IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, G.B.M. KARIUKI & OUKO, JJ.A)

CIVIL APPEAL NO 282 OF 2002

BETWEEN

THE DELPHIS BANK LIMITED……….......….....……..….. APPELLANT

AND

CANELAND LIMITED …...................................………. RESPONDENT

(An appeal from the Ruling and Decree of the High Court of Kenya at Milimani Commercial Courts, Nairobi (Mbaluto, J) dated 24th November 1999

in

H.C.C.C. No.1135 of 1998)

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JUDGMENT OF THE COURT

1. This appeal is against the judgment of the High Court entered in the suit No.1135 of 1998 against the appellant pursuant Order VI rule 13(1) (b) (c) and (d) of the Civil Procedure Rules following an application by the respondent to strike out the defences. All the evidence before the learned trial judge (Mbaluto J) was contained in affidavits and the annextures attached to them.
2. **Caneland Limited**, *the respondent* in this appeal, filed suit No.1135 of 1998 in the High Court at Nairobi against two defendants, namely, **Delphis Bank Limited**, *the appellant herein*, and Dolphin Holdings Ltd (which was the 1st defendant in the suit but was dropped in this appeal), claiming from both of them jointly and severally the sum of shs.94,174,193/45 and interest thereon as therein pleaded and costs of the suit. The High Court (T. Mbaluto J) struck out on 24.11.1999 the defences filed by the appellant and its co-defendant, following an application by the respondent and proceeded to enter judgment in favour of the respondent against both the appellant and its co-defendant, Dolphin Holdings Ltd, plus costs of the suit.
3. In the said suit, the respondent's claim against the appellant and its co-defendant was founded on an alleged agreement dated 12th July 1995 made between (the respondent) and Dophin Holdings Ltd in which the latter agreed to sell to the respondent all its shares in a company known as Vanessa Associates Inc (which owned 51% shares in Miwani Sugar Co. (1989) Ltd). This would effectively enable the respondent to become the owner of the 51% shareholding in Miwani Sugar Co. (1989) Ltd. This business venture was not successful although the respondent had paid a total of Shs.72,900,000/= to Dophin Holdings Ltd through the appellant in this appeal. When the

transaction fell through, only a portion of Shs.15 million was refunded to the Respondent by a cheque drawn by the appellant leaving unpaid a balance of shs.57,900,000/=.

4. The claim in the suit by the Respondent against the appellant was predicated on the obligation by the appellant and Dolphin Holdings Ltd to repay the money to the respondent and as money had and received on a total failure of consideration as the agreement on which it was made rescinded.
5. Dolphin Holdings Ltd. averred in its defence to the claim that the suit was premature as the agreement had provided for arbitration in the event of dispute which the respondent had failed to invoke it. In any event, averred Dolphin Holdings Ltd, there were other agreements relating to other litigation involving the parties the outcome of which had to be awaited and hence suit No.1135 of 1998 whose ruling gave rise to this appeal was premature.
6. On its part, the appellant, as the 2nd defendant in the suit denied either owing the money claimed or having admitted owing the Respondent the money.
7. The respondent as the plaintiff in the suit moved the High Court in an application to strike out the defences of the appellant and its co-defendant and sought summary judgment. The application was premised on Order VI rule 13(i) (b), (c) and (d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It was supported by an affidavit sworn by **Surjit Singh**, a director of the respondent. It was opposed by the appellant and the latter's co-defendant whose executive director and corporate director, **John Barnes** and **Kish Bando Padyay** respectively, swore affidavits in opposition. Under Order VI Rule 13 (supra) the court was vested with discretionary power to strike out the defence at any stage of the proceedings on the grounds that:

"(a) ..

b. ***It is scandalous, frivolous, or vexatious; or***
c. ***It may prejudice, embarrass or delay the fair trial of the action or***
d. ***is otherwise an abuse of the process of the court and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."***

8. In his considered ruling delivered on 24th November 1999 striking out both defences and entering judgment in favour of the respondent as prayed in the plaint, Mbaluto J. stated in part, that-

> ***"…Each of the parties to these proceedings has filed an affidavit in support of its case. The facts disclosed by those affidavits are clear and straight forward and do not give rise to any dispute.***
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> ***…In my judgment, the evidence available is clear and straight forward. It establishes without any shadow of doubt that the plaintiff not only paid Shs.72,900,000/= under an agreement which failed but also in respect of which payment the 1st defendant agreed to refund the money. It is also clear that the agreement to repay was not conditional upon payment of any further sums by the plaintiff to the 1st defendant and in any event, the 1st defendant did not lodge any counter claim to the plaintiff's suit, neither did it seek to join other parties in the suit. Consequently, its reference to other parties and other conditions for the repayment of the monies it had agreed to repay is a clear attempt to introduce a red herring into the matter in its endeavour to further delay the plaintiff's recovery of its money.***
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> ***As for the 2nd defendant, it was not as innocent and as uninvolved in the transactions giving rise to this suit as it would, through its defence and replying affidavit, have us believe. The 2nd defendant claims that it has never been paid any money by the plaintiff and that its involvement in the matter was that of a collecting and clearing bank. It also adds that it is a complete stranger to the transactions between the plaintiff and the 1st defendant. That claim, we may observe, is also repeated in the affidavit of Mr. John Barnes, the Executive director of the 2nd defendant. But the position taken by the 2nd defendant is, as observed by learned counsel for the plaintiff, less than candid. As will be clear from the correspondence between the real persons behind these companies (see annextures SS4 attached to the affidavit of Surjit Singh) the parties made no distinction between the 1st defendant and the 2nd defendant. Thus when***

the plaintiff is writing about the sums due to them under the transactions, they do not write to the 1st defendant but to K.S. (obviously meaning Ketan Somaia) without in any way attempting to indicate in what role they are addressing him. And when Mr. Ketan Somaia writes of Mr. Rumi Singh about the money due to the plaintiff, he does not use the letter heads of the 1st defendant but those of "Dolphin" which in the circumstances must mean the 2nd defendant.

Even the defence that the 2nd defendant was acting as a collecting and clearing bank appears untrue when viewed against the fact that in all the cheques involved in the transaction, the payee was not the 1st defendant as one would have thought, if the 2nd defendant's defence is credible but the 2nd defendant itself. Is it not generally accepted that payments through clearing banks are not made to the banks themselves? Given those facts, it cannot surely be correct or even true that the 2nd defendant only acted as a collecting and clearing bank. The fact of the matter is that the 2nd defendant received all the moneys, the subject of this suit. Accordingly, when the 2nd defendant claims, in the face of clear evidence that it was never paid any money by the plaintiff and that it is a stranger to the transactions between the plaintiff and the 1st defendant, there can be no doubt that the 2nd defendant is not stating the truth. In my view, there is the clearest evidence that the money in question was paid to the 2nd defendant. Indeed there is no way it could have reached the 1st defendant without the 2nd defendant in turn paying it over to the 1st defendant. Given all that, the question that obviously begs an answer in the circumstances of this matter is, if the 2nd defendant was not a party to the transaction, how come that it, in turn, decided to transfer the moneys to the 1st defendant. The answer to the question is clear; the 2nd defendant's denial of receipt of the money is not only baseless but also a shameless attempt to mislead this court. ......For that reason, it is baseless for the defendants to contend that the framing of the claims in the alternative was caused by the plaintiff's uncertainly as to the validity of the reliefs it sought. On the contrary, the plaint clearly demonstrates that the plaintiff knew what he wanted and clearly went for it.......I wish to repeat that the claim by the 2nd defendant that its involvement in the transaction was only as a collecting and clearing bank, has no basis in fact; as observed above, it was the payee of the cheques that comprised the sum of Shs.72,900,000/= clearly therefore, the 2nd defendant was not a clearing bank for the 1st defendant in the transaction. If it was, the cheques in question would have been made in favour of the 1st defendant......The 2nd defendant's defence is clearly a sham.

9. The decree ensuing from the ruling shows that the court, after striking out the defences, ordered the appellant and its co-defendant to pay to the respondents Shs.164,804,838/50 together with interest as therein stated.

10. In the memorandum of appeal, the appellant contended in the 21 grounds of appeal that the decision of the High Court was wrong. In particular, the appellant contended that the trial Judge erred in law and in fact in finding that one **Ketan Somaia** was the owner of Dolphin Holdings Ltd and in placing the onus on the appellant to show that it was not acting as a collecting bank, thus, in effect, *"shifting the burden of proof in total disregard to the basic general principle of law that he who alleges must prove."* It was also contended that the appellant's defence raised bona fide triable issues in respect of all the allegations contained in the plaint. In other grounds of the appeal, the appellant contended that;

(5) The Learned Judge totally misapprehended the law in failing to appreciate that the Defendants were, and still are, separate corporate entities, each competent to sue and be sued in its own name.

(7) The Learned Judge erred in law and fact in failing to appreciate that the Appellant's Defence raised bonafide triable issues in respect of all the allegations contained in the Plaint.

(19) In the result, the Learned Judge totally misdirected himself by finding that the

Defendants were jointly and severally liable to the Plaintiff

(20) In all the circumstances of the case, the findings by the Learned Judge are insupportable in law or on the basis of the evidence adduced.

(21) In making the findings that he did, and in making the orders appealed against, the Learned Judge did not exercise his discretion judiciously or properly, but rather exercised his discretion on the basis of inarticulate premises."

11. When the appeal came up for hearing before us, **Ms Julie Soweto Aullo**, the learned counsel for the appellant, submitted that the appellant was only a collecting bank and hence an agent and did not receive the money for its own use and that the trial judge erred in finding that the appellant owed the respondent the money claimed particularly in the light of the admission by the respondent that the money was transmitted to the appellant which was a banking institution. In counsel's submission, the trial Judge could not do so without going behind the corporate veil of incorporation. It was further the contention of the appellant that the trial court failed to observe the principles for striking out defence and instead went into the merits of the case and expressed its opinion on matters that should only elicit the court's opinion following a trial. Counsel referred the Court to the decision in **D.T. Dobie & Company (K) Ltd vs Muchina** (1982) KLR 1 in which this court (Madan, Miller and Potter JJ.A) held, inter alia, in holding 3 that -

"As the power to strike out pleadings is exercised without the court being fully informed on the merits of the case, through discovery and oral evidence, it should be used sparingly and cautiously."

In holding (8) (*Obiter) Madan JA* held -

"The power to strike out should be exercised only after the court has considered all the 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.

In holding (9) (*Obiter) Madan JA* held-

"The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out.

12. Counsel contended that the defences raised triable issues and that even one triable issue was sufficient to let the matter go to trial. Moreover, said counsel, there was reasonable doubt with regard to the money claimed and consequently the matter should have gone to trial. Counsel for the appellant wondered how the appellant qua bank could be held liable when the respondent had admitted that the money it paid had been received. It was counsel's contention that there was a triable issue that required the matter to go to trial. In this regard, we observe that the trial Judge reasoned as follows at page 14 of his judgment;

"It is significant when payment was demanded in a letter we have (sic) annexed to supplementary affidavit dated 18.1.98 BS1 – the 1st defendant (Dolphin Holdings Ltd) denies having had any dealings with the plaintiff. This letter shows that the 1st Defendant (Dolphin Holdings Ltd) is not being very candid in this matter. All these other defences ceased to be available to the 1st Defendant (sic). They did not invoke the arbitration clause. Once a party takes a position, inconsistent with admitting an agreement cannot rely on the same agreement as a defence. That is the position the 1st defendant is in. That being the position, the money paid in the 2nd Defendant bank in the account of the 1st defendant is money had and received to the account of the Plaintiff."

13. The main thrust of the appellant's case is that it was a grave error for the trial court to find the appellant qua collecting and receiving bank liable to the respondent. Counsel for the appellant urged us to allow the appeal with costs and to set aside the judgment of the High Court and the orders thereof and instead allow the matter to be tried and determined after a trial.

14. The respondent, although served, was not represented during the hearing of the appeal.

15. We have perused the record of appeal and duly considered the submissions by the appellant's counsel and the authorities cited in support of the appeal. We reserved this judgment. We regret the delay in delivering it which was occasioned by a mishap in recording the date of delivery and in subsequent misplacement of the court file for which we apologize.

16. The issue for our determination in this appeal is whether the trial Judge erred in striking out the defences and entering judgment?

17. The leading local case on interpretation of Rule 13 of Order VI of the Civil Procedure Rules on which the application striking the defences was based is perhaps **D.T. Dobie & company (Kenya) Ltd vs Muchina** which counsel for the appellant referred to us. In the case, **Madan JA**, as he then was, opined in an obiter dictum that;

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

In **Kenindia Assurance co. Ltd vs Commercial Bank of Africa Ltd & 2 others** (Nbi C.A. Civil Appeal No.11 of 2000) this court (differently constituted) stated;

> ***"The law on summary judgment procedure is now well settled. This is a procedure to be resorted to in the clearest of cases. In Dhanjal Investments Ltd vs Shabaha Inv. Ltd. Civil appeal No.232 of 1997, (unreported)) this court stated;***
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> > ***"The law on summary judgment procedure has been settled for many years now. It was held as early as 1952 in the case of Kandnlal Restaurant v Devshi & Co.. (1952) EACA 77 and followed by the Court of appeal for Eastern African in the case of Sonza Figuerido & Co. Ltd v Mooring Hotel Limited (1952) EA 425 that if the defendant shows a bona fide triable issue he must be allowed to defend without conditions.....".***

And in **Provincial Insurance company of East Africa Limited** now known as **UAP Provincial Insurance Limited v Lenny M. Kivuti** (SCivil Appeal No.216 of 1996) (unreported), this court again stated:-

> ***"In an application for summary judgment even one triable issue, if bona fide, would entitle the defendant to have unconditional leave to defend."***

Lastly in **Kenya Trade Combine Ltd vs M Shah** (Civil appeal No.193 of 1999) (unreported), this court said:

> ***"In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed."***

18. These are the principles that ought to guide the court while considering a decision on an

application for summary judgment under Order VI Rule 13.

19. Counsel for the appellant robustly contended that the court failed to see that there were triable issues necessitating a trial. It is desirable to focus on the uncontested facts constituting the claim that gave rise to the suit in which the summary judgment appealed against was entered. Firstly, the agreement for the purchase of 51% paid up equity in Miwani Sugar Company (1989) Ltd which were held by Vanessa Associates incorporated in Panama whose beneficial owner was Dolphin Holdings Limited, the 1st defendant in the suit, was made between the respondent and the Dolphin Holdings. The latter was dropped from the appeal by the appellant. Secondly, the agreement came a cropper following which another agreement was executed on 13th May 1998 between Dolphin Holdings Ltd. and respondent, in which Dolphin Holdings Ltd acknowledged that the respondent had paid to it Shs.72.9 million towards the purchase of shares belonging to Dolphin Holdings Ltd in Vanessa Associates Inc and agreed to refund the same less Shs.15 million it had already paid back leaving a balance of Shs.57.9 million. It was in respect of this balance that the respondent sued claiming loss of its use and interest thereon making a total of shs.94,174,193/45 claimed in the suit from both Dolphin Holdings Ltd and the appellant.

20. Thirdly, although the two aforementioned agreements only involved Dolphin Holdings Ltd and the respondent, Delphis Bank Limited was brought on board as evidenced by paragraph 12 of the Plaint in which the appellant pleaded thus –

> ***"In the alternative and without prejudice to the foregoing the Plaintiff states that the written Agreement pursuant to which the Plaintiff paid the aforesaid sum of Kshs.72,900,000/= to the Second Defendant having been rescinded and the consideration for such payment having wholly failed it is only just that the Second Defendant is under an obligation to repay the said monies to the Plaintiff as money had and received from the Plaintiff to the use of the Plaintiff for which there has been total failure of consideration. And the Plaintiff therefore claims as against the Second Defendant the said sum of Kshs.94,174,193.45/= together with interest at the rate of 30% per annum from 1st June, 1997 till payment in full as money had and received by the Second Defendant from the Plaintiff for no consideration."***

21. Fourthly, the respondent acknowledged in paragraph 3 of the Plaint in the suit that Delphis Bank Ltd was a banking institution operating under the provisions of the Banking Act, Cap 488.

22. The respondent maintained a bank account with the appellant and channelled the payment of shs.72.9 million to Dolphin Holdings Ltd through that account.

23. In the application for summary judgment, the respondent contended that the appellant had admitted having received the money but a proper perusal of paragraph 5 of the latter's defence shows that the averment was not an admission. Rather, it was an assertion that it acted as a collecting bank and that the cheques in payment of shs.72.9 million by the respondent to Dolphin Holdings Ltd were cleared by the appellant in its capacity as the respondent's banker and once cleared, credited the amount to the account of Dolphin Holdings Ltd in the appellant Bank. The evidence before the trial judge shows that the respondent issued three cheques of shs.37.9 million, Shs.10 million, and shs.25 million on 18.7.95, 13.10.95 and 29.12.95 respectively all totalling to shs.72.9 million. The first cheque of shs.37.9 million was drawn on Standard Chartered Bank by the respondent in favour of the appellant while the third cheque of Shs.25 million was drawn by the respondent on the Bank of Baroda in favour of the appellant. The details about the third cheque were not clear but it was not denied that the amount was paid and received.

24. Why did the respondent draw its cheques in payment of shs.72.9 million in favour of the appellant, Delphis Bank Limited, which was neither privy to the agreement dated 12th July 1995 for sale of the said shares nor to the agreement dated 13th May 97 relating to the refund of shs.72.9 million? The appellant maintained in its affidavits in the application for summary judgment that it received the money on behalf of its customer, Dolphin Holdings Ltd, for the purpose of clearing them which it duly did and thereafter credited the proceeds thereof to the account of Dolphin Holdings Ltd. But it is patently clear

that the appellant was the payee in the cheques and therefore a party to the transaction relating to the payment process as opposed to being a receiving bank on behalf of its customer. Glaringly, the appellant as the payee in the cheques was the beneficiary and the issue of its being a collecting bank with a view to crediting the account of its customer, to wit, Dolphin Holdings Limitedm, is not apparent nor is it supported by evidence. Simply put, Dolphin Holdings Ltd seems from the material before the Court to have caused the money to be remitted to Delphis Bank Ltd by the respondent. Delphis Bank Ltd as the payee on behalf of Dolphin Holdings Ltd was patently its agent and it received the payments in its capacity as such. The argument that it was a collecting bank does not hold water not least because the cheques were in its favour as payee and it was therefore not, on the face of it, collecting for a customer. Rather, it was receiving in its own right as the payee clearly on instructions of Dolphin Holdings Ltd. How the proceeds were to be applied was a matter for Dolphin Holdings Ltd which owned the money and the appellant to whom it was paid and if the instructions were to credit the Account of Dolphin Holdings Ltd as seems to have been the case, that did not constitute the appellant a collecting bank. It was an agent for Dolphin Holdings Ltd.

25. Although Dolphin Holdings Ltd was dropped in the appeal, the impugned judgment found both the appellant and Dolphin Holdings Ltd liable to the respondent. At any rate, Dolphin Holdings Ltd, on the facts emerging from the evidence in the pleadings was the principal while the appellant was clearly the latter's agent.

26. In the light of these facts, was the trial Judge correct in striking out the defences as scandalous and embarrassing and also as an abuse of the process of the Court and in entering judgment in favour of the respondent? Firstly, it is not disputed that the transaction in which the money was paid fell through. As money had changed hands, the same became recoverable on total failure of consideration. The money was in the hands of the appellant as the entity in whose favour the cheques were drawn on behalf of Dolphine Holdings Ltd. It was in law recoverable from the appellant. The contention that the appellant was a collecting bank did not hold good in this context. As payees and holders of the cheques in a transaction that had come a cropper, the appellant as the agent of Dolphin Holdings Ltd was liable to return the money to the respondent, Caneland Ltd *(See **Sutters v Briggs [1922] 1 AC 1**)*. It would have made no difference if the cheques from the respondent had been drawn in favour of a non-banker who in turn deposited them in his account in a bank and received payment. The respondent would still have been entitled to recover it from such non-banker and it seems clear that the fact that the appellant was a banker did not afford it any defence which a non-banker would not have. As an agent of Dolphin Holdings Ltd which is liable to refund the money as the contract was not performed and there being an agreement binding on Dolphin Holdings to refund the money, the appellant was clearly liable and could not successfully resist the claim through defences that were not tenable in law. If the respondent had remitted the money to Dolphin Holdings Ltd directly rather than through the latter's agent as was the case, the respondent would in law be entitled to recover it from Dolphin Holdings Ltd as money had and received on a total failure of consideration or on non-performance of the contract. The fact that the money was in the hands of Dolphin Holdings Ltd's agent did not prejudice the right of the respondent to recover it. Although the appellant was a third party in relation to the contract in which the money was paid, it was nevertheless fully cognisant of the transactions and actually had the cheques drawn in its name. In the circumstances, there would be no reason or rhythm why the respondent cannot recover the payment from either or both.

From its defence and affidavit evidence, the appellant misled the court in claiming that it was a complete stranger to the transactions between the respondent and Dolphin Holdings Ltd. The evidence on record reveals that the appellant misled the court and there is no doubt that the appellant was utterly dishonest. As the superior court below put it,

> ***"the 2nd defendant's (Delphis Bank Ltd) denial of receipt of the money is not only baseless but also a shameless attempt to mislead this Court."***

27. The discretionary power of the court to give summary judgment *"ought to be applied in plain and obvious cases where the action is one which cannot succeed or is in some way an abuse of the process of the court."* See **Nagle v Fieldan & Others (1966) 2 QBD 633 page 648**. This was such case.

It was in **D.T. Dobie & Co. Ltd v Muchina (supra) (1982) KLR 1** that this court (differently constituted) held that

> ***"as the power to strike out pleadings is exercised without the court being fully informed on the merits of the case, through discovery and oral evidence, it should be used sparingly and cautiously,"***

Where there is no plausible defence and it is plain that the defence is a sham or cannot be sustained, it would be pointless to put the parties through a trial that would inflate costs to the disadvantage of the debtor and delay delivery of justice to the prejudice of the claimant. This was the position obtaining in this case. Needless to emphasize, in the instant case, there was no legitimate defence to the claim by either the appellant or its co-defendant as the respondent was entitled to the payment of the money whether it was in the hands of the principal (Dolphin Holdings Ltd) or the appellant as the latter's agent. The facts do not show any plausible defence by the appellant to the respondent's claim.

28. The trial judge went a tad too far into the issues of merit but this, though undesirable, did not cause any prejudice to the appellant. In the end, the Judge found that the defences were not only scandalous and frivolous but also an abuse of the process of the court after making a finding that the defences were *"clearly untenable and bogus.....solely intended to delay the recovery of the money."*

29. We are in agreement with the learned Judge's conclusion and we find no merit in the appeal which we hereby dismiss with costs to the respondent.

Dated and delivered at Nairobi this *28th day of November 2014*.

R. N. NAMBUYE

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JUDGE OF APPEAL

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

W. OUKO

...

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

<u>DEPUTY REGISTRAR</u>