REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
(CORAM: TUNOI, O'KUBASU & WAKI, JJ.A)
CIVIL APPEAL NO 335 OF 2001
BETWEEN

M/S RAMJI MEGJI GUDKA LTD…….……....…….….APPELLANT

VERSUS

ALFRED MORFAT OMUNDI MICHIRA…….....……...1ST RESPONDENT

GETEMBE THRIFT COMPANY LTD…..…….....…….2ND RESPONDENT

THOMAS ORESI…….....…….……..3RD RESPONDENT

(Appeal against the ruling and Order of the High Court of

Kenya at Kisii (Wambilyangah J) dated 3rd October, 2001
in
H.C.C.C. NO. 40 OF 2001
****

JUDGMENT OF THE COURT

This is an appeal from the ruling of Wambilyangah J. delivered on 3rd October, 2001 dismissing the appellant's application to strike out the statement of defence and counter-claim.

We must state on the outset that the record of appeal herein was very poorly prepared and we are mildly surprised that it has reached the hearing stage in the form it is. We shall, however, try our best to decipher what the parties are seeking.

The dispute herein relates to a piece of land described as KISII TOWN/BLOCK 11/72 together with improvements thereon. The lease for this piece of land *(the suit land)* was registered in the name of M/S GETEMBE THRIFT CO. LTD and pursuant to a written sale agreement the property was offered for sale to one, Alfred Morfat Omundi Michira, *(1st respondent in this appeal)*. According to the appellant, *(the plaintiff in the superior court)* the 1st respondent failed to fulfill his part of the agreement which meant *Getembe Thrift Co. Ltd* was entitled to enter into a new agreement which culminated in the transfer of the lease into the name of the appellant. Consequent upon being the registered owner of the suit land, the appellant instituted legal proceedings against the 1st respondent seeking delivery of vacant possession. That was via High Court Civil Case No. 40 of 2001 at Kisii. What we have endeavored to summarize above is what we can make of the appellant's plaint filed on *3rd March, 2001*.

The 1st respondent *(as the defendant in the superior court)*, filed a defence and counter-claim which was filed on 30th April, 2001. In the defence and counter-claim, the appellant's claim was not only denied but the 1st respondent alleged fraud and proceeded to give particulars of fraud in the said defence.

The 1st respondent stated in paragraph 4 of his defence as follows:-

"4. the defendant shall aver at the hearing hereof that he properly purchased and is in possession and actual occupation of the suit land parcel No. KISII TOWN/BLOCK 11/72 being the same subject matter in suit No. KISII HCCC NO. 426 of 1998 between ALFRED MORFAT OMUNDI MICHIRA (defendant herein) versus LAND REGISTRAR–KISII and GETEMBE THRIFT COMPANY LIMITED seeking among other prayers specific performance ……"

After the statement of defence and counter-claim was served on the appellant, his advocate filed a reply to the defence and a defence to the counter claim. Having done so, the appellant's advocate filed an application by way of Chamber Summons stated to be under *"Order VI rule 13(1) (b) (c)* and *(d)* of Civil Procedure Rules and section 3A Civil

Procedure Act". In that application, the appellant sought the following orders from the superior court:-

> *"1. The Honourable court do struck (sic) out the statement of defence and counter-claim filed by the respondent herein on the 30th day of April, 2001.*
>
> *2. Costs of this application and of the main suit be borne by the respondent.*
>
> *3. Such other and/or further direction be made as shall be deemed fit and expedient to meet the ends of justice".*

That application was grounded on an affidavit of one, Ashwin Gudka a director of the appellant company and on the following:-

> *(a) The defendant herein (Alfred Morfat Michira) is a trespasser onto the suit parcel without any rights over same. (b) The plaintiff is a bona fide Purchaser for value and his title cannot be defeated at the instance of a stranger whose agreement to purchase the same property failed.*
>
> *(c) The defendant/respondent was not privy to the sale agreement between M/S GETEMBE THRIFT CO. LTD and the plaintiff, hence the defendant cannot allege fraud as against the plaintiff.*
>
> *(d) The defendant/respondent is nonsuited as against the plaintiff.*
>
> *(e) The defendant's defence and counterclaim are therefore frivolous, vexatious and scandalous.*
>
> *(f) The statement of defence and counterclaim are merely meant to delay and/or embarrass the due process of law.*
>
> *(g) The joinder of the 2nd defendant herein is a nullity and bad in law."*

That was the application that was argued before the learned judge culminating in his ruling of *3rd October, 2001*. In dismissing the appellant's application to strike out the statement of defence and counter-claim the learned judge concluded thus:-

"Suffice it for me to say that to allow the plaintiff's application at this stage would achieve an entirely absurd result: in light (of?) my discussion above it would be a clear travesty of justice to strike out a defence which clearly raises formidable, plausible and triable issues. So I dismiss the application with costs."

It is that ruling that provoked this appeal in which the appellant set out the following grounds of appeal:-

> *"1. The learned trial judge gravely misapprehended the law on execution of pleadings by and/or on behalf of a company and in particular the provisions of Order III rule 2 Civil Procedure Rules.*

2. The learned trial judge erred in law in not finding that the 2nd respondent having ceased to be a registered company could not therefore sue and/or be sued.

3. The learned trial judge grossly misapprehended the law on privity of contract when he held that the 1st respondent's counter-claim raised serious triable issues, without first establishing the Locus Standi of the said 1st respondent to sue against the appellant.

4. The learned trial judge erred in law in not expunging the 2nd respondent's replying affidavit for being improperly on record.

5. The learned trial judge committed a grave error in allowing the 2nd respondent to rely on evidence whereas only a preliminary objection had been taken against her (2nd respondent).

6. The learned trial judge failed to address the weighty issues of law raised before him (judge) thus arriving at a wrong decision.

7. The learned trial judge's ruling is contrary to the mandatory provisions of order XX rule 4 Civil Procedure Rules.

8. The learned trial judge's findings and/or ruling is against the weight of evidence on record thus constituting a miscarriage of justice."

Mr Oguttu, the learned counsel for the appellant, meticulously took us through all these grounds but abandoned grounds 6 & 8 of appeal in a bid to show that the learned Judge mis-apprehended the law as regards limited liability company and how the learned judge failed to direct his mind to the law that was cited before him. It was Mr. Oguttu's contention that the ruling of the learned Judge constituted miscarriage of justice.

In opposing the appeal, Mr. Masese the learned counsel for the 2nd respondent started his submission by stating that he had permission to reply to this appeal. That must mean that Mr Nyatundo, the counsel for 1st respondent and Mr. Bosire, the learned counsel for 3rd respondent had allowed Mr. Masese to oppose the appeal on their behalf. Mr Masese submitted that what was raised in the memorandum of appeal had never been the subject of determination. It was Mr. Masese's view that the appeal was premature. He went on to argue that there were weighty matters like fraud which could only be dealt with by way of a full trial.

We have endeavoured to set out, at the commencement of this judgment, what we thought was the bone of contention in this litigation – a plot in Kisii town. The appellant sought vacant possession of the same which claim was resisted by the 1st respondent who alleged that there was fraud. In his statement of defence and counter-claim he gave particulars of the alleged fraud. But the dispute over the suit land was not only between the appellant and the 1st respondent. The 1st respondent herein had sued the Land Registrar Kisii and Gitembe Thrift Company Ltd seeking specific performance of some agreement. Without even examining the pleadings, it would appear that the ownership of the suit land is seriously in dispute. But the appellant was of different view. It thought that the 1st respondent had no valid defence to its claim hence the application to strike out the defence and the counter-claim.

The application before the learned Judge was for striking out the statement of defence and the counterclaim. At that stage the learned Judge had to consider the pleadings and satisfy himself that the defence filed was a sham, frivolous, vexatious or scandalous. Strong arguments were put before him to show that the defence of 1st respondent raised triable issues. We have considered all that has been urged before us and we must ask ourselves whether the 1st respondent's defence was indeed "formidable" as put by the learned Judge. In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in *DT DOBIE & COMPANY (KENYA) LTD. V. MUCHINA [1982] KLR 1* in which Madan J.A. at p. 9 said:-

"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." (Sellers LJ (supra). As far as possible indeed, there should be no opinions 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."

In dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient. A Court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham. A defence on merit does not mean a defence which must succeed but it means a defence which raises a triable issue to warrant adjudication by the court. In *PATEL V. E.A. CARGO HANDLING SERVICES [1974] E.A. 75 at p. 76 Sir William Duffus P* put it thus:-

"The main concern of the court is to do justice to the parties, and a court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merit.

In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as SHERIDAN, J. put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication.

Having considered carefully the submissions of Mr. Oguttu for the appellant, and Mr. Masese for the respondents, we are satisfied that the appellant's application to strike out the 1st respondents defence and counter claim was rightly rejected by the learned Judge. We, therefore, find no merit in this appeal which we accordingly order that it be dismissed with costs. It is so ordered.

DATED and DELIVERED at KISUMU this 15th day of July, 2005.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR