IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, G.B.M. KARIUKI & MWILU, JJ.A.)

CIVIL APPEAL NO. 264 OF 2003

BETWEEN

FURSYS (KENYA) LIMITED..... APPELLANT

AND

SOUTHERN CREDIT BANKING CORPORATION LIMITED.....RESPONDENT

(Being an Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Nyamu J.) delivered 17th July, 2003

in

H.C.C.C NO.723 OF 2001)

****

JUDGMENT OF THE COURT

1. **FURSYS (KENYA) LIMITED** (hereinafter referred to as "the appellant") filed suit No.723 of 2002 in the High Court at Nairobi Milimani Commercial Courts on 12.6.2002 against **SOUTHERN CREDIT BANKING CORPORATION LIMITED** (hereafter referred to as "the Respondent") seeking payment of Ksh.4,545,132/= and US$ 296,875.25 (equivalent to Ksh.23,450,000 @ 1 US$ = Ksh.74.9894) plus general damages, and costs of the suit and interest. The appellant's claim arose from the respondent's action in filing Winding Up Petition No.13 of 2001 against the appellant in the High Court on 22.02.2001 and advertising it in the local dailies and thereafter having it withdrawn by consent. The said petition sought orders that the appellant be wound up by the Court under the provisions of the Companies Act on the ground that the appellant was indebted to the respondent in the sum of Ksh.5,060,148/= plus interest thereon on account of Bills of Exchange drawn by the appellant and discounted by the respondent.

2. The consent withdrawing the Winding Up Petition followed the appellant's application to have it (Winding Up Cause No.13 of 2001) struck out as scandalous, frivolous and vexations. The consent was recorded striking out the petition for *"being scandalous, frivolous and vexatious or otherwise as being an abuse of the process of the Court."* As we shall see shortly, the wording of that consent became contentious. The costs of the petition were awarded to the appellant. A decree to this effect dated 17.7.2001 was issued on 15.08.2001.

3. When the respondent filed its defence in the Suit No.723 of 2002, it invoked the Winding Up Petition No.13 of 2001 and pleaded, inter alia, that it was justified in filing and advertising the Petition. The

appellant, armed with the consent decree, moved the Superior Court below by an application dated 23.09.2002 for an order to strike out the Respondent's defence on the ground that it was an abuse of the process of the Court and prayed for judgment to be entered against the respondent. The application was heard by Nyamu J, (as he then was) who on 17.7.2003 dismissed it in his ruling which gave rise to this appeal.

4. In his ruling, Nyamu J, posited that the respondent could not be said *"to have abandoned the alternative right to sue or defend in a subsequent action"* and that from his analysis of the law it could not be said *"to be a clear and obvious case where the Court could be asked to strike out the defence."* He found that *"on the contrary it was quite apparent from the analogy of issues of law and fact as outlined ... that it would be extremely unsafe to invoke summary procedure without a full hearing."* It was for those reasons that he dismissed the appellant's application with costs to the respondent.

5. The appellant was aggrieved by this decision. On 23rd July 2003, the appellant lodged notice of appeal against the whole of the said decision.

6. In the memorandum of appeal dated 21st October 2003, the appellant put forward the following 5 grounds of appeal.

1. ***That the learned Judge erred in law and fact in finding that there was no clear and obvious case where the court could be asked to strike out the defence.***
2. ***That the learned Judge erred in law in not finding that the defendant was estopped from raising a defence that attacked the consent judgment already entered and not set aside.***

3. ***That the learned Judge erred in law and fact in finding that the issues raised in the defence were not in issue in the Winding Up Petition already struck out by consent.***
4. ***That the learned Judge erred in law and fact in disputing the existence of a compromise in the winding up cause after having acknowledged that the petition for winding up had been compromised.***

5. ***That the learned Judge erred in law and in fact in considering matters that were not argued before him.***

7. The appeal came up for hearing before us on 23.9.2014. Learned counsel **Mr. Migui Mungai** appeared for the appellant. There was no representation for the respondent. The Court record shows that the advocates on record for the respondent,

Messrs Muriu, Mungai & Co, were duly served. Consequently the hearing of the appeal proceeded.

8. Mr. Mungai submitted that there was no dispute that a consent order was recorded in the Winding Up Cause No.13 of 2001. An attempt, he said, was made by the respondent through an application filed on 26.2.2003 to amend the decree issued on the basis of the consent on the ground that *"the decree as drawn created the impression in both its wording and tenor that the Court determined the application (dated 23.03.2001) on the grounds alleged in the said application whereas in fact the application was settled by consent without any reference to the alleged grounds for the application whatsoever."*

The respondent had indicated in its unprosecuted application dated 26.2.2003 that the only issue it consented to was the striking out of the petition. It was pointed out by Mr. Mungai that the respondent has hitherto not prosecuted the application seeking to amend the decree and consequently the decree is still in force. Counsel took issue with paragraph 7 (iii)(g) of the respondent's defence dated 3.9.2002 in which the latter stated-

"the defendant avers that their then advocates on record in Winding Up Cause No.13 of 2001 did not seek the defendant's authority in drawing up the terms and conditions of the consent order and specifically the said advocates had no authority to execute a consent on the grounds they did. The defendant avers that their (sic) instructions were that the Winding Up Cause be withdrawn without

prejudice to the defendant's rights to pursue their claim."

9. Mr. Mungai also took issue with paragraph 4(c) of the defence in which the respondent stated:

"in answer to paragraph 4 of the plaint, the defendant;

"(c) avers that its filing of Winding Up Cause 13 of 2001 was pursuant to its legal rights under the Companies Act, Cap 486, and the law."

10. It was the appellant's counsel's contention that the respondent could not fault the decree extracted pursuant to the consent of the parties which struck out the Winding Up Cause.

11. We have perused the record of appeal and given due consideration to the grounds of appeal and the submissions made by counsel for the appellant.

12. The appellant's application to strike out the respondent's defence in High Court suit No.723 of 2002 was premised on Order 6 Rule 13(1)(d) and Rule 16 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

13. The rule on which the application was premised gave the superior court below discretionary power to allow or to reject the application to strike out the respondent's defence in the suit. That power is required to be exercised judicially and after a careful consideration.

14. The jurisdiction to strike out pleadings is exercised without the benefit of all the merits of the case as discovery is yet to be made and oral evidence is yet to be adduced. For this reason, and as this Court has stated on many occasions in the past, it should be exercised sparingly and cautiously and only in very clear cases. The words contained in the *obiter dictum* by Madan JA, as he then was, in **D.T. Dobie & Company (Kenya) Ltd v. Muchina [1982] KLR 1**, are apt –

"The power to strike out should be exercised only after the Court has considered all 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 fair trial and would restrict the freedom of the trial Judge in disposing the case."

15. Sight must not be lost of the fact that a plaint or defence is required to contain only statements in a summary form of the material facts on which the party pleading relies for his claim or defence and no more. Inclusion of evidence in pleadings or irrelevant facts is improper and there are rules empowering the Court to strike out such irrelevant or extraneous or scandalous material in pleadings.

16. Further, while exercising the power to strike out a pleading under Rule 13 of Order 6 of the Civil Procedure Rules, the court ought to be alive to the fact that such power is very drastic and for that reason, only in plain and obvious cases should recourse be had to it. In short, the power will be exercised in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the Court or is unarguable (**see Solomon CJ in Nale v. Field an [1966] 2QB 633** at pg 648-651.

17. It was Sir Kenneth O'Connor, President of the Court of Appeal for East Africa, the predecessor of this Court, who, in **Souza Figuerido v. Moorings Hotel [1959] EA 425** stated in the reasons for judgment in **Kundanlal Restaurant v. Devshi & Co.(2) (1952), 19 E.A.C.A 77** the following-

"the principle on which the Court acts is that where the defendant can show by affidavit that there is a bona fide triable issue, he is to be allowed to defend as to that issue without condition (Jacobs v. Booth's Distillery Co. (1901) 85 T.L.R. 262 H.L.) ..... A condition of payment into Court ought not to be imposed where a reasonable ground of defence is set up ..... Since Jacobs v. Booth's Distillery Co (supra) the condition of payment into Court, or giving security, is seldom imposed, and only in cases where the defendant consents, or there is good ground in the evidence for believing that the defence set up is a sham defence and the master "is prepared very nearby to give judgment for the plaintiff in

which case only the discretionary power given by this rule may be exercised (Wing v. Thurlow 10 T.L.R. 53, 151). It should not be applied where there is a fair probability of a defence (Ward v. Plumbley 6 T.L.R. 198; Bowes v. Caustic Soda Co.9 T.L.R. 328) nor where the practical result of applying it would be unjustly to deprive the defendant of his defence."

In the decision of the Court of Appeal for East Africa, the predecessor of this Court in **City Printing Works (Kenya) Ltd v. Bailey** [1977] KLR 85 which was endorsed by all the three Judges of the Court, Law, V-P, stated with regard to summary judgment principles that have bearing in the instant appeal -

"the defendant must show a reasonable ground of defence, or a bona fide defence or facts which may constitute a plausible defence. In deciding whether the defendant has done this, the Court must have regard to merits of the application as disclosed by the pleadings and affidavits, and in using the expression "balance of probabilities", Madan J was adverting to the matter before him, that is to say whether on a balance of probabilities the defendant had satisfied him that his defence was both reasonable and bona fide. He was not in my view, trying to prejudge the final decision of the suit on the merits, but was confining himself to consideration of the grounds of defence relied on as justifying leave to defend."

18. What emerges from these principles in relation to the matter we are called upon to decide? Was the superior court (Nyamu, J.) correct in dismissing the appellant's chamber summons application dated 23.09.2002 which sought striking out of the respondent's statement of defence in H.C. Suit No.723 of 2002?

19. For starters, the respondent raised several issues in its defence to the appellant's claim. It denied the allegations relating to loss and expense of the appellant's business allegedly occasioned by the publication of the Winding Up Cause. This was perfectly within the amplitude of the defences available to the respondent. But it was not open to the respondent to deny the decree issued in the Winding Up Cause or the consent it had endorsed that resulted in the decree, for the simple reason that that decree was in force and was binding on all the parties. An action where a party to a consent decree would in separate proceedings either deny the consent on which such decree is founded or the decree itself would clearly be frivolous. Unless set aside, the decree remains binding and sacrosanct.

20. In paragraph 6 of the defence, the respondent stated:

> 6. ***That the defendant (i.e. the respondent) was justified in filing and advertising the Winding UP Petition aforesaid for the foregoing reasons (which are that the appellant allegedly was indebted to the respondent to the tune of Kshs.5,060,148/=)***

21. The Winding Up Cause was struck out for being scandalous, frivolous, and vexatious and as an abuse of the process of the Court. Having conceded in the consent that the Winding Up Petition was an abuse of the process of the court for being scandalous, frivolous, and vexatious, it was not open to the respondent to plead to the contrary in the defence to the suit (by the appellant) nor could the respondent claim justification in having filed the Winding Up Petition. The averment therefore in paragraph 6 of the defence was a reprobation of what the respondent had stated in the consent order and hence in the consent decree. The approbation and reprobation was clearly improper and at variance with proper pleading. A party who in one proceeding avers one thing and in another proceeding the opposite in a related matter as in this case cannot but be said to be vexatious. Where in the same matter a party's pleadings are at variance, such party is said to be guilty of departure in his pleadings and the Court has power to strike out a matter that is vexatious or amounts to departure.In this appeal, although paragraph 6 of the defence is at variance with the consent decree in the Winding Up Cause, the proceedings are separate. Nevertheless, paragraph 6 of the defence is clearly frivolous and vexatious and inconsistent with the respondent's averment in the winding up cause. It cannot be said to be reasonable or serious. Pleadings are required to contain facts. The consent and consent-decree in the Winding Up Cause vitiate the averment in paragraph 6 of the respondent's defence. Parties in legal proceedings do not have and are not entitled to the luxury of departing from their pleadings nor are they allowed to plead falsely. That is not the jurisprudence we wish to see develop in this country. Facts in pleadings must be supported or supportable by evidence.

Litigation in court must lead to determination of truth and justice. Impropriety has no place in our jurisprudence. We must uphold proper standards of pleading. This reasoning impugns paragraph 7(1) of the respondent's defence to the extent to which it reiterates paragraph 6 and paragraph 7(ii) and 7(iii) (g) of the defence.

22. We take the position that the respondent would be within its rights to sue the appellant for recovery, if any, of money it may allege the appellant owes it. As correctly pointed out by the learned trial Judge, if the consent decree in the Winding Up Cause did not compromise the respondent's cause of action, the latter would be entitled to sue. We are unable to subscribe to the view expressed by the learned Judge at page 9 of his judgment that the appellant against whom a suit has been filed for recovery of money is, by seeking to strike out the respondent's defence in H.C. Suit No.723 of 2002, approbating and reprobating so as to be denied in toto the relief he seeks in his application. While we agree that it is not the entire defence by the respondent that is at variance with the consent decree, the principle that a person may not approbate and reprobate did not expose the respondent to a choice of two courses of conduct where either may be treated as having made an election from which he cannot resile nor that it took a benefit under or arising out of the course of conduct which it first pursued and with which its subsequent conduct is inconsistent. We find no difficulty in stating that if the respondent claims to be owed money by the appellant and notwithstanding the consent decree in the Winding Up Cause, the respondent would be at liberty to pursue recovery in a suit. But in doing so, the respondent would be estopped from resiling from the position the respondent took in the Winding Up Petition and specifically the fact that the petition was struck out as frivolous, vexatious and as an abuse of the court process. This in itself did not however determine the issue whether the appellant was indebted to the respondent or not. Clearly, the doctrine of estoppel by record would not operate unless the parties to the litigation or their privies claimed or defended in the same right in the former proceedings as they represent in the later ones (see **Halsbury's Laws of England, 4th Edn vol 16 para 993**).

23. For the reasons stated above, it is our finding that the following paragraphs in the respondent's statement of defence dated 3.9.2002 should be and are hereby struck out

1. paragraph 6

2. paragraph 7 (i) by deleting the words "and 6 above"

3. paragraph 7 (ii)

4. paragraph 7(iii) (g)

24. In the result, the appeal partially succeeds. We allow it to the extent to which the averments in the statement of defence are struck out as per paragraph 23 above.

25. In the circumstances, we order that the Suit No.723 of 2001 be and is hereby remitted to the High Court at Milimani Commercial Courts, Nairobi, for hearing and final disposal.

26. Half of the costs of this appeal shall be borne by the unsuccessful party in the suit in the superior Court below.

Dated and delivered at Nairobi this *30th day of January 2015*.

P. N. WAKI

.....

JUDGE OF APPEAL

G. B. M. KARIUKI

.....

JUDGE OF APPEAL

P. M. MWILU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR