



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, OKWENGU & KANTAI, JJ.A.)

CIVIL APPEAL NO. 52 OF 2010

BETWEEN

FIVE FORTY AVIATION LIMITED APPELLANT

VERSUS

TRADEWINDS AVIATION SERVICES LIMITED RESPONDENT

(Being an appeal from the Ruling of the High Court of Kenya at Nairobi (Muga Apondi, J.) given on 28th January, 2010)

in

HCCC No. 577 of 2009)

JUDGMENT OF THE COURT

By a plaint filed at the High Court of Kenya at Nairobi the respondent, **Tradewinds Aviation Services Limited**, sued the appellant **Five Forty Aviation Limited** where it was claimed that the two parties had by an agreement dated 7th November, 2006 contracted for the respondent to provide the appellant with ground handling services which included passenger services, ramp services and cargo handling services and that agreement although entered for a period of 2 years continued upto 7th July, 2009. It was claimed that as of that last day the appellant owed to the respondent the sum of USD275,264.77 in respect of services rendered as per that agreement.

The appellant filed a defence and counterclaim where the claim was denied. It was claimed *inter alia* in the defence that the respondent had provided unsatisfactory services and that charges levied by the respondent were exorbitant, erroneous and were not as per the agreement. In the counterclaim the appellant claimed that the respondent had caused damage to its aircraft and that the appellant was entitled to recover cost of repairs of that aircraft and loss of revenue to the aircraft as a result of the same being grounded for repairs.

The respondent filed a reply to defence where the counter claim was denied.

The respondent immediately thereafter filed a Notice of Motion under the then **Order XXXV rules 1(1) (a) (2), (9) and Order VI rules 3(1) (b) (c) (d)** of the **Civil Procedure Rules** where the orders prayed for

were that judgment be entered against the appellant in the sum claimed in the plaint and that in the alternative the appellant's statement of defence and counterclaim be struck out for being scandalous, frivolous, vexatious; meant to embarrass, prejudice or delay the fair trial of the suit; was otherwise an abuse of the process of the court. It was further prayed that once the defence and counterclaim were struck out judgment be entered for the respondent as prayed in the plaint. There were grounds set out in support of the motion which were basically that the appellant was truly indebted to the respondent in the said sum; that the statement of defence and counterclaim were evasive and bereft of any candid and positive averment on which issues could be framed for trial; that the defence and counterclaim were scandalous, frivolous and vexatious and that the defendant's counterclaim was spurious. It was also said that it was just and proper that the application be allowed.

There was also an affidavit by a director of the respondent which deponed to various matters in support of the said application.

The appellant filed a fairly lengthy replying affidavit in its attempt to show that the suit could not be determined by summary process. The application was heard by Muga Apondi, J. who in a ruling delivered on 28th January, 2010 allowed the application in the event entering judgment for the sum claimed in the plaint. Those orders have provoked this appeal.

There are nine grounds set out in the memorandum of appeal drawn on behalf of the appellant by its advocates. The first ground taken is that the learned judge of the High Court erred in law and fact by holding that the agreement entered by the parties subsisted to the 7th January, 2010. In the second ground the learned judge is faulted for holding that a charge note was raised by the respondent for every service rendered when such charge note was not produced in evidence. Next the learned judge is faulted for holding that there were no triable issues in the suit whereas according to the appellant the pleadings raised triable issues. Next the learned judge is faulted for ignoring material presented by the appellant. In the next ground the learned judge is faulted for holding that the appellant was liable. In the sixth ground the learned judge is said to have erred by not appreciating the evidence and submissions by the appellant. In the seventh ground the appellant says that the learned judge erred in giving judgment in favour of the respondent in United States currency of dollars without converting the same to the Kenya shilling. In the penultimate ground the learned judge is said to have erred by not setting out the points in issue and the reasons for making his decision. The last ground faults the learned judge for not dealing with issues raised and for giving what is said to be a scanty ruling.

Mr. Gilbert Mungu, learned counsel for the appellant referred us to the written submissions filed on behalf of the appellant and in a highlight when the appeal came for hearing before us on 26th October, 2015 he submitted that the learned judge was wrong to rely on documents that were not produced in the summary judgment application. Learned counsel submitted that the respondent could not avail itself of summary procedure when it did not produce relevant documents in support of the case. In the event counsel believed that the evidence relied on by the trial judge amounted to hearsay evidence which could not be admitted in the case. Learned counsel referred us to the agreement made between the parties and submitted that some of the claims in the plaint were outside the services provided in the agreement and to counsel this was a triable issue.

Mr. Samuel Wanyaga, learned counsel for the respondent in opposing the appeal also referred to the written submissions filed on behalf of the respondent. Learned counsel submitted that there was a running account between the two parties and that the running account produced before the learned judge was sufficient to prove that the sum claimed in the plaint was due and payable and that there was no viable defence to the suit. For these he urged us to dismiss the appeal but should we allow the appeal then the whole sum claimed by the respondent should be deposited either in court or with a bank.

After hearing the application the learned judge considered submissions made by counsel. The learned judge made the following finding:

“From the above detailed submissions, it is crystal clear that the parties had entered a valid agreement on 7th November, 2006 to provide ground handling services which

included both cargo and passenger service. Consequently, the agreement subsisted and included up to 7th July, 2009. From the document availed to the court, I am satisfied that the applicant raised a charge note for every service rendered to the defendant. It is actually ironical and contradictory for the respondent to claim on one hand that the services were not rendered on the other to state that the same were unsatisfactory. That defeats all logic. Secondly, this court is

also satisfied that the applicant has claimed USD 275,264/77 in the plaint. The applicant has also claimed the same amount in the application. Therefore, the claim that the figures are different does not hold any water. In any event the parties were operating a running account during the subsistence of the agreement. Lastly, the court concurs with the applicant's counsel that though the respondent has claimed special damages the amounts claimed have not been specified. It is trite law that special damages must specifically be pleaded before they are proved specifically."

The learned judge therefore found that there were no triable issues and that the counterclaim did not disclose any *bona fide* triable issue.

It is true that an applicant who satisfies a trial court in a liquidated claim that there is no viable defence to the claim is entitled to judgment in a summary way. That is what **Order 36** (formerly numbered Order XXXV) permits.

In the case before the trial judge the respondent chose to follow two routes the first which was the summary procedure way but prayed in the alternative under Order VI Civil Procedure Rules which latter procedure allows a pleading to be struck out for reasons to be given. It is not clear to us that an applicant can combine these two processes one for summary procedure and the other of striking out a pleading in the same application. However as the parties did not address us on this we shall not discuss the same here today.

The principles guiding the court in considering an application to strike out a pleading are well settled. Madan, JA, (as he then was), in his judgment in the case of **D.T. Dobie & Company (Kenya) Ltd v Muchina, [1982] KLR 1** discussed the issue at length. In that case the application that had led to the appeal had been brought under **Order 6 rule 13 (1) (a)** which was seeking striking out a plaint on ground that it did not disclose a reasonable cause of action against the defendant. The learned judge went further and dealt with broad principles which covered all other aspects where striking out a pleading or a part of a pleading is sought. It was held *inter alia* in that case that:

"The power to strike out should be exercised 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 opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case."

This Court in **Blue Shield Insurance Company Limited v Joseph Mboya Ogotu [2009] eKLR** went further on the same principles to say that the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable. In that same case this Court held that a party need not raise more than one triable issue. The court stated:

"In law, only one issue raised in defence if it constitutes a genuine defence and not necessarily a successful defence would warrant a full hearing."

This Court in **Moi University v Vishva Builders Limited [2010] eKLR** considered various authorities on the matters which we are called upon to determine in this appeal. The court considered **H.D. Hasmani v Banque Du Congo Deige [1938] 5 EACA** where it had been held that only one trial issue was sufficient for a defendant to be granted leave to defend. The court added:

“We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in Patel v E.A. Cargo Handling Services Ltd [1974] E.A. 75 at page 76 Duffus P. said:

“In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as SHERIDAN, J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

Also considered was Continental Butchery Limited v Samson Musila Ndura, Civil Appeal No. 35 of 1997:

“With a view to eliminate delay in the administration of justice which would keep litigants out of their just dues or enjoyment of their property, the court is empowered in an appropriate suit to enter judgment for the claim from the plaintiff under summary procedure provided by Order 35 subject to there being no triable issues which would entitle a defendant leave to defend.

If a bona fide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the Court feels justified in thinking that the defences raised are a sham.

That decision was made in 1977. In 1997, this Court again confirmed the same principle in the case of Dhanjal Investments Limited vs Shabana Investments Limited, Civil Appeal No. 1232 of 1997 (unreported) where it stated:

The law on summary judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of Kundanlal Restaurant vs Devshi & Company Limited [1952] 19 EA 77, and followed in the Court of Appeal for Eastern Africa in the case of Souza Fiqueredo & Co. vs. Moorings Hotel [1959] EA 425, that if the defendant shows a bona fide triable issue he must be allowed to defend without conditions.”

In the matter that was before the learned judge the appellant while denying the claim raised a counterclaim. In the replying affidavit in opposition to the application it was deposed that:

- “3. THAT the application by the plaintiff is brought mala-fides and in it the plaintiff aims at avoiding proving whatever alleged claim the plaintiff may have against the defendant and thereby subvert justice.***
- 4. THAT I am informed by my advocates on record which information I verily believe to be true that the application by the plaintiff is incompetent in that it does not state in clear terms how the defendant’s statement of defence and counterclaim is scandalous, frivolous and vexatious.***
- 6. THAT to the extent that the plaintiff demanded sum of USD 264,758.27 from the defendant as shown in exhibit BT-5 attached to the plaintiff’s application, the plaintiff cannot claim that the defendant is TRULY INDEBTED to it in the sum USD 275,264.75 as prayed in the plaint.”***

In the affidavit in support of the application the respondent's director deposed *inter alia* that:

- “5. THAT I know of my own knowledge that though the agreement was only for 2 years as deposed to herein above, the same remained in force and subsisted upto and including the 7th day of July 2009 when the defendant unilaterally terminated the contract. The said termination was conveyed by the defendant’s letter dated 8th July 2009. A copy of this letter is exhibited hereto and marked BT -2.***

6. ***THAT the plaintiff raised a charge note for every service rendered to the defendant and such charge note was always signed by a representative of the defendant. These charges notes are bulky and over 1,500 pages.***

Learned counsel for the appellant submitted before us that the respondent could not be allowed a summary process when it had not produced documents in support of the claim. We agree. As we have just shown the respondent was telling the learned judge that it could not produce charge notes because they were bulky. Those documents were not agreed by the appellant. How could the learned judge who had not seen either primary or secondary evidence proceed to avail the respondent a summary process without benefit of such evidence? Was that not a triable issue?

As we have shown only one triable issue was enough to allow the appellant to be heard on its defence and not be shut out of the judgment seat. We are of considered opinion that the learned judge was wrong to avail the respondent of summary process when there were clear triable issues raised in the defence and counterclaim. The consequence of our finding is that the appeal has merit and we allow it with costs the effect of which is that the Notice of Motion dated 2nd October, 2009 is dismissed with costs.

Dated and Delivered at Nairobi this 18th day of December, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

H.M. OKWENGU

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE

OF

APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR