



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ONYANGO OTIENO, NYAMU & MARAGA, JJ.A)

CIVIL APPEAL (APPLICATIO) NO. 237 OF 2003

BETWEEN

TELCOM KENYA LIMITED *as successor to* **KENYA POSTS & TELECOMMUNICATIONS CORPORATION**

UNDER LEGAL NOTICE NO. 158 OF
1999APPELLANT

AND

PAUL GACHANGA
NDARUARESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Aluoch, J.) dated 11th October, 2001

in H.C.C. C NO. 2863 of 1996)

JUDGMENT OF THE COURT

In an amended plaint dated 9th April, 2001 and filed on 10th April, 2001, the respondent in this appeal **Paul Gachanga Ndarua**, stated at paragraph 4 as follows:

“By a written contract as contained in a letter of appointment (Ref SOII/SC) dated the 20th day of May, 1991, emanating from the office of the Managing Director of the Defendant addressed to the Plaintiff, the Defendant appointed the Plaintiff as a “Project Co-ordinator/Consultant for a period of two (2) years from 2nd January, 1991 “on terms applicable to consultants and as particularly detailed this letter of offer The plaintiff duly accepted the appointment by counter-signing the said letter of appointment.”

At paragraph 5, the respondent stated further that he subsequently rendered services to the appellant, the then **Kenya Posts & Telecommunications Corporation** herein, at the appellant’s request and interest for which the respondent was entitled to be paid in terms of the letters of appointment part of which we have alluded to above. That appointment was later renewed for a period of one year and thus the appointment

was now to expire on 31st December, 1993 on the same terms and conditions as the previous appointment letter. At paragraph 7 of that amended plaint the respondent further stated:

“In pursuance of the said two letters of appointment the plaintiff rendered services to the Defendant as directed and required by the Defendant from time to time. The Plaintiff rendered to the defendant fee notes or invoices from time to time and the Defendant duly paid except for the now outstanding amount of Kshs.44,261,519.50 which the defendant has failed or refused to pay. The Plaintiff has failed or refused to pay (sic). The Plaintiff has furnished the Defendant with a schedule of the details and full particulars of this amount.”

After several attempts to get the appellant meet the demanded payment of the claim, the respondent alleges in that plaint that he served the appellant with the necessary demand notice pursuant to the provisions of **section 109** of the then **Kenya Posts and Telecommunications Corporation Act (Cap 411 of the Laws of Kenya)**. He did so through its authorized agents on 16th September, 1996. On the expiry of that notice, the claim remained unpaid and the respondent moved to the Court by way of a plaint which as we have stated, was later amended, the original plaint being dated 17th October, 1996. The amended plaint thus filed over five and a half years later and had a schedule showing the particulars of the appellant’s indebtedness to the respondent. He ended that plaint by praying for judgment against the appellant for:

“(a) The unpaid outstanding amount as per the invoices @ 30% p.a (Kshs.44,261,519.50) together with interest amounting to Kshs.53,068,872.45 as stated in paragraph 12 above from the date of each invoice to date of judgment and payment in full.

(b) Punitive and exemplary damages for late payment as this honourable court shall determine.

(c) Costs of this suit.

(d) Interest on (a), (b) and (c) at the rate of 30% per annum till payment in full.

Further interest @ 30% per annum from 20th June, 1998 to date of full payment.

(d) (a) Alternatively and without prejudice, interest on the principal sum owed from date of each invoice to date of full payment at commercial rates prevailing throughout the period that his debt was owing and not at civil rates.

(e) Any other relief or remedy as this honourable court shall see fit and proper.”

In response to the plaint, the appellant filed defence to plaint which attracted reply to defence but when thereafter the plaint was amended as we have stated a defence to the amended plaint dated 18th June, 2001 was also filed. Both in the original statement of defence and in the defence to the amended plaint, the appellant denied that it had done any wrong as alleged in paragraph 7 we have reproduced herein above. At paragraphs 10, 11, 12 and 13 of the statement of defence to amended plaint, the appellant stated:

“10. It denies that it has admitted liability to pay the Plaintiff as alleged in paragraph 12 or at all, and it denies that it has at any time admitted owing interest to the plaintiff. No particulars are given of the allegations.

11. In further reply to paragraph 12, it states that the plaintiff has no contract for and is not entitled to the interest claimed or an interest.

12. As shown by paragraph 12 and the particulars interest is alleged to have arisen more than one year before the suit filed. All the alleged claims of the Plaintiff arose at the latest by March 1993. The suit not having been filed within 1 year from that date all claims are barred by section 109 (b) of the Kenya Posts & Telecommunications Act (Cap 411).

13. *No claim for interest prior to suit filed is maintainable as alleged or at all.*”

After the exchange of these pleadings and apparently before the hearing dates were taken to dispose of the case, the parties started negotiations for settlement of the suit out of court. The record shows that letters were exchanged between the parties which were of course letters on a without prejudice basis. The result of these negotiations was that an agreement was reached during the month of August 1997, to be precise on 22nd and 27th August, 1997 whereby the appellant agreed to pay the principal debt of Kshs.44,261,519.50 by weekly instalments from 31st October, 1997. The last instalment was made on 20th January, 1998. So the appellant paid the entire principal sum of Kshs.44,261,519.50. The respondent was however far from being satisfied as he had claimed interest on the delayed payment of the principal sum. He returned to the court vide chamber summons dated 29th June, 2001 and filed on the same date. He sought three orders as follows:

- “1. *The defendant’s Amended Defence dated 18th June, 2001, be struck out for being frivolous, vexatious ad an abuse of the court process.*
2. *Judgment on admissions be entered in favour of the Plaintiff against the defendant.*
3. *The costs of this application be provided for.*”

The grounds in support of that application were that:

- “1. *The defendant has admitted and paid in full the principal amount claimed of Kshs.44,261,519.50 shortly after filing this suit.*
2. *The defendant has, by settling the principal amount claimed in the suit forfeited any or any right to a demur as stated in the amended defence or at all.*
3. *The averments in the amended defence that it denies that it has admitted liability to pay the plaintiff or his admitted only interest to the plaintiff is frivolous, vexatious and aimed at delaying the hearing of this case.*
4. *The defendant is by its actions and by law liable to pay interest on the principal sums prayed in the plaint.*
5. *The claim in amended defence that the plaintiff had no contract and is not entitled to interest is belated and an afterthought.*
6. *The defendants all deliberately misled the court in order to cause undue delay.*
7. *The defendants are estopped from denying liability at this later stage.*”

That application was placed before Aluoch J (as she then was) who after hearing counsel on matters of fact and law, in a lengthy judgment allowed the chamber summons stating in her conclusion as follows: -

“From the points I have considered in detail, I do not find any triable issues in the defence to amended plaint, and I proceed to strike it out as it is no defence to the plaintiff’s claim for interest. The defendant’s payment of the principal sum amounted to admission of liability over the principal sum. Interest was claimed for delayed payment of the principal sum, and I am satisfied from evidence on record that the plaintiff should be paid such interest as tabulated. I therefore proceed to enter judgment on admission on the principal sum already paid and order the defendant to pay the plaintiff interest claimed on all the invoices amounting to Kshs.53,068,872/45.”

This is the ruling that has prompted this appeal before us. The appellant felt aggrieved by the ruling; filed

Notice of appeal and thereafter this appeal premised on nine grounds of appeal which are in a summary that the court failed to consider the defence of limitation as the plaint was time-barred as it was not filed within one year in accordance with **section 109 (b)** of the Kenya Posts & Telecommunication Act; that the court erred in holding that as the principal sum was paid on a without prejudice basis outside the limitation period the provisions of **section 109** aforesaid was ousted; that the court erred in holding that the Limitation of Actions Act had effect on provisions of the Kenya Posts & Telecommunication Act which is the latter act; that the court erred in relying on documents exchanged on a without prejudice basis; that the admission of liability of principal sum was no admissibility of liability to pay interest at any rate and was no admission to pay interest at the rate claimed by the respondents; that there was no agreement for interest and it was wrong to enter judgment on the averments in the plaint in the absence of contracts; that there was no evidence advanced to support the claim for interest and interest prior to the suit can only be claimed as damages and that requires proof of loss; and that the defence raised triable issues and should not have been struck out.

In his address to us Mr. Gitonga Murugara, the learned counsel for the appellant submitted that the learned Judge of the High Court erred in applying the

Provisions of **Limitation of Actions Act Chapter 22 Laws of Kenya** whereas the **Kenya Posts & Telecommunications Act Chapter 419 Laws of Kenya** was a later Act and **section 109 (b)** of that Act clearly spelt out that the limitation period was one year whereas the plaint the subject of the appeal was filed well after that period of one year. That application of **section 23** of the Limitation Act which provided that part payment took the matter outside the limitation period could not be correct. That was an arguable point and the suit should have been allowed to proceed to full hearing to ventilate it. Secondly, he also submitted that the mere fact that there was an agreement on the principal issue and a settlement reached on that account, did not in itself mean that the issue of interest was also agreed upon as these were two separate claims in the suit and further, Mr. Gitonga complained about the admission of documents that were exchanged in attempts to reach a settlement on principal sum. He submitted that in this case, no interest was ordered to be paid whereas there was no agreement between the parties on the interest claimed and the invoices issued by the respondent had no element of interest so that even the rate of such interest was not agreed upon by the parties. Lastly Mr. Gitonga stated that striking out a pleading is a draconian action which can only be taken in an obvious case, and in a case such as this where defence was pleaded against the interest claim and that claim having been denied, there should have been a full hearing to have the entire matter investigated.

On the other hand, Ms. Kethi Kilonzo the learned Counsel for the respondent vehemently opposed the appeal contending that parties are bound by their pleadings and as the appellant admitted in their defence that they received notice under **section 109** of the Posts & Telecommunication Act, and they also denied any settlement and denied owing any money and later settled the principal amount, it must accept that even interest was due. She felt that the trial court was right for when the suit was filed time stopped to run. As the appellant had paid part of the debt, the matter was taken out of the provisions of **section 109** and the provisions of Limitation Act would be applicable. She also felt that as the documents that were allegedly written without prejudice basis had accomplished their purpose, in that the agreements they sought to secure had been so secured, they were rightly relied on by the learned Judge. She asked us to dismiss the appeal.

We have anxiously considered the record, the grounds of appeal, the ruling of the learned Judge, the exhibits that were before her, the submissions by both counsel and the law. For what will be apparent later in this judgment, we will not go into detailed analysis of the entire saga. The application that was before the learned Judge of the High court was premised on **Order VI Rule 13 (1) (b) (c) and (d)**, **Order XII Rule 6** of the Civil Procedure Rules and **section 3A** of the Civil Procedure Act. **Order VI Rule 13 (1) (b) (c) and (d)** of the Civil Procedure Rules provides as follows: -

“13 (1) at any stage of the proceedings, the court may order to be struck out or amended any pleading on the ground that-

a.not applicable.

- 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 *Order XII Rule 6* provides:

“Any party may at any stage of a 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.”

In our understanding of the learned Judge’s Ruling, she was of the view that as the appellant had agreed to settle the principal amount and had indeed settled it, the appellant was thus presumed to have admitted indebtedness to the respondent and thus the interest that the respondent claimed in respect of the delay in paying that amount which amount it eventually settled must be met by the appellant for to her that interest was a consequence of and therefore part of the claim for the principal amount. She felt that as the principal amount was admitted out of the limitation period provided under *section 109* of the Kenya Posts & Telecommunications Corporation Act, the appellant’s act of admitting that claim took the claim out of the limitation period and thus the interest being, to her, a consequence of the admitted principal amount was also due as the provisions *section 109* (supra) no longer applied and *section 23* of the Limitation Act of Action Act would and was invoked.

The law as regards the principles that guide the court when dealing with an application seeking striking out a pleading is now well settled. In the well known case of **D.T. Dobie & Company (Kenya) Ltd vs. Muchina (1982) KLR 1**; Madan JA (as he then was) held:

“8. (obiter Madan JA) the process to strike out should be exercised only 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 explained as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing of the case.

9. (obiter Madan JA) 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 amendments, it should not be struck out.”

Although the learned Judge was dealing with an appeal emanating from an application ***under Order 6 Rule 13 (1) (a)***, nonetheless, the pronouncements he made which we do adopt, meant that a court of law should be very reluctant to strike out a pleading. A suit is for full hearing where discoveries are made, evidence taken including cross-examination of witnesses etc and the court eventually decides a matter when all facts are before it. Of course, there may be cases where the pleading is merely meant to deny the other party his obvious right in law. In such cases, the court must intervene to ensure sound and immediate justice. Such cases though are far between.

This court had a similar situation in the case of **Bakari Ali Ogada & 245 Others vs. Unilever Kenya Ltd, Civil Appeal No. 32 of 2008**. It stated as follows on the pertinent issues: -

“We are of the view that as far as is possible, the courts should encourage the resolution of disputes by hearing both sides on merit, without undue regard to technicalities. The courts should not easily strike out pleadings, unless there is a good reason to do so. We reiterate the principle outlined by this Court in Trust Bank Ltd vs. Amolo (supra) as follows: -

“The principal which guides the court in the administration of justice when adjudicating on any dispute is that where possible disputes should be heard on their own merit. This was succinctly put a while ago by George CJ (Tanzania) in the case of Esanji and Another vs. Solank (1968) EA at page 224,

The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that error should not necessarily deter a litigant from the pursuit of his right.”

In the matter before us, the record shows that the element of interest on the principal amount was claimed on account of delay in the payment of that principal amount. Such claim of interest was tabulated in the amended plaint which was filed on 10th April, 2001 over four and a half years after the original plaint was filed. There was no evidence that that interest claimed emanated from contracts between the parties. It is not reflected in the invoices. There was also no evidence that the rate charged therein was agreed between the parties. Without saying more, we are of the view that this was a claim that required full investigation at a full hearing to ventilate those aspects. The statement of defence to amended plaint denied liability of the interest that was sought by the respondent and in our view whether that claim of interest was due to the respondent or not was an arguable issue which had to go to full hearing. In this regard without adjudication on whether or not interest was payable in the circumstances the position at common law is that where interest is not agreed as a matter of contract it is not payable except in certain specified circumstances which include custom and usage. All these are triable.

Secondly, we have also looked at the issue of whether the appellant’s admission (if it was an admission) of the principal sum denied it the defence of limitation based on **section 109** of the **Kenya Posts & Telecommunications Act (cap 411)** or not and again we feel this was an issue that should have been fully heard by the court.

We do not think we need to say more for we have demonstrated that in our view there were triable issues that should have been left to go for full hearing of the court. In the event, the appeal is allowed, the decree of the High Court is set aside. Let the suit be fully heard by the High Court. Costs of this appeal and of the High Court to be paid by the respondent to the appellant.

Dated and delivered at Nairobi this 4TH day of MAY, 2012.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

J.G. NYAMU

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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