of the appellant and Car & General (K) Ltd. The consent order gave the respondent 14 days within which to file the amended plaint. Ordinarily, within the time specified in the summons, not being less than 10 days, the defendant must enter appearance.

19. By Order 5 rule 3, the summons was to be accompanied by a copy of the amended plaint. It is not in dispute that these requirements were not complied with. The amendment itself was not effected within the time ordered by the Court.

20. Order 8 rule 6 stipulates that;

> 6. Where the court has made an order giving any party leave to amend, unless that party amends within the period specified or, if no period is specified, within fourteen days, the order shall cease to have effect, without prejudice to the power of the court to extend the period."

21. The respondent did not file the amended plaint until 29th April 2014. This, as we have indicated earlier, was a delay of three months. Although the respondent only filed grounds of opposition which did not explain the delay, the learned Judge, guided by the justice of the case and relying on Article 159 of *the Constitution* and the overriding objectives held the view that the application to amend the plaint having been prompted by the appellant and Car & General (K) Ltd for good cause, they could not turn and

demand that the suit against them be struck out on the grounds alluded to; and that the two did not stand to suffer any prejudice by the failure of the respondent to file the amended plaint within 14 days.

22. This Court, it has been held time without number, will not interfere with the exercise of judicial discretion, exercised upon facts and grounds on which a reasonable man could have come to the conclusion arrived at. See Mbogo & Anotehr V Shah (1968) EA 93 . The court will only interfere if it is satisfied that the order is wrong and given unjudicially or on wrong principles, or where no reasons for the decision are given, or where reasons are given, the Court considers that those reasons are not sufficient enough. See Supermarine Handling Services Ltd. V Kenya Revenue Authority, Civil Appeal No. 85 of 2006.

23. In this appeal, given the circumstances, we are unable to find any transgression on the part of the learned Judge in the manner she exercised her discretion. She took into account the background of how the appellant and Car & General (K) Ltd joined the proceedings, that no prejudice would be suffered by the two; and that she was empowered by *the Constitution* and statute to indulge the late filing of the amended plaint.

24. We may add that under order 8 Rule 6, reproduced in the proceeding paragraph, where the court limits the time within which an amendment is to be effected, the court can extend that time, otherwise the order to amend shall cease to have effect. The learned Judge in her discretion thought the delay was not inordinate. Secondly the appellant's advocates having filed a notice of appointment on 27th February 2014, a memorandum of appearance (under protest) on 21st September 2015, and both having so far actively participated in the proceedings leading to this appeal we think are contradicting their original position that made them, in the first place to seek to be joined in the proceedings, to protect their interests. If the applications for striking out the suit against the appellant and Car & General (K) Ltd, were to be allowed, the appellant would have had to start afresh, at some expense and time.

25. After the appellant and Car & General (K) Ltd failed to enter appearance, the respondent applied and obtained a default judgment. The appellant deposed, without being controverted, that the amended plaint was not served. Order 10 rule 2 requires that an affidavit of service of summons be filed before proceedings against the defaulting party. We think the respondent was intent on stealing a match on the appellant and Car & General (K) Ltd, knowing well that they could not file memorandum of appearance without having been served with summons. Although the entry of the interlocutory judgment was not appealed against, we think ourselves that the question is so closely intertwined with the appeal that to fail to deal with it will result in more loss of time and further expense. In any case, the amended plaintiff not being a liquidated claim, the entry of interlocutory judgment was irregular.

26. In the end we find no substance in the appeal which we accordingly dismiss with cost to the respondent. We also, pursuant to sections 3 & 3A of the *Appellate Jurisdiction Act* and Rule 1 (2) set aside the interlocutory judgment entered on 18th September 2015 and further direct that both the appellant and Car and General (K) Ltd be and are hereby granted 14 days from the date of this judgment to file and serve the respective statements of defence.

DATED AND DELIVERED AT MOMBASA THIS 14TH DAY OF OCTOBER, 2016.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

W. OUKO

.....

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