REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. 302 OF 2019

MAGDALINE MIRIGO NDIRITU.....APPELLANT

VERSUS

JOHN MUASA KALOKI.....1ST RESPONDENT

CINDY KATHAMBI KARIMI.....2ND RESPONDENT

JUDGMENT

1. This appeal emanates from the ruling of **Mbeja SRM** in **Milimani CMCC No. 9235 of 2017,** delivered on 3rd June 2019. In the lower court suit, **John Muasa Kaloki** and **Cindy Kathambi Karimi** (hereafter the Respondents) had sued **Magdaline Mirigo Ndiritu** (hereafter the Appellant) seeking to recover the sum of Kshs. 2,000,000/= which was paid to the Appellant by the Respondents pursuant to a sale agreement in respect two parcels of land located in Ruai and executed between the parties on 27/02/2014. The Respondents were however allegedly prevented subsequently from taking possession of the parcels by some strangers and or third parties.

2. In her defence statement, the Appellant admitted the sale agreement but asserted that she had put the Respondents into possession, denying their claims of obstruction by third parties. Thereafter, the Respondents successfully moved the lower court through a motion dated 14th May, 2018, and brought under Order 50 Rule 1 and Order 2 Rule 15(1) b to (d) of the Civil Procedure Rules, seeking the striking out of the defence.

3. Having heard the parties, the court ruled that the Appellant's defence consisted of mere denials and did not disclose any triable issues. The defence was struck out and judgment entered for the Respondents. The said ruling provoked this appeal. The memorandum of appeal dated 7th June, 2017 contains five grounds of appeal to the effect that the learned Magistrate erred in law and fact by:

a) finding that the defence by the Appellant did not disclose triable issues;

b) finding that the Respondents were not given actual possession of the suit property;

c) failing to find that the ownership documents presented by the Appellant to the Respondents were unchallenged and that the Appellant had passed a good title to the said purchasers;

d) finding that the case warranted the exercise of the remedy of striking out; and

e) finding that the Appellant had relied on procedural requirements/technicalities to defeat the Respondents' claim.

4. The appeal was canvassed by way of written submissions. The Appellant relied on four authorities including the locus classicus, **D.T Dobie and Company (Kenya) Limited vs. Joseph Mbaria Muchina & Another (1980) eKLR** as to the principles applicable in considering an application to strike out a pleading. The Appellant further referred to paragraph 4 of the defence which raised the twin issues of her averred ownership of the suit property and the possession thereof allegedly given to the Respondents and asserted that these were substantive issues which could only be determined upon evidence. It was submitted that even where a defence raises only one *bona fide* triable issue, the defendant ought to be allowed to defend.

5. On their part, the Respondents submitted that the power to strike out a pleading under Order 2 Rule 15 of the Civil Procedure Rules is discretionary and based on the grounds in the provision. Citing the decisions in **DT Dobie** (supra) and **Southern Credit Bank Limited V. Haren Mandavia t/a Fidelity Timber & Hardware Ltd & Another [2012] eKLR** among others, the Respondents argued that the defence of the Appellant was scandalous, frivolous and vexatious, and representing an abuse of the process of the court and was properly struck out. They urged the court to dismiss the appeal.

6. The court has considered the record of appeal, the lower court record and the submissions made on this appeal. This being a first appeal, the applicable principles are as stated in **Selle and Another V. Associated Motor Boat Co. Ltd & Others [1968] EA 123; Peters V. Sunday Post Ltd [1958] EA 424**, among others. The duty of the first appellate court is to re-evaluate the evidence in the lower court and to draw its own conclusions while bearing in mind that it did not have the opportunity to hear and see the witnesses testify. Moreover, an appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on a misapprehension of the evidence or on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See **Ephantus Mwangi & Another V. Duncan Mwangi Wambugu [1982 – 1988] 1KAR 278].**

7. In the case of **Cooperative Merchant Bank Ltd V. George Fredrick Wekesa Civil Appeal No. 54 of 1999**, cited in the Appellant's authority, **Jubilee Insurance Co. Ltd V. Grace Anyona Mbinda [2016] eKLR** the court 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…."**
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> See also **Kivanga Estates Limited v National Bank of Kenya Limited (2017) e KLR.**

8. The motion leading to the impugned ruling was chiefly based on the provisions of Order 2 Rule 15(1) b-d of the Civil Procedure Rules; 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—**
>
> **(a) it discloses no reasonable cause of action or defence in law; or**
>
> **(b) it is scandalous, frivolous or vexatious; or**
>
> **(c) it may prejudice, embarrass or delay the fair trial of the action; or**
>
> **(d) it is otherwise an abuse of the process of the court,**

9. In the **DT Dobie** case, **Madan J.A** (as he then was) enunciated several principles to be applied in an application brought under Order 6 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.
>
> b) The summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of documents and the facts of the case to see whether the plaintiff really a cause of action, as to do that would amount to usurpation of the role of the trial judge.
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> c) The power to strike out pleadings under the rule is permissive, not mandatory and confers a discretionary jurisdiction to be exercised having due regard to the quality and all the circumstances relating to the impugned pleading.

10. In summing-up, the learned judge stated:

> **"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."**

11. Similarly, 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 *bonafide* defence to the plaintiff's claim…. In *Moi University V. Vishva builders Limited Civil Appeal No. 296* of 2004 (unreported) this Court said:**
>
> ***"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:***

> ***"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"***

12. 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. V. Grace Anyona Mbinda [2016] eKLR,** the Court of Appeal laid out 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."**

13. With these principles in mind, this court is called upon to determine one key issue herein, namely, whether this was a proper case for the striking out of the defence and entry of summary judgment. In the plaint filed on 20th December, 2017 before the lower court, the Respondents had pleaded at paragraph 4, 5, 6 and 7 that the parties had entered into a sale agreement for the sale of two plots in Ruai referred to as plot Nos. **G562** and **G563** for the agreed sum of kshs. 2,000,000/-; that the Appellant (seller) represented to the Respondents (the purchasers) to be the legal owner of the said plots "free from all encumbrances or 3rd party claims; that it was an express term of the agreement that the Appellant would put the plaintiff's into possession of the suit properties against the payment of the agreed purchase price; and that the Respondents paid the full purchase price on the date of the agreement" which payment was acknowledged.

14. Further at paragraph 8, 9 and 10 the Respondents averred that:

> **"8. The defendant duly pointed out the plots to the plaintiffs and handed over allotment documents to them but the plaintiffs were prevented from entering the plots or taking possession of the same by 3rd parties/strangers who laid adverse claims to the plots.**
>
> **9. In spite of several promises to put the plaintiffs into possession or allocate them different problem-free plots, or refund the purchase price, the defendant has totally failed to do so and to (all) intent and purpose the sale has fallen through and the plaintiffs have cancelled the sale for total failure of consideration.**
>
> **10. Consequently, the plaintiffs claim against the defendant is for a refund of the sum of Kshs. 2,000,000/= which sum is now due and owing by the defendant to the plaintiffs on account of money paid for a consideration that has failed"** (sic).

15. In her defence statement filed on 19th February, 2018 the Appellant admitted the sale agreement for the suit properties at the sum stated and receipt of the purchase price. She proceeded to plead that:

> **"4. The defendant avers that she was the legal owner of the said plots and duly put the plaintiffs in possession.**
>
> **5. The defendants avers that she is not aware of the allegation that the plaintiffs were prevented from entering the plots or taking possessions by 3rd parties/stranger or that there are any 3rd parties/strangers having adverse claims to the plots.**
>
> **6. The defendant avers that she has no way of protecting the plaintiff's from claims by unknown persons and it was the duty of the plaintiffs to effect the transactions and safeguard their rights to the plots as the defendants' rights ceased upon conclusion of the sale.**
>
> **7. The defendant avers that the plaintiffs claim for a refund is unfounded as there is no proof that the defendant did not have a right to sell the plots to them." (sic)**

16. The Respondents joined issue with the defence by their Reply to Defence filed on 12/03/2018 wherein it was averred inter alia that:

> **2. In answer to the contents of paragraphs 4, 5, 6 and 7 of the Defence the plaintiffs reiterate the contents of paragraphs 6 to 9 of the plaint and state that they have subsequently discovered that the defendant's alleged ownership documents in respect of the same plots had earlier been impounded by Embakasi Ranching Company Limited and the Police as the same were alleged to be fake and the defendant had sued the said company and the Attorney General for various reliefs in Nairobi CMCC No. 5277 of 2013 (Magdalene Mirigo Ndiritu versus Embakasi Ranching Company Ltd and the Attorney General) which suit was heard and determined by the court on 6th February, 2016 by which judgment the defendants' said suit was dismissed… Consequently, the plaintiffs' position is that the defendant had no plots to sell to them and the plots showed to them did not belong to the defendant but to 3rd parties who denied the plaintiff's access thereto…**
>
> **By virtue of the foregoing the plaintiffs aver that the defendant had no good title to the plots to pass to the plaintiffs------ and the plaintiffs are entitled to full refund of the consideration paid on the sale which fell through".** (sic).

17. In their affidavit in support of the motion in the lower court, the Respondents narrated that upon executing the sale agreement and making full payment to the Appellant they had proceeded to erect a fence around the plots purchased, only to discover a few days later that the fence had been pulled down and the efforts made to get replacement plots after the Appellant's promise to sort out the issue with the Embakasi Ranching Company came to naught.

18. The deponent further asserts that after several meetings, the Appellant promised to refund the purchase price but later demanded that first,

the Respondents disclose the third parties who had prevented them from accessing the suit property; that it was subsequently discovered that the Appellant's advocate had by a letter dated 16th November, 2015 addressed to Embakasi Ranching Company (the land buying company which presumably sold shares to subscribers which culminated in plot allotments) indicating that the suit property was the subject of a pending dispute in **Milimani CMCC 5277 of 2013,** and warning against encroachment and trespass thereon by Embakasi Ranching Company. The letter is annexed to the said affidavit and marked as annexure **"KM8".**

19. What was the Appellants' response to the application? By her replying affidavit sworn on 19th June, 2018 she admitted the sale agreement and receipt of the purchase price but proceeded to assert that she had handed over all the ownership documents to the plaintiffs as well as put them in possession. She further claimed that her letter of 16th November, 2015 was prompted by and based on information by the Respondents and that the reference in the letter to the suit property as being the subject of the pending dispute was erroneous as the suit property herein fell under a different share certificate. She denied having offered alternative plots to the Respondents and asserted that as the lawful owners of the suit property the Respondents should deal with the encroachment/trespass thereto.

20. The trial court stated that having considered the affidavit material and pleadings, it was persuaded that the defence consisted of mere denials and raised no triable issue. This court has similarly reviewed the pleadings herein and the affidavit material together with annexures thereto. Under the sale agreement exhibited by in the Respondents' affidavit as annexure "**MKM2"** the purchasers (Respondents) were upon full payment to be put in possession of the suit property and ownership documents by the Appellant. The parties agreed by clause 6 that the actual transfer of the document would be effected *"later at an appropriate time agreed on by both parties*". There is no dispute that full payment was received. The Respondents complained that despite receiving the documents and paying the full purchase price, they were not put into possession of the suit property.

21. On her part, the Appellant claims that she did her part to put them into possession. However, the letter from her own advocate to the Embakasi Ranching company (annexure **MKM 8**) tells a different story. It says in part:

> **"RE: PLOT NO. G562 and G563 EMBAKASI RANCHING LIMITED - RUAI**
>
> **We act for Magdalene Mirigo Ndiritu and have instructions to write as under.**
>
> **Our client is the owner of the above plots.**
>
> **On 13th and 14th November, 2015 you entered and trespassed onto our clients plots. You uprooted the seedlings she had planted on the plots. You then constructed a temporary structure on the plots.**
>
> **The dispute regarding these plots is pending in court vide Milimani CMCC No. 5277 of 2013.**
>
> **We have been instructed to demand, which we hereby do that you forthwith stop trespassing on our client's plots. You should await the determination of the matter in court.**
>
> **TAKE NOTICE THAT if you do not comply, we shall sue for damages and other necessary orders as to costs and consequences.**
>
> **Yours faithfully**
>
> **(Signed)**
>
> **Ndumu Kimani & CO. Advocates**" (sic). (emphasis supplied).

22. This letter speaks for itself. Significantly, it makes no reference to the 2014 sale to the Respondents but confirms the Respondents' complaints concerning possession. Three years after this letter, the Appellant claimed in her defence before the lower court that she was legal owner of the plots and had put the plaintiffs in possession. And surprisingly also pleaded at paragraphs 5 that ***"The defendant avers that she is not aware of the allegation that the plaintiffs were prevented from entering the plots or taking possession by 3rd parties/strangers or that there are 3rd parties/strangers having adverse claims to the plots."*** She further averred that it was the Respondents' duty to protect their interests by transferring the plots as her rights thereto had ceased upon the sale.

23. Later on in her affidavit in reply to the motion for striking out, the Appellant was to admit that on 16th November, 2015 she became aware of the trespass onto the subject plots and caused the above letter to be written to Embakasi Ranching Company Limited on information obtained from the Respondents. That deposition notwithstanding, she also proceeded in the same affidavit to swear that contrary to the clear contents of the above letter, the two subject plots were not a subject of the pending dispute as they relate to a different share certificate.

24. The copy of the plaint in **Milimani CMCC No. 5277 of 2013** attached to the replying affidavit and marked annexure "**MMN1"** indicates that Appellant had sued Embakasi Ranching Company and the Attorney general concerning charges of forgery laid against the Appellant in connection with a complaint made by Embakasi Ranching company that she had forged several share certificates; and that certain share certificates had been impounded from the Appellant, and that the company (Embakasi Ranching Company) *"had unlawfully alienated the plots allocated to the plaintiffs vide the said certificates."*

25. Two key reliefs in the plaint sought the return of the certificates and restoration of the related plots to the Appellant. It is difficult therefore, in light of the Appellant's Advocates letter of 16th November,2015 to take seriously the depositions at paragraphs 8 – 12 of her

Replying Affidavit dated 17th June, 2018 and her averments in the defence statement to the effect that she was the undisputed owner of the suit plots and had indeed put the Respondents into possession. The issue went beyond the question of handing over of documents to the Respondents which the Appellant has emphasized.

26. Moreover, in spite of the contents of the Appellant's lawyer's letter of 16th November, 2015, the plaint in the suit No. Milimani CMCC No. 5277 of 2013, the Appellant's lawyer wrote on 9th February, 2017 to the Respondent' Advocate demanding that the Respondents provide "*particulars of the 3rd parties who have pre vented them from taking possession and developing the plots"* before she could consider a refund to them .Notably, in her replying affidavit, the Appellant did not controvert the contents of paragraphs 10 and 11 of the affidavit supporting the motion and related annexures **MKM 6** and **MKM 7**. These are to the effect that after deliberations the Appellant had agreed to refund the purchase price but when the letter from the Respondent's Advocate (**MKM6**) was sent to confirm that position, the Appellant's advocate wrote back with a condition, that the Respondents give particulars of the trespassers who prevented her from taking possession.

27. The Appellant had by her pleadings claimed that she was the lawful owner of the plots she sold to the Respondents and had put them into possession. But by her own replying affidavit and correspondence, the Appellant had admitted that there was a pre-existing ownership dispute in relation to the suit property and that the Respondents indeed did not take possession after the sale. However, it is apparent that the Appellant has approbated and reprobated on these matters as demonstrated. Her defence statement in my considered view lacks bona fides, is frivolous and vexatious and a mere sham.

28. On this score, I associate fully myself fully with **Odunga J in Beatrice Wanjiku Muhoho (suing as the legal representative of Francis Muhoho Ngugi (deceased) v the Honourable Attorney General [2012] eKLR** where he stated: -

> **"A matter (or pleading) is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the court; or (iv) when to put up a defence would be wasting the court's time; or (v) when it is not capable of reasoned argument. See Dawkins V Prince Edward of Sane Weimber [1976] 1 QBD; Chatters Vs Goldsmid [1894] IQBD 186.**
>
> **Again, a pleading or an action is frivolous, when it is without substance or is groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense.**
>
> **See Bullen & Leake and Jacob's Precedents of Pleadings (12th Edn.) at 145.**
>
> **A matter is said to be vexatious when (i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the defence (pleading) is brought merely for purposes of annoyance; or (iv) it is brought so that the party pleading should have some fanciful advantage; or (v) where it can really lead to no possible good. See Willis v Earl Beauchamp [1886] 11 PD 59".**
>
> (See also the decision of **Onyango -Otieno J(as he then was) in Trust Bank Limited v H.S. Amin & Co. Ltd & Another (2000) e KLR ; Joseph Okumu Simiyu V Standard Chartered Bank NRB HCCC No. 899 of 1994;** and **Mpaka Road Development Company Ltd. v Abdul Gafur Kana t/a Anil Kapuri Coffee House NRB HCCC No. 318 of 2001; [2001] 2 EA 468**.)

29. The learned Judge (in **Beatrice Wanjiku Muhoho**) in emphasizing the overriding objective (the "oxygen principle") encapsulated in section 1 A and 1B of the Civil Procedure Act stated that there is *"no magic in holding a trial simply because it is fashionable to do so"* and cited a passage in **Hunker Trading Company Ltd. Vs Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010** where the Court of Appeal stated inter alia that: -

> **"The applicant cannot be allowed to invoke the "oxygen principle" and at the same time abuse it at will… All provisions and rules in the relevant Acts must be "Oxygen" compliant because they exist for no other purpose. The oxygen principle poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in the interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the courts view, this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case are for it so that the ends of justice are met…**
>
> **The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the (Civil Procedure) Act or in the interpretation of its provisions. …. under Section 1B some of the aims of the said objective are; the just determination of proceedings, the efficient proceedings the efficient disposal of the business of the court the efficient use of available judicial and administrative resources; and the timely disposal of proceedings…at a cost affordable by the respective parties."**

30. The Appellant may have passed over to the Respondents the alleged documents of ownership, none of which is a title document or in her own name, but the Respondents have been unable to take possession of the suit property despite paying the full purchase price. The Respondent appears to suggest by her pleadings that the onus lies with them to resolve preexisting ownership issues as she has done her part! In the circumstances of this case, that is vexatious.

31. The Appellant's ownership of the suit property was subject to her court case, at the time of the sale agreement. The said suit was dismissed. She cannot be heard to claim that she passed on a good title to the Respondents and that it is up to them to deal with the trespassers. Reviewing the Appellant's correspondence, affidavits and pleadings it appears to this court that she was engaging in a game of smoke and mirrors, approbating and reprobating and moving goal posts as suited her circumstances, thereby dissipating valuable court time.

32. This court therefore agrees with the lower court's assessment that the defence statement filed by the Appellant was a mere defence that did not disclose any triable issues, or in other words, was lacking in bona fides and ought not to have been allowed to proceed further. In the circumstances, this court finds no merit in the grounds of appeal urged by the Appellant and will dismiss the appeal with costs.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 25TH DAY OF JUNE 2021.

C. MEOLI

JUDGE

In the Presence of:

For the Appellant: N/A

For the Respondents: Mr. Mikwa h/b for Mr. Meenye

Court Assistant: Carol.