



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Bataniwalla & another v Njuguna & another (Civil Appeal  
240 of 2017) [2022] KECA 1343 (KLR) (2 December 2022) (Judgment)**

Neutral citation: [2022] KECA 1343 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 240 OF 2017  
MSA MAKHANDIA, AK MURGOR & J MOHAMMED, JJA  
DECEMBER 2, 2022**

**BETWEEN**

**ALISAIGHER BATANIWALLA ..... 1<sup>ST</sup> APPELLANT**

**ZOHER TAHERALI DAWOODBHAI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**NELLIE WANJIKU NJUGUNA ..... 1<sup>ST</sup> RESPONDENT**

**FRANCIS NJUGUNA ..... 2<sup>ND</sup> RESPONDENT**

*(An Appeal from the Ruling of the High Court at Mombasa (F. Amin, J)  
delivered on 26th September, 2016 in Nairobi High Court Case No. 1 of 2016.)*

**JUDGMENT**

1. This appeal is against a ruling of the High Court dated September 26, 2016 which dismissed a notice of motion dated March 16, 2016 filed by the appellants, Alisaigher Bataniwalla and Zoher Taherali Dawoodbhai, which application sought to dismiss the respondents, Nellie Wanjiku Njuguna and Francis Njuguna's suit dated December 21, 2012 on grounds that the suit was to enforce a joint venture agreement in respect of immovable property, which was an abuse of the court process; that the joint venture agreement they were relying upon was undated, and incapable of enforcement by virtue of section 3 of the *Law of Contract Act*, and owing to the fact that it was made between the 1<sup>st</sup> appellant and a company, known as, Kings Developers Limited, a limited liability company.
2. A brief background to the appeal is that, in their suit, the respondents claimed that they had entered into a joint venture agreement with the appellants to develop for sale, 32 executive apartments on land reference number 330/317 (the subject property) situated in Thompson Estate, Nairobi City County. The terms of the agreement were that the respondents would provide the land while the appellants



would finance and facilitate construction of the apartments. In return, the respondents were to receive 8 apartments, while the remaining 24 apartments would be retained by the appellants.

3. The respondents' case was that, in breach of the terms of the joint venture agreement, the appellants went ahead to fraudulently construct, 40 apartments instead of the agreed 32 and received the entire proceeds from sale of the additional apartments without apportioning the respondents a share. The respondents sought to have the appellants account and share the proceeds of sale of the additional 8 apartments, but despite attempts to engage them in discussions, they remained unavailable which rendered it necessary for them to institute the proceedings against the appellants.
4. In their defence, the appellants denied entering into an agreement with the respondents, but conceded that the parties had been contracted to develop apartments on the subject property. They further denied having breached any agreement or having engaged in fraudulent actions. Simultaneously with filing their defence, the appellants filed the notice of motion, seeking to have the respondents' suit struck out.
5. In an affidavit in reply to the motion sworn by the 1<sup>st</sup> respondent on April 8, 2016, it was reiterated that the respondents had entered into a joint venture agreement with the 1<sup>st</sup> appellant and that the 2<sup>nd</sup> and 3<sup>rd</sup> appellants were its directors; that the joint venture agreement was not available since the firm of Kittony Maina and Karanja Advocates who had retained the original agreement informed them that the agreement had been stolen following a break in to their offices on February 15, 2015; that they were also informed that the 1<sup>st</sup> appellant had retained a counterpart to the agreement, and were in a position to provide a copy; that despite requests made to the appellants to produce a copy, they had declined to respond, but did not deny the existence of such document.
6. It was further deponed that the appellants were rightfully joined as parties, as they are liable for the breach of the joint venture agreement; that in the circumstances it was necessary for the corporate veil to be lifted to identify and punish the persons liable for the fraudulent and improper actions.

After considering the pleadings, the parties' submissions, and the law, the trial judge dismissed the motion upon concluding inter alia that, the parties case is complicated, because the prayers raised a number of issues for determination; that striking out or dismissing the suit without a hearing was too drastic and draconian a step, which should only be exercised in the clearest of cases; that notwithstanding the joint-venture agreement was not available, the proceedings had not reached a stage where it could be categorically stated that the documents alleged did not and had never existed.

7. The appellants were aggrieved and have brought this appeal on the grounds that the trial judge did not determine the issues pleaded, and failed to appreciate that the joint-venture agreement was entered into between the respondents and Kings Developers Limited to the exclusion of the appellants; that the learned judge misdirected herself in seeking to rewrite a joint-venture agreement, and disregarded the long settled rule espoused by the case of *Salomon v Salomon and Company Ltd [1897] AC 22*; the trial judge was also wrong in holding that an instrument offending the mandatory provisions of section 3 of the Law of Contract can find refuge in article 159 (2)(d) of the *Constitution*.

When the appeal came up for hearing on a virtual platform, both parties had filed written submissions. Mr Muchiri learned counsel appeared for the appellant while Mr G Sakimpa learned counsel appeared for the respondents. In highlighting the appellants' submissions, counsel submitted that the suit named the appellants as the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, and that the plaint was filed in relation to an undated joint-venture over a parcel of land. The appellants were sued because they were directors of Kings Developers Ltd. They sought to strike out the suit on the basis of the doctrine of privity of contract, as the joint-venture agreement was not entered into with the appellants, and so they were not parties to the agreement; that the suit cannot be filed against the directors, and therefore it should be struck out.



It was further argued that the contract seeking to deal in land should be in writing and signed by the parties, and that since the contract was not signed, it could not be a basis for the suit. It was also argued that the learned judge addressed the issue of discovery under order 7 rule 5 of the *Civil Procedure Rules* which was not pleaded, and furthermore, it was an error for the court to rewrite the parties' contract.

8. On behalf of the respondent, Mr Sakimpa submitted that the appellants had misconstrued the respondents' case; that the plaint specifically pleaded fraud on the appellants' part, and therefore it was premature to determine the suit on the basis of the pleadings, particularly since the appellants had yet to file all their documents; that there was a signed agreement which the appellant confirmed was in existence, but which their advocate stated was stolen. It was further argued that a case involving tenets enumerated in the case of *Salomon v Salomon* (*supra*) can only be ascertained after a full hearing.

We have considered the appeal, the parties' submissions, and the law. The question for determination is whether the learned judge properly exercised her discretion to decline to dismiss or strike out the respondent's suit. See *Mbogo v Shah* [1968] EA 93.

9. The application was brought under order 2 rule 15 of the *Civil Procedure Rules*. Sub-rule 1 provides;

“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 and 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 court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

10. In the case of *Evanson Jidraph Kamau Waitiki v Kenya Power & Lighting Company Ltd* [2017] eKLR, this court held that;

“The application that was before Omollo, J. (as he then was) was brought pursuant to order 2 rule 15(1) (d) of the *Civil Procedure Rules*. That provision has been the subject of interpretation in numerous decisions, as such we do not intend to spend more time than is necessary on its application to the facts before the trial judge. The application having been brought specifically under rule 15(1)(d), the respondent was expected, indeed required to present evidence to show that the pending suit is an abuse of the court process. It has repeatedly been stressed that, because of its far-reaching and drastic nature, the remedy of striking out pleadings is resorted to very sparingly and only as a remedy of a last resort. Instead courts are encouraged to have recourse to amendment. An application for striking out pleadings does not require the court to engage in a mini-trial.”

11. In their motion, the appellants argued that the suit was an abuse of the court process, because they were not parties to the joint venture agreement, and by virtue of the doctrine of privity of contract, they ought not to have been joined as parties to the suit; that the agreement was between the respondents and the entity known as Kings Developers Limited.

For their part the respondents' response was that, they entered into a joint venture agreement where the appellants, as directors of Kings Developers Limited signed the agreement on behalf of the company. But more particularly, they stated that their case being based on fraud by the appellants', the allegations



of fraud that were specifically pleaded required to be proved; that consequently, it was too early in the proceedings for the appellants to seek to have the suit struck out.

Adopting the finding of Sellers LJ in the case of *Wenlock v Moloney* [1965] 1 WLR 1238, Madan JA stated thus;

“This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the Plaintiff really has a cause of action. To do that is to usurp the position of the trial Judge and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power”.

12. When we consider the circumstances leading to the dispute, we find that the issues involved are complex in nature. A cursory reading of the plaint points to claim based on a joint venture agreement entered into between the respondents and Kings Developers Limited, a company in which the appellants were directors. A management company, Skyrock Management Limited was later incorporated comprising inter alia, of the respondents and other purchasers of the apartments. The respondents claim to have signed the joint venture agreement, while the appellants claim that such an agreement did not exist, and that the document attached to the plaint was unsigned. On this basis, they assert that the suit offends the requirements of section 3 of the *Law of Contract*, particularly as the agreement was concerned with dealings in land. Further, that since it was made between the respondents and Kings Developers Limited, on the basis of the case of *Salomon v Salomon* (*supra*) they should not have been joined as parties to the suit since the company is a separate entity from its directors.

13. Notwithstanding the appellants’ assertions, we consider that many questions abound in this dispute. For instance, did the respondents own the subject property? Did they enter into a joint venture agreement, and with who? What were the terms of the parties’ arrangements? Were the appellants involved in any way with the project? Were apartments constructed? If so, how many? And so on.

Additionally, the plaint also alludes to fraud on the part of the appellants, with particulars specifically pleaded. What is yet to be ascertained is whether or not fraud can be established. This is an issue that can only be determined at the trial when parties will have the opportunity to test the evidence adduced under cross-examination. The respondents’ word against the appellants’ that is deponed in affidavits will not be of much assistance to a court in the circumstances. It is on the basis of the evidence adduced that the court can reach a determination. This is the purpose of a substantive trial, and lest we embarrass the court that is yet to hear the dispute we will say no more in this regard.

14. It is evident that, the motion succeeded in raising more questions than answers, so that, like the learned judge, we find that the appellants did not demonstrate that the suit was an abuse of the court process, and as a consequence, they had not satisfied the criteria set out in order 2 rule 15 of the *rules*.

As concerns the complaint that the learned judge determined matters that were not pleaded, in particular that the issue of discovery was addressed though not pleaded, upon review of the ruling, it seems that the learned judge merely observed that the motion to strike out the suit was raised well before the parties had had an opportunity to complete discovery as mandated by order 7 rule 5 of the *Civil Procedure Rules*. This is because the record shows that the respondents filed a notice to produce on April 22, 2016 to which a response had yet to be filed. This being a procedural matter necessary for preparation for trial, and the application coming so soon thereafter, we consider that the learned judge’s observation served to buttress the fact that the motion was ill timed and unwarranted. We find this allegation to be without basis.



As a consequence, we have no reason to interfere with the trial court's exercise of discretion. It is apparent that the appeal is not merited, and is for dismissal with costs to the respondents.

**It is so ordered.**

**DELIVERED AND DATED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2022.**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**A K MURGOR**

.....

**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

