



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, O'KUBASU & ONYANGO OTIENO, JJ.A.)

CIVIL APPEAL NO. 202 OF 2006

BETWEEN

SWAPAN SADHAN BOSE ..... APPELLANT

AND

NYALI BEACH HOTEL LIMITED ..... 1<sup>ST</sup> RESPONDENT

KETAN SURENDRA SOMAIA ..... 2<sup>ND</sup> RESPONDENT

DOLPHIN HOLDINGS LIMITED ..... 3<sup>RD</sup> RESPONDENT

MARSHALLS (E.A.) LIMITED ..... 4<sup>TH</sup> RESPONDENT

*(Appeal from the Ruling and Order/Decree of the High Court of Kenya, Milimani Commercial Courts, Nairobi (Azangalala, J.) dated 24<sup>th</sup> day of March, 2006*

*in*

*H.C.C.C. NO. 164 OF 2004)*

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**JUDGMENT OF THE COURT**

This is an appeal from the ruling of the High Court (Azangalala, J.) delivered on 24<sup>th</sup> March, 2006 in which the learned Judge struck out the plaintiff's case against the 4<sup>th</sup> Defendant. In order to appreciate what is involved in this appeal it will be necessary to go to the root of the dispute.

By an Amended Plaint the appellant herein, **SWAPAN SADHAN BOSE** sued **KETAN SURENDRA SOMAIA** (1<sup>st</sup> Defendant), **DOLPHIN HOLDINGS LTD** (2<sup>nd</sup> Defendant), **MARSHALLS (E.A.) LTD.** (3<sup>rd</sup> Defendant) and **NYALI BEACH HOTEL LTD.**, (4<sup>th</sup> Defendants) seeking judgment against these defendants jointly and severally as follows:-

***“i That the first Defendant do transfer to the plaintiff 30% of issued share capital of the Second Defendant.***

***ii That the First Defendant do transfer to the plaintiff 100% interest of the Second Defendant in the Third and Fourth Defendants or in it's subsidiary companies free of any encumbrances whatsoever.***

***iii That the First Defendant do bear the costs of such transfer.***

**iv That the First Defendant do pay to the plaintiff damages at the rate of USD6250 per day from 11<sup>th</sup> August, 2001 until such time the First Defendant complies with what is prayed for in prayers (i) and (ii) above.**

**v That the Defendants be restrained until determinations of this suit, from transferring alienating or otherwise whatsoever the shareholding of DHL in the Third and Fourth Defendants.**

**vi In the alternative the First Defendant be ordered to pay to the Plaintiff if (sic) the sum of USD 15,000,000 plus interest thereon at court rates from 11<sup>th</sup> April, 2001 until date of payment.**

**vii Costs of this sui.”**

By way of Chamber Summons, application brought under **Order 6 Rule 13(1) (a)** of the Civil Procedure Rules the 4<sup>th</sup> Defendant (4<sup>th</sup> Respondent herein) sought the following orders in the High Court:-

- “1. The Amended Plaintiff herein dated 26<sup>th</sup> March, 2004 and amended on 14<sup>th</sup> October, 2004 be struck out;**
- 2. Consequently, the plaintiffs’ suit as against the 4<sup>th</sup> Defendant be dismissed;**
- 3. The 4<sup>th</sup> Defendant be at liberty to apply for such further or other orders and/or directions as this Honourable Court may deem fit and just to grant;**
- 4. The costs of this Application and of the plaintiff’s suit as against the 4<sup>th</sup> Defendants be borne by the plaintiff.”**

The application was brought on the following grounds:-

**“The Amended Plaintiff dated 26<sup>th</sup> March, 2004 and amended on 14<sup>th</sup> October, 2004 does not disclose any reasonable cause of action against the 4<sup>th</sup> Defendant in that:-**

- (a) There is no averment of any actionable act, wrong or omission with regard to the 4<sup>th</sup> Defendant;**
- (b) The said Amended Plaintiff complains of breaches of agreements by the 1<sup>st</sup> Defendant and not the 4<sup>th</sup> Defendants.**
- (c) The said Amended Plaintiff clearly shows that the 4<sup>th</sup> Defendant was not party or privy to the agreements the breach of which the plaintiff complains of and on the basis of which the suit herein has been instituted;**
- (d) The 4<sup>th</sup> Defendant is a separate and distinct legal entity from the other Defendants herein;**
- (e) There is no nexus between alleged cause of action herein and the 4<sup>th</sup> Defendant following the Ruling delivered by this Honourable Court on 17<sup>th</sup> October, 2005.”**

The application was placed before Azangalala, J. for determination. Having heard submissions from Counsel appearing for the parties, the learned Judge struck out the plaintiff’s suit as against the 4<sup>th</sup> defendant. In concluding his ruling which was delivered on 24<sup>th</sup> March 2006, the learned Judge said:-

**“In this case the plaintiff seeks an injunction to restrain the transfer alienation or dealing in any manner with shares of the 2<sup>nd</sup> defendant in the 3<sup>rd</sup> and 4<sup>th</sup> defendant. As the 2<sup>nd</sup> defendant is no longer a party to those proceedings the order sought by the plaintiff is no longer available to the plaintiff. In my view, the 4<sup>th</sup> defendant cannot qualify as a necessary party.**

**I am alive to the fact that striking out any pleading should be the last resort of any court and should be**

*resorted to only in plain and obvious cases. In my view however, this is a plain and obvious case where no cause of action at all has been disclosed against the 4<sup>th</sup> defendant. The upshot is that the amended plaint dated and filed on 14<sup>th</sup> October, 2004 is struck out as against the 4<sup>th</sup> defendant. The plaintiff's suit as against the 4<sup>th</sup> defendant is dismissed with costs.*

*The plaintiff will also bear the 4<sup>th</sup> defendant's cost of this application."*

The foregoing is what provoked this appeal in which the appellant's Counsel filed a Memorandum of Appeal setting out the following eight grounds of appeal:-

***“1. THAT the learned Judge erred in fact and law by allowing 4<sup>th</sup> Defendant's application dated 18<sup>th</sup> October, 2005.***

***2. THAT the learned Judge erred in law by not holding that 4<sup>th</sup> Defendant's interest would substantially be affected.***

***3. THAT the learned Judge erred in law by holding that issue of 4<sup>th</sup> Defendants shares was no longer a live issue.***

***4. THAT the learned Judge erred in law that the 4<sup>th</sup> Defendant was not necessary party to the proceedings.***

***5. THAT the learned Judge erred in fact and law by holding that no claim is made against the 4<sup>th</sup> Defendant.***

***6. THAT the learned Judge erred in law by holding that the 4<sup>th</sup> Defendant's application was based on plain and obvious principle of law.***

***7. THAT the learned Judge misdirected himself on the issue of shareholding.***

***8. The learned Judge exercised his discretion in favour of the 4<sup>th</sup> Defendant wrongly or based on wrong principles or misapplied and misdirected himself.”***

The appeal came up for hearing on 26<sup>th</sup> May, 2011 when Mr. M. Billing appeared for the appellant, while Mr. K. Mogeni appeared for the respondents.

In his submissions, Mr. Billing referred to the Memorandum of Appeal and stated that all the eight grounds could be put in one ground in that the learned Judge misdirected himself in holding that the 4<sup>th</sup> defendant was not a necessary party to the proceedings. Mr. Billing went on to submit that the 4<sup>th</sup> defendant was brought in as a party which would be affected by the outcome of the suit. He was of the view that the matter should have gone to full hearing. Finally, Mr. Billing submitted that any orders made against the 1<sup>st</sup> defendant would affect the interest of the 4<sup>th</sup> defendant. He therefore asked us to allow this appeal.

On his part, Mr. Mogeni submitted that there was no cause of action against the 4<sup>th</sup> defendant.

Mr. Mogeni went on to submit that there was no nexus between the plaintiff (appellant) and the four defendants, (respondents). As regards *paragraphs 7-12* of the Amended Plaint, Mr. Mogeni submitted that the shares did not belong to the 2<sup>nd</sup> defendant and that the shares can be traded in any manner.

Having referred us to his list of authorities, Mr. Mogeni asked us to dismiss this appeal.

We have set out the background facts of this matter and having considered the submissions by counsel appearing for the parties the issue is whether the learned Judge was right in striking out the appellant's suit as against the 4<sup>th</sup> defendant.

**Paragraph 12** of the Amended Plaintiff states:-

***“The Second, Third and Fourth Defendants are enjoined in these proceedings as their interest are substantially affected.”***

And among the orders sought by the appellant in the Amended Plaintiff are:-

***“ii That the First Defendant do transfer to the Plaintiff 100% interest of the Second Defendant in the Third and Fourth Defendants or in its subsidising companies free of any encumbrances whatsoever***

***iii***

***iv***

***v That the Defendant be restrained until determination of this suit, from transferring alienating or otherwise whatsoever the shareholding of DHL in the Third and Fourth Defendants.”***

Hence, from the foregoing it would appear that the appellant had issues to raise in respect of the 4<sup>th</sup> defendant. We have considered the pleadings and the authorities cited by both counsel and what emerges out of all these is that this was not a proper case for striking out. It should have been left to the appellant (as the plaintiff) to prove his case by way of evidence against the 4<sup>th</sup> defendant. As it has been stated in some of the cases cited to us, the power of the Court to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence and hence this power to strike out pleadings should be used sparingly and cautiously.

In **D.T. DOBIIE & COMPANY (KENYA) LTD. V. MUCHINA [1982] KLR 1** at p. 9 Madan, J.A. said:-

***“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and 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 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 a case before it.”***

In view of what we have stated so far, we are satisfied that there is merit in this appeal as the learned Judge was in error in striking out the appellant's suit against the 4<sup>th</sup> defendant. The appeal is therefore allowed and the superior court's ruling/order made on 24<sup>th</sup> March, 2006 set aside. The appellant may proceed with the suit in the superior court.

The costs of this appeal and costs in the superior court are awarded to the appellant.

***Dated and delivered at NAIROBI this 8<sup>th</sup> day of July, 2011.***

***P.K. TUNOI***

.....  
***JUDGE OF APPEAL***

***E.O. O'KUBASU***

.....  
***JUDGE OF APPEAL***

**J.W. ONYANGO OTIENO**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**