Makini Security Services Ltd v Advent Valuers Ltd & another (Civil Appeal 189 of 2018) [2023] KEHC 22665 (KLR) (Civ) (28 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22665 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 189 OF 2018

CW MEOLI, J

SEPTEMBER 28, 2023

BETWEEN

MAKINI SECURITY SERVICES LTD ..... APPELLANT

AND

ADVENT VALUERS LTD ..... 1ST RESPONDENT

VIRGIN ESTATES LTD ..... 2ND RESPONDENT

(Being an appeal from the ruling of M.W. Murage (RM) Delivered on 22nd March, 2018 in Nairobi Milimani CMCC No. 908 of 2017)

JUDGMENT

1. This appeal emanates from the ruling delivered on 22.03.2018 in Nairobi CMCC No. 908 of 2017. The events leading to the ruling were that in 2017, Makini Security Services Ltd, the Plaintiff in the lower court, (hereafter the Appellant) filed sued Advent Valuers Ltd, the defendant in the lower court, (hereafter the 1st Respondent) seeking payment of the sum of Kshs. 2,286,048/-.

2. The gist of the Appellant's claim was that the Appellant had supplied security services to the 1st Respondent vide a contract dated 01.04.2015 and respective order form for eighteen (18) guards at Shujaa Mall, Kayole within Nairobi County, at a cost of Kshs. 18,000/- for each guard per shift. That it was an express term of the contract that the 1st Respondent would pay to the Appellant Kshs. 324,000/- exclusive of VAT as a starting charge. That pursuant to the contract, the Appellant dispatched the security guards in due performance of its obligation, but the 1st Respondent defaulted in making good the agreed payments and fell into arrears that stood at Kshs. 2,286,048/-.

3. The Appellant further averred that despite demand the 1st Respondent had failed to pay the outstanding amount or to disclose the alleged third party the 1st Respondent attributed the debt to on

account of agency, and therefore the Appellant claimed the said sum together with interest thereon at the court's rate until payment in full.

4. The 1st Respondent filed a statement of defence on 27.03.2017 admitting to having entered into a contract for the supply security services while denying the other key averments in the plaint. And further averred without prejudice that, at all material times of the contract, the 1st Respondent was acting as an agent of or benefit of Virgin Estate Ltd (the 2nd Respondent) , the proprietors of Shujaa Mall against whom, third party proceedings would be instituted at the appropriate time.

5. On 13.04.2017, the 1st Respondent successfully instituted third party proceedings as against Virgin Estate Ltd, the third party in the lower court, (hereafter the 2nd Respondent).

6. On 22.05.2017 the Appellant filed a motion expressed to be brought under Sections 3A of the *Civil Procedure Act* and Order 2 Rule 15(1) (a) (b) (c) & (d) of the Civil Procedure Rules inter alia seeking that the 1st Respondent's defence dated 17.03.2017 and filed in court on 27.03.2017 be struck out; and that summary judgment be entered for the Appellant against the 1st Respondent as prayed in the plaint.

7. The grounds on the face of the motion were amplified in the supporting and supplementary affidavit of Ann Selempo, the proprietor of the Appellant, essentially reiterating the background outlined earlier in this judgment and generally asserting that the statement of defence was a sham; frivolous; evasive; consisted of mere denials; did not raise any triable issues as the 1st Respondent is truly and justly liable in debt to the Appellant; and that the statement of defence was calculated at vexing the Appellant by denying its dues. It was further deposed that the Appellant was not privy to the contract between the Respondents whereas the 1st Respondent admitted indebtedness to the Appellant.

8. The 1st Respondent opposed the motion through a replying affidavit dated 02.08.2017. Thereafter, the parties canvassed the said motion by way of written submissions. The lower court's ruling disallowing the Appellant's motion provoked the instant appeal, which is based on the following grounds: -

> " 1. The learned magistrate erred in law and fact by holding that the defendant's defence raised triable issues.
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> 2. The learned magistrate erred in fact by failing to consider the defendant's admission that it owed the plaintiff the amount of Kshs. 2,286,048.00.
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> 3. The learned magistrate erred in law and in fact by failing to consider that the property management agreement was between the plaintiff and the defendant.
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> 4. The learned magistrate erred in law and fact by failing to consider that the plaintiff was not privy to the contracts between the defendant and the alleged 3rd party.
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> 5. The learned magistrate erred in fact by failing to consider the admission by the defendant in its replying affidavit sworn by Timothy Saruni on 2nd August 2017 that it entered into an agreement with the plaintiff." (sic)

9. The appeal was canvassed by way of written submissions. Counsel for the Appellant, while restating the events leading to the instant appeal, condensed the grounds of appeal and centered his submission on the question whether the 1st Respondent's statement of defence raised triable issues or amounted to mere denials. Counsel submitted that no investigation by way of oral enquiry into the facts was required in the matter; that the 1st Respondent's assertion that it was acting as an agent was immaterial since it is trite law that the Appellant can only sue the principal if the latter was disclosed in the contract;

and that prior to institution of the lower court suit the 1st Respondent admitted to owing the Appellant Kshs. 2,286,048/-.

10. It was further submitted that the purported 2nd Respondent was never involved directly or indirectly in respect of any prior payment by the 1st Respondent to the Appellant as such the ostensible contract between the Respondents is only relevant to the 1st Respondent's claim as against the 2nd Respondent in the third-party proceedings, the Appellant not being a party or privy to the agency contract between the Respondents.

11. While calling to aid the Court of Appeal decision in Margaret Njeri Mbugua v Kirk Mweya Nyaga [2016] eKLR, counsel argued that mere denials do not constitute a valid defence. Further, that the 1st Respondent having admitted indebtedness, entry of summary judgment would save judicial time and prevent a party from causing further delay to the detriment of the aggrieved party. The court was thus urged to allow the appeal.

12. The 1st Respondent naturally concurred with the trial court's findings and especially that the defence raised a triable issue. Equally restating the events leading to the instant appeal, counsel for the 1st Respondent anchored his submissions on the provisions of Article 50(1) of *the Constitution*. Condensing his submission around the singular issue whether the court erred in law and fact in dismissing the Appellant's motion.

13. Counsel in restating the duty of a first appellate court as espoused in the of-cited decision in Selle v Associated Motor Boat Co. (1968) EA 123 as cited in Charles Agina v Shipmac Limited & Another [2012] eKLR. He asserted that the 1st Respondent's defence raised triable issues, was a reasonable defence and the trial court rightly so held while dismissing the Appellant's motion which was devoid of merit.

14. In demonstration of the foregoing, counsel relied on the decisions in DT Dobie & Company (K) Limited v Joseph Mbaria Muchina & Another [1980] eKLR and Raghbir Singh Chatte v National Bank of Kenya [1996] eKLR. He argued that the issue of agency between the Respondents was a live question that ought to have proceeded to trial and that the 1st Respondent's statement of defence did not consist of mere denials but gave a fair and substantial answer to the issues raised by Appellant.

15. It was further submitted that courts should exercise their jurisdiction to enter summary judgment in the clearest of cases and where the defence does not espouse any triable issues and that where a single triable issue was demonstrated, the defence ought to be ventilated through trial. The decision in Job Kilach v Nation Media Group Ltd & 2 Others [2015] eKLR was cited in this regard. The court was urged to find that the appeal was without merit and to dismiss it with costs.

16. The 2nd Respondent opted and or failed to participate in both the proceedings before the lower court or this court.

17. The court has perused the record of appeal as well as the original record and considered the material canvassed in respect of the appeal. As aptly submitted by the 1st Respondent, the duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have an opportunity to see or hear the witnesses testify. See Peters v Sunday Post Ltd [1958] EA 424; Selle and Anor. v Associated Motor Boat Co. Ltd and Others [1968] EA 123; William Diamonds Ltd v Brown [1970] EA 11 and Ephantus Mwangi and Another v Duncan Mwangi Wambugu [1982] – 88) 1 KAR 278.

18. The Court of Appeal stated in Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR that:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

19. The trial court in disallowing the Appellant's motion before it expressed itself in part as follows:

> " I have considered the application, replying affidavit and the submissions filed. I have to now determine whether the application meets the conditions set out under Order 2 Rule 15 of the Civil Procedure Rules, that is whether it discloses no reasonable cause of action.... It is scandalous, frivolous or vexatious as it may prejudice, embarrass or delay the fair trial of the action or it is otherwise an abuse of the process of the court.
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> Summary judgment should be entered in the clearest of cases when the defence does not have any triable issue.
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> The defendant insists that it was acting on behalf of Virgin Estate Limited.
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> I have considered the agreement filed herein dated 1st April 2015 between Makumi Security Guard (The Plaintiffs herein and Advent Valuers Limited).
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> The defendant made an application to have the said Virgin Estate Limited enjoined as a party to this suit.
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> The amount claimed by the plaintiff is not admitted in clear terms. Furthermore, the defence has a triable issue in the sense that it introduces a third party. Justice can only be done if this matter is fully heard. The application herein is thus disallowed....." (sic)

20. This appeal turns on the sole question whether the trial court misdirected itself in disallowing the Appellant's motion before it. The said motion leading to the impugned ruling was anchored on the provisions of Section 3A of the *Civil Procedure Act* alongside Order 2 Rule 15(1) of the Civil Procedure Rules. The latter which provides that:

> " At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
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> (a) it discloses no reasonable cause of action or defence in law; or
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> (b) it is scandalous, frivolous or vexatious; or
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> (c) it may prejudice, embarrass or delay the fair trial of the action; or
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> (d) it is otherwise an abuse of the process of the court"

21. Concerning striking out of pleadings, the Court of Appeal in Cooperative Merchant Bank Ltd v George Fredrick Wekesa Civil Appeal No. 54 of 1999 as cited in Jubilee Insurance Co. Ltd v Grace Anyona Mbinda [2016] eKLR, stated that:

> " The power of the court to strike out a pleading under Order 6 Rule 13 (1) (b) (c) & (d) is discretionary and an appellate court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong.

Striking out a pleading is a draconian act, which may only be resorted to, in plain cases. Whether or not a case is plain in a matter of fact...."

See also Kivanga Estates Limited v National Bank of Kenya Limited [2017] eKLR.

22. As to the exercise of discretion, the same court later in Mashreq Bank P.S.C v Kuguru Food Complex Limited [2018] eKLR stated:

> " This Court ought not to interfere with the exercise of a Judges' discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice. Conversely, a court exercising judicial discretion must be guided by law and facts and not ulterior considerations. This much was stated by the Court of Appeal in the case of Mbogo v Shah, (supra):
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> "A court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice".
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> See; United India Insurance Co. Ltd v East African Underwriters (K) Ltd [1985] E.A 898: -

23. Madan J.A in D.T. Dobie & Company (Kenya) Ltd v Muchina [1982] eKLR, enunciated several principles to be applied in an application brought under then, Order VI Rule 13 (now Order 2 Rule 15) of the Civil Procedure Rules. Referring to various English decisions, Madan J.A distilled the following principles:

> " a) The rule is to be acted upon in plain and obvious cases and the jurisdiction exercised sparingly and with care.
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> b) ...
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> c) ...."
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> It is relevant to consider all averments and prayers when assessing under Order 6 Rule 13 whether a pleading discloses a reasonable cause of action, and also the contents of any affidavits that may be filed in support of an application that a pleading is otherwise an abuse of the process of the court... The court ought to act very cautiously and carefully and consider all the facts of the case without embarking on 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... A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal... No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment." [Emphasis Added]

24. In the case of Crescent Construction Co. Ltd v. Delphis Bank Ltd Civil Appeal No. 146 of 2001; [2007] eKLR cited in Jubilee Insurance Co. (supra) the Court of Appeal stated the rationale for the

exhortation that the power of striking out a pleading ought to be exercised with the greatest care and caution. The court stated that:

> " This comes from a realization 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 drag a person to the seat of justice when the case purportedly brought against him is a non-starter."

25. Alongside the prayer for striking out of the 1st Respondent's pleadings, the Appellant had equally sought that summary judgment be entered against the 1st Respondent as prayed in the plaint. In Isaac Awuondo v. Surgipharm Limited & Another [2011] eKLR the Court of Appeal stated:

> " Summary judgment is a drastic remedy which may be granted in the clearest of cases in which there is no bona fide defence to the plaintiff's claim.... In Moi University v Vishva Builders Limited Civil Appeal No. 296 of 2004 (unreported) this Court said:
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> "The law is now settled that if the defence raises even one bonafide triable issue, then the defendant must be given leave to defend...As we know, even one triable issue would be sufficient – see H. D. Hasmani v Banque Congo Belge [1938] 5 EACA 89. We must, however, hasten to add that a triable issue does not mean one that will succeed. Indeed, in Patel v E. A Cargo Handling Services Ltd [1974] EA 75 at P. 76 Duffus P said:
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> "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 for trial for adjudication." [Emphasis Added]

26. These then are the guiding principles. The gist of the Appellant's plaint was restated earlier in this judgment. The 1st Respondent by their defence statement summarily denied the key averments in the plaint by its statement of defence at paragraphs 4, 5, 6, 8, 9 & 11 and averred at paragraph 3 and 7 of its statement of defence that: -

> " 3. The Defendant admits paragraph 3 of the plaint in so far as it is to the effect that the plaintiff and defendant entered into a contract for the supply of security services at Shujaa Mall situated in Kayole, Nairobi in which the Plaintiff was obligated to supply security services at the Shujaa Mall.
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> 4 .....
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> 5 .....
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> 6 .....
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> 7. Without prejudice to paragraph 6 above, the Defendant avers that at all circumstances of the continuance of the contract for the provision of services, the defendant was acting as an agent of and for the benefit of Virgin Estates Limited who are the proprietors of the Shujaa Mall and further avers that at the appropriate time, the defendant shall institute third party proceedings against the Virgin Estate Ltd." (sic)

27. The Appellant filed a reply to the statement of defence wherein it reiterated the averments in the plaint, joined issues with the 1st Respondent's defence and reiterated that the contract in question was between itself and the 1st Respondent. The pertinent question here is whether the 1st Respondent's statement

of defence disclosed a single triable issue. The Appellant clearly did not think so, hence its motion. As stated in Kenya Trade Combine Ltd v Shah Civil Appeal No. 193 of 1999, "a defence which raises triable issues does not mean a defence that must succeed."

28. Alongside the admission of the contract between the Appellant and 1st Respondent, the latter's defence statement denied the main averments in the Appellant's plaint, and at paragraph 7 asserted without prejudice, that the 2nd Respondent was the party indebted to the Appellant by dint of an agency agreement between the two Respondents. Subsequently, the 1st Respondent successfully moved the court by way of third-party application which from the record of proceedings in the lower court the Appellant did not oppose.

29. This notwithstanding, the gist of the Appellant's reply to the defence and affidavit material in support of the motion before the trial court was that firstly, the Appellant was not privy to the contract executed between the Respondents while the subject contract giving rise to the claim was only between the Appellant and the 1st Respondent. Additionally, the 1st Respondent had unequivocally admitted indebtedness in respect of the latter contract. Therefore, the statement of defence did not raise any triable issues.

30. Upon a perusal of the contract between the Appellant and the 1st Respondent exhibited in the motion as annexure "AS-1" as well as the contract between the Respondents exhibited as annexure " TS-1" in the 1st Respondent's affidavit material, it is evident from the former that the 1st Respondent contracted the Appellant to provide guard services to the suit property in question while under the latter contract the 1st Respondent was at the material time acting as a property manager for the 2nd Respondent. Therefore, as correctly asserted, the Appellant was not privy to the said contract. Moreover, the fact of the alleged agency was not stated in the contract between the principal parties herein.

31. That said, while the introduction of the third party, (who from the record had not entered appearance), may have introduced a new issue for determination between the two Respondents, the 1st Respondent's defence statement read in its totality disputed all the key averments pleaded in paragraphs 4-19 of the plaint. And contrary to the assertions of the Appellant, beyond the admission of the contract between the principal parties at paragraph 3 of the defence statement, this court, like the trial court, cannot see any unequivocal or clear admission by the 1st Respondent of the Appellant's claim in the defence.

32. In considering whether paragraph 3 of the 1st Respondent's defence and annexures "TS-2" and "TS-3" relied on in the 1st Respondent affidavit material disclose the admission envisaged in Order 12 Rule 6 of the Civil Procedure Rules, it is useful to bear in mind the applicable principles as enunciated by superior courts. In Agricultural Finance Corporation v Kenya National Assurance Company Limited (In Receivership) [1997] eKLR the Court of Appeal had this to say concerning the nature of an admission:

> "Order 12 r 6 empowers the court to pass judgment and decree in respect of admitted claims pending disposal of disputed claims in a suit. Final judgment ought not to be passed on admissions unless they are clear, unambiguous and unconditional. A judgment on admission is not a matter of right; rather it is a matter of discretion of the Court and where a defendant has raised objections which go to the very root of the case, it would not be proper to exercise this discretion. In the case of Choitram Nazari [1982-88] 1 KAR 437 Madan, J.A (as he then was) said at pages 441 to 442:
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> "For the purposes of O.X111 r. 6 admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their

meaning. Much depends upon the language used. The admission must leave no room for doubt that the parties passed out of the stage of negotiations on to a definite contract. It matters not even if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admission by analysis." [Emphasis Added]

33. In this case, the asserted admission did not satisfy the above test. As between the Appellant and the Respondent key issues raised by the 1st Respondent's defence statement included the requisition and provision of services giving rise to the Appellant's claim and indebtedness. The averments in the statement of defence were not mere denials but raised issues that warranted interrogation at a trial. This is true whether a third party had been enjoined or not.

34. By its ruling, the lower court seems to have emphasized the introduction of a third party above the fact that the claimed sums were disputed, or at least not admitted as asserted by the Appellant. However, the lower court cannot be faulted for arriving at the conclusion it did, namely, that the defence statement raised at least one triable issue entitling the 1st Respondent to defend the suit. In the circumstances, the trial court properly exercised its discretion by disallowing the Appellant's motion before it. This appeal therefore is without merit and is dismissed with costs to the 1st Respondent.

DELIVERED AND SIGNED AT NAIROBI ON THIS 28TH DAY OF SEPTEMBER 2023.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Mr Maina

For the 1*st Respondent: Ms. Nyabuto h/b for Mr. Munguti

C/A: Carol