



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 219 OF 2002

NURU CHEMIST LIMITED 1ST APPELLANT

JAMES ISABOKE 2ND APPELLANT

AND

NATIONAL BANK OF KENYA RESPONDENT

**(Appeal from a ruling and order of the High Court of Kenya at Milimani Commercial Courts
(Mbaluto, J) dated 24th May, 2002**

in

H.C.C.C No. 1343 of 2001)

JUDGMENT OF THE COURT

In a plaint dated 31st August 2001 and filed at the High Court of Kenya at Milimani on 4th September 2001, the respondent in this appeal, National Bank of Kenya Limited (respondent) sued Nuru Chemists Limited and James Isaboke, the first and second appellants respectively, alleging as follows, *inter alia*:

“4. Sometimes in 1996, the plaintiff Bank took over all debts, liabilities, obligations and duties of Standard Chartered Bank Kenya Limited, Kisii Branch.

5. The 1st defendant maintains and operates a current account and a loan account with the plaintiff Bank.

6. By an agreement dated 16th August 1993, the 1st defendant applied for and was granted a loan of Kshs.2,000,000/= by Standard Chattered Bank Kenya Limited, Kisii Branch.

7. It was a term *inter alia* of the said agreement that the said:

(a) Sum would accrue interest at the rate of 37% per annum.

(b) Sum would be repaid on demand at any time at the Banks discretion.

8. By an instrument of guarantee and indemnity dated 16th June 1993, the 2nd Defendant guaranteed the 1st Defendant's indebtedness to the Standard Chartered Bank of Kenya, Kisii Branch upto the sum of Ksh.3,500,000/=.

9. The plaintiff's claim against the 1st Defendant is for the sum of Kshs 5,937,231.70 as at 31st May 2001 in respect of loan and overdraft facilities provided by the Defendant (sic) at its request full particulars are well within its knowledge and which sum continues to accrue interest at the rate of 26% p.a. until payment in full.

10. The plaintiff's claim against the 2nd defendant is for the sum of Kshs 3,500,000/= being the sum payable under the instrument of guarantee dated 6th June 1993 duly executed by the defendant in favour of the plaintiff to secure the loan advanced to the 1st defendant under the loan agreement dated 16th August 1993.

11. Despite demand and notice of intention to sue having been issued, the defendants have failed, refused and or neglected to make good the plaintiff's claim.

12. The plaintiff avers that there is no other suit or proceedings pending in any other court involving the parties and issues to this suit.

13. The cause of action arose in Kisii within the jurisdiction of this Honourable Court.

REASONS WHEREFORE the plaintiff prays for:

(a) Judgment against the 1st Defendant for the said sum of Ksh.5,937,231/70 together with interest at 26% from 31st May 2001 until payment in full.

(b) Judgment against the 2nd defendant for the sum of Kshs.3,500,000/=.

(c) The costs of this suit together with interest thereon at court rates from date of filing suit until payment in full.

(d) Any other relief that the Honourable Court may deem fit to grant.”

In response to the same plaint, the appellants filed joint statement of defence dated 11th October 2001 and filed on 12th October 2001 in which they denied the claim stating as follows, *inter alia*:

“2. The defendants have no knowledge that the plaintiff took over debts liabilities, obligations and duties of Standard Chartered Bank Kenya Limited Kisii Branch.

3. The defendants denies (sic) ever operating a current and loan account with the plaintiff and puts them (sic) on strict proof.

4. The contents of paragraph 6 is admitted save the fact the defendants was (sic) servicing the same and should have made efforts to recover the same immediately the same was due.

5. The defendants denies (sic) that this Honourable Court has got no jurisdiction (sic) to entertain this suit as defendants resides (sic) in Kisii and has business in Kisii and urge this Honourable Court to have this suit transferred to Kisii.

6. The defendants denies (sic) that a demand and notice of intention to sue was duly given before this suit was filed.

7. SAVE what is expressly admitted herein the defendants denies (sic) each and every allegation

contained in the plaint as if the same were set out herein and traversed seriatim.

REASONS WHEREFORE the defendants prays that the plaintiff's suit against them be dismissed with costs."

After the close of pleadings, the respondent filed a notice of motion erroneously dated 5th February 2001 but filed on 7th February 2002 together with a supporting affidavit sworn on 10th December 2001 but also filed on 7th February 2002. In that notice of motion brought under Order VI rule 13(1) (b) (c) and Order 35 rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act, Chapter 21, Laws of Kenya, the respondent sought orders that:

"(i) The defendants' statement of defence dated 11th October 2001 be struck out.

(ii) In the alternative or without prejudice to the foregoing, summary judgment as prayed in the plaint be entered against the defendants.

(iii) That costs of this application be provided for."

The grounds for that application were, in a nutshell, that the appellants were truly and jointly indebted to the respondent in the sums claimed in the plaint; that the defence did not raise any triable issues and was a sham, bogus, illusory, evasive, scandalous, frivolous and vexatious; and that the defence may prejudice, embarrass or delay the fair trial of the action. In the supporting affidavit sworn by the Bank Manager of the respondent bank, the respondent repeated that it had taken over all debts, liabilities, obligations and duties of the Standard Bank Kenya Limited Kisii Branch and the appellants were indebted to the said Bank and that the debt claimed was one of the debts taken over. The appellants failed to pay the debts and made various repayment proposals which they did not honour. It annexed statements of accounts allegedly in respect of the appellants' accounts with the Standard Bank and letters written by the appellants to the respondent making proposals for repayments of the alleged debt. The appellants filed a replying affidavit sworn by the second appellant on 10th May 2002. Paragraph 3, 4, 5, 6 and 7 of that affidavit are important and we do reproduce them. They state:

"3. That I have never entered into agreement with the plaintiff neither was I ever advanced any loan by the plaintiff company.

4. That all loans advanced by Standard Chartered Bank was (sic) fully paid through a loan advanced by Barclays Bank of Kenya. (Annexed and marked JIA is copy of the letter of offer from Barclays Bank Kisii Branch).

5. That upon receipt of the said loan from Barclays Bank I paid Standard Chartered Bank as follows:

(i) Cheque No. 820287 – Kshs. 1,100,000

(ii) Cheque No. 820288 – Kshs. 750,000

(iii) Cheque No. 820289 – Kshs. 240.835

Total 2,090.835

6. That I have fully repaid all my loans advanced by Standard Chartered Bank Ltd. And there is no debts which the Plaintiff is taking over.

7. That I further maintain I never operated a loan account with plaintiff."

That application came up before the superior court (Mbaluto J.) for hearing on 17th May 2002. The applicants' counsel applied for adjournment claiming that he had just been instructed to take over the

conduct of the matter from the applicants who were earlier on acting in person, and he had no time to prepare his case. The learned Judge rejected that application for adjournment and the matter proceeded with the learned counsel for the respondent making his submissions whereas the learned counsel for the applicants in response said he had nothing to say. Thus in effect, the appellants were not heard in their response to the submission by the respondent's counsel. The learned Judge of the superior court had discretion to allow or refuse the adjournment and as he gave reasons for his refusal of the adjournment, we have no jurisdiction to interfere in his exercise of that discretion which we feel he did exercise properly. As the matter was heard inter partes, we see no flaws in the procedure. Having heard the application, the learned Judge allowed it, struck out the defence and entered judgment for the respondent against the appellants jointly and severally as prayed in the plaint. In doing so, he had the following to say:

“Given the evidence as briefly summarized above, I find that the defendants’ defence is a sham which wholly fails to raise any triable issues. For that reason, it is struck out and judgment entered in favour of the plaintiff against the defendants jointly and severally as prayed in the plaint. The defendants will jointly and severally bear the plaintiff’s costs of this application.”

The appellants felt aggrieved by that decision and hence the appeal before us premised on three grounds as follows:

- “1. That the learned Judge erred in law and fact by not holding that there was a triable issue or issues.
2. That the learned Judge erred in law and fact by failing to appreciate that the defendants had a good defence to wit that there was no evidence of transfer or assignment of defendants’ alleged debt from Standard Chartered Bank of Kenya.
3. That the learned Judge erred in law by granting the respondent’s prayers in the superior court.”

In his submissions before us, Mr. Mbigi, the learned counsel for both appellants, contended that the learned Judge of the superior court did not demonstrate in his ruling any regard for the law as regards the principles guiding the courts when considering an application for summary judgment such as was before him. He maintained that had the learned Judge done that, he would have found that there were several triable issues raised both by the statement of defence and by the replying affidavit and these would have entitled the appellants to leave to defend the suit.

Mr. Wangila, the learned counsel for the respondent, on the other hand felt the defence was struck out on proper grounds as the substantial parts of the claim were, in his view, admitted by the statement of defence and further that the appellants through their letters also admitted knowledge of their indebtedness to the respondent.

The law as regards the principles that guide the courts when considering application either for striking out a pleading under Order 6 rule 13(1) or for summary judgment under Order 35 rule 1 both of the Civil Procedure Rules are now well settled. We note that the application that was before the superior court was brought pursuant to Order 6 rule 13(1) (b) and (c) and under Order 35 rule 1 of the Civil Procedure Rules. These are two different provisions of the Civil Procedure Rules and each sets out its own requirements that must be demonstrated before an applicant succeeds.

Order 6 rule 13(1) (b) and (c) 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)
- (b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action.

(d)

An applicant who brings an application seeking an order to strike out a pleading on this ground must demonstrate to the court either that the pleading, in this case, the defence, is scandalous, or it is frivolous or vexatious or that it may prejudice, embarrass or delay the fair trial of the case that was before the superior court. For a pleading to be struck out under Order 13(1) (b) or (c) it is obvious that the pleading must exist.

In this case, the statement of defence was already filed. The learned Judge found however that it was a sham because there were two letters allegedly written by the appellants which, in the learned Judge's mind, were acknowledgment of the debt by the appellants. He thus apparently felt satisfied that in the presence of the two letters, the appellants' pleas that they never operated a loan account with the respondent was scandalous, or vexatious and would delay fair trial of the action, and so he struck out the defence.

Order 35 rule 1(1) (a) states:

"In all suits where a plaintiff seeks judgment for -

(a) a liquidated demand with or without interest.

(b)

where the defendant has appeared the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest

In such a case, it is important to note that the plaintiff need not wait for a defence to be filed. He is required to move the court for summary judgment soon after the appearance has been entered by the defence. That, we believe, is the reason why the defendant is enjoined under Order 35 rule 2 to show either by an affidavit or by oral evidence, or otherwise, that he should have leave to defend the suit. In the matter before us, the learned Judge, having struck out the defence, proceeded to enter judgment saying he had perused the statement of defence and the affidavit and he had found them wanting.

We have, on our own, as a first appellate court, perused and considered the record, the ruling of the superior court as well as the law. We are aware that the learned Judge in deciding the matter was exercising his unfettered discretion and that being the case, we must, in law, be very reluctant to interfere with that exercise of his discretion – see Mbogo and another vs. Shah (1968) EA 93. We are not persuaded that the statement of defence that was filed by the appellants was a sham. The respondent in its pleadings, part of which we have reproduced above, alleges at paragraph 4, that it took over the debts, liabilities, obligations and duties of Standard Chartered Bank Kenya Limited, Kisii Branch and that allegation is what it contended enabled it to be a party to the original contract that was allegedly between the Standard Bank, Kisii Branch and the appellants. The appellants in their defence at paragraph 2 state that they had no knowledge that the respondent took over debts, liabilities, obligations and duties of the Standard Chartered Bank, Kisii Branch. In our view, that is a triable issue which is neither scandalous, frivolous or vexatious. We cannot see how it may prejudice, embarrass or delay the fair trial of the case. However, the learned Judge declared it a sham because there were exhibited by the respondent two letters allegedly written by the appellants which indicated that the appellants acknowledged that the respondent had taken over the Standard Bank loan to him. In our view, those letters must be read together with the appellant's replying affidavit sworn on 10th May 2002. If that is done, then what becomes clear is that the letters were written on 9th May 1996 and 26th April 1999 while the replying affidavit was sworn over three years after the last letter was written. In the replying affidavit, the second appellant states that he had never entered into an agreement with the respondent, neither was he ever advanced any loan by the respondent and goes on to say that all the loans advanced by Standard Chartered Bank had been fully paid through a loan he obtained from Barclays Bank of Kenya. He then revealed the numbers of the cheques

used in paying the loan and the amounts that were in each cheque and ended by saying he had fully paid the Standard Bank loan to the respondent and there were then no debts which the respondent could have taken over. In our view, the appellants were raising the issue as to whether the respondent had *locus standi* to sue them, in that there was no privity of control between them. The second issue they were raising is that even if there was a debt with the Standard Chartered Bank, Kisii Branch, which they did not deny, the same had been paid. This second issue was raised three years after the alleged letters had been written – a period long enough for making such payment. The other point, Mr. Mbigi raised, was the way the claim was made and the judgment was entered which would mean double payment in respect of a loan of Ksh.2,000,000/= given to the first appellant which was guaranteed by the second appellant to the extent of Ksh. 3,500,000/=.

The law, as is stated above, is that even if the respondent was to proceed under Order 6 Rule 13(1) (b) and (c) only, it would still have been required to show that the issues raised in the statement of defence part of which is reproduced above is scandalous, frivolous and vexatious and may prejudice, embarrass or delay the fair trial of the suit or, in other words, that the statement of defence does not raise any issues worth being ventilated. Secondly, that if the respondent were to proceed under Order 35 rule 1 (a), the appellants had to show, through affidavit, oral evidence or otherwise that they had a defence to the suit which would entitle them to have leave to defend the suit which also means, in other words, that the issues raised or to be raised in their defence were triable issues and thus were worth being ventilated at a full trial.

We think, we have said enough to show that in the matter before us, there were substantial questions to be tried. Without appearing to be deciding those issues and without pretending to exhaust the issues, we think the issue as to whether the respondent had *locus standi* to sue the appellants on the basis of a contract entered into between Standard Bank and the appellants is a triable issue. The question whether the alleged debt owed to Standard Bank had been fully repaid as alleged in the replying affidavit is another triable issue. Allegations were made by the respondent that the respondent took over the debts owed to Standard Bank, Kisii Branch and that the subject debt was one of the debts and it had not been repaid. These were denied. That called for a full trial where proof would be availed in respect of those claims.

In the case of GICIEM CONSTRUCTION COMPANY VS AMALGAMATED TRADE & SERVICES, (1983) KLR 156, this Court stated:

“The discretion under Order XXXV should be exercised cautiously because as it was stated in the case of James V. Stone (1894) AC 122 –

“The powers to give summary judgment under Order XXXV is intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment and where therefore it is inexpedient to allow a defendant to defend for mere purposes of delay”.

As a general principle, where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a *bona fide* defence, he ought to have leave to defend. Leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to the facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment.”

The learned Judge of the superior court, with respect, did not direct his mind to the above legal principles. He did not consider, for instance, that there was need to ventilate the question as to whether or not the respondent indeed took over the alleged debt owed to Standard Bank, Kisii Branch by production of the relevant documents which could only be done at a full hearing. Again, having refused the adjournment which would have given the appellants a chance to produce the cheques they allegedly used in paying the debt as they stated in their replying affidavit, the learned Judge did not consider that that allegation that the debt to Standard Bank, Kisii Branch had to be proved at a full hearing where documents or exhibits proving payments would be availed.

In the result, we have no alternative but to interfere with the learned Judge's discretion. This appeal must be allowed. We allow it, set aside the order striking out the defence, and set aside the judgment entered in favour of the respondent against the appellants vide the superior court's ruling dated 24th day of May 2002. We substitute therefor an order dismissing the notice of motion dated 5th February 2001. We order that the suit shall proceed to full hearing. The respondent will pay the costs of the appeal and the costs of the notice of motion in the superior court. Judgment accordingly.

Dated and delivered at Nairobi this 25th day of April, 2008.

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR