IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & MARAGA, JJ.A)

CIVIL APPEAL NO. 71 OF 2012

BETWEEN

FIVE FORTY AVIATION LIMITED.....APPELLANT

AND

FINEJET LIMITED.....RESPONDENT

(An Appeal from the Ruling of the High Court of Kenya Milimani Commercial Court

(J.B. Havelock, J.) dated 14th February, 2012 in

NAIROBI MILIMANI H.C.C. NO. 331 OF 2011)

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JUDGMENT OF THE COURT

1. Both the appellant and the respondent are limited liability companies incorporated in Kenya. The appellant carries on the business of operating flights in the name and style of Fly 540 and East African Safaris Air while the respondent carries on the business of purchasing oil products from the major oil importers and marketers and resells the same to third parties.

2. In its amended plaint dated 5th August and filed in court on 10th August 2011, the respondent claimed a sum of US $ 656,304.49 being the price of petroleum products (jet fuel uplifts) sold and delivered by the respondent to the appellant on diverse dates at various points of supply in Kenya, Uganda and South Sudan. The respondent further averred that in part payment of the said sum of US $ 656,304.49, the appellant issued to the respondent cheques amounting to a total of US $ 90,000 which cheques, upon being presented for payment, were returned to the respondent unpaid.

3. In its statement of defence, while admitting that the respondent indeed supplied fuel to it, the appellant denied owing to the respondent the sum of US $ 656,304.49 or any other sum at all and stated that if anything, the appellant's account with the respondent is in credit and that it is the respondent who owes the appellant supply of fuel that has been paid for in advance. The appellant further stated that the cheques issued to the respondent were on account and were stopped when it discovered that the appellant did not owe the respondent any money.

4. The respondent did not think highly of the appellant's defence. After filing a reply to defence on 25th

October 2011, the respondent filed a notice of motion under **Order 2 Rule 15 (1)(b)** and **(d),** and **Order 50 Rule 1** of the **Civil Procedure Rules** as well as **Sections 1A** and **3A** of the **Civil Procedure Act** and sought the striking out of the appellant's defence on the ground that it was frivolous, vexatious and an abuse of the court process. In his affidavit in support of that application, Mr. Kimani, the Managing Director of the respondent, denied the appellant's claim that the fuel supplied was based on the international Platt's price tariff as the appellant had claimed. He averred that the prices were agreed upon at the beginning of each month before the supplies were made. Since December, 2008 when the parties started their business relations the appellant settled the invoices sent to it without any complaint. In his view therefore, the appellant's claim of overcharging is a sham and a decoy intended to delay the settlement of its account with the respondent.

5. Mr. Kimani further averred that for the respondent to supply the appellant with the fuel it had to take a bank facility secured by his matrimonial property. The appellant's delay in settling the account is therefore causing the respondent great loss. In the circumstances he prayed that the appellant's defence should be struck out and judgment be entered for the respondent as prayed in the amended plaint.

6. In response to that application, the appellant filed a replying affidavit sworn on 3rd November, 2011 by its Chief Executive, Donald Earle Smith. In that affidavit, Mr. Smith deposed that he knew Mr. Kimani of the respondent company when the latter was working for Chevron which was being sold off. The two held discussions and the appellant agreed to switch from its then suppliers of fuel if the company Mr. Kimani was intending to incorporate offered the appellant competitive prices. After incorporating his company, Mr. Smith further averred, it was finally agreed that the respondent would supply the appellant with jet fuel at a "differential of 19 cag" (19 cents a gallon) on the prevailing international Platt's price and that the respondent would, from time to time, advise Mr. Smith or someone responsible in his company of the applicable prices based on the Platt's tariff which would change in the international market from time to time.

7. Mr. Smith continued to state that after that agreement, the respondent supplied fuel to the appellant on credit and the latter made payments on account believing that they were Platt's based until June 2011 when, upon reconciliation of its accounts, the appellant realized that the respondent's prices were too high. When the appellant asked the respondent to state the Platt's rates it had used for various months, the respondent turned around and claimed that the prices were not Platt's based.

8. After hearing that application, in a ruling dated 14th February, 2012, Havelock, J. acceded to the respondent's plea, struck out the defence and entered judgment for the respondent as prayed in the amended plaint thus provoking this appeal.

9. In its memorandum of appeal, the appellant, in a nutshell, faults the learned Judge for failing to set out the issues for determination; failing to appreciate or appreciate sufficiently the import of the evidence placed before him; and in the process coming up with a scanty ruling that the appellant's defence raised no triable issue when the same and other pleadings raised clear triable issues.

10.Counsel's submissions before us reiterated their respective clients' cases as summarized above with counsel for the appellant contending that the voluminous documents with different figures placed before the learned Judge cannot be said to speak for themselves. Viva voce evidence, which could only be furnished at a formal hearing, was and is still required to explain them.

11.On his part, counsel for the respondent added that as agreed the fuel prices were to be advised monthly and the respondent did that before making any supply. The appellant having conceded that such advices were given and that it was supplied with jet fuel, it cannot now be heard to turn around and question those prices.

12.Having considered these rival submissions and read the record, we find that the issue before us is whether or not the appellant's defence raised any triable issue.

13.The law on summary procedure as clearly appreciated by counsel for both parties is well settled. Both

under its inherent jurisdiction and under the provisions of **Order 2 Rule 15** (formerly Order 6 Rule 13) of the **Civil Procedure Rules** the court is clothed with wide powers to either stay and maintain an action or dismiss or strike it out if it is an abuse of its process. The objective of the striking out power, as Lord Buckley stated in the English case of **Carl- Zeiss- Stiftung v. Rayner, [1969] 2 ALL ER 897 at p. 908**:-

> ***"…is to prevent parties being harassed and put to expense by frivolous vexatious or hopeless litigation… bound to fail having regard to the uncontested facts."***

14.However, as the exercise of the striking out power is draconian in that it denies a party of its constitutional right to a plenary hearing, the law requires the courts to exercise that power with the greatest care and circumspection and only in the clearest cases. There are a host of authorities on this point. For instance in the old English case of **Dyson v. Attorney General [1911] 1 KB 410 at page 419** Fletcher – Moulton L J said:

> ***"To my mind it is evident that our judicial system would never permit a plaintiff to be driven from the judgment seat … without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad."***

15.This principle, which of course equally applies to hopeless defences, has been endorsed in numerous decisions of both this Court and the High Court in this country. In applications for striking out defences like the one we are concerned with in this appeal, in **Moi University v. Vishura Builders Ltd, CA No. 292 of 2004**, this Court reiterated the point that "*if the defence raises even one bona fide issue*," it should not be struck out and instead the suit should go to full trial. The issue in contention should be plain and incontestable from the pleadings to warrant the striking out of any pleading.

16.The court, in a summary application like the one which gave rise to this appeal, is not required to go into minute examination of documents to determine it. This is how Danckwerts LJ expressed this point in **Wenlock Vs Maloney and Others [1965] 1 WLR 1238 at p. 1244**, a decision cited with approval by this Court in **DT Dobie Company (Kenya) Ltd Vs Muchina, [1982] KLR 1**:

> ***"This summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of documents and the facts of the case to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge and to produce a trial of the case in chambers, on affidavits, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."***

17.In this matter we are called upon to either disturb or sustain the exercise of discretion by the trial court. We remind ourselves of the hallowed principle enunciated in the case of **Mbogo v. Shah [1968] EA 93**, and which has been followed in numerous subsequent decisions, that an appellate court should not disturb the exercise of discretion by a trial court unless that exercise is perverse or unless the appellate court is satisfied that the judge misdirected himself or it is manifest from the case that the judge was clearly wrong.

18.In this case, it is common ground that the agreement on the pricing mode was oral. From the emails exchanged between the parties, copies of which are in the record of this appeal, there is mention by both sides of the Platt's tariff. Whether or not the agreed fuel prices were to be based on that tariff with some top-up differential, is in our view a triable issue raised in the suit. It is not obvious and determinable from a perusal of the pleadings. We are not sure whether the issue can be determined by even a minute examination of the voluminous documents relied by the parties, which examination, as we have pointed out, is not desirable in summary applications like the one that gave rise to this appeal, without oral evidence subjected to cross-examination.

19. In the circumstances, we allow this appeal, set aside the impugned ruling and direct that the High Court suit be heard and determined on merit. The costs of this appeal shall abide the outcome of the suit.

Dated and delivered at Nairobi this 18th day of DECEMBER, 2014

P. WAKI

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JUDGE OF APPEAL

R. NAMBUYE

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JUDGE OF APPEAL

D.K. MARAGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR