



**Said & 2 others v Schering (Civil Appeal 142 of 2019)
[2022] KECA 552 (KLR) (6 May 2022) (Judgment)**

Neutral citation: [2022] KECA 552 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 142 OF 2019
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
MAY 6, 2022**

BETWEEN

NEREAH MICHAEL SAID 1ST APPELLANT

GERHARD HEIDUK 2ND APPELLANT

JOHANN EHGARTNER 3RD APPELLANT

AND

THOMAS SCHERING RESPONDENT

(An appeal from the ruling and order of the Environment and Land Court at Mombasa (Yano, J.) delivered on 16th September 2019 in ELC Case No. 442 of 2017)

JUDGMENT

1. The appellants, Nereah Michael Said, Gerhard Heiduk, and Wolfgang Georg Johann Ehgartner have challenged the ruling delivered by the Environment and Land Court (ELC) (C.K. Yano, J.) on 16th September 2019, in which the ELC dismissed an application by the the 1st appellant, as well as a preliminary objection by the 2nd and 3rd appellants, seeking to strike out a suit against them by the respondent, Thomas Schiering.
2. In that suit, the respondent seeks reliefs against the appellants to restrain them, by permanent injunction, from dealing with a property known as Title Number Kwale/Galu Kinondo/2460; and an order directing the Land Registrar Kwale to cancel registration of the 2nd and 3rd appellants as owners thereof. In the alternative, he seeks an order directing the appellants to remit the full purchase price to him. Also sought in the plaint is an order against Kenya Power & Lighting Company Ltd, named as the 4th defendant, to compel it to restore or reconnect electricity supply to the respondent's residence on Kwale/Galu Kinondo/2458 and Kwale/Galu Kinondo/2459.



3. In the suit, the respondent avers that he is the legal, registered and/or beneficial owner of the property Kwale/Galu Kinondo/755 which he transferred to the 1st appellant in trust; that the property was sub divided into three parcels Kwale/Galu Kinondo/2458 and Kwale/Galu Kinondo/2459 and Kwale/Galu Kinondo/2460; that the 1st appellant sold Kwale/Galu Kinondo/2460 to the 2nd and 3rd appellants who were aware of the respondent's interest; that the appellants thereafter conspired to deny the respondent electricity supply with a view to frustrating him so as to move out in order to give the 1st appellant opportunity to dispose of the remaining subdivisions Kwale/Galu Kinondo/2458 and Kwale/Galu Kinondo/2459.
4. In their statements of defence, the appellant's deny the respondent's claims; deny that the respondent was the owner of the property Kwale/Galu Kinondo/755; asserted that the 1st appellant purchased the property from Rising Eagle Limited; averred that there was no agreement or trust between the 1st appellant and the respondent and that the alleged agreement is a forgery; that at the time of sub division of Kwale/Galu Kinondo/755, the 1st appellant was the legitimately registered owner with all the rights of ownership. It was also pleaded that the respondent "lacks locus standi to commence this case". Notice of intention to strike out the suit in limine was given in the defence.
5. On 9th May 2018, the 1st appellant filed an application dated 30th April 2018 seeking orders for the respondent's suit, and an application the respondent had filed alongside it, to be struck out on grounds that: the 1st appellant acquired the property from a limited liability company, Rising Eagle Limited; that the 1st appellant was the registered owner of the property Kwale/Galu Kinondo/755; that the process of transferring the property to the 1st appellant was not impeached; that the property Kwale/Galu Kinondo/2460 was registered in the name of the 1st appellant prior to its transfer to the 2nd and 3rd appellants; that the respondent was purporting to indirectly act for a limited liability company, a distinct legal entity; that of the respondent lacked the standing to challenge the sale of the property Kwale/Galu Kinondo/2460 to the 2nd and 3rd appellant. The application was supported by the affidavit of the 1st appellant which was answered by a lengthy replying affidavit of the respondent in response to which the 1st appellant filed a further affidavit. The 2nd and 3rd appellants gave notice of preliminary objection to the suit essentially on similar grounds.
6. In dismissing the application and the preliminary objection, the learned Judge concluded, in the impugned ruling, that this is not a "clear and plain" case for striking out and that the respondent's plaint raised triable issues.
7. In their memorandum of appeal, the appellants complain, among other things that the Judge: failed to make determination on issues presented before him; considered extraneous issues and thereby deprived the appellants of their constitutional rights under Articles 27 and 50 of the Constitution; failed to consider the preliminary objection; failed to appreciate that lack of locus standi rendered the suit incompetent; ignored undisputed facts; and erred in dismissing the application with costs.
8. Mr. Abidha Nicholus, learned counsel for the appellants submitted that the application and the preliminary objection dismissed by the learned Judge raised the issue that the respondent lacked locus standi to sue or maintain the suit against the appellants because: the respondent admitted that he lacked interest in the suit property; the respondent was attempting to sue on behalf of a limited liability company and was a stranger to the appellants; that lack of locus standi is a preliminary issue and sufficient ground for striking out a suit under Order 2 Rule 15 of the *Civil Procedure Rules* and the Judge erred in holding that there were triable issues. The decision in *MGG vs. Gateway Insurance Co. Ltd & 2 others* [2020] eKLR, among others was cited.



9. It was further submitted that in his suit against the appellants, the respondent is seeking, indirectly, to sue on behalf of Rising Eagle Ltd, a limited liability company with distinct legal personality; that the suit property was transferred by the 1st appellant to the 2nd and 3rd appellants and the respondent was not privy to that transaction and cannot therefore maintain a claim against them. Reference was made to the case of *Savings & Loan(K) Limited vs. Kanyenje Karangaita Gakombe & another* [2015] eKLR.
10. Opposing the appeal, learned counsel Miss. Mukoya began by submitting that the appeal is incompetent on account of an incomplete record of appeal that is not compliant with Rule 87 of the Court of Appeal Rules and the same should be struck out; that the respondent was constrained to file a supplementary record of appeal.
11. On the merits of the appeal, counsel submitted that the complaint by the appellants that the Judge did not consider the preliminary objection is misplaced as it is evident from the impugned ruling that the learned Judge considered the objection alongside the application to strike out the suit. It was submitted that there is no basis for interfering with the decision of the Judge declining to strike out the respondent's suit; that the Judge was properly guided and correctly applied the principles in *D. T. Dobie & Company (Kenya) Limited vs. Joseph Mbaria Muchina* [1980] eKLR and rightly concluded that there are triable issues for trial.
12. We have considered the appeal and the submissions. In dismissing the application and preliminary objection, the learned Judge was exercising judicial discretion. As stated in *Mbogo & Another vs. Shah* [1968] E.A. 93:

“...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 misjustice....”
13. The only issue before us therefore is whether the appellants have demonstrated that the decision of the learned Judge constitutes an erroneous exercise of judicial discretion.
14. In dismissing the application and the preliminary objection, the judge stated:

“In the exercise of its power under order 2 Rule 15, there are certain well-established principles that a court of law must adhere to. Whereas the essence of the said provision is the striking out of a pleading, that is a jurisdiction that must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit tried by a proper trial. The court ought to act very cautiously and carefully and consider all facts of the case without embarking up a mini trial thereof before finding that the case is otherwise an abuse of the court process.”
15. We endorse fully the approach taken by the learned Judge. It accords with the principles established by this Court in *D. T. Dobie & Company (Kenya) Limited vs. Joseph Mbaria Muchina* (above). It is plain from the pleadings before the court, that there are contested matters of fact. Indeed, the fact that the 1st appellant's supporting affidavit was countered by the respondent's replying affidavit which was in turn countered by the 1st appellant's further affidavit attests to the contentious nature of the matter. There is for instance, as the learned Judge correctly pointed out the plea that the 1st appellant breached trust and the question whether or not there was such trust between the 1st appellant and the respondent is indeed a triable issue. We echo the words of Madan JA in *D. T. Dobie & Company (Kenya) Limited*



vs. Joseph Mbaria Muchina (above) that it is not for a court, when dealing with an application to strike out a suit for not disclosing a reasonable cause of action or being otherwise and abuse of process of the court, to embark upon or to usurp the function of the trial court.

16. Based on the pleadings and the affidavits before the court below, the antecedents of the transfer of the property Kwale/Galu Kinondo/755, its subdivision and transfer of Kwale/Galu Kinondo/2460 are contested and are matters for determination upon trial. It is also clear from the ruling that the preliminary objection was considered by the Judge and the argument by the appellants that it was not addressed is not correct.
17. The complaint by the respondent as to the competence or otherwise of the appeal is not a matter properly taken at this stage in light of the proviso to Rule 84 of the Court of Appeal Rules and we need not address it.
18. All in all, we can see no basis for interfering with the decision of the learned Judge in declining to strike out the suit. Consequently, the appeal fails. It is accordingly dismissed with costs to the respondent.

DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF MAY 2022.

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

J. LESSIT

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

