



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gicheru, Kwach & Shah JJ A)

CIVIL APPEAL NO 132 OF 1989

BETWEEN

NITIN PROPERTIES LTDAPPELLANT

AND

JAGJIT S. KALSIRESPONDENT

KALDEEP K. KALSI.....RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Nairobi (Mr Justice Dugdale) dated 7th October, 1987 in HCCC No 3417 of 1987)

JUDGMENT OF THE COURT

On 30th September, 1987 the respondent's then advocate Mr Bhasker Sheth took a preliminary point before the superior court to the effect that the plaint filed therein was incompetent, misconceived, was an abuse of the process of court and sought to have the same struck out.

This Court on 12th July, 1995 ruled in *Pan Africa Builders & Contractors Ltd & another vs Jogdish Singh*, (CA No 52 1995) (unreported) that:-

“Quite unprocedurally and based on preliminary objection supported by an affidavit sworn by the second applicant the applicants applied for a stay of proceedings in the superior court. That is most unusual. It is clear and must be so that an objection in limine can be based on what used to be demurrer. The predecessor of this court said in the case of *Mukisa Biscuit Company vs Westend Distributors Limited* [1969] EA 696 at page 701: “A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse the issues. This improper practice should stop.””

The preliminary point taken by the respondents' advocate before the judge of the superior court was primarily directed against that part of the claim which the appellant sought reliefs based on adverse possession. It was contended on their behalf that such a claim cannot be made by a plaint and that where such a relief is sought the proper procedure is by way of originating summons. In view of the mandatory provisions of order 36 rule 3D of the Civil Procedure Rules and this court's decision in the case *Lali & others v Wachira & others* (CA No 132/93) (unreported) there is no doubt that the objection was properly

taken. A relief based on adverse possession must be brought by originating summons.

Mr Ibrahim for the appellant quite correctly concluded that reliefs sought by the appellant by way of adverse possession could not form part of the plaint and he agreed that paragraphs and prayers in the plaint pertaining to reliefs based on adverse possession ought to be struck out.

Mr Ibrahim then submitted that the learned judge was wrong in striking out the rest of the plaint. A simple examination of the plaint shows that the plaintiffs claim was not based entirely upon the allegation of adverse possession.

Paragraph 8 of the plaint refers to a Land Survey Plan Number 37220, alleging registration in the plaintiff's name, of 1.97 acres of land. Paragraph 10 of the plaint talks of moving of beacons to mark the boundary between the appellant's and respondent's land. Paragraph 11 to 16 of the plaint refer to drastic alteration of the said boundary. Paragraph 16 of the plaint refers to alleged trespass by the respondents on to appellant's land. Paragraph 23 of the plaint alludes to a constructive trust.

It must be borne in mind that for a preliminary point to succeed the facts as alleged in the plaint are deemed to be correct. If the facts (other than those relating to adverse possession) are correct the plaintiff had an arguable claim. Such a claim cannot be struck out as it was done by the superior court. Striking out is a drastic remedy and it has been held time and again that striking out procedure can be invoked only in plain and obvious cases and that such jurisdiction must be exercised with extreme caution. See *Republic of Peru vs Peruvian Guano Company* 36 Ch Div 489 at pages 495 and 496. Also *Moore vs Lawson & another*, 31 TLR 418 at p 419 both these cases were quoted with approval in the case of *DT Dobie (K) & Co Ltd vs Muchina & another* (CA No 37 of 1978) (unreported).

A plaint can be struck out only if the claim is incontestably or hopelessly bad. Otherwise as said by Madan JA (as he then was) in *DT Dobie* case (supra):-

“A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.”

It is also clear that a proper application for striking out must be filed if such a course is warranted under order VI rule 13 (1) (a) (b) (c) (d) (as applicable) by a summons as stated in order VI rule 16 of the Civil Procedure Rules.

The learned judge in the superior court was clearly wrong in striking out the whole suit. He ought to have allowed the plaintiff (appellant) to breath some life into the suit by calling upon him to withdraw those pleadings which refer to adverse possession claim, amend plaint accordingly, and to bring in the Land Registrar into the suit if so advised to enable justice to be done. He ought in our view to have stayed the proceedings until the Attorney General's office or the Commissioner of Lands (as may be deemed proper) was brought into the suit and he should have ordered the status quo to be maintained for some time to allow the appellant to put his house in order.

In the end we allow this appeal and set aside the order of the judge and in lieu thereof we reinstate the plaint and give the appellant 30 days within which to apply to the superior court for leave to amend the plaint. We also issue an injunction in terms of prayers 2 and 3 of the Chamber Summons dated 28th August, 1987 which order shall remain in force until the hearing and final determination of the suit in the superior court. We also grant the appellant the costs of this appeal.

Dated and delivered at Nairobi this 30th day of October 1995

J.E GICHERU

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JUDGE OF APPEAL

R.O KWACH

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JUDGE OF APPEAL

A.B SHAH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR