IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 91 OF 2014

EQUITY BANK LIMITED.....APPELLANT

AND

WESTLINK MBO LIMITED……...RESPONDENT

***(Appeal from the ruling and order of the High Court of Kenya at Nairobi, (Apondi, J.) dated 4th February 2014* in HCCC NO. 142 OF 2009)**

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JUDGMENT OF THE COURT

The straightforward issue in this appeal is whether ***Apondi, J.*** erred, on 4th February 2014, when he struck out the appellant's defence and entered judgment for the respondent in the sum of ***Kshs.39,720,000/.*** The ***appellant, Equity Bank***, argues that its defence raised triable issues and that the suit in the High Court ought to have been heard and determined on merit. The ***respondent, Westlink MBO Ltd***, counters that the defence was a vexatious and frivolous sham, a general denial that did not raise any triable issue.

The appellant is a bank within the meaning of the ***Banking Act, cap 488,*** laws of Kenya,while the respondent, a limited liability company, was at all material times a client of the appellant and operated a current account ***No. 0180292062194*** at the appellant's ***Community Corporate Branch*** in Nairobi. The respondent was in the business of distributing to Safaricom agents, information, communication and technology products for sale throughout the Republic.

One of the agents to whom the respondent was supplying goods was known as ***Elinah K. Zablon Tai (Tai)***. The established practice between the respondent and the agents, including Tai, required them to first deposit money in the respondent's bank account, after which the respondent would supply the products to the agents upon production of bank deposit slips vouching for payment of money into its account.

Peter Njuguna (Njuguna) and ***Martin Njau Ngochi (Ngochi***), who are notparties to this appeal, were at the material time employed by the appellant as cashiers or tellers. The two, after the respondent sued them jointly with the appellant, did not file any defence and default judgment was entered against them on 6th May 2009. They do not appear to have challenged the default judgment and did not take part in the application leading to this appeal.

By a plaint dated 2nd March 2009, the respondent instituted a claim in the High Court against the appellant and both Njuguna and Ngochi for Kshs.39,720,000/-, interest and general damages. The respondent pleaded that in the course of their employment by the appellant, Njuguna and Ngochi, received a total of Kshs.27,835,000/- from Tai between 9th and 30th August 2008, which they fraudulently failed to credit to the respondent's account. Instead they issued her false deposit slips, being reprints of earlier deposit slips that were merely imprinted with a new date. Relying on the deposit slips as genuine, the respondent claimed, it released to Tai goods, the value of which was not pleaded. It was the respondent's case that the appellant was vicariously liable for the acts of its two employees.

The respondent further pleaded that on 26th August 2008,the said Tai authorised the appellant to transfer Kshs.7,500,000/- from her account to that of the respondent. It was further averred that although Tai's account was debited with the amount, the appellant fraudulently and wrongfully failed to credit the same to the respondent's account. Lastly the respondent pleaded that on 29th September 2008, without any colour of right or permission, the appellant wrongfully, debited its account with Kshs.4,485,000/- after the respondent had reported to the appellant the fraud perpetrated on its account by the appellant's employees.

It is evident that the figures pleaded by the respondentas its claim against the appellant and its two employees adds up to Kshs.39,820,000 rather than Kshs.39,720,000 as stated in the claim. However nothing much turns on that arithmetic error.

By its lengthy 30-paragraph defence dated 27th April 2009, the appellant denied liability. In particular it denied that Njuguna and Ngochi were acting as its employees or in the course of their employment at the material time or that it was vicariously liable for their actions. It contended in particular that it was not practical for Njuguna and Ngochi to have both received the sum of Kshs.27,835,000/-concurrently on the dates specified by the respondent. The appellant too denied the arrangement pleaded by the respondent between it and Tai and contended that if the arrangement existed, the appellant was not privy to it. In paragraph 6 of the defence, the appellant pleaded that while *ex facie* a deposit slip could be treated as evidence of deposit of money, it was not conclusive evidence that money had in fact been deposited in the respondent' s bank account.

By paragraph 11 of the defence, the appellant pleaded that no money had been deposited by Tai in the respondent's account with the appellant; that the alleged deposit slips were fake; that at the material time neither Njuguna nor Ngochi were cashiers or tellers at the appellant's counters; that the alleged deposits were never reflected in the respondent's bank statements; and that the alleged deposits by Tai never entered the appellant's bank system because those deposits did not exist in the first place. The appellant also specifically denied that the respondent had supplied any goods to Tai on the strength of the alleged deposit slips and put it to strict proof.

In paragraph 15 the appellant averred that if Njuguna and Ngochi issued any fake deposit slips, the same were not issued in the course of their employment and were issued in collusion with Tai who knew or should have known that she had not deposited any money with the appellant. Paragraph 20 of the defence answered the claim regarding the Kshs.7,500,000 that Tai had allegedly authorised to be transferred from her account to that of the respondent. The appellant pleaded that at the time of the alleged instructions to transfer the sum to the respondent's account, Tai's account did not have sufficient funds and had only Kshs.1,201,975/-. As regards the Kshs.4,485,000/-, the appellant denied that any such amount was withdrawn from the respondent's account and put it to strict proof. In the alternative, it was pleaded that if such amount was debited from the respondent's account, it was a justified and permissible reversal to correct erroneous aggregate credits to the respondent's account, made without the respondent having deposited any money.

Lastly in paragraph 28 the appellant pleaded and particularized fraud by the respondent and Tai on the one hand, and Tai and Njuguna and Ngochi on the other. It was averred that the respondent and Tai had colluded to defraud the appellant by relying on purported deposit slips which did not show in which branch of the appellant the money was deposited or showed deposit in branches of the appellant which did not exist and slips that did not have any bank transaction codes and did not relate to the branches

where Njuguna and Ngochi worked. It was also averred that Tai had fraudulently colluded with Njuguna and Ngochi to be issued with deposit slips that she knew or ought to have known were fake because they were issued without her in fact depositing any money in the respondent's bank account.

Somehow the respondent did not think that the above matters raised in the defence were triable issues. Accordingly, on 24th August 2009, it took out a Motion on Notice under ***Order VI Rule 13 (1) (a), (b), (c)*** and ***(d)*** of the ***Civil Procedure Rules*** praying for the appellant's defence to be struck out as sham, frivolous, vexatious, and a general denial that did not raise any triable issues. ***Mustafa Aden Gedi***, the managing director of the respondent swore the affidavit in support of the application reiterating the facts that we have set out above. He annexed to the affidavit the contentious deposit slips and cash sale receipts in favour of Tai, apparently to vouch for delivery of goods to her, although the total value of the goods allegedly delivered to Tai on the strength of the deposit slips was not shown. The appellant opposed the application by an affidavit sworn on 6th October 2009 by ***David Momanyi Gichana,*** its legal officer, insisting that its defence raised triable issues.

Apondi, J. heard the application and in a ruling dated 4th February 2010 held that the appellant was vicariously liable for the fraudulent actions of Njuguna and Ngochi and that the appellant had not raised any reasonable defence. Hence he struck out the defence and entered judgment for the respondent as prayed, leading to this appeal.

Mr. Munyalo, learned counsel for the appellant, contended that the learned judge had erred by striking out the appellant's defence, which raised a multiplicity of triable issues, among them whether the appellant had received any money on behalf of the respondent which it had failed to credit into the respondent's account; whether at the material time Njuguna and Njochi were acting within the scope and in the course of their employment; whether in the circumstances of the case the appellant was vicariously liable to the respondent; whether deposit slips were conclusive evidence of deposit of money in the respondent's account; and whether the reversal of Kshs.4,485,000 in the respondent's account was fraudulent or it was justified.

The appellant also impugned the conclusion by the High Court that it was vicariously liable for the actions of Njuguna and Ngochi as a finding made without the benefit of a trial, which denied the appellant the opportunity to demonstrate that the actions of the two were not in the course or within the scope of their employment and that they were not acting on the appellant's instructions or for its benefit.

Regarding the principles that guide the court in determining whether or not to strike out a pleading, counsel submitted that the High Court disregarded or failed to pay due regard to the applicable principles. It was contended that the power of the court to strike out a pleading is draconian; it must be exercised cautiously and with a lot of restraint; and that the court should not determine disputed issues in an interlocutory application without the benefit of evidence tested by cross-examination. The judgments of this Court in ***DT Dobie & Co (Kenya Ltd) v. Muchina [1982] KLR 1***; ***Coast Projects Ltd v. MR Shah Construction (K) Ltd [2004] 2 KLR 119; Ramji Megji Gudka Ltd v. Alfred Morfat Omundi Muchira & 2 Others, CA. No. 335 of 2001 (Kisumu***); and ***Job Kilach v. Nation Media Group Ltd., CA. No. 94 of 2006***, among others, were relied upon to demonstrate the applicable principles in an application to strike out a pleading.

Mr. Sagana, learned counsel for the respondent defended the order of the High Court contending that the appellant's defence consisted of bare denials which did not warrant a trial because they were incapable of effectively resisting the respondent's claim. In counsel's view, the defence did not raise any triable issues because it was not disputed that Njuguna and Njochi were employed by the appellant as cashiers or tellers; that in the course of their employment they fraudulently issued genuine bank slips to Tai; that a bank-customer relationship existed between the appellant and the respondent; that the respondent lost 39,720,000 as a result of the fraud of Njuguna and Ngochi; that interlocutory judgment was entered against the two employees; and that the appellant dismissed them from its service as a result of the fraud.

Citing the judgments of the former Court of Appeal for East Africa in ***Muwonge v. Attorney General of Uganda [1967] EA, 17*** and the Supreme Court of Canada in ***Bazley v. Curry [1999] 2 SCR 534,*** counsel

submitted that an employer will be vicariously liable for actions of his employees if the employee is acting within the course of his employment and the wrongful act is sufficiently related to the conduct authorized by the employer to justify the conclusion that there is vicarious liability. He concluded by submitting that the case before the learned judge was a plain and clear one where the defence did not raise any triable issues and that the learned judge did not err by striking it out since it was intended to vex the respondent and delay the determination of the suit.

We have anxiously considered the pleadings before the High Court, the ruling by the learned judge, the grounds of appeal, the submissions by learned counsel, the authorities that they relied upon and the law. The manner in which courts exercise the power to strike out pleadings has been the subject of numerous determinations by the High Court and this Court, that it will serve no useful purpose to regurgitate them. Suffice to highlight the main threads that run through the numerous authorities.

The procedure for striking out a defence is intended to afford a plaintiff a quick remedy where he is being denied the benefits of his claim by a sham defence that is intendedmerely to delay resolution of the dispute. (See ***Coast Projects Ltd v. MR Shah Construction (K) Ltd*.*(supra)*** and ***Continental Butchery Ltd v Nthiwa, CA. No. 35 of 1977).***It is a power, which must be exercised sparingly and only in plain and clear cases. (***Ramji Megji Gudka Ltd v. Alfred Morfat Omundi Muchira & 2 Others*, *supra).*** If the defence can be saved or improved by amendment, the court is not entitled to strike it out. (***DT Dobie & Co (Kenya Ltd) v. Muchina).*** Even a single bona fide triable issue will entitle the defendant to unconditional leave to defend. (***Postal Corporation of Kenya v. Inamdar & 2 Others [2004] 1 KLR 359***). A triable issue is not one that must succeed at trial; it is a *prima facie*defence, which deserves to go to trial for adjudication (***Patel v. East Africa Cargo Handling Services Ltd [1974] EA 75)***. To conclude that a defence does not raise any triable issue, the court must be satisfied that there is no real or substantial question to be tried and that there is no dispute as to the facts or law, which raises a reasonable doubt that the plaintiff is truly entitled to judgement. ***(Giciem Construction Co v. Amalgamated Trade Services [1983] KLR 156)***. The court should not strike out pleadings merely because the story therein is highly improbable, or one, which was difficult to believe could be proved (***Yaha Towers v. Trade Bank Ltd (in Liquidation), CA. No. 35 of 2000)***. Lastly, once a party has assumed the heavy burden of demonstrating, as in this case, that the there is no *bona fide* defence, the court is not allowed to conduct a mini trial by way of affidavits. ***(Yaya Towers v. Trade Bank (In Liquidation), supra).***

One of the most astounding aspects of the application before the learned judge was what counsel for the respondent stated when he rose to argue the application and convince the court that the defence raised no triable issue. On page 504 during the proceedings held on 21st October 2009, counsel for the respondent is recorded stating as follows:

> ***"But from the reading of all pleadings, there is only one issue to be determined, that is whether the 1st defendant (appellant) is vicariously liable to the acts of the 2nd and 3rd defendants (Njuguna and Ngochi)."***
>
> (Emphasis added).

On page 2 of the ruling, the learned judge repeated what counsel for the respondent had submitted above, stating:

> ***"According to Mr. Sagana, the only issue to be determined by the court is whether the 1st defendant is vicariously liable to the acts of the 2nd and 3rd defendants."***

From the mouth of the appellant's learned counsel, it was readily admitted that there was one issue to be tried. Instead of giving the appellant unconditional leave to defend the claim, the learned judge, with great respect, fell into error and purported to try the issue on the basis of affidavits, without the benefit of oral evidence tested by cross-examination. The learned judge thenproceeded and made final and conclusive findings on the one issue that the respondent had admitted was triable. This is how the learned judge expressed himself:

"This court has carefully considered the application together with the detailed submissions by learned This court has no doubt that the 2nd and 3rd respondents were actually employees of the 1st respondent. In fact the 1st respondent has acknowledged that particular fact it is also not in dispute that the applicant lost a total of Kshs.39,720,000 due to the fraudulent activities of the 2nd and 3rd respondents. Following their fraudulent activities the 2ndand 3rd respondents were sacked from employment of the 1strespondent. In addition to the above there is no doubt that the 2nd and 3rd respondents committed their fraudulent activities in the course employment (sic)."

We seriously doubt whether the learned judge could, in the circumstances of this case, determine conclusively on the basis of affidavit evidence alone that fraud was committed by any of the parties.

In ***Westmont Power Kenya Ltd v. Frederick & Another t/a Continental Traders & Marketing [2003] KLR 357*** this Court stated that summary judgment ought not to be entered when serious allegations of fraud and other wrong doing are alleged and that such issues should be decided, not on conflicting affidavits, but after a proper trial.

But even without the appellant's own admission that there was a triable issue, was the defence before the learned judge a sham which did not raise any triable issues? We do not think so. The appellant had pleaded and particularized various acts of fraud, which it alleged against the respondent, Tai, Njuguna and Ngochi. Without a proper hearing, such weighty issues could not be determined in a summary procedure. In addition, contrary to the conclusion by the learned judge that Njuguna and Ngochi were acting in the course of their employment, there is the averment in the defence that they were not tellers or cashiers at the appellant's counters at material time. There was the issue raised in the defence that when Tai instructed the appellant to transfer Kshs.7,500,000/- from her account to that of the respondent, she did not have sufficient funds in her account to effectuate the instructions. There is also the issue whether the debit of Kshs.4,485,000/- that the respondent was complaining about was a wrongful debit or a justified reversal of erroneous or fraudulent credits to his account. Also contested was the effect in law of a bank deposit and whether it was conclusive evidence that money was deposited in an account. With respect, the learned judge glossed over or completely ignored all the above issue in reaching the conclusion that the defence did not raise any triable issue.

The learned judge also completely ignored the appellant's contention in its defence that the respondent had not lost the amount it claimed, by supplying goods to Tai. The respondent had to tender proper evidence instead of photocopies of cash sale receipts, which did not have any totals of the value of the goods allegedly supplied to Tai. All that we are saying is that in the circumstances of this case, the learned judge should have ordered a proper trial before he could conclude as he did that "***it is also not in dispute that the applicant lost a total of Kshs.39,720,000 due to the fraudulent activities of the 2nd and 3rd respondents."***

We are satisfied that this appeal has considerable merit and that the learned judge misdirected himself when he concluded that the appellant's defence did not raise any triable issue. We allow the appeal, set aside the order dated 4th February 2010 and substitute therefore an order dismissing with costs the respondent's application dated 21st August 2009. The appellant shall have costs of this appeal.

Dated and delivered at Nairobi this 4th day of November, 2016

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