IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO.109 OF 2005

SAID HAMAD SHAMISI ……..……. APPELLANT

AND

DIAMOND TRUST OF KENYA LTD ……..……..……. RESPONDENT

(Appeal from a ruling and order of the High Court of Kenya

at Mombasa (Mwera, J) dated 24th February, 2005

in

H.C.C.C.No. 21 of 1998)

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JUDGMENT OF THE COURT

This is an appeal against a ruling and order of the superior court, ***Mwera, J***., in ***High Court Civil Case Number 21 of 1998***. The ruling stemmed from two chamber applications, the first dated 1st October, 2004 brought under ***Order 6 rule 12(1)(b), Order 16*** and ***section 5*** of the Civil Procedure Act and the second application dated 16th December 2004 brought under ***Order 6 rule 13(b)(c)*** and ***(d)*** and ***section 3A***. The first application was brought by ***Diamond Trust of Kenya Limited,*** the respondent herein, and sought orders to strike out the plaint and to have the suit dismissed with costs as against respondent while in the second application the appellant sought orders to have the respondent's defence struck out.

The respondent's application was based on the ground that there was no privity of contract between the appellant and the respondent which at the material time was a finance company carrying on *inter alia* a hire purchase business involving motor vehicles. The respondent claimed that the hire purchase agreement was between itself and Mustafa Mohamed A. Majid and Coastline Limited who are the first and second defendants respectively but were not cited as parties in the appeal. On his part, the appellant (plaintiff) by a plaint filed in court on 23rd January 1998 averred that he was the registered owner of two motor vehicles, passenger buses, Nissan Diesel registration numbers KAG 088P and KAG 062T and that by an oral agreement made on 1st February 1997 between the appellant and the first defendant, it was agreed that the appellant would sell the two passenger buses to the first defendant for a total sum of

Ksh.10 million. The appellant stated that it was a condition precedent to the oral agreement that the appellant would deliver the said vehicles together with their log books to the first defendant to facilitate the sale of the said motor vehicle and that the first defendant would pay Ksh.500,000 as a down payment on delivery of the motor vehicles. However, when the first defendant issued cheques which upon being presented to the appellant bank were returned unpaid and as a result the appellant demanded the entire purchase price from the first defendant.

However to his surprise on 18th August, 1997 the appellant by chance received from the Registrar of Motor Vehicles through his personal postal address, a log book in respect of motor vehicle registration KAG 088P which log book indicated that the ownership of the vehicle had been transferred to the first and second defendants as joint owners. In the plaint, the appellant claims that the alleged transfer was fraudulent and illegal and that he had not signed any transfer to the two transferees and consequently, the suit against all the respondent and the other two defendants was based on breach of contract, conversion and fraud. As regards the claim based on fraud the appellant had set out particulars of fraud in the plaint.

In answer to the appellant's claims the respondent, in its defence denied all the allegations as set out above and in particular denied the alleged fraud and that the two vehicles belonged to the appellant and contended that at all material times, the two vehicles were registered and lawfully owned jointly by the appellant and a third party finance company (not party to the suit) and that in February, 1997 the respondent bought the two vehicles at an agreed price of Kshs.10 million in respect of four vehicles which included the two vehicles which are the subject matter of the suit and this appeal. The agreement was to the effect that as the appellant had an outstanding loan from a third party, the respondent would pay the outstanding loan in the sum of Kshs.5,200,000 as regards the two vehicles and that after the discharge of the outstanding loan, the appellant would hand over the respective log books together with the transfer forms duly executed by the appellant or on his behalf.

The substance of the respondent's defence was that by hire-purchase applications dated 28th January 1997 and 24th February 1997 one ***Aziz Heri Mohamed*** and Coastline Limited (the hirers) respectively applied to the respondent for a hire purchase facility to enable them acquire motor vehicles KAG 0027 and KAG 088P respectively at a total hire purchase price of 8,935,081.20 and 8,473,080.60 respectively and that the dealer of the vehicles was the appellant and that the hire purchase financing was availed by the respondent to the two hirers whereupon the appellant *"lent"* to the two hirers the two vehicles and that the appellant was an agent of the hirers and that the respondent duly paid to the appellant the cash price set out in the hire purchase agreements in respect to the two vehicles.

On 24th February 2005 the superior court struck out the plaint as against the respondent on the ground that there was no privity of contract between the appellant and the respondent and also dismissed the appellant's chamber application dated 16th December, 2004 on the grounds that the application had been abandoned. Aggrieved by the said ruling the appellant filed the appeal citing the following grounds:-

"1. The learned judge erred in law and fact and further misdirected himself in holding wrongly that the appellant suit against the respondent was based on an oral agreement between the appellant and the first defendant in the superior court and that the respondent was not privy to the said agreement and therefore there existed no reasonable cause of action against the respondent to warrant the appellant suit to proceed to full hearing against the respondent.

2. The learned Judge erred in law and fact when he failed to consider and hold that the appellant suit against the respondent was one based on fraud as pleaded and particularized in the appellant's statement of claim and which fraud resulted to the illegal and wrongful deprivation of the appellant's property rights of ownership to his two motor vehicles buses KAG 088P and KAG 062T and which cause of action was a triable issue requiring determination thereof in a full trial.

3. The learned Judge further erred in law when he failed to consider all the pleadings filled by parties and further failed to make a finding that there existed triable issues that required their determination in a full hearing.

4. By holding that no reasonable cause was laid against the respondent by the appellant suit, the learned Judge misdirected himself by failing to consider the respondent's plea in its statement of defence alleging to have paid the appellant cash price for the purchase of the two motor vehicles as having been rebutted b y the appellant in his reply to the respondent defence and also in his replying affidavit to the respondent application for striking out the plaint as an issue that required the determination thereof in a full trial.

5. The learned Judge erred in law, and in fact in failing to hold that the respondent plea in its statement of defence that it acquired the ownership of the two motor vehicles from the appellant after having paid the appellant cash price set out in the hire purchase agreement and the consequent rebuttal by the appellant in his reply to defence amounted to serious and weighty triable issues in absence of clear evidence from the respondent to support its claim hereof.

6. The learned Judge erred in law by striking out the appellant suit when appellant case was not so plain, clear or obvious to warrant the exercise of such a drastic remedy.

7. The learned Judge erred in law by awarding costs to the respondent when the respondent had not filled any reply to the appellant's application to strike out the respondent's defence.

During the hearing of the appeal, ***Mr Mwangi Njenga***, advocate represented the appellant whilst ***Mr James Rimui***, advocate represented the respondent.

The principal grounds raised by ***Mr Njenga*** in his submission is that the striking out of the plaint by the superior court was drastic and inappropriate because the plaint raised several triable points including ownership of the vehicles, the circumstances surrounding the transfer to the first and second defendants and the validity of the subsequent hire purchase agreements. Mr Njenga further stressed that the plaint raised other triable issues including breach of contract, damages, conversion, fraud and illegality. He submitted that the striking out of pleadings can only be done in plain and obvious cases and in view of the litany of issues as outlined, the suit ought to have gone for full hearing. He concluded by citing several decisions handed down by this Court in the past in which the Court has frowned upon the striking out of suits with prima facie triable issues.

Mr Rimui supported the superior court judgment on the ground that there was no privity of contract between the appellant and the respondent in respect of the two hire purchase agreements and that parties are bound by their pleadings and that before the hire purchase agreements were executed the log books were registered in the names of the first and second defendants and that the first defendant was in fact borrowing money from the respondent to buy the vehicles from the appellant. He contended that the appellant had admitted that he had sold the vehicles to the first defendant.

We have deliberately and extensively set out the facts in extenso, as gleaned from the pleadings. This we did on purpose so as to avoid making any adjudication of the matter on merit at this stage. The reason for our restraint is that we would not want to embarrass any trial which might follow this judgment or tie the hands of the trial court on any point. We make no findings on any facts because this is not our mandate at this stage.

With respect, from the facts as set out in the pleadings analysed above, it is clear to us that the pleadings reveal many issues for adjudication in a full trial and that the superior court's observation that there was only one issue, namely the alleged absence of privity of contract as regards the hire purchase agreements was not supported by the pleadings and therefore the appellant was, without the benefit of a hearing, was sent away from the seat of justice as regards the other issues raised namely, conversion, fraud and illegality. The allegations of fraud are contestable. We think these are issues which should have been allowed to go for trial. In this connection the record reveal that in a related suit the appellant had obtained an ex-parte judgment against the first and second defendants on the basis of the same averments.

While we fully endorse Mr Rimui's submissions that a party is bound by his pleadings it is equally true that even courts are bound to adjudicate matters in terms of the issues raised in the

pleadings. Unfortunately for Mr Rimui, this is not what the trial court did in the case before us. The superior court in fact and in law failed to consider the issue of the alleged conversion, fraud and illegality of the transfer of the vehicles the subject matter of the suit and this appeal. In our view when a court fails to consider important issues raised, this reflects its failure to accord the parties equality of hearing which is itself a fundamental miscarriage of justice. In the result, the superior court was only able to summarily adjudicate on one issue namely privity of contract in respect of the hire purchase agreements and at the same time it proceeded to exclude the hearing of the other issues in a summary manner instead of having them litigated upon and thereafter a determination made. For this reason, we are of the opinion that the superior court failed to act justly when it opted to determine the matter using the summary process of striking out.

In the light of the above analysis of the legal position, we shall deliberately confine ourselves to a restatement of the law concerning the ambit of the courts as regards their power to strike out pleadings. In the case of ***D.T. Dobie Company (Kenya) –vs- Muchina (KLR 1982) 1***, this Court stated:

"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 continuously" …

In the same case ***Madan, J.A***. as he then was observed (Obiter)"

"***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."***

On the same point ***Bullen Leake*** and ***Jacobs*** Precedents of Pleadings 12th edition has expressed the same point as follows:-

"The exercise of the court's power by "summary process" means that the court may exercise its jurisdiction without a trial i.e. without hearing the evidence of witnesses examined orally and in open court, so that by summary process, the court adopts a method of procedure which is different from the normal plenary trial procedure. The result is of course that where these powers are invoked the action is stayed or dismissed or judgment is ordered against the defendant, the party affected may thereby be deprived of a plenary trial, but this is only because the court has concluded that the proceedings should properly be terminated or disposed of without a trial. For these reasons, the court will exercise its coercive powers by summary process to terminate proceedings without a trial only with the greatest care and circumspection and only in the clearest case".

Again in the case of ***DYSON -VS- ATTORNEY GENERAL [1911] K.B. 410*** *at*

419 the court held:-

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

Finally in the case of ***HUBDUCK & SONS LTD VS WILKINSON, HEYWOOD & CLARK [1899] I.K.B. 86 at 91 'Lord Pearson*** *stated:*

"The summary procedure … is only appropriate to cases which are plain and obvious so that any master or judge can say at once that the statement of claim as it stands is insufficient even if proved to entitle the plaintiff to what he asks."

In the case before us the plaint sets out alleged particulars of fraud and other triable allegations and the court ought to have readily appreciated the need to allocate time to have those issues heard on merit. It did not do so hence our intervention.

We accordingly allow the appeal and set aside the ruling/order of 24th February 2005 with costs to the appellant. In the result, the matter is remitted for hearing on merit before any judge of the superior court except *Mwera J*.

It is so ordered.

DATED and delivered at Nairobi this 5th day of March, 2010.

R. S. C. OMOLO

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

J. G. NYAMU

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR