REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CORAM: AKIWUMI, SHAH & LAKHA, JJ.A.

CIVIL APPEAL NO. 17 OF 1998

BETWEEN

JOSEPH KAHUGU WAKARI

APPELLANT

AND

BARCLAYS BANK OF KENYA LIMITED

BRACLAYS BANK (PLC)

RESPONDENTS

(An appeal from the judgment of the High Court of Kenya at Nairobi (Ole Keiwua J) dated 30th June, 1995 in

H.C.C .C. NO. 87 OF 1994)

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JUDGMENT OF AKIWUMI, J.A.

The respondents who are well known banks, sued the appellant in this appeal, seeking from him the sum of KShs.591,747/15 plus costs and interest. The respondents alledge in their plaint that by an agreement dated 18th January, 1990, made between them the first respondent acting as agent of the second respondent, and the appellant, they would pay the appellant who ran a curio shop for tourists known as Jambo Curio Shop, the amount shown on sale vouchers presented by him in respect of goods sold and services provided by his curio shop upon the presentation of Barclays and Visa credit cards. It was part of the agreement which was signed by the appellant on behalf of his Jambo Curio Shop, that the presentation of the sale vouchers was a warranty by him, inter alia, that the facts contained in the sale vouchers were true to his knowledge and that the goods and services stated therein to have been sold or provided by Jambo Curio Shop had in fact taken place. It was also provided that if the terms of the agreement were breached by the appellant, the respondents could claim from him the money credited or paid to Jambo Curio Shop on the basis of the sale vouchers. The respondents claimed that between April and July, 1991, the appellant in breach of their agreement presented sale vouchers for a total amount of KShs.591,747/15 as representing goods sold and services provided by Jambo Curio Shop to the holders of the credit cards as described and identified in the sale vouchers but which transactions were subsequently denied by the credit card holders to have taken place.

In his defence, the appellant denied having entered into any agreement at all with the respondents or having presented any false sale vouchers for payment to the respondents. The appellant then went on to counterclaim against the respondents and deliberately avoiding to state that he was the sole proprietor of the Jambo Curio Shop, averred that even though there was an agreement between the respondents and Jambo Curio Shop and Barclays or Visa credit cards holders, the respondents had wrongfully taken out the sum of KShs.482,094/40 from a Fixed Deposit account without stating whether it belonged to him or not, and had also wrongfully debited his account number 1163557 with the sum of KShs.4,542/45. These two accounts which the appellant had with the first respondent, were separate from those of Jambo Curio Shop. The appellant therefore claimed from the respondents the total sum of KShs.606,636/85 with costs and interest.

In their reply to the appellant's defence and counterclaim, the respondents averred that the appellant was the sole proprietor of Jambo Curio Shop, that they lawfully applied the balances in the appellant's personal accounts against what was due to them arising out of their agreement with Jambo Curio Shop. The respondents then moved the High Court under 0 35 of the Civil Procedure Rules for judgment as prayed in the plaint and for the appellant's defence and counterclaim to be struck out. In their supporting affidavit, the averments contained in the plaint were repeated. In addition, it was deponed that in breach of the agreement between the respondents and Jambo Curio Shop which was annexed to the affidavit, the appellant had in breach of that

agreement, presented sale vouchers where no goods or services had been supplied by the defendant; that the card holders had rejected the vouchers as not having been authorised or signed by them; that Jambo Curio Shop which was not registered as a legal entity by the Registrar General, was under the sole proprietorship of the defendant; that under the agreement, the appellant upon presenting a sale voucher warranted not only that the statement of facts therein were true to his knowledge but also that the goods alleged to have been supplied or services rendered, were genuine and not unlawful; that in exercise of their right under the agreement to do so and the Letters of Set-off signed by the appellant in favour of the first respondent, and as a result of the appellant's breach of the foregoing terms of the agreement, the appellant's accounts with the first respondent had been debited with the sum of KShs.l,073,841/55 leaving still outstanding the sum of KShs.591,747/15 which the respondents were claiming from the appellant with interest and costs; and lastly, that the appellant's defence and counterclaim had been filed merely to delay the fair trial of the action.
In his replying affidavit the appellant, and he did not deny that he was the sole proprietor of Jambo Curio Shop, only made a general denial of the crucial allegations contained in paragraphs 9, 10 and 11 of the respondents' supporting affidavit which were to the effect that the appellant had in breach of the agreement between the respondents and Jambo Curio Shop, presented to the first respondent and for which he had been paid, false sale vouchers which were not authorised or signed by the card holder. The appellant in his replying affidavit also deponed that he had been acquitted of criminal charges brought against him which were based on the allegation that he had presented unauthorized sale vouchers to the first respondent. He further deponed in paragraph 12 of his affidavit in reply, and this is noteworthy:

> "That I personally am not indebted to the Plaintiffs and no suit has been filed against the Jambo Curio Shop, to claim a legal set off, and therefore there are TRIABLE issues, both in the defence and counterclaim, and this application ought to be dismissed with costs: paragraph 23 (of the affidavit in support of the respondents' application to enter judgment for them and to strike out the appellant's defence and counterclaim) is therefore a sham.".

When the motion came before the learned judge of the High Court, he upheld it. This has prompted the present appeal by the appellant. In his ruling, the learned judge, and relying on the decision of the predecessor to this Court in the case of Sadrudin Shariff v. T. Singh (1961) EA 72, quite rightly, came to the conclusion that the appellant trading as, indeed, the sole proprietor of his Jambo Curio Shop, which was a mere expression and not a legal entity, had been properly sued. This issue was what the appellant in paragraph 12 of his relying affidavit, as set out above, can be said to have been the sole basis of his opposition to the respondents' application. What is more, it seems to me that the contents of paragraph 12 were in all the surrounding circumstances, sworn to in bad faith. But the appellant having hopelessly failed in respect of the point raised therein, no triable issues arose and for this reason alone, I would dismiss the present appeal brought by the appellant.

Lest I be seen as merely determining this appeal on a narrow point of law, I will now deal with the other matters raised in the judgment of the learned judge. Having considered the agreement between the respondents and Jambo Curio Shop, he concluded quite rightly, that the presentation of a sale voucher also amounted to a warranty by the presenter, the appellant, that the facts represented therein were true to his knowledge. This being so, and upon it having been averred in the plaint that the card holders had denied having signed or authorized the sale vouchers which the appellant had presented, it behoved the appellant, since he had warranted that the facts represented in the sale vouchers were true to his knowledge, to set out in his statement of defence the facts which support the facts represented in the sales vouchers. The mere denial that he resorted to in hisstatement of defence will not do. Indeed, in the surrounding circumstances, it shows mala fides. For instance, the Letter of Set-off dated 30th August, 1990, signed by the appellant in favour of the first respondent is in very wide terms and enables the first respondent to charge against any account of the appellant with it: "towards the satisfaction of any moneys, obligations or liabilities of me/us to you whether those liabilities be present, future, actual, contingent, primary, collateral, joint or several.".

In his replying affidavit, the appellant had sought to show that because the court which had acquitted him of the fraud charges brought against him at the instigation of the respondents had thereupon, subsequently rescinded its original interim order freezing the appellant's accounts with the first respondent, and which recission order had been obeyed by the first respondent, that that was sufficient proof that the set-off

exercised by the first respondent, was unlawful. Apart from the fact that the standard of proof in respect of a criminal charge is much higher than that required in the trial of a civil matter, namely, only proof on a balance of probabilities, the compliance by the first respondent with the recission order which had consequently to be made after the appellant's acquittal, is no bar to the respondents' relying, and I would say successfully, on the Letter of Set-off which the appellant had not denied signing. By the way, it is interesting to note that in the recission order relied upon by the appellant, it is ordered that the first respondent: place all the funds at the disposal of the said Joseph Kahugu Wakari trading as Jambo Curio Shop.". The agreement between the respondents and Jambo Curio Shop which the appellant was trading as, and the appellant's Letters of Set-off are common form documents which are clearly designed to deal with cases such as the presentation of false or unauthorised sale vouchers in respect of alleged credit card transactions, which is the basis of the respondents' action against the appellant, without the necessity of calling the credit card holders who may be all over the world, to give evidence in a civil case. The defendant must have been well aware of this and cannot pretend otherwise. In my view, any other interpretation would not only, be entirely unrealistic and inappropriate, but would also, enable unprincipled persons, I regret to say, like the appellant, to get away with murder. I find no merit in the appellant's pleadings to make me conclude that the learned judge was wrong in granting the respondents' motion. I had occasion recently to express my views on the striking out of pleadings in my judgment in the case of J. P. Machira & Co. Advocates v Wangethi Mwangi and Nation Newspapers Civil Appeal No. 179 of 1997, (unreported). In my judgment in that case, and after considering the oft quoted dictum of Madan JA as he then was, in the case of D.T. Dobie and Company (Kenya) Limited v Joseph Mberia Muchina and Leah Wanjiku Mbugua Civil Appeal No. 37 of 1978 (unreported) that:

"If a plaint 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 before it.",

I expressed my unhappiness with the proposition that a mere semblance where the darkness is the creation of the pleader himself, would do, without there being any good reason to suppose that the pleading in this case after the pleadings are closed, "can be injected with real life by amendment", none of which by the way, has been advanced in this appeal. I had expressed my preference for the following dictum of Dankwerts L. J. in Wenlock v Haloney and Others (1965) 1 W.L.R. 1283 at 1244 which Madan JA had referred to in his judgment, in D.T .Dobie and which I find to be a well balanced and appropriate commentary on the relevant provisions of the Civil Procedure Rules under which the respondents had applied for the appellant's defence and counterclaim to struck out:

"The power to strike out any pleading or any part of a pleading under this rule is not mandatory, but permissive, and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.".

In the present appeal, as was observed by Lord Blackburn in Metropolitan Bank v Pooley (1885) 10 App. Cas. 210 at 221, with which I agree, the striking out of pleadings may: "often be required by the very essense of justice to be done.", so as to prevent parties being harassed and put to expense by frivolous, vexations or hopeless litigation. See Riches v Director of Public Prosecutions (1973) 2 All E.R. 935, at 942.
It must now be obvious that in my view, the appellant's appeal must be dismissed. As Shah and Lakha, JJA hold the opposite view, the appeal is allowed in the terms proposed by Shah JA. It is so ordered.

Dated and delivered at Nairobi this 10th day of July, 1998.
A. M. AKIWUMI
JUDGE OF APPEAL