Case Number:	Civil Appeal 268 of 2012
Date Delivered:	21 Mar 2018
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Martha Karambu Koome, Jamila Mohammed, Fatuma sichale
Citation:	Rift Valley Water Services Board v Oriental Construction Co. Limited [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	C.C No. 161 of 2012
Case Outcome:	Appeal allowed
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, SICHALE & J. MOHAMMED JJ.A)

CIVIL APPEAL 268 OF 2012

BETWEEN

RIFT VALLEY WATER SERVICES BOARD.....APPELLANT

AND

ORIENTAL CONSTRUCTION CO. LIMITED.....RESPONDENT

(*An appeal from the Ruling of the High Court of Kenya at Nairobi, (Mutava, J.) dated and delivered on 12th July, 2012*

in

H.C.C.C No. 161 of 2012)

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JUDGMENT OF THE COURT

Background

1. This is an appeal from a Ruling by the High Court, (Mutava, J.), dated 12th July, 2012 whereby the learned Judge allowed the notice of motion dated 4th May, 2012 by **ORIENTAL CONSTRUCTION CO. LIMITED,** (the respondent), to strike out the defence filed by **RIFT VALLEY WATER SERVICES BOARD,** (the appellant).

2. A brief background as can be gleaned from the plaint filed by the respondent dated 13th March, 2012, is that the dispute between the parties arose from a contractual relationship that existed between them. By a contract **No. RVWSB/WC/01/3** dated 25th February, 2009, (the contract), the respondent undertook to carry out construction projects for the appellant.

3. The appellant paid the sum of Kshs.194,087,963.51 commensurate with the 100% contractual works completed. However, the respondent, in its plaint dated 13th March, 2012 claimed a further sum of Kshs.7,882,793/= from the appellant, made up as follows;-

"i) For additional works done – Kshs.2,116,029.00.

ii) Being additional payment of the contract value arising from the extended time of the contract – Kshs.5,766,764.00."

4. In its statement of defence dated 18th April, 2012, the appellant denied owing any additional amount to the respondent having paid all sums due under the contract. The appellant claimed that the demand for further payment was part of a wider scheme to rip off public bodies. It was the appellant"s further claim that the High Court had no jurisdiction over the dispute and that it would raise a preliminary objection on a point of law in support of its claim.

5. On 5th April, 2012 the appellant filed a notice of preliminary objection on the grounds that the court had no jurisdiction to arbitrate over the matter and that the suit is an abuse of court process.

6. On 4th May, 2012 the respondent, by way of notice of motion brought pursuant to Order 2 Rule 15(1) of the Civil Procedure Rules and Section 1A of the Civil Procedure Act sought to have the appellant"s statement of defence struck out and judgment entered for the respondent. The application was predicated on the grounds that the defence failed to disclose a reasonable defence in law; that it would prejudice and delay the fair trial of the respondent"s suit and that it was an abuse of the process of the court as it was a sham defence containing mere denials.

7. The learned Judge considered the notice of motion dated 4th May, 2012 and found that it called for the exceptional exercise of discretion to strike out the defence; that there was no plausible basis for sustaining the defence, struck it out and entered judgment for the respondent against the appellant as prayed and rendered himself as follows;-

"In my analysis, and saving the pronounced largesse and pomp in the language used to dismiss the Plaintiff's claim, the Defence completely fails to controvert the Plaintiff's claim on its merits. The list of documents filed by the Defendant similarly fails to show that the sums claimed were paid or that the claims in their entirety do not lie. … the Defence in this matter plainly and obviously discloses no cause [sic] reasonable cause of action and is so weak as to be beyond redemption."

8. Aggrieved by that decision, the appellant preferred this appeal based on 8 grounds contained in its memorandum of appeal that the learned Judge erred in law and fact:-

a) by hearing the Notice of Motion dated 4th May, 2012 ex-parte without the benefit of evidence of service;

b) by summarizing the facts of the case and concluding that the bill of Kshs 7,882,793/= had not been paid without the benefit of any direct evidence thereby arriving at a wrong finding;

c) by holding that there was an outstanding sum of Kshs.7,882,793/= when there existed documents to prove that the full contractual sum had been paid by the appellant.

d) by accepting the evidence of counsel for the plaintiff/applicant in the Superior Court and thereby arriving at a finding on the basis of documentary hearsay.

e) by proceeding with the hearing of the Motion dated 4th May, 2012 against a defence on the jurisdiction of the Court and without first entertaining the Preliminary arguments on jurisdiction.

f) by holding that the defence of satisfaction discloses no reasonable cause of action and that the witness Statement filed together with the defence do not form a basis for the defence of the claim.

g) by striking out the defence dated 18th July, 2012 without a proper basis and without the full test laid in the case of Muhuni & Another Vs. Patel & Another [1990] KLR and the provisions of Article 159(2) of the Constitution of Kenya 2010.

9. The appellant sought the following orders:

"(a) that the Ruling of the Superior Court (sic) dated and delivered on 12th July, 2012 be set aside.

(b) that the defence herein filed together with the Witness Statements and the List of Documents be reinstated.

(c) that the Preliminary Objection filed together with Memorandum of Appearance be reinstated for hearing before a Judge other than the Hon. J. M. Mutava."

Submissions by Counsel

10. When the appeal came up for hearing, both parties were represented by learned counsel. Professor Tom Ojienda SC together with Ms Awuor, represented the appellant. Counsel the appellant submitted that he would focus on the following three main grounds of appeal:

a) That the learned Judge misdirected himself in proceeding to entertain the application for striking out the statement of defence on a date when a mention had been fixed;

b) That the learned Judge misdirected himself by failing to stay the application on his own motion in the face of a question of law on jurisdiction; and

c) That the learned Judge misdirected himself by striking out the statement of defence despite triable issues having been raised in the same."

11. It was Senior Counsel"s submission that the mention date had been fixed in court *ex parte*. Counsel faulted the learned Judge for failing to ascertain that service had been effected on counsel for the appellant; that the learned Judge should not have proceeded with the hearing of the application without having first dealt with the preliminary objection raised on the issue of jurisdiction; that the question on the jurisdiction of the High court had been raised at the earliest opportunity, at the time of filing the memorandum of appearance and that being a question of law, the issue of jurisdiction can be raised at any time. Counsel urged us to allow the appeal.

12. Ms Awuor developed the argument further and assailed the decision of the learned Judge in striking out the appellant"s statement of defence as triable issues had been raised in the defence; that the statement of defence clearly stated that all sums owing under the contract had been paid and any additional sums claimed were outside of the contractual terms; that the law requires the appellant to raise triable issues which need not be necessarily successful; that the learned Judge erred in dealing with the preliminary objection on the issue of jurisdiction as part of the defence and without setting it down for hearing. Counsel urged us to set aside the ruling in its entirety, reinstate the statement of defence and the dispute be heard on its merits before the High Court.

13. Learned counsel, Mr. Wanjama, for the respondent, opposed the appeal. Counsel argued that the respondent"s notice of motion, bore, on the face of it, the date for hearing and therefore the appellant could not be heard to say that it was not aware of the date of the hearing of the application; that it was clear from the record that its claim for unpaid amounts was justified and no further evidence was necessary to prove its claim.

14. On the preliminary objection, counsel contended that the same was contained in the statement of defence which the learned Judge dealt with exhaustively; that the appellant had submitted to the jurisdiction of the High Court by entering appearance and filing the statement of defence; that the appellant should have filed an application for stay of proceedings under Section 6 of the Arbitration Act if it desired to rely on the arbitration clause in the Contract. Counsel urged us to dismiss the appeal.

Determination

15. We have considered the record of appeal, the respective submissions by learned counsel the authorities cited, and the law. This is a first appeal. In the case of

Abok James Odera T/A A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, this Court stated as follows regarding the duty of a first appellate court:-

"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse 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. See the case of *Kenya Ports Authority versus Kusthon (Kenya) Limited (200) 2EA 212* wherein the Court of Appeal held, *inter alia***, that:-**

"On a first appeal from the High court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

16. Before delving into the issue of whether the learned Judge was justified in striking out the appellant"s statement of defence, the appellant has raised the issues that the learned judge gave a ruling on the respondent"s application before making a determination on the preliminary objection raised by the appellant; and secondly that the hearing of the application proceeded on a date that the court had set down the matter for a mention.

17. It is trite law that when a point of law, that goes to the jurisdiction of the court is raised, the court must first deal with that issue before proceeding with any other matter. In the oft cited case of **Owners of the Motor Vessel "Lillian S" *v* Caltex Oil (Kenya) Ltd (1989) KLR 1** Nyarangi, J.A held:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step."

18. From the record of proceedings when the matter came up before the High Court on 4th May, 2012 a mention date was fixed for 14th June 2012 with notice to issue. On 14th June, 2012 the respondent"s counsel in the absence of the counsel for the appellant, informed the court that he was ready to proceed with the hearing of the application. Despite the appellant"s absence and with no confirmation on whether service had been effected upon the appellant, the application proceeded for hearing.

We are guided by the case of:

Central Bank of Kenya vs. Uhuru Highway Development Ltd. & 3 Others,

Civil Appeal No. 75 of 1998 where the Court of Appeal held that where a matter is fixed for mention the Judge has no

business determining on that date, the substantive issues in the matter unless the parties so agree, and of course, after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties.

Further, in **Mrs. Rahab Wanjiru Evans vs. Esso (K) Ltd**. Civil Appeal No. 13 of 1995 [1995-1998] 1 EA 332, it was held that when the matter is fixed for mention it cannot be heard unless by consent of the parties and that orders cannot be made before hearing submissions of the parties.

See: **AG vs. Simon Ogila,** Civil Appeal No. 242 of 2000 and **Peter Nzioki & Another vs. Aron Kivuva Kitusa,** Civil Appeal No. 54 of 1982; [1984] KLR 487.

We find that in the circumstances of this case, the learned Judge erred in proceeding to hear the application exparte on a date when the application was listed for mention and in the absence of counsel for the appellant.

19. We also take note that in striking out the defence, the learned Judge was exercising discretionary powers. The principles which guide the court in exercising discretion to strike out pleadings have been stated in **D.T. Dobie & Co. (Kenya) Limited v Muchina & Another [1982] KLR 1** and in many other cases. It is a power which should be exercised, *inter alia*, sparingly and with circumspection. The court would not strike out a pleading if it discloses an arguable case or raises a triable issue. Madan J.A, (as he then was) stated as follows in the said case:-

"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"… 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. 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."

20. In the instant case, the pleadings sought to be dismissed is the appellant"s statement of defence. In **Provincial Insurance company of East Africa Limited** now known as **UAP Provincial Insurance Limited v Lenny M. Kivuti (Civil Appeal No.216 of 1996) (unreported)**, this court stated:

"In an application for summary judgment even one triable issue, if bona fide, would entitle the defendant to have unconditional leave to defend."

21. Similarly in **Kenya Trade Combine Ltd vs M Shah (Civil appeal No.193 of 1999) (unreported)**, this court said:

"***In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must***

succeed."

22. Applying these principles and avoiding to delve into the merits of the case while identifying whether the appellant has raised any triable issues in his statement of defence; a matter for the trial court to determine; we find that the learned Judge in coming to his decision resorted to dealing with the merits of the case at an interlocutory stage and that the appellant raised triable issues for determination; it is trite that even one triable issue is sufficient. In the replying affidavit sworn by Japheth Mutai, the appellant"s Chief Executive Officer, the appellant claimed that the amounts claimed by the respondent were not approved by the project manager and that the claim was made one year after the completion of the project and issuance with a completion certificate and that the claim was an afterthought and in contravention of clause 44.4 and 55 of the contract which provide as follows;-

"Clause 44.4: The Contractor shall not be entitled to compensate to the extent that the Employer's interests are adversely affected by the Contractor's not having given early warning or not having cooperated with the Project Manager.

Clause 55.1: The Contractor shall request the Project Manager to issue a certificate of Completion of the Works, and the Project Manager will do so upon deciding that the work is completed."

23. The plaint contained details of the transaction that took place. In the Statement of Defence the appellant denied owing the respondent any additional monies, having paid Kshs.194,087,963/51 which was commensurate with 100% works. Further, the appellant averred that the High Court had no jurisdiction over this matter and the appellant would raise a preliminary objection on a point of law.

We therefore find that the dispute was dependent on the construction of the contract which raised triable issues such as whether the respondent was entitled to payment for additional work done and whether the respondent was entitled to additional payment arising from an extended time of the contract.

24. **Black's Law Dictionary 8th Ed at page 2435** defines an „issue" as a point in dispute between two or more parties. The strength or otherwise of the appellant"s defence, raises triable issues to allow the documents produced by the parties to be tested during the trial. It was not the function of the court at that stage to examine the evidence in-depth to determine the case. In the circumstances, we find that the learned Judge erred in finding that the statement of defence was "*so hopeless*

… *as to be beyond redemptio*n" to justify striking it out.

25. For the foregoing reasons, we find that the learned Judge did not exercise his discretion judicially in striking out the defence. Accordingly, we allow the appeal, set aside the order striking out the defence on the record with the result that the suit shall be heard on the merits. The appellants are entitled to the costs of the appeal and of the High Court.

Orders accordingly.

26. We wish to apologize for the delay in the delivery of this judgment; it was occasioned by challenges presented by the transfer of all three members of the bench to new Duty Stations and is highly regretted.

Dated and Delivered at Nairobi this 21st day of March, 2018.

M. K. KOOME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR