



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), ASIKE-MAKHANDIA & MUSINGA, J.J.A.)

CIVIL APPEAL NO. 311 OF 2018

BETWEEN

DESTERIO OYATSI.....APPELLANT

AND

FLORENCE SOILA NGOSSOR.....1ST RESPONDENT

NAIKUNI NGAH & MIENCHA ADVOCATES.....2ND RESPONDENT

KIRIINYA MUKIIRA.....3RD RESPONDENT

(An appeal from the ruling and order of the Environment and Land Court of Kenya

at Kajiado (Ochieng, J.) dated 14th March, 2018

in

ELC Case No. 828 of 2017)

JUDGMENT OF THE COURT

The parameters within which this Court can interfere with the exercise of discretion by a trial court was aptly articulated in the *locus classicus* case of **Mbogo & Another vs. Shah** [1968] E.A. 93. We can only interfere with such discretion where we are satisfied that the same was clearly wrong because the learned Judge misdirected himself or herself or acted on matters which he or she should not have acted upon thereby arriving at a wrong conclusion which results in injustice.

It is the above jurisdiction that the appellant has invoked in this interlocutory appeal, which challenges the exercise of discretion by the Environment and Land Court (ELC) in declining to strike out the 2nd respondent's defence to the appellant's counter claim. This is how the question arose.

The 1st respondent claimed that she was not only the registered owner of Kajiado/Kaputei North/ 2966 measuring 18 acres, but that her title was indefeasible; that sometime in April, 2013 it came to her attention that third parties were also laying claim to the suit property; that upon following up with her then advocates, M/S Shapley Barret & Company Advocates, who had custody of the certificate of title, she learnt that the title had been misplaced; that pursuant to the process of obtaining a new title from the Lands Registry, a notice inviting any objections to the same was gazetted on 15th March, 2013; that the 3rd respondent lodged an objection on the ground that it had purchased the suit property from one Jeffrey Robin Mein and was issued with a title to the same; that, Roots Investments Company Ltd. likewise claimed that the suit property had been subdivided into two portions namely, Kajiado/Kaputei North/45336 & Kajiado/Kaputei North/45337; and that it was entitled to the former by virtue of the title it held.

As far as the 1st respondent was concerned, all the records in the lands office relating to the above objections were as a result of fraud and illegality. In that regard, she instituted a suit in the ELC, being ELC Case No. 828 of 2017, seeking various orders against some 9 defendants including the appellant.

The appellant was sued in his capacity as a senior partner of M/S Shapley Barret & Company Advocates; the allegations against him were that he had fraudulently affixed his signature as having witnessed the execution of an alleged transfer of the suit property in favour of Jeffrey Robin Mein, the 7th defendant in the suit who apparently sold the same to the 3rd respondent, and an application for the land control board consent for the said transaction by the 1st respondent.

In his defence, the appellant denied the allegations of fraud and maintained that the 1st respondent's suit was based on falsehoods; that the 1st respondent had voluntarily sold the suit property in 1993 to Jeffrey Robin Mein, the 7th defendant in the suit, and title issued to that effect; that 20 years down the line, the 1st respondent was trying to fraudulently take back the suit property through the suit; and that there was no cause of action against him.

In addition, the appellant filed a counter claim against the 1st and 2nd respondents. In his view, the 2nd respondent, who were the 1st respondent's advocates, were not only privy to but also aided the 1st respondent's fraudulent claim by drawing the suit and allowing the 1st respondent to swear false affidavits; and that the 2nd respondent as officers of the court were under an obligation to verify their client's allegations prior to drawing the suit. For these reasons, the appellant sought *inter alia*; dismissal of the suit; a declaration that the 1st respondent's suit is an abuse of the court process; and a declaration that the 2nd respondent had misconducted themselves and committed offences against the administration of justice.

Only the 2nd respondent filed a defence to the counter-claim disputing the allegations against them.

Subsequent to the filing of the suit, the appellant by an amended notice of motion prayed for the 2nd respondent's defence to the counter claim to be struck out; entry of judgment on liability against the 1st and 2nd respondents; the counter claim to be set down for formal proof; and the 1st respondent's suit against him be struck out or dismissed with costs. The motion was premised on the same grounds as the appellant's defence and counter claim.

In response, the 2nd respondent deposed that the motion was misconceived and brought in bad faith; that in drawing and filing the suit, the 2nd respondent were acting in their capacity as advocates and in line with the instructions of their client, the 1st respondent; that the ELC lacked jurisdiction to entertain the claim which touched on the 2nd respondent conduct and the proper forum should have been the Advocates Complaints Commission.

Ochieng, J. in a ruling dated 14th March, 2018 dismissed the motion for the reason that the 2nd respondent's defence to the counter claim raised triable issues which ought to be considered on merit. It is that decision that is the basis of this appeal.

At the plenary hearing, the appellant was represented by Ms. Akello learned counsel while the 1st and 2nd respondents were represented by Mr. Rono, learned counsel. The appeal was disposed by way of written submissions as well as oral highlights.

According to Ms. Akello, learned counsel for the appellant, the 1st respondent initially served the summons to enter appearance and her pleadings on him only; and that upon the appellant filing and serving his defence and counter claim, which exposed the suit as a fraud, the 1st respondent abandoned her claim against the other defendants by deliberately failing to serve the summons or pleadings upon them. Therefore, counsel submitted that the 1st respondent's cause of action which was based on conspiracy to defraud her of the suit property could not be maintained against the appellant only.

In any event, Ms. Akello further contended, the abandonment of the suit against the 5th defendant meant that the 1st respondent had accepted or admitted that the 5th respondent had acquired the suit property through a valid sale agreement. It therefore followed that the allegation to the effect that the appellant had fraudulently witnessed her signature on the transfer and application for land control board consent was frivolous and abuse of the court process.

The learned Judge, for those reasons, was faulted for not exercising her discretion properly by failing to appreciate that the above facts were outlined in the amended motion; that the said facts were not challenged by the 1st respondent; and that the reply by the 2nd respondent was simply to state that it had acted in accordance with the 1st respondent's instructions.

The appellant also maintained that the 2nd respondent aided the 1st respondent in its unlawful pursuit of claiming the suit property after its sale to the 5th respondent.

Opposing the appeal, Mr. Rono, learned counsel argued that the appellant had not raised or established any of the grounds stipulated under **Order 2 Rule 15 (1)** of the Civil Procedure Rules to warrant the striking out of the 2nd respondent's defence to the counter claim; and that the issue of service of summons to enter appearance was not before the ELC. According to the 1st and 2nd respondents, the grounds upon which the amended motion was premised as well as the grounds set out in the memorandum of appeal ought to be canvassed fully at the hearing of the suit. In their view therefore, the learned Judge exercised her discretion properly, as set out in **D.T. Dobie & Company (Kenya) Limited vs. Joseph Mbaria Muchina & Another**

[1980] eKLR, by declining to strike out the 2nd respondent's defence. The 1st and 2nd respondents also urged us to allow the 1st respondent to file her defence to the counter claim out of time.

The rules of natural justice require that a litigant should not be driven away from the seat of justice, without a hearing, however weak his or her case may appear. See **Kivanga Estates Limited vs. National Bank of Kenya Limited** [2017] eKLR.

As such, the discretionary jurisdiction of a court to strike out pleadings, which is exercised without the court delving into the merits of the case, through discovery and oral evidence, should be used sparingly and as a last resort. Moreover, it should be in instances where the court is convinced that the pleadings are a non-starter and hopelessly undeserving of judicial time.

Applying the above principles to the case at hand, with respect we agree with the learned Judge that the main suit, the counter claim as well as the 2nd respondent's defence to the counter claim raise triable issues. Without making any definite findings on merit, there are allegations of fraud and/or conspiracy against each party which cannot merely be implied from the pleadings but have to be strictly proved by way of evidence at the trial. See **Vijay Morjari a vs. Nansingh Madhusingh Darbar & Another** [2000] eKLR. Equally, whether the 1st respondent had served the summons to enter appearance on all the defendants, allegations of misconduct on the part of the 2nd respondent and whether the ELC had jurisdiction to make a determination on the same could not be dealt with summarily as suggested by the appellant in the motion.

Consequently, we find no reason to interfere with the learned Judge's discretion.

Finally, the prayer by the 1st and 2nd respondents to allow the 1st respondent to file her defence to the counter claim can only be made before the ELC and not us.

In the end, we find that the appeal lacks merit and is hereby dismissed with costs to the 1st and 2nd respondents.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR