Daniel & another (Suing as administrators of the Estate of Daniel Bernhard Hefti) v Reinhard & 3 others (Civil Appeal E027 of 2021) [2023] KECA 969 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KECA 969 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL E027 OF 2021

SG KAIRU, JW LESSIT & GV ODUNGA, JJA

JULY 28, 2023

BETWEEN

ELSBETH REINHARD-HEFTI DANIEL .... 1ST APPELLANT

BERNARD REINHARD .... 2ND APPELLANT

SUING AS ADMINISTRATORS OF THE ESTATE OF DANIEL BERNHARD HEFTI

AND

JOYCE JEPLETING' REINHARD .... 1ST RESPONDENT

THE CABINET SECRETARY IN CHARGE OF LANDS .... 2ND RESPONDENT

REGISTRAR OF TITLES, MOMBASA .... 3RD RESPONDENT

THE ATTORNEY GENERAL .... 4TH RESPONDENT

(Being an appeal from the Ruling of the Environment and Land Court. at Malindi delivered by J. Olola. J on 30th April 2021 in Malindi ELC Case No 75 of 2019)

JUDGMENT

1. Elsbeth Reinhard-Hefti and Daniel Bernard Reinhard, the appellants are challenging the dismissal of their application dated January 13, 2020where they sought the striking out of the 1st respondent's amended statement of defence filed on December 6, 2019. The ELC Judge [J. Olola, J.), is faulted for admitting to the Court record, pleadings filed out of time and without leave and which were founded on a claim that was statutorily time barred. He was faulted for holding that the appellant ought to have annexed affidavit evidence on matters of fact already expressly pleaded and/or admitted by the respondents. Finally, the Judge was faulted for holding that a pleading exclusively founded on a claim that was time barred can be said to disclose a cause of action.

2. The appellants now seek to have the 1st respondent's amended statement of defence struck out for being filed out of time, without leave of court, failing to disclose a reasonable cause of action or defence, and containing a monetary claim that was time-barred by the *Limitation of Actions Act*. The appellant prayed the court do enter Interlocutory Judgement in respect of the prayers for Special Damages contained in the Amended Plaint filed on November 18, 2019 and for costs.

3. The background to the appeal is that the Plot Numbers 588 (CR 30959), 589 (CR 30960) and 654 (CR 30961) Watamu were registered in the names of the deceased, late Daniel Bernhard Hefti, who died in 1999. The deceased was the father of the 1st appellant and the grandfather of the 2nd appellant. The 2nd appellant married the 1st respondent.

   The suit properties are the subject of Malindi High Court Succession Cause No. 47 of 2008 where a grant was confirmed in the names of the appellants on 1June 8, 2009.

4. The appellants case was that they were aggrieved by the fraudulent registration of the suit property on March 13, 2015, from their names to the name of the 1st respondent, for an alleged consideration of Kshs 500,000/=. They filed the subject suit where they denied receipt of the money, the sale of the suit property, and availability of the suit property for transfer, as the estate of the deceased was yet to be distributed. They also pleaded that the 1st respondent acted in breach of trust by transferring the suit property to herself. The appellants, in the amended plaint dated November 18, 2019, sought a declaration that the 1st respondent unjustly enriched herself. They also claimed Special Damages from the 1st respondent in the sum of Kshs 50m as restitution for the suit property. They sought a declaration that the appellants have an equitable lien over the 1st respondent's assets. They also sought general damages for breach of trust and for interest.

5. The 1st respondent's case was that she obtained title to the suit land by way of transmission through Power of Attorney issued to her by the appellants on July 23, 2009. She stated that the appellants transferred the suit land to her, after she successfully recovered the said land from invaders and trespassers. She filed an amended statement of defence and counter claim on December 6, 2019, where she sought a declaration that the suit properties belong to her, and Special Damages in the sum of Kshs 100,000/=. She also sought injunctive relief against the appellants.

6. The appellants filed a request for judgement dated December 4, 2019, in respect of the prayer for Special Damages in the sum of Kshs 50, 000, 000/=. The appellants then filed the impugned application for the striking out of the 1st respondent's defence and counter claim, on January 13, 2020 as afore stated.

7. The 1st respondent in response to the application maintained that she was entitled to respond to the issues raised in the appellants' amended plaint that the appellants amended without leave of court, thus her impugned amended statement of defence filed on December 16, 2019. She averred that the application was incompetent, an afterthought, baseless and without merit for not disclosing any reasonable legal or factual ground for the orders sought. Further, that the application was not supported by any affidavit and did not meet the threshold for striking out of a defence as by law required. She averred that the defence raised pertinent issues that affected her property rights, and that painted her as a fraudster.

8. The learned trial Judge dismissed the application, ruling that he was unable to find the amended defence and counter claim of the 1st respondent disclosed no reasonable cause of action or that the claim in the counter claim was time barred, for reason the application made passing reference to the complaint, and without embarking upon a trial, he saw no basis to strike out the amended defence and counter claim.

9. This appeal was heard through this Court's virtual platform on the 21st March 2023. Learned counsel Mr. Steve Kithi was present for the appellants; learned counsel Mr. Amos Songok was present for the 1st respondent, while learned counsel Mr. Emmanuel Makuto was present for the 2nd to 4th respondents. Mr. Kithi relied on his written submissions dated March 10, 2023, which he highlighted before us. Mr. Songok relied on his written submissions dated 26th January 20222, which he highlighted before us. Mr. Makuto did not wish to participate in the appeal, as it did not affect his clients.

10. This is a first appeal from an interlocutory application before the ELC. Our duty as the first appellate Court in this respect, as set out in *Selle and another v Associated Motor Boat Co. Ltd & others* (1968) EA 123, is to reconsider the evidence, evaluate it and draw our own conclusions of facts and law. We will only depart from the findings by the trial court if they were not based on the evidence on record; where the said court is shown to have acted on wrong principles of law as held in *Jabane v Olenja* [1986] KLR 661; or if its discretion was exercised injudiciously as held in *Mbogo & another v Shah* (1968) EA.

11. Mr. Kithi for the appellants in his submissions urged that the 1st respondent's amended defence and counterclaim (hereinafter defence) was filed by a firm, Kimaru Kiplagat, simultaneously with a notice of appointment, at a time the firm of Chepkwony advocate were still on record for her. He urged that the documents ought not to have been admitted. Counsel maintained that the impugned amended defence disclosed no reasonable cause of action, and was filed after pleadings were closed.

    He took issue with the learned Judge's finding that the appellants were estopped from challenging the 1st respondent's defence of being filed out of time, as the appellants had filed an amended plaint out of time without leave. Counsel urged what was in issue was the validity of the defence not the plaint. Counsel took issue with the finding that the appellant was equally at fault and therefore there was no basis to allow their application.

12. Mr. Kithi challenged failure by the learned judge to enter interlocutory judgement on special damages and yet there was an application for judgement that was before the court that was not pegged on the amended plaint.

13. Mr. Songok for the 1st respondent, in his submissions urged that the issue raised by appellants' counsel in the dismissed application did not include the issue of representation of the 1st respondent. That in any event the 1st respondent appointed counsel who is on record. He urged that the appellants re-opened their pleadings 37 days after filing the plaint, prompting the 1st respondent to amend its defence to respond to the issue of the claim for monetary value.

14. Placing reliance on *Dawkins v Prince Edward of Save Weimber* (197611 OBD 499: *Chaffers v Golds Mid* 1189411 OBD 186 , Mr. Songok submitted that the appellants have not demonstrated that the amended statement of defence has in any way not disclosed a reasonable defence in law. He urged us to dismiss the appeal.

15. The power to strikeout proceedings is a discretionary power. In *Co-operative Merchant Bank Ltd v George Fredrick Wekesa* Civil Appeal No 54 of 1999 this Court summarized the principles as follows:

    > "The power of the court to strike out a pleading under Order 6 rule 13(1) (b) (c) and (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 is a matter of fact....A court may only strike out

pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment."

16. What the appellants needed to show is that the learned Judge, in exercise of his discretionary power either made an error on principle or was plainly wrong. We have considered the appeal to find out what the complaint of the appellants was. Mr. Kithi's submission was that the *Civil Procedure Act* and rules was clear that time is and is always presumed to be of essence. That, when parties submit to the jurisdiction of a court of Law for the determination of their disputes, they submit to the timelines pursuant to the law applicable and the court is required to conduct its proceedings. When parties fail to observe and/or comply with statutory timelines prescribed under the *Civil Procedure Act* and Rules, the court of law to whose jurisdiction they seek to submit themselves is likewise 'denuded' of any legal basis to entertain their claim(s). He also submitted that the defence filed out of time could not be deemed to disclose reasonable cause of action. With that, the appellants' position was that the learned Judge had no option but decline to consider or admit it.

17. Order 2 rule 15 of the *Civil Procedure Rules* (hereinafter the CPA) outlines grounds upon which pleadings can either be struck out or amended, and provides as follows:

> "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, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

18. The appellants had the burden to demonstrate the manner in which the impugned defence did not disclose a reasonable cause of action. The appellants' major complaint was that the 1st respondent amended defence was filed out of time without leave. The learned trail Judge considered that complaint and had this to say:

> "While the plaintiff is quick to urge the court to strike out the 1st defendant's pleadings for being filed out of time and without the leave of the court, a perusal of the record herein reveals that the initial Paint was instituted by the by the plaintiff herein on September 18, 2019. On October 11, 2019, the 1st defendant filed her Statement of Defence.
>
> Some 37 days later theplaintiff moved to court on November 18, 2019to file his Amended Plaint which is he subject of the matter herein.
>
> There is no evidence on record to show whether the plaintiff himself sought and or obtained leave to file the said Amended Plaint given that the pleadings would have closed 14 days after the Defence was filed and served upon himself."

19. The learned trial Judge, while placing reliance on the celebrated case of *DT Dobie & Company (Kenya) Ltd v Muchina* (1982) KLR 1, observed, in dismissing the application, that:

> "The principles that guide the striking out of pleadings as set in the cited case were that no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and or is so weak as to be beyond redemption and

incurable by amendment. Accordingly, where a suit shows a mere semblance of 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…I was not persuaded that the defendant's statement of defence having been filed some 18 days after service of the amended plaint would prejudice the plaintiff in any way and I find no merit in the Motion dated January 13, 2020.The same is dismissed…"

20. It is settled law that the court's power to strike out pleadings is to be exercised sparingly and cautiously, because the court exercises the power without being fully informed on the merits of the case, being an interlocutory procedure. Having considered this appeal, we find that the learned Judge cannot be faulted in the exercise of his discretion and for his decision to dismiss the impugned application.

21. We are convinced that the appeal has no merit and is for dismissal, which we hereby do, with costs to the 1st respondent.

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY, 2023

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR