



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI**

Civil Appeal 146 of 2001

CRESCENT CONSTRUCTION CO. LTD. APPELLANT

AND

DELPHIS BANK LTD. RESPONDENT

**(Appeal from a ruling and order of the High Court of Kenya at Milimani Commercial Courts
(Keiwua, J) dated 15th December, 1998**

in

H.C.C.C No. 4082 of 1994)

JUDGMENT OF THE COURT

This is an appeal from the ruling of the superior court (Ole Keiwua J, as he then was) delivered on 15th December 1998 in which the plaint filed in the superior court on 17th November 1994 by the appellant, **Crescent Construction Company Limited**, against the respondent, **Delphis Bank Limited**, was struck out on grounds that it disclosed no cause of action and it was also an abuse of the court process and vexatious.

The record shows that prior to 26th November 1992, the appellant was a customer of a bank, then existing and carrying out its operations in Kenya, and known as Bank of Credit and Commerce International (Overseas) Limited (BCCI). The two had some dealings on banker – customer basis. Immediately before 26th November, 1992, BCCI ceased to operate in Kenya and in all other countries and the respondent claimed that BCCI had transferred to it (respondent) its actionable claims, loan agreements, mortgages and chargers over properties which were the subject matter of the loan transactions between the appellant and that bank. The respondent therefore assumed the status of BCCI and claimed immediate payment of monies allegedly loaned to the appellant. When the appellant failed and/or delayed in meeting the respondent's demands, the respondent filed Winding Up Cause No. 38 of 1993 dated 8th September, 1993 in which it alleged that the appellant was insolvent and prayed that it be wound up by court under the provisions of the Companies Act and such other orders be made as the court may deem fit and the petition's costs be provided to the petitioner out of the assets of the company on priority. Before that petition could be advertised, the appellant filed chamber summons dated 15th October, 1993 under certificate of urgency in which it sought to restrain the respondent from advertising or further advertising the petition or from taking any other proceedings upon the said petition until the application was determined interpartes and also sought a temporary injunction to restrain the respondent

from taking any further proceedings upon the petition and thus the “said petition be removed from the file of the proceedings stayed and/or be struck out”. That application had a supporting affidavit annexed to it alleging among other grounds, lack of *locus standi* on behalf of the respondent. On 19th October 1993, the superior court issued an order restraining the respondent, whether by itself, its directors, officers, servants, or agents or any publishers from advertising or further advertising the winding-up petition till the application was heard *inter partes* on 2nd November, 1993. That interim injunction order was extended from time to time till the application was heard and on 20th April 1994, the superior court (Bosire J.) struck out the respondent’s petition with costs to the appellant. In striking out the petition, the superior court stated, *inter alia*, as follows:

“As to whether the assignment of the claim is illegal is not an issue here. The petitioner having said that it based its petition as creditor on the provisions of Ss 130 and 131, the court’s duty is confined to satisfying itself whether indeed that is so. By reason of those two provisions and the definition of actionable claim contained in S3. of the Transfer of Property Act, the petitioner’s position as creditor is not established. The case of Kunvarji s. Varshani & another vs. BCCI - Civil Application No. Nai. 68 of 1992 (CA) is distinguishable on its own peculiar facts. This petitioner in this cause was seeking to realise securities on behalf of BCCI before establishing its position as successor or assignee of the debt which it was claiming.

In the foregoing circumstances, I will grant prayer (2) of the application dated 15th October, 1993 and will strike out the petition with costs. Order accordingly.”

After the respondent’s petition had been struck out, the appellant, feeling aggrieved by the winding up petition filed by the respondent, filed a plaint in the superior court, Civil Case No. 4082 of 1994, dated 17th November 1994, against the respondent, seeking judgment against the respondent for:

“A. Shs 125,000,000.00 as special damages.

B. General Damages.

C. Aggravated or exemplary damages.

D. Interest on each of the foregoing from the date of the filing of this suit until payment in full.

E. Costs of this suit.

F. Such further, other or consequential relief that this Honourable Court may deem fit.”

According to what we can read from that plaint, the above reliefs were sought on the allegation that the winding-up petition filed by the respondent, to which we have referred above, was unlawful, brought contrary to the law for ulterior purposes and was an abuse of the process of the court; that the said winding-up petition and the application to stay it were reported in the national newspapers and were widely known throughout the Republic where the appellant carried out its business and particularly it was known to the relevant ministries, financial institutions and for all those reasons, the appellant suffered loss, injury, damage and further loss and damage in its business standing, trading reputation and its credit-worthiness. The appellant also cited in that plaint matters that it alleged entitled it to additional claims and exemplary and aggravated damages. The respondent filed a defence in response to the plaint and also filed, together with that defence, a counter-claim. At paragraph 2 of the statement of defence, the respondent pleaded that the plaint disclosed no cause and/or reasonable cause of action. It also stated that the suit was an abuse of due process of the court and was scandalous and vexatious. It maintained that its winding-up petition was based on proper legal principles as according to it, the appellant did owe it money as a debt that it owed to the erstwhile BCCI which the respondent was properly authorized to claim and did claim. It stated further that it was not liable to the appellant on account of any reports about the petition having been presented as the same reports never emanated from it. As to the claims for exemplary and or aggravated damages, the respondent denied each and every allegation of the same as

contained in the plaint and the particulars thereof and put the appellant to strict proof thereof. It specifically denied that the appellant was entitled to exemplary and/or aggravated damages. In the counter-claim, the respondent claimed from the appellant Ksh.109,606,970/45 plus interest at 43% p.a. from 27th February, 1993 till full payment, being the amount owed to it in respect of the claim which was earlier on the subject of the winding-up petition.

The appellant filed a defence to the counter-claim in which it denied being indebted to the respondent and sought the dismissal of the counter-claim with costs.

After the close of the pleadings, the respondent filed chamber summons dated 30th October, 1995 in the superior court in which it prayed for orders:

- “1. That the plaint dated 17th November 1994 be struck out.**
- 2. That judgment be entered for the defendant/ applicant as claimed in the counter-claim.**
- 3. That the cost of this application be awarded to the Defendant/Applicant.”**

That chamber summons was brought under **Order VI rule 13(1) (a), (b) and (d)** and **Order 35** of the Civil Procedure Rules and **section 3A** of the Civil Procedure Act. It was premised upon the following grounds:

“(a) That the Plaintiff’s suit is based upon alleged publication of a judgment in High Court Winding- Up Cause No. 38 of 1993 by certain Newspapers.

(b) That the publication was in routine dissemination of news by Newspapers under their constitutional right to print proceedings in court of matters of interest according to their (the Newspaper’s) understanding.

(c) That the publication is too remote and no way contributing or can cause the alleged loss to the plaintiff.”

The appellant filed grounds of opposition to the respondent’s chamber summons. In its opposition, the appellant raised fifteen grounds. As the same grounds are brief, we set them out herebelow. They were:

- “1. The grounds set out in the application do not support the order and rules of Civil Procedure relied upon or their requirements.**
- 2. The grounds set out in the application are matters of alleged fact and evidence and are therein asserted contrary to the law applicable thereto.**
- 3. Ground (a) of the application is not true and is factually wrong.**
- 4. The grounds set out in the application do not disclose any basis to strike out the plaint.**
- 5. The application does not satisfy the principles of striking out set out by the Court of Appeal in D.T. Dobie & Co. vs. Muchina – CACA No. 37 of 1978.**
- 6. No plaint can be struck out under the provisions of S. 3A, Civil Procedure Act relied upon by the Defendant.**
- 7. The application under O. 35 is defective and in violation of the provisions of law applicable thereto.**
- 8. The grounds set out in the application do not disclose any basis to enter summary judgment.**

9. **There are several serious triable issues disclosed on the pleadings and the plaintiff is entitled to leave to defend against the defendant's counter-claim.**
10. **No judgment on a counterclaim can be entered summarily under the provisions of S.3A, Civil Procedure Act relied upon by the defendant.**
11. **The defendant is seeking to relitigate issues which are res judicata.**
12. **The defendant is trying to circumvent the doctrine of res judicata applicable hereto.**
13. **The defendant is seeking to relitigate issues which are subject to issue estoppel.**
14. **The defendant is trying to circumvent the principles of issue estoppel applicable hereto.**
15. **All the matters set out in the pleadings."**

That is the chamber summons which was heard by the superior court (Ole Keiwua J.) and which was partly allowed resulting into the appeal before us. We make haste to state that although the chamber summons was purportedly brought under **Order VI rule 13(1) a, b, d, Order 35** of the Civil Procedure Rules and **section 3A** of the Civil Procedure Act, when it came up for hearing, the prayer for summary judgment on counter-claim was abandoned and towards the end of his submissions in chief, Mr. Hira, the learned counsel for the respondent, further informed the court that he was relying on the provisions of **Order 6 rule 13(1) (a)** only. It is upon that assurance that Mr. Nowrojee, the learned counsel for the applicant, addressed that court in reply to the respondent's submissions. The superior court in its ruling stated as follows in pertinent parts:

"As the publication of the petition and application to strike out was not by the defendant and the petition was struck out for not being a creditor petition and for lack of compliance with section 220(a) of the Companies Act, I am satisfied that the defendant has shown that the plaint discloses no cause of action and it is also an abuse of the court process and it is vexatious. The plaint is accordingly struck out with costs."

As we have stated above, the appellant felt aggrieved by that decision and has come before us on appeal citing nine grounds of appeal in its memorandum of appeal dated 29th June 2001. On the main, the appellant's complaints are that the learned Judge erred in law in holding as he did, that the plaint disclosed no cause of action; that the learned Judge erred in law in holding that the plaint was also an abuse of the court process and was vexatious while the application before him was confined to **Order VI rule 13(1) (a)** of the Civil Procedure Rules only; that the learned Judge erred in holding as he did that the plaint did not disclose any cause of action merely because the publication of the petition was not by the respondent; that the learned Judge erred in law in considering evidence when dealing with the application before him which was under **Order 6 rule 13 (a)** of the Civil Procedure Rules and that the learned Judge applied wrong principles in considering the matter that was before him.

The learned counsel for the appellant, Mr. Nowrojee and Mr. Nyaoga, as well as the learned counsel for the respondent, Mr. Kiragu, addressed us at length on their respective legal and factual position and we have anxiously considered the rival arguments as well as the pleadings, the ruling by the superior court and the law. After the respondent had withdrawn its application for summary judgment on the counter-claim and in effect abandoned reliance on **Order 6 rule 13(1) (b)** and **(d)** which were part of the basis of its application, all that remained before the superior court was an application to strike out a plaint brought under **Order VI rule 13(1) (a)**. That rule states 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) it discloses no reasonable cause of action or defence."

That rule, by its use of the word “*may*”, confers upon the court the discretion to either strike out a plaint upon being satisfied that it discloses no cause of action or to strike out defence if it discloses no reasonable defence or to order their amendment, even though it may find that the plaint as it stands does not disclose a cause of action or the defence does not disclose a reasonable defence. In our view, when dealing with a plaint, that discretion is limited as it is not clear under what circumstances a plaint may fall short of disclosing a cause of action so as to have it amended and when it may be struck out. We think, when, as Madan JA. said in the case of **D.T. Dobie vs. Muchina (1982) KLR 1** (to which we will later refer) a plaint is weak but shows some form of a cause of action, the court can, under **Order VI rule 13(1) (a)**, order it to be amended, but when it lacks cause of action completely, then it stands to reason that it ought to be struck out for in such a situation, there is nothing to be amended. Be that as it may, in all cases brought under **Order VI rule 13(1) (a)**, the court is obliged in law to look at no evidence i.e. no affidavit or any evidence from the bar in considering whether or not a plaint or a pleading raises a cause of action. The court must look at the pleadings only and not go beyond the pleadings. The predecessor to this Court stated in the case of **Jevaj Shariff & Co. vs. Chotail Pharmacy Stores (1960) EA 374** as follows:

“The question whether a plaint discloses a cause of action must be determined upon a perusal of the plaint alone, together with anything attached so as to form part of it, and upon the assumption that any express or implied allegations of fact in it are true.”

This is proper because once the court incorporates evidence in its consideration of the pleading at this stage, then the aim of the rule which is to dispose of unnecessary and baseless litigation speedily will be defeated. However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realisation that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drug a person to the seat of justice when the case purportedly brought against him is a non-starter. The principles to guide the court in the exercise of its discretion when considering an application under **Order VI rule 13(1) (a)** have been spelt out in several cases but the judgment of Madan JA. in the case of **D.T. Dobie vs Muchina (supra)** gives what has always been considered a summary of the law on the matter. He stated, *inter alia*, as follows:

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Seller L.J. (supra). As far as possible indeed, there should be no opinion expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.

If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally, a law suit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly 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.

On the other hand, if there is a point of law which merits a serious discussion, the court should be asked to proceed under Order XIV rule 2.”

That case has been followed by the courts in this jurisdiction consistently. The legal principles pronounced therein are sound law and we have no hesitation in being guided by it as it reflects the correct legal position.

In the case before us, we will ignore the learned Judge's part of the ruling that says "***the plaint was also an abuse of the court process and vexatious***". We do so because we do feel that that aspect did not form the main part of the reasons for striking out the plaint but rather were added as a consequence of the finding that the plaint disclosed no cause of action. However, even after ignoring that aspect of the ruling, we still find some difficulties in accepting that the learned Judge applied the correct principles as we have demonstrated above in coming to the conclusion that the plaint indeed lacked a cause of action and therefore striking it out. At the very onset of his ruling, the learned Judge stated as follows:

"The defendant applies to have the plaint struck out as the claim is based on some illegal publication of a winding up petition W.U.C No. 38 of 1993. The publication complained of was by newspaper independently of the defendant. In any event that publication is too remote and in no way contributed or could cause loss allegedly suffered by the plaintiff. I agree that the publication in question took place independently of the defendant and I am satisfied that it has not shown that the defendant was instrumental in the said publication which was one of the incidents of court proceedings."

From the extract above, it would appear that the learned Judge was under the impression that the plaint complained of publication of the winding up cause by the respondent only. This was, in our view, erroneous. A plain reading of the plaint shows that the complaint was that as a result of the winding up cause being filed by the respondent for no good cause, even though official publication of the same was restrained, the suit still found its way into the normal circulation and reached the ears of those persons with whom the appellant was doing business and that affected its business adversely. That was a matter for court's investigation through evidence being adduced before it. Further, at paragraph 20 of the plaint, the appellant alleged that it suffered exemplary and/or aggravated damages. Whether it indeed suffered the same damages and whether those damages were remote or not were, in our view, matters that required full investigation and thus called for hearing of the suit.

Further, we do agree that the learned Judge considered what was not before him for consideration when he held as he did that:

"The court also found that the petition had not been established to be a creditor petition. That court in my view did not go as far as to find or to hold that the petition was brought for purposes that were not proper."

That holding must have resulted from considering the evidence and the court was not at that stage obliged to consider any other matters or evidence. Its sole duty, as we have indicated above, was to consider the plaint as it stood and decide whether or not it disclosed a cause of action.

We think we have said enough to show that in our view, the plaint dated 17th November, 1994 and which was the subject of the ruling delivered on 15th December, 1998 did not "*appear so hopeless that it plainly and obviously disclosed no reasonable cause of action.*" Without saying any more for fear of prejudicing the hearing of the entire suit, we feel it was for hearing.

In the result, we allow the appeal. The ruling delivered on 15th December, 1998 and all consequential orders are set aside. The appellant will have the costs of this appeal and of the chamber summons dated 30th October, 1995.

Judgment accordingly.

Dated and delivered at Nairobi this 9th day of February, 2007.

R.S.C OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR