IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 231 OF 2009

BETWEEN

KENYA COMMERCIAL BANK LIMITED…….....APPELLANT

AND

HON. JUSTICE NICHOLAS R. O. OMBIJA….....RESPONDENT

*(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (**Khaminwa, J.**) dated 27th July, 2009*

in

H.C.C.C. No. 547 of 2008)

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JUDGMENT OF THE COURT

This is an appeal from the Ruling of the High Court (**Joyce Khaminwa, J.**) dated 5th March, 2009 whereby the High Court allowed an application to strike out the appellant's defence and consequently the High Court entered judgment on liability for the respondent against the appellant. In addition, the High Court ordered that the suit be set down for formal proof.

The respondent's suit was for damages for breach of contract and damages for libel. The respondent pleaded in the plaint, *inter alia*, that he was a holder of KCB Serena Card No. 5201 9300 0000 0467 issued by the appellant bank; that it was a term of the contract that the respondent maintains the authorized credit limit and make payments due to the appellant in accordance with the contract; that the appellant would accept all transactions on the said card; that on or about 14th April, 2008 the respondent in compliance with terms of the contract deposited a cheque of Kshs. 19,500 with the appellant for the payment of the card which was honoured in four days; that on various dates the appellant in breach of the contract failed, refused and/or neglected to accept a total of five transactions; and that as a consequence of the breach of the contract, the appellant on three occasions in declining the three transactions, falsely and maliciously printed and published or caused to be printed and published the defamatory words "INSUFF FUNDS" and "TRANSACTION DECLINED".

The respondent described the natural and ordinary meaning of the said words and stated that they were calculated to disparage him both professionally and socially.

The appellant averred in the statement of defence that the contract constituted a debtor-creditor relationship under which the appellant would allow the respondent to purchase goods from various recognized establishments subject to a credit limit of Kshs. 50,000; that it was a term of contract that the credit would be available so long as the respondent operated the card without exceeding the authorised credit limit, and further, that in the event such limit was exceeded or for any other reasons, the appellant had a discretion to suspend or cancel the availability of credit; that on or about 1st April 2008, the respondent in breach of the terms of the contract exceeded the credit limit of Kshs.50,000 as a result of which the credit card was contractually suspended and the respondent notified of the suspension; that upon payment of Kshs. 19,500 the respondent was still indebted to the appellant to the tune of Ksh. 34,817.85 and the card remained suspended; that the respondent could not use the card before the suspension was lifted; that the payment of Kshs. 19,500 towards the debit did not and could not automatically lift the suspension; that the appellant did not fail, refuse or neglect to accept the transactions as it was not under a duty to honour the transactions and that the suspension was lifted on 6th May, 2008.

The appellant denied publishing or causing to be published the alleged defamatory words and averred that it was contractual and customary when transactions on suspended card were rejected, words stating such rejections are usually printed for the holders' attention and that such words are within the contract, custom and usage of the card. The appellant further averred that the respondent deliberately and in breach of the terms of the contract attempted to use a suspended card in order to simulate a cause of action and that the action is scandalous, frivolous and an abuse of the process of the court.

The respondent filed a reply to the defence and averred, amongst other things, that the appellant had no right to suspend or continue suspending the card or decline any transactions if the respondent's account was in funds; that he was not notified of the continued suspension, and that the appellant offered an apology and admitted liability.

The respondent's application to strike out the defence was filed on 1st December, 2008 and was based on Order VI rule 13(1) (b) and (c) of Civil Procedure Rules (**CPR**) [now Order 2 Rule 15(1), (b), (c) (d)]. It was based on the ground that the defence was scandalous, frivolous and vexatious; that it would prejudice, embarrass or delay the fair trial of the action and that it was otherwise an abuse of the process of the court. It was also based on the ground that the appellant had admitted the respondent's claim in writing. The application was supported by the respondent's affidavit to which he annexed copies of receipts by which the appellant declined to honour the transactions on the credit card, his bank statement, letter of demand and appellant's letter dated 20th May, 2008 in reply to the demand letter.

The appellant filed a replying affidavit and annexed a copy of the contract dated 15th September 2006, statements of the respondent's credit card account and correspondence from the appellant to the respondent relating to the operations of the credit card account.

On 12th January, 2009 the appellant filed an application seeking to strike out the respondent's reply to the defence on the ground that it was filed out of time without leave. The respondents' application for striking out the defence was heard on 15th January, 2009 before the appellant's application was heard.

In 1½ page ruling the learned Judge allowed the respondent's application thus:

> ***"I have examined the pleadings and statement of defence. I am satisfied that the defendants admitted the claim and even went to the extent of offering apology in the manner they handled the plaintiff (Judge of the High Court) under contract with them. The defence now filed is just an afterthought. Application is allowed. The defendants defence is struck off and judgment is entered for the plaintiff and as it is in claim of damages. The plaintiff shall set the suit down for formal proof.***

Costs to the plaintiff for this application."

In ground 5 of the memorandum of appeal the appellant avers that the High Court erred in fact and in law in entering a judgment on admission without such an application having been made before it. In ground 2, the appellant states that the High Court failed to draw a distinction between the causes of action claimed in the plaint and instead lumped the whole claim as having been admitted. It was submitted by **Miss Ndirangu** for the appellant that the court misdirected itself in entering judgment on admission when no application for judgment on admission had been made under the former Order XII rule 6 of CPR. **Mr. Miller** for the respondent countered that the application had also been made under S. 3A of Civil Procedure Act which invoked the inherent jurisdiction of the court and submitted that since the supporting affidavit referred to the admission, justice should be administered without undue regard to procedural technicalities as provided by Article 159(2)(d) of the Constitution.

The application was brought under Order VI rule 13(1) b, c and (d) of the CPR now renamed Order 11 rule 15 Civil Procedure Rules 2010 which provides:

"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 in law; or

(b) It is scandalous frivolous or vexatious; or

(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.

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

The power of the court to enter judgment on admission was governed by order XII rule 6 of the former CPR – now order 13 rule 2 which provides:

"Any party may at any stage of the suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just."

The two orders namely Order II rule 15 and Order 13 rule 2 CPR have different objects. The power to strike out pleadings is intended to ensure that parties do not offend against the rules of pleadings as laid down by the rules. Whilst the parties retain the freedom to frame their case as they deem appropriate, their right to do so is limited by the requirement that the pleading should conform to set down standards of, *inter alia*, fairness and decency. In exercising its discretion whether to strike out a pleading or order amendment, the court considers only the averments in the pleadings and any admissible evidence.

On the other hand, the object of rule 2 of order 13 CPR is to enable a party to obtain a speedy judgment without waiting for the trial of the action. In exercising its discretion whether or not to enter judgment on admission the court considers whether or not there is a clear and unequivocal admission of the claim either in the pleadings or in any other form.

The application, the affidavit of the respondent in support of the application and submissions of the respondent's counsel in support of the application clearly show that the application before the High Court was indeed an application to strike out the pleading – the defence in this case, and that it was prosecuted as such. The supporting affidavit and the counsel's submissions referred to the averments in the defence. It was contended that the defence was hollow, bereft of merit, scandalous, frivolous, vexatious that it may

embarrass or delay the fair trial and that it was otherwise an abuse of the process of the court; it was also contended that the defence was a mere denial and that it does not raise trial issues.

The principles which guide the court in exercising its discretion to strike out pleadings have been stated in **DT Dobie & Co. (Kenya) Limited *v* Muchina & Another [1982] KLR 1** and in many other cases. It is a power which should be exercised, *inter alia*, sparingly and with circumspection. This summary procedure does not enable the court to hold a trial on the affidavits by engaging in minute and protracted examination of documents and facts of the case. Moreover, the court would not strike out a pleading if it discloses an arguable case or raises a triable issue.

In the instant case, the respondent's claim was based on breach of contract relating to the use of a credit card and also on defamation. The respondent pleaded the terms of the contract. The appellant also pleaded further terms of the contract and annexed a copy of the contract. The appellant in particular pleaded that it was the respondent who was in breach of the terms of contract by, *inter alia*, exceeding the credit limit of Kshs. 50,000 and that at the time of the alleged breach, the respondent upon payment of Kshs. 19,500 was still indebted to the appellant in the sum of Kshs.34,817/85. The appellant further pleaded that it has discretion under the terms of the contract to suspend the card which it did. The respondent contended in his reply to the defence that the appellant had no right to suspend the card. The appellant's counsel referred to specific clauses of the contract including clause 26 which provides, *inter alia*, that the bank (appellant) may at any time and without notice cancel or suspend the right to use the card either entirely or in specific facilities.

Thus the dispute was dependent on the construction of the contract which raises obvious triable issues such as whether the respondent exceeded the credit limit; whether the appellant had a discretion to suspend the use of the card; whether it was contractually suspended and whether the payment of Kshs.19,500/- regularized the credit card account.

On the claim for defamation, the appellant denied publishing or causing the alleged words to be published either falsely or maliciously and denied that the words were defamatory. It also referred to the contract, custom and usage of the card which allowed it to print the impugned words on suspended or rejected cards. It is also obvious that triable issues arise from pleadings on the claim for defamation, such as whether the printed words were defamatory and whether the contract, trade and usage of the card permitted the appellant to print such words.

The averment in the defence that the respondent was in breach of the contract deliberately attempted to use a suspended card in order to simulate a cause of action is on the face of it scandalous. However, in law a scandalous allegation cannot be struck out if it is relevant to the facts in issue. In our view, such allegation is relevant to the facts in issue.

The learned Judge did not apparently consider whether the defence as a pleading breached the rules of pleadings as alleged in the application. As we have endeavored to show, the defence conforms with the rules of pleadings and raises genuine triable issues. There is indeed no abuse of court process manifest from the defence.

The High Court relied on alleged admission as a reason for striking out the defence. The application was not for judgment on admission. It seems that the respondent relied on the alleged admission to show that the defence is an abuse of process of the court or frivolous or likely to delay a fair trial of the action. The issue of admission was fully argued in the High Court and grounds of appeal have been raised against the court's finding on the issue. It is appropriate therefore that the issue should be considered.

The principles governing applications for judgment on admission are aptly enunciated in **Choitram v Nazari, [1984] KLR 327**. A judgment on admission is in the discretion of the court and is given, if it is plain that there is a clear express or implied admission. Such admission must be clear, unambiguous, unconditional and unequivocal.

The alleged admission is contained in a letter dated 20th May, 2008 by **William Maiyo**, the Risk Manager

of the appellant bank. It was apparently a reply to the demand letter by the respondent's advocates dated 14th May, 2008.

The letter is addressed to the respondent and states in full:

> ***"KCB CARD NO. 5201 9300 000 0467***
>
> ***BALANCE KSHS. 36,527 DB LIMIT KSHS. 50,000.00***
>
> ***We refer to the above and deeply regret the unfortunate incidents that you experienced at the merchant sites on 19.04.08, 03.05.08 and 04.05.08 respectively where your card could not be honoured.***
>
> ***We wish to advise that your account was in excess of the authorized credit limit between 1st and 15th of April. As a result the account was temporarily suspended pending regularization. We received your payment of Kshs. 19,500.00 on 15.04.08 which regularized the account.***
>
> ***However, there was a delay on our part in uplifting the temporary suspension on your account after the cheque cleared on the evening of 19.4.08 until 6th May 2008. This is highly regrettable.***
>
> ***In view of the above we wish to tender our unreserved apologies to you for the inconvenience and embarrassment this has caused to you. We assure you that this lapse will not be allowed to recur and we will strive to ensure that we offer you quality service at all times.***
>
> ***Once again Hon. Justice, we apologize for this unfortunate incident and thank you for being our esteemed customer."***

It was contended by the respondent that the letter was clear and unequivocal admission of the claim and that the defence was an afterthought.

William Maiyo denied that the letter constitutes an admission of liability and explained the circumstances under which the letter was written in his replying affidavit. According to him, it is customary for the bank whenever a customer raises a complaint touching on the quality of services, to write a letter of apology and assurance of excellent services to the customer irrespective of whether it was the customer's fault which led to the inconvenience.

One of the grounds of appeal states that the judge erred in law in construing the letter as an admission of the claim without establishing the spirit of the letter through oral evidence. The appellant's counsel submitted that the letter was only an admission of delay geared to preservation of customer relationship and not an admission of liability of breach of contract or libel.

The ruling appealed from is cryptic. It does not analyse the contents of the letter in relation to the contents of the replying affidavit, the defence and the contract. The ruling does not also say whether the admission applies to both the claim for breach of contract and defamation. The letter refers to the respondent having exceeded the credit limit and shows in the heading that there was a balance owing after payment of Kshs.19,500. There was no denial in the plaint or supporting affidavit that the respondent had a debit balance in the card account. Indeed, the respondent counsel submitted at the hearing of the appeal that the respondent never denied that he had overdrawn the account. Thus, the statement in the letter that the payment of Kshs.19,500 regularized the account is not an unequivocal admission.

Furthermore, the letter of demand dated 14th May, 2008 only demanded an immediate apology and not admission of liability. In our view, the letter constituting the alleged admission has to be construed together with the terms of the contract to determine whether or not there was a clear and unequivocal admission. That is the function of the trial court.

For the foregoing reasons, we find that the learned judge did not exercise her discretion judicially in striking out the defence.

We allow the appeal, set aside the order striking out the defence, and restore the defence on the record with the result that the suit shall be heard on the merits. The appellant is entitled to the costs of the appeal and of the court below. Orders accordingly.

Dated and delivered at Nairobi this 23rd day of October, 2015.

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