IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GITHINJI, MAKHANDIA & MURGOR, JJ.A.)

CIVIL APPEAL NO. 234 OF 2010

BETWEEN

OMAR SALEH SAID ….....APPELLANT

AND

KILINDINI WAREHOUSES (K) LIMITED….....1ST RESPONDENT

AWADH SALEH SAID ….....2ND RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Mombasa (Ojwang, J.) dated 2nd July, 2010

in

H.C.C.C. No.5 of 2010)

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JUDGMENT OF THE COURT

This is an appeal from the ruling of the superior court (***Ojwang, J***., as he then was) delivered on 2nd July, 2010 wherein the learned Judge dismissed the appellant's application for striking out plaint with costs to the respondents.

The appellant, in a Chamber Summons dated 30th March, 2010, had fled an application for orders:-

"1. That this Honourable Court do dismiss the plaintiff's suit against the defendant as it does not disclose a reasonable cause of action against him.

2. **That the 2nd plaintiff should bear the costs of the application and this suit."**

Which application was based on the following grounds:-

a) That the plaint does not disclose a reasonable cause of action against the defendant in so far as the 2nd plaintiff/defendant is concerned.

(b) That the 2nd plaintiff has not been wronged by the alleged actions of the defendant and can therefore not bring a suit against the defendant, nor is it disclosed in the pleadings.

The application was in relation to a plaint dated 8th March 2010 where ***Kilindini Warehouse (K) Limited*** (the 1st respondent) was named as the 1st plaintiff, and ***Awadh Saleh Said,*** (the 2nd respondent) as the 2nd plaintiff.

In their plaint, the respondents, sought orders for a permanent injunction against the appellant, his agents and servants and/or employees to restrain him from interfering with the running and operations of the 1st respondent or in destablising its business. The appellant filed his defence on the 6th April, 2010.

The appellant being aggrieved by the decision of the High Court dated 2nd July, 2010 has brought this appeal before us, in which he has set out four grounds of appeal, to wit:-

1."The Honourable Judge erred in law and in fact in dismissing the appellant/defendant's application dated 30th March, 2012.

2. The Honourable Judge erred in law by failing to take into account that the 1st plaintiff, being a company, was capable of and did sue on its own account and that the 2nd plaintiff could not sue on behalf of the 1st plaintiff.

3. The Honourable Judge, having made a finding that the 2nd plaintiff's case disclosed no cause of action, erred in law and fact in failing to strike out the 2nd plaintiff's suit

4. The Honourable Judge erred in law by holding that it was within proper procedure for each plaintiff to be represented by separate firms of advocates."

In canvassing his appeal, ***Mr Ali***, learned counsel for the appellant, informed us, that he would argue all the grounds together.

The main thrust of ***Mr Ali's*** submission was that, whilst dismissing the application, the learned Judge had stated that:-

"On the question whether the 2nd respondent by himself had a cause of action, this is not entirely evident."

Mr Ali contended that, despite having made this statement, the learned Judge failed or omitted to strike out the 2nd respondent from the suit. He therefore sought from this Court an order to strike out the 2nd respondent based on the learned Judge's statement aforesaid.

Mr Ali referred us to the often cited case of ***Salmon v Salmon (1897) A.C. 22*** in support of his contention that, it was a principle of company law that a distinction must be drawn between the company and its directors and shareholders, as the company is a separate legal entity; and as such it could sue and be sued. It therefore did not require any support in the safeguard of its interests from the directors or shareholders.

Mr Ali's view was that, if the 1st respondent had a complaint against the appellant, it was not up to the 2nd respondent to seek to defend the 1st respondent from the appellant. Company law principles were such as to enable the 1st respondent to do so of its own volition. He urged the Court to allow the appeal on that basis.

Mr Nyamu, learned counsel for the 1st respondent, opposed the appeal. He submitted that there is no provision under the former ***Order VI Rule 13(a)*** (now ***Order 2 Rule 15(1)(a)*** of the Civil Procedure Act for the dismissal of the suit, and the court did not therefore have powers to dismiss the suit. ***Order VI Rule 13(a)*** only permits the court to strike out or to amend the pleadings. It is only after striking out the suit that the Court can order a dismissal of the suit. In his view, the application was a non-starter. He further stated that the suit could not also be dismissed for mis-joinder or non-joinder of the parties. He asserted that under ***Order VI rule 13(a)*** the court exercises discretionary powers. For this proposition learned counsel referred us to the Supreme Court Rules.

In addition, ***Mr Nyamu*** submitted that there were triable issues amongst the parties, particularly the dispute relating the shareholding in the 1st respondent.

In support of this contention, ***Mr Nyamu*** referred us to the cases of ***D.T. Dobie & Co (Kenya) Limited vs Muchina (1982)*** and ***Crescent Construction Co. Limited vs Delphis Bank Limited, Civil Appeal No. 146 of 2001 (2001) eKLR.***

Mr Oguk, learned counsel for the 2nd respondent begun by concurring with the submissions of M***r Nyamu***, but went on to state that the triable issues before the court included, and were not limited to the continued interference by the appellant in the operations of the 1st respondent, the involvement of the appellant in fraudulent acts in relation to the 1st respondent, and the existence of a dispute between the 2nd respondent and the appellant in the shareholding of the 1st respondent.

Mr Oguk concluded by informing the Court that the plaint had since been amended on 9th December, 2012 and that the appellant had also filed an amended defence. Therefore, the plaint in which the Chamber Summons dated 30th March, 2010 and on the basis of which the court order the subject of this appeal was made, was no longer of essence and therefore invalid. He urged that the appeal be dismissed.

We have anxiously considered the pleadings and submissions canvassed before us, as well as the prevailing circumstances.

The learned Judge in holding that the respondents had a cause of action stated thus:-

> ***"The 1st plaintiff's position is clear enough: it is suing the defendant because the defendant is unlawfully interfering in its management of affairs. So, clearly 1st plaintiff has a cause of action, which should be herd and judgment on the question rendered."***

Upon an examination of the pleadings, it is demonstrated that there is a dispute between the appellant and the 2nd respondent relating to the shareholding in the 1st respondent. It is clear that, the Court will be required to consider such materials as will enable it to unravel the case as between the parties. The 1st and 2nd respondents had gone to court to seek relief against the actions of the appellant. Their complaint is that, the appellant is interfering with the management and operations of the 1st respondent. To determine whether such relief should be granted against the appellant, will require the court to go into the merits of the case, and make a finding as to whether or not the respondents should indeed be granted these prayers.

We find these to be triable issues, and agree with the learned Judge that the court should have the opportunity to consider all the material placed before it, in order to arrive at a just determination. It should not rush to strike out or dismiss suits, as this is considered to be a draconian step, which could result in devastating consequences against the party affected. The court should be slow and painstakingly cautious in the exercise of its discretion to strike out a suit.

On the issue of whether there is a cause of action disclosed against the 2nd respondent, it is apparent that there is a rather contentious dispute amongst the parties involving the operations and management of the 1st respondent, as well as on the question of the shareholdings within the 1st respondent. Whatever the case, the dispute as amongst the parties is so intricately interwoven, that it is difficult to see how the 2nd respondent can be struck out of the suit without first going into the merits of the case. The 1st respondent has been sued as a separate entity, as espoused by the principles of ***Salmon v Salmon*** (supra) and similarly, has rights that require to be determined by the court.

When we consider the statement of the learned Judge referred to by Mr Ali, we construe this to mean that a cause of action against the 2nd respondent on the face of the pleadings, was not entirely clear.

The definition of ***"evident"*** in the ***Concise English Dictionary*** is ***"plain"*** or ***"obvious"*** or ***"clear".***

In other words, from the pleadings, the 2nd respondent's case was not apparent at that stage, but could

become clearer when all the materials were placed before the court. It will be noted, that the learned Judge did not state, that there was no cause of action against the 2nd respondent.

Having regard to the paragraph that followed the ***concerned*** statement, the learned Judge went on to state that:-

> ***"But as already noted, the 2nd plaintiff's case is so inherently lodged in 1st plaintiff's case that it is in my opinion impractical at this stage to disassemble the two and then judge 2nd plaintiff separately for seriousness of its cause of action; any attempt to pas the judgment in that regard would take the court into matters of evidence, which must await the trial of the main cause."***

We agree with the learned Judge that, it is not the place of the Court at this early stage in the proceedings to attempt to mine into the pleadings filed so far, so as to determine whether or not there is a cause of action against the 2nd respondent. Such matters are better left to the court to consider at the trial stage.

Counsel referred us to the often cited case of ***D.T. Dobie & Co. (Kenya) Limited v Muchina (1982) KLR*** wherein ***Madan LJ*** (as the then was), stated:-

> ***"No suit ought to be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and it is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided that it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of the case before it."***

With respect to the contention that the pleadings have since been amended, which fact was brought to our attention from the bar and was not countered by any of the parties it may well be that this appeal has been overtaken by events and is now perhaps an exercise in futility. With the amended pleadings having been filed, the suit should proceed on the basis of the amended pleadings. ***Mr Ali's*** arguments and the court order of 2nd July, 2010 cannot now have any bearing on the suit.

Consequently, we dismiss the appeal and uphold the ruling delivered on 2nd July 2010. The costs of this appeal and the Chamber Summons dated 30th March, 2010 are awarded to the respondents.

It is so ordered.

Dated and delivered at Malindi this 3rd day of July, 2013.

E. M. GITHINJI

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

….....

JUDGE OF APPEAL

A. K. MURGOR

….....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR