REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMABAY

ENVIRONMENT AND LAND COURT LAND APPEAL NO E032 OF 2024

DISMAS OKELLO WILLIAM ROWA……1ST APPELLANT

THOMAS JOSEPH OKELLO ……..2ND APPELLANT

GREGORY ONYANGO OKELLO……3RD APPELLANT

VERSUS

HEADMOND JAMES K'OBIL……

…….RESPONDENT

(Being an Appeal from the ruling of Hon. M. Agutu (PM) in Mbita PMCC E002 of 2023 delivered on the 20th day of June 2024)

JUDGEMENT

1. The Respondent filed an Application dated 4th December 2023 seeking the following orders in the trial court;

1) **That this Honourable Court be pleased to strike out the Defendant's Statement of Defence dated 20th June 2023;**
2) **That this Honourable Court be pleased to enter interlocutory judgement in favour of the Plaintiff against the Defendants herein accordingly;**
3) **That this Honourable Court be pleased to make such other order(s) as the Honourable Court may deem appropriate, just and expedient to grant.**

4) That costs of this application be provided for.

2. In his supporting affidavit, he pleaded that he filed the suit in 2023 and served. While he did not specify that it was counsel for the 1st defendant (as the record shows), he deposed further that the defendants' counsel entered appearance on 24th January 2023. That the matter was set down for pretrial hearings and the appellants' advocate failed to file a defence. That he filed the Statement of Defence, but outside of the prescribed time and as granted by court.

3. The 1st Appellant filed a Replying Affidavit dated 24th January 2024 sworn by the 1st Appellant. He deponed that when he was served with the summons he approached a family friend who advised that he retain the services of an advocate which he did. Learned counsel entered appearance and sought for time to get proper instructions. When he finally had a chance to meet the advocate and explain the facts she and the advocate agreed that only he would file pleadings and enter appearance on his behalf as he had no knowledge of the whereabouts of the 2nd and 3rd defendants.

4. He deponed further that he rushed to Mombasa to trace his sons as he feared that they were among the Shakahola victims. He urged that they had not been served with the summons. Thus, to him, therefore the matter was not ripe for hearing as they had not been served properly. That due to issues with the filing no invoices were raised for paying filing fees. He urged the court to dismiss the application as he had made efforts to take steps. He urged that the defence raised triable issues.

5. Upon considering the pleadings and submissions, the trial court struck out the statement of defence and entered judgment in favour of the Plaintiff vide the ruling delivered on 20th June 2024.

6. Being dissatisfied with the decision of the trial court, the Appellant instituted the present appeal vide the Memorandum of Appeal dated 3rd July 2024 premised on the following grounds;

1) **The Learned Trial Magistrate erred in law and in fact by failing to consider and/or make a determination on whether the 1st Appellant's Defence on record raised triable issues.**
2) **The learned trial magistrate erred in law and in fact in reaching a conclusion as she did, that the 2nd and 3rd Appellants herein were properly served with summons to enter appearance so as to be found to be indolent in filing their statement of defence.**
3) **The learned trial magistrate erred in reaching the extremely punitive conclusion that there was inordinate delay on the part of the Appellants.**
4) **The learned trial magistrate erred in law and in fact in failing to appreciate the glaring fact that no summons to enter appearance had been served upon the 2nd and 3rd Appellants.**
5) **The learned trial magistrate made a fundamental error in law by deciding to lock the Appellants out of the seat of justice.**

6) **The learned trial magistrate erred in law and in fact by turning a blind eye and completely ignoring the weighty and triable issues raised in the Appellant's Statement of Defence.**
7) **The learned trial magistrate erred in law and in fact by denying the 1st Appellant an opportunity to be heard in his defence.**
8) **The learned trial magistrate erred in law and in fact by ignoring the fact that whereas the delay on the part of the Appellant if any, could be sufficiently cured by an award of a reasonable throw away cost, the loss that would be suffered by the Appellants due to the expunging of the defence and entering interlocutory judgment in favour of the plaintiff would be permanent, painful and not quantifiable in monetary terms at all.**
9) **The learned trial magistrate erred in failing to fully appreciate the fact that land matters are extremely emotive and thus best determined on merit.**
10) **The learned trial magistrate erred in law and in fact by failing to consider and/or interrogate the issues of illegality and fraud raised in the 1st Appellant's Statement of Defence dated 20th day of June, 2023.**
11) **The learned magistrate erred in law and in fact by sanitizing and cleansing the whole fraudulent processes without scrutiny contrary to the interest of justice and fairness.**

7. The parties were directed to file submissions on the Appeal. The Appellant filed submissions dated 14th December 2025 through the office of counsel.

Appellants' submissions

8. Learned counsel for the 1st Appellant urged that the trial court the learned magistrate erred in law and in fact by failing to consider the 1st appellant's statement of defence dated 20th June 2024. He reproduced the details of the defence and urged that the issues raised in the statement of defence were not only triable but also weighty. That the issues concerning availability of the 2nd defendant is a pertinent issue since it affects how service is done. He cited the provisions of Order 5, Rule 7 of the civil procedure rules and the case of Fidelity Shield Insurance Co Ltd v Festus Cherop Kiplangat & another [2020] in support of the submissions. He urged the court to find that the defence had triable issues and allow the appeal.

9. On inordinate delay, Counsel pointed out that the court however stated that a statement of defence was filed without the leave of the court, citing the decision in Ezekiel Onyango versus Shella Sheikh another 2018 KEHC 6911(KLR) and urged that the finding on inordinate delay was an error on the part of the trial court. That when the matter first came up before the trial court, on 13th July 2023, the trial court after hearing the sentiments of both parties allowed Ms Adoyo to file statement of Defence and accompanying documents on or before the 27th of July 2023 when the matter would be heard and that this was the very

last indulgence for counsel for the 1st Appellant. That in compliance with the orders of 13th July 2023, counsel filed a memorandum of appearance, statement of defence, witness statements and documents and counsel for the respondent confirmed being served with bulky documents and that he needed time to study, so as to be able to adequately respond. In fact, it is at the instance of the counsel for the respondent herein that the matter was adjourned on 27th July 2023 when it came up for hearing.

10. Counsel submitted that somehow, when counsel filed the new memo of appearance, defence and accompanying documents, she mistakenly raised invoices requiring payment of no money because of the aforesaid challenges of the novel e-filing and the fact that court users were still learning how to go about it, especially in Homabay. Similarly, there is no law whatsoever that required opposing counsel to be served with receipts evidencing filing, especially in the era of e-filing when counsel just needs to confirm from the system whether the documents have been uploaded and are in the system or not. To date, the system bears witness that the appellant's documents were filed on the 27th of July 2023 and this is something that the court can suo moto verify from its end.

11. Counsel urged that the defence was filed in time and in accordance with the directions of the court and the same should have been considered. He placed reliance on the decision in Peter Juma Kuriah TA Scope Designs Systems v Attorney General (Sued on behalf of Ministry of

Industrialization another 2016 KEHC 8617(KLR) and implored the court to find that the appellants had the intention to defend this suit and that the case be determined on merits and order that the appellants be given an opportunity to be heard by the lower court.

12. Counsel urged that the 2nd and 3rd defendants left home in 2006 and 2024 respectively and have never returned home. Further, that the 1st appellant had a meeting with his counsel and they agreed that at the time of filing the defence they should also file a new memorandum of appearance just for the 1st appellant since he did not know of the whereabouts of the 2nd respondent whom he suspected was part of the Shakahola Victims at the time. To the best of the 1st appellant's knowledge, the 2nd appellant had not been served with summons to enter appearance or the pleadings given the fact that their whereabouts were and are still not known to the 1st appellant. Counsel posited that service was not properly done in accordance with Order 5 Rule 7 of the Civil Procedure Rules.

13. Counsel urged that the trial court did not determine the issues before it on merit and urged the court to allow the appeal as prayed with costs.

Analysis and Determination

7. It is worth noting and repeating in this appeal just as in many other decisions this court has made that submissions do not constitute pleadings or evidence. This is because some of the arguments by the Respondent amounted to raising

evidence. **Moi v Muriithi & another (Civil Appeal 240 of 2011) [2014] KECA 642 (KLR) (9 May 2014) (Judgment)**,

> "***Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented***."

8. Thus, this court will consider the evidence as was presented before the trial court by way of affidavits in support or opposition of the application before the court at the time.

Analysis and Determination

9. This is a first appeal. It arises from a decision that the trial court exercised its discretion on. Of discretion, appellate courts have often relied on a number of principles, but the general legal rule is that such courts should not substitute their conclusions with those of the courts appealed from. Again, they do not interfere with the decisions of courts appealed unless wrought with a number of flaws. Thus, in **Supermarine Handling Services Ltd V Kenya Revenue**

Authority [2010] KECA 373 (KLR) the court held as follows:

> ***"…Thus, where a trial Court has exercised its discretion on costs, an appellate Court should not interfere unless the discretion has been exercised injudiciously or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule".***

10. Also, in **Supermarine Handling Services Ltd versus Kenya Revenue Authority [2010] eKLR (Civil Appeal 85 of 2006)** the Court stated: -

> ***"… Thus, where a trial Court has exercised its discretion on costs, an appellate Court should not interfere unless the discretion has been exercised injudiciously or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied***

that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule".

11. Similarly, in **Farah Awad Gullet v CMC Motors Group Limited [2018] eKLR** the Court of Appeal held that:

"…the Court of Appeal, in interfering with the exercise of discretion of the trial Judge appealed from, ought to satisfy itself that the exercise of that discretion either way was improper and therefore warrants interference."

12. Moreover, in **Edward Sargent versus Chotabha Jhaverbhat Patel [1949] 16 EACA 63**, it was held that there is no bar to an appeal lying to an Appellate Court against an order made in the exercise of judicial discretion, but for the Appeal Court to interfere only if it be shown that the discretion was exercised injudiciously.

13. Furthermore, in **Mbogo and Another v Shah [1968] EA 93** at **96** the court held:

"For myself I like to put it in the words that 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 his 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 that as a result there has been mis-justice."

14. Also, in **Agola v Ngodhe (An administrator to the Estate of Zakayo Ngodhe) (Environment and Land Appeal E025 of 2024) [2025] KEELC 1367 (KLR) (6 March 2025) (Judgment),** this court stated;

"As for the instant appeal, it is clear that it arose from the low court's exercise of discretion. Regarding appeals of such nature, the appellate court will not normally interfere with the discretion of the trial court unless the trial magistrate or judge exercised the discretion wrongly, injudiciously or misdirected himself in some matter thereby arriving at a wrong decision, the decision clearly wrong."

15. Also, in **Nyaoke & 7 others v Ayaga (Environment and Land Appeal E024 of 2024) [2025] KEELC 7345 (KLR) (28 October 2025) (Judgment)** this court held,

> ***"Again, it is worth of note that this is an appeal that challenges the exercise of discretion by the trial court. The principles that govern the instances that an appellant court may interfere with a decision arrived at by exercise of discretion by a court appealed from are now settled. This court must be cautious in deciding to interfere with the discretion of the trial court. If I must do so, I should not substitute my decision with the that of the trial court. I must consider and find, if I have to overturn that decision, that the trial court failed to act judiciously or was plainly wrong on principles that he proceeded on or considered or failed to consider factors which he ought not or ought to have considered, respectively."***

16. The above decisions settle the legal elements appellate consider. They are whether the trial court exercised its discretion judiciously; included or excluded material it should not have included or excluded respectively; or even in the

step of doing the right things as noted here before, the decision arrived at was plainly wrong. Therefore, the germane issue for determination is; **Whether the trial court erred in striking out the Appellants' Defence**

17. The Court's jurisdiction to strike out pleadings is found under **Order 2 Rule 15** of the Civil Procedure Rules which provides thus;

"Rule 15. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

1. **It discloses no reasonable cause of action or defence in law; or**
2. **It is scandalous, frivolous or vexatious; or**
3. **It may prejudice, embarrass or delay the fair trial of the action; or**
4. **It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."**

18. Suffice it to say, it is trite that striking out pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham. To put it more succinctly, striking out parties' pleadings is a draconian step which ought to be take very carefully, perhaps as the very last resort of a court. This could be only in the clearest of the cases where a plaint or claim, or a defence or response is incorrigibly hopeless that it cannot be salvaged even by way of amendment, or unless it is wrought with a such a

fundamental legal flaw, for instance, lack of capacity or standi, that cannot be salvaged. In the case of **D.T. Dobie & Company v Muchina, (1982) KLR 1, Madan J.A (as he then was)** held as follows with regard to striking out pleadings:

> **“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]. Sellers, JA [supra]. As far as possible, indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.**
>
> **If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overact by considering itself in a bind summarily to dismiss the action. 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.

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." (Emphasis added)

19. When considering what a triable issue is, in the case of **Equatorial Commercial Bank Limited vs Jodam Engineering Works Limited & 2 Others (2014) eKLR** had the occasion to determine this question. In its decision Kasango J stated as follows ;-

"A statement of defence is said to raise reasonable Defence if that Defence raises a prima facie triable issue."

20. In the case **of Olympic Escort International Co. LTD & 2 Others vs Parminder Singh Sandhu & Another (2009) eKLR**, the court of Appeal held that for an issue to be triable, it has to be bona fide. The court stated as follows:

"It is trite that, a triable issue is not necessarily one that the Defendant would ultimately succeed on. It need only be bona fide."

21. I have considered the defence which was struck out. Specific defences were raised regarding the claim and more particularly the agreements in issue. These, no one can wish away, more so on whether the said agreement is enforceable or breached. I am satisfied that the Defence raises triable issues with regard to the sale agreement that is the subject of the instant claim.

22. This court is of the humble view that where the party, or defendant did the best he could to present his defence to the court, the trial court could have recalled that it is a fundamental natural and constitutional principle and right respectively that a party should not be condemned unheard, unless he has deliberately and in an abuse of the process of the court failed to utilize the chance given to him/her.

23. In my humble view, the Application did not meet the merits of **Order 2 Rule 15** of the **Civil Procedure Rules.** Additionally, I note that three was no evidence to show that the 2nd and 3rd defendants have ever been served with Summons to Enter Appearance. The affidavit of service sworn by one Edwin Omondi Otieno on 11th January 2023 fell short of the provisions of Order 5 regarding proper service: it was defective. This is because the deponent or process server only stated vaguely that he served the all the Defendants. He stated, at paragraphs 3 and 4, that "*on 11/1/2023 I proceeded to Nyabomo in Sindo and with the help of the Plaintiff who directed me to the home of the defendants.... After brief introduction, I explained to them my purpose of*

me being there and indeed lawfully served them… they each received."

24. I have carefully perused the annexture to the Affidavit of Service. The Summons to Enter Appearance which were indicated as served were only those of the 1st Defendant, now Appellant, (Dismas Okelo Rowa) only. None were for the other two Defendants/ Respondents were attached. Thus, whereas the Process Server purported to have served the latter two, he did not. It was a pure lie that he served, which means the purported 'service' on the 2nd and 3rd Defendant was defective.

25. In any event, the 1st Defendant deposed that the 1st and 2nd Defendants never entered appearance, having disappeared without a trace. It follows that the judgment entered against was irregular because they have never been given an opportunity to be heard, which is an affront to the rules of natural justice.

26. If it had to do with failure to pay filing fees for the document, definitely it meant that indeed there was no document or pleading filed in court to strike out if that was the case. But since the trial court did not address itself on that issue and use it as a determining point, this court will say nothing more that it has stated about there being no document to strike out if no payment is made for a document because it is not filed. Indeed, if no fees was paid for it, and since this court has found that the Defendants ought to have been accorded chance to have their defense and participate in urging it, they

should proceed to pay for the same within fifteen (14) days of this Judgment.

27. One legal point of importance that I need to make a finding on as a parting shot is that the claim in the lower court was for reliefs of injunction, specific performance and general damages. There was none for special damages or a specific sum of money (pecuniary damages). Thus, in terms of Order Rules 10 Rules 6 and 7 of the Civil procedure Rules, this Court is of the view that interlocutory judgment court have been entered in the circumstances or pleadings of the case.

28. The upshot of the foregoing is that the appeal succeeds. I hereby order that;

i) The ruling of the trial court and the dated 20th June 2024 and the interlocutory judgment given on the same date is hereby set aside.

ii) The Applicant's statement of defence is hereby deemed as duly filed, on condition that the fees, if not paid for earlier, be paid within fourteen days in default of which the papers would stand expunged from the record, and the matter is to proceed for hearing or for formal proof (whichever will be applicable), before the trial magistrate or a court of concurrent jurisdiction.

iii) Costs to the Appellants.

29. Orders accordingly.

Judgment **dated, signed and delivered virtually via the Teams Platform this 18th day of March 2026.**

HON. DR. IUR NYAGAKA

JUDGE

In the presence of,

Court Assistant: Ms. Fiona

Trevor Molo Advocate holding Q. Adoyo for the Appellants

Ms. Kibet for the Respondent.