REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NUMBER 607 OF 2011

TAJ MALL LIMITED...APPELLANT

VERSUS

TAJ VILLAS MANAGEMENT LIMITED......................RESPONDENT

J U D G M E N T

This is an appeal from the Ruling delivered on the 9th day of November, 2011 by the Honourable Chief Magistrate Mr. Boaz Olao in CMCC No. 1564 of 2011 wherein the learned magistrate dismissed an Application by the Appellant Taj Mall Limited who had sought orders that the Plaint be struck out and that the costs of the Application and the suit be awarded to it.

A brief history of the matter will suffice for purposes of determination of the Appeal herein. The Respondent Taj Villas Management Limited who was the Plaintiff in the lower court sued the Appellant Taj Mall Limited on the 9th May, 2011 and prayed for judgment against the Appellant for Ksh.2,156,815/-, interest on that amount at Commercial Rates of 18% per annum from 15th December, 2010 until payment in full and also the costs of the suit.

At all material times, the Appellant was the registered proprietor of all that property known as Land Reference Number 9116.

The Appellants have caused to be erected on the said property certain buildings consisting of Thirty Seven (37) residential maisonettes, swimming pool, parking place, the gardens and the boundary or perimeter wall.

It has sold all the 37 residential maisonettes and has granted leases to all the said maisonettes. The lessees of each of the 37 maisonettes in the said property paid the full membership fees of Ksh.100,000/- and on execution of their respective leases applied for and subsequently became members of the Respondent.

The Respondent was incorporated to acquire the leasehold interest of the property known as L.R. Number 9116, manage the said property and to hold the same as an investment for the benefit of the lessees of the masionettes erected on the said property. The shareholding in the Respondent is limited to the lessees of the maisonettes erected on the said land reference Number.

As a party to the leases of the Maisonettes on L.R. No. 9116, one of the duties of the Respondent as provided under Clause 3 (d) of the Lease is to: -

"keep the driveways, car park paths, boundary walls or fences, the said garden, swimming pool and common water pipes, drains gutters, sewers and the main electric cables in and about the estate in good repair and condition upkeep and maintenance and to effect such repairs thereto and replacements thereof, as may from time to time become necessary and desirable".

On or about the year 2006/2007 the Appellants erected or caused to be erected a boundary wall on the said property.

It is alleged that part of that wall was erected and/or constructed near House No. C2 so carelessly, negligently and/or in breach of duty causing the said boundary wall to fail structurally and be on the verge of collapse and thereby posing imminent danger of damage and/or injury to House No. C2 and the lives and safety of persons dwelling therein. The particulars of such negligence are set out in paragraph 11 of the plaint.

Due to the imminent danger paused to House No. C2 and/or its occupants and after the Appellant failed to remedy the wrong, despite demand to do so, the Respondents intervened and caused the said part of the boundary wall to be constructed as a reinforced concrete retaining wall at a cost of Ksh.2,156,815/- which it claims from the Appellant.

The Appellant filed a Memorandum of Appearance on 8th June, 2011 and a defence on 22nd June, 2011 both of which were filed under protest.

The Appellant in its short defence avers that the plaint and the verifying Affidavit filed in the case are fatally defective and does not comply with the mandatory provisions of the Civil Procedure Rules. The Appellant further avers that the Respondent lacks any locus to commence the suit as against the Appellant since there is no privity of contract between the Appellant and the Respondent.

On 1st July, 2011 the Appellant field a Notice of Motion dated 30th June, 2011 seeking to strike out the Plaint and also sought costs of the Application and the main suit. The gist of that Application is that the Plaint does not disclose any reasonable cause of action and that the Respondent lacks any locus to commence the suit and for the two reasons the Appellant alleges that the plaint and the entire suit is fatally defective and cannot be sustained.

The Respondent filed grounds of opposition and a Replying Affidavit to the Notice of Motion insisting that the plaint discloses a cause of action and that there is privity of contract between the Appellant and the Respondent and in any event privity of contract between them was not necessary for the Respondent to sustain a cause of action against the Appellant. The Appellant filed a further Affidavit on the 15th August, 2011. The Application was disposed off by way of written submissions with both parties filing their rival submissions and a ruling was delivered on the 9th day of November, 2011 by Hon. Boaz Olao dismissing the Application and the Appellant being dissatisfied with the said ruling appealed to this court on the 30th day of November, 2011 citing four grounds of appeal as hereunder.

1. The learned magistrate erred in law and in fact in failing to appreciate the serious issues raised by the Appellant in the Notice of Motion application dated 30th June, 2011 and in dismissing the same with costs.

2. The learned magistrate erred in law and in fact in holding that the claim by the Respondent was based on the tort of negligence and not on contract and that the Respondent had a cause of action.

3. The learned magistrate erred in law and in fact in holding that the Respondent had locus to institute the suit in cause No. 1564 of 2011.

4. The learned magistrate erred in law and in fact and showed bias in determining the suit prematurely by stating that the Respondent incurred a total of Ksh.2,156,815/- to remedy the damages whereas the Respondent's claim had not been proved by adducing evidence.

The Appeal proceeded by way of written submissions with the parties highlighting the same on the 5th October, 2015 when it came up for hearing.

In his submissions the counsel for the Appellant submitted that the cause of action is based on contract and not tort and referred to paragraphs 7, 9 and 10 of the Plaint. He told the court that the relationship between the parties was contractual and had been reduced into writing and this supported his first ground of appeal. He faulted the finding by the lower court that the cause of action was based on the tort of negligence. It was his further submission that if the cause of action is based on negligence, the same is a non starter because the same would be deemed to have been filed out of time, the cause of action having arisen in the year 2007 and the suit having been filed on the 19th May, 2011. The statutory period within which to file the suit expired in the year 2010.

He submitted that the Respondent has no locus in law to institute the suit against the Appellant in that the property is registered in the name of the Appellant and the Respondent's duties are limited to managing the estate. The Respondent does not have proprietary interest in the property and that the manager cannot be the owner of the estate.

According to him, the Respondent's right is that of an occupier of common areas of the suit premises and it cannot be said to be the owner. The Respondent came into existence after the construction of the wall and the premises, and therefore, a right cannot be bestowed retrospectively. The alleged imminent danger of negligence was limited to a certain house No. C2 and not to the general estate and the owner of the said house is not claiming anything and the Respondent cannot purport to litigate on his behalf and the said owner is not a party to the suit.

He concluded his submissions by arguing ground 4 of the Appeal and submitted that the learned magistrate was biased against the Appellant by making a finding in his ruling that the Respondent had incurred a total of Ksh.2,156.815/- and had a right to commence proceedings to recover the money which finding was made before the parties were heard.

On his part, Counsel for the Respondent submitted that the appellant needed to proof that the Respondent had no cause of action and that the court was only required to look at the plaint. Under the provisions of Order 2 Rule 15 (1), no evidence is required by way of an Affidavit and that the Appellant could not argue the other ground of the Respondent not having any locus under that order as this ground would call for evidence.

He submitted that the Respondent had been given the mandate by the owners of the maisonettes to manage the common areas and if in its duties it finds that the Appellant had built a defective boundary wall, as in the present case, and it repairs the same and as a result incurs a cost (in this case, Ksh.2,157,618), then the Appellant is liable.

It was his further submission that, the Respondent being in charge of common areas, the Appellant owed it a duty and there was a breach of that duty by the Appellant building a defective wall. The claim can be based on either Tort or Contract.

According to him, the issue of limitation of Action cannot be argued under Order 2 Rule 15(1). He argued, the issue before the court is on latent defect and in his view time starts to run when a party becomes aware of the defect and in this case when the Respondent rebuilt the wall. He said the issue of Limitation had not been raised by the Appellant in his submissions but it only raised it in court.

He relied on the case of **<u>Batty & Another Vs Metropolitan Property Realization Limited & Another</u>** where it was held: -

> ***"you do not need to have proprietary interest to sue in negligence, you can do so if you establish that there is a duty of care owed to you."***

On the issue of bias, by the lower court, he submitted that the court did not make a finding that a sum of

Ksh.2,157,618/- was incurred by the Respondent in building the wall and that the court could not make such a finding because no evidence was led to that effect. He submitted that in the written submissions, the Appellant stated that there was no privity of contract which is contrary to their oral submissions.

On the issue of reversionary interest, the respondent submitted that at this stage you can only refer to the plaint and not the documents because by doing so the Appellant is importing evidence and giving evidence from the bar. The Appellant is at liberty to bring all these issues in its defence in the lower court and await the determination of the same by the lower court. He relied on the case of **D. T Dobie & Company (Kenya) Ltd Vs Muchina** where the court held that striking out of a case should be done as the last result.

In his reply to the submissions by the Respondent, the Advocate for the Appellant stated that in the Application to strike out the suit, it states that there is no privity of contract based on the pleadings by the Plaintiff. He urged the court to make a finding on privity of contract and relied on the case of **Batty & Another Vs Metropolitan Property Realization Limited and Others** which adopted the principle of **Dunhill Vs Stevenson.**

I have carefully considered the grounds of Appeal, the submissions by the learned counsels and the law.

The issues that the court is being called upon to decide are whether the Plaint discloses any cause of action and whether the Plaintiff has locus to commence the suit.

In considering an Application for striking out a plaint like the one before the court, it is important to consider what a reasonable cause of action means. This was clearly defined in the celebrated case of **D.T. Dobie & Company (Kenya) Limited Vs Muchina** (Civil Appeal Number 37/1978 as follows: -

> ***"A reasonable cause of action means action with some chance of success when the allegations in the Plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claimed prayer."***

The court went ahead to define **"Cause of Action"** as hereunder: -

> ***"As an action on the part of the Defendant which gives the Plaintiff his cause to complain."***

It is important to note that at this stage no evidence has been offered by the parties and at most the court can only rely on what is pleaded in the plaint without going into the merits of the case as this is solely reserved for the trial Judge/Magistrate.

In the Plaint sought to be struck out, it is pleaded that the Defendant is the registered proprietor of all that property known as Land Reference Number 9116 and that it has caused to be erected on the said property certain buildings consisting of 37 residential maisonettes, swimming pool, parking place, the gardens and the boundary or the perimeter wall.

The Respondent has sold all the thirty seven (37) residential maisonettes and has granted leases to all the said maisonettes.

In paragraph 9 of the plaint, it is pleaded that, as party to the leases of the maisonettes erected on L.R. No. 9116 one of the duties of the Plaintiff is as provided by Clause 3(d) of the lease.

The Respondent alleges that Appellant erected and/or constructed part of the boundary wall near House No. C2 so carelessly, negligently and/or in breach of duty causing the said wall to fail structurally and to be on the verge of collapse and thereby posing imminent danger of damage and/or injury to House No. C2 and the lives of safety of persons in the said house and the particulars of negligence are set out in paragraph 11 of the Plaint.

The Respondent goes further to plead that due to the imminent danger posed to House No. C2 and/or its

occupants and after the Defendant failed to remedy the wrong, the Respondent intervened and caused the said part of the boundary wall to be constructed as a reinforced concrete retaining wall at a total cost of Ksh.2,156,815/- the particulars of which are set out in paragraph 13 of the plaint. What I am able to gather from the plaint is that Respondent alleges negligence on the part of the Appellant in the manner it erected or constructed part of a boundary wall near house No. C2. This to me discloses a cause of action in negligence.

On the other hand Respondent has referred to a lease and in particular Clause 3(d) of the same. In my humble view, the reference to the lease prima facie unveils a different cause of action in contract. It is trite law that a party can plead two separate causes of action in the same plaint. As to whether there was privity of contract between the Plaintiff and the Defendant, this again can only be determined by way of perusing the lease that the Respondent has relied on in paragraph 9 of the Plaint.

The lease agreement was referred to by the Respondent in the lower court and was annexed to the replying Affidavit to the Notice of Motion which is the subject of this Appeal. The court would not be in a position to make a finding on the issue of **"Locus"** without considering the lease itself, Clause 5 (v) of the same provides: -

> ***"From the date of the transfer of the said reversionary interest all the obligations and like benefits herein contained on the part of the lessor will vest in and be carried out by the manager." ………*** who according to the

Lease is the Respondent.

My understanding of that clause is that until such a time that the reversionary interest is transferred, the manager does not have any legal interest in the property and therefore, has no locus to sue.

Am fully, aware of the holding in the case of **D.T. Dobie & Company (Kenya) Limited Vs Muchina** that: -

> ***"As the power to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence, it should be used sparingly and cautiously but my hands are tied by the contents of the lease.***

The fourth ground of Appeal has no merit. The learned magistrate did not make a finding on the sum of Ksh.2,156,815/= and whether the same has been incurred by the Respondent or not. On page 3 of his ruling he merely stated what the Respondent was claiming.

In the upshot, I make the following orders: -

1. ***The appeal herein is allowed.***

2. ***The ruling and Order issued on the 9th day of November, 2011 in the Chief Magistrate's Court at Nairobi (Milimani Commercial Courts in CMCC No. 1564 of 2011 is hereby set aside.***

3. ***The Appellants Notice of Motion dated 30th June, 2011 is hereby allowed.***

4. ***Each party to bear its own costs of the Appeal but the costs of the lower court to be borne by the Respondent.***

Dated and delivered at Nairobi this 10th day of December, 2015.

....

L. NJUGUNA

JUDGE

In the presence of

……………………………..….. *for the Appellant.*

…………………………… *for the Respondent.*