



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, GATEMBU & MURGOR JJA)

CIVIL APPEAL NO.104 OF 2011

BETWEEN

MAUREEN WAITHERA MWENJE.....1ST APPELLANT

ERIC KAMAU MWENJE (*Appealing as*

***representatives of the Estate of David Mwenje-deceased*)...2ND APPELLANT**

AND

DAVID KINYANJUI NJENGA1ST RESPONDENT

MONICA WANGUI NJENGA2ND RESPONDENT

GRACE NJERI NJENGA.....3RD RESPONDENT

(Appeal from the Ruling and Orders of the High Court of Kenya at Nairobi of (A.O. Muchelule, J.) delivered on 15th December, 2010 in

Civil Case No. 243 Of 2009 (OS)

JUDGMENT OF THE COURT

By an amended Originating Summons dated 24th June 2009, ***the appellants, Maureen Waithera Mwenje and Eric Kamau Mwenje*** appealing as

representatives of the Estate of the late David Mwenje sought orders before the High Court for:

a) A declaration that the appellants as personal representatives to the estate of the late David Mwenje are entitled to be registered forthwith as owners of LR.NOS 10060 /6-8, 10060/9 and 10060/12 (the subject properties) which fter the death of the deceased they have been in adverse possession since 30th June 1993 to date over 12 years, having lived on them openly, continuously and without interruption from the respondents or its predecessors. As such, the respondents' title over the mentioned property have been extinguished in favour of appellants under section 37 of the Limitation of Actions Act.

b) A Permanent injunction be issued restraining the respondents from evicting the appellants from the suit lands, from levying any distress for rent or interfering with the appellants' possession of the same.

c)A declaration that the distress for rent levied on the 8th May 2009 by Kang'eri Wanjohi t/a KINDEST AUCTIONEERS is unlawful, null and void and an order for general damages for illegal attachments of distress.

In the Originating Summons the appellants contended that, the dispute arose out of a sale agreement dated 20th March 1992

where Njenga Mathu, the respondents' father and registered proprietor of the subject properties entered into a sale agreement with the appellants' father David Mwenje to purchase the subject properties for Kshs. 2,780,000. Upon the execution of the sale agreement, David Mwenje paid Kshs. 1.3 million towards the purchase price, and took over possession of the subject properties at a monthly rent of Kshs.7500. It was contended that when David Mwenje failed to pay the balance of the purchase price, Njenga Mathu rescinded the agreement, and simultaneously filed a *HCCC No. 3195 of 1993* seeking to evict the appellants' father. Before the matter was heard Njenga Mathu discontinued the suit. He subsequently transferred the subject properties to his children, the respondents, for a consideration of Kshs. 100,000.

In reply, the respondents reiterated that the appellants' father had entered into a sale agreement with their father David Mwenje, who had defaulted in paying the balance of the purchase price. A suit was subsequently filed to have him evicted, but it was later withdrawn. Another suit was filed that is *HCCC No. 10 of 2000* against him, which suit was still pending. The respondents' case is that the appellants' father had always occupied the subject properties on the authority, leave, permission or licence of the respondent's father and therefore their possession of the subject properties did not at any time become adverse to the respondents. Prior to the hearing of the Originating Summons, the respondents filed an application dated 4th February 2010 brought under **Order VI rule 13 (1) (a), (b) and (d)** of the **Civil Procedure rules** amongst other provisions, seeking orders for;

- 1) the Originating Summons dated 26th May 2009 and amended on 24th June 2009 be struck out.
- 2) An eviction order do issue against the appellants to remove them their servants or agents from the subject properties;
- 3) An order that the appellants pay the outstanding rent with interest thereon at court rates.

The application was brought on the grounds that, the entire suit was frivolous and that it was an abuse of the court process and as such, a suit did not lie.

On 15th March 2020, the appellants filed a preliminary objection to the respondent's application on grounds *inter alia* that the application was incompetent and an abuse of the court process.

After considering the parties' pleadings and submissions on both the Originating Summons and the respondents' application, the learned judge struck out the appellants' Originating Summons in a ruling delivered on 15th December 2010 upon being satisfied that it was frivolous and an abuse of the court process particularly since, the agreement was rescinded, and two suits had been instituted against the appellants' father namely, *HCCC No. 3195 of 1993* and *HCCC No. 10 of 2000* which sought to evict the appellants from the subject properties. That therefore, the appellants claim that they had been in uninterrupted occupation or possession of the subject properties for 12 years was unfounded.

The appellants were aggrieved by the said ruling of the trial court and have brought this appeal on grounds that the learned judge failed to dismiss the respondent's application despite appreciating that evidence was not admissible in an application brought under **order 6 rule 13(1) (a)** of the **Civil Procedure Rules** and therefore the affidavit evidence relied upon rendered the application to be incompetent; in striking out a suit without affording the appellants' an opportunity to be heard; in holding that the replying affidavit to the Originating summons did not provide a counterclaim; in failing to determine the appellants' Preliminary Objection; for striking out the suit against the weight of the evidence in support of the claim for adverse possession; in failing to take into account that the sale agreement was rescinded and the failure by the respondents' father to refund the purchase price paid.

Learned counsels **Mr. Githinji**, for the appellants and **Mr. Raburu** for the respondents appeared before us on a virtual platform owing to the Covid 19 pandemic and highlighted their written submissions.

It was the appellants' submission that the court's jurisdiction in striking out a suit should be exercised sparingly, and only in exceptional circumstances; that such exercise should not be simply based on the chances of success of the case. See the case of ***Yaya Towers Limited vs Trade Bank Limited (in liquidation) [2000] eKLR*** that was also cited in the case of ***Beatrice Wanjiku Muhoho vs Honourable Attorney General [2012] eKLR***. It was further submitted that the occupation of the subject properties became adverse when the appellants failed to pay the balance of the purchase price to Njenga Mathu and the sale agreement was rescinded. On the exercise of discretion to strike out the Originating summons, it was submitted that it ought to have been exercised without the court considering the merits of the case. See ***DT Dobie & Company (Kenya) Limited vs Muchina (1982) KLR***.

Turning to whether a claim for adverse possession was made out, the appellants relied on the case of ***Wambugu vs Njunguna (1983) KLR***

172, for the proposition that, where the claimant is in exclusive possession of the land with leave and licence of the appellant pursuant to a void agreement, the possession becomes adverse and time begins to run from the time the licence is determined. Also relied on was the case of ***William Gatuhi Murathe vs Gakuru Gathimbi Civil Appeal 49 of 1996*** for the proposition that the mere filing of a suit for recovery of possession may not disrupt the possession of the adverse possessor.

On their part, it was the respondents' case that the correct legal position in a case for striking out of a suit was set out in the case of ***J.P. Machira & Company Limited vs Farid Al Maary & Another, HCCC No. 3 of 2004*** where it was held that the court should exercise caution before striking out pleadings; that if the judge concluded that a *prima facie* case did not exist, the pleadings should be struck out for failure to disclose a cause of action, and for being frivolous or an abuse of the court process. It was further submitted that it was immaterial that the sale contract was rescinded since the Originating Summons was not about rescission of the contract, since the purchaser had not challenged the rescission. It was also submitted that a tenant cannot be in adverse possession even if he deliberately refuses to pay rent.

After carefully considering the Record of appeal and the parties' rival written submissions, we bear in mind that this is a first appeal, and we are guided by the principles set out in the case of ***Peters vs Sunday Post Limited (1958) EA 424***, where the predecessor of this Court pronounced itself on the mandate of this Court that;

"whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide." *Watt V. Thomas, [1947] 1 All E.R. 582; [1947] A.C. 984, applied.*

See also ***Selle vs Associated Motor Boat Company Ltd., [1968] EA 123***

We also take into cognisance the guidance set out in the case of ***Crescent Construction Co Ltd vs Delphis Bank Limited [2007] eKLR*** on the exercise of discretion where it was explained that;

"...the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest of care and caution. This comes from the rules of natural justice that the court must not drive away the litigant, however weak his case may be, from the seat of justice. This is a time-honoured principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter."

See also the case of ***Mbogo & Another vs Shah [1968] E A 93***.

Having said that, we discern that the central issue for determination is the question of whether the learned judge rightly exercised his discretion in striking out the appellants' suit for the reason that it was frivolous, vexatious and an abuse of the court process.

In determining this question, the learned judge began by observing that;

"Evidence is however permitted in the case where there is allegation that the application is frivolous and an abuse of the process of the court. The power to strike out a suit, without affording the litigant the usual hearing, is a drastic step which can only be resorted to in an obvious and plain case and where the case is so weak that it cannot be remedied by an amendment".

The judge went on to state that;

" It is an abuse of the process of the court if it is frivolous or vexatious. A suit is vexatious if it has no foundation or has no chance of succeeding. A close examination of the Applicants suit clearly shows that it is both frivolous and an abuse of the process of the Court. The applicants late father came onto the land following the Agreement he signed to buy the suit properties subsequent to which he was allowed to be a tenant pending the completion of the transaction. It is not in dispute that the Agreement was executed on 20th March, 1992. On 22nd March 1993, the Agreement was rescinded following which a suit was filed for eviction. The suit was discontinued on 26th July, 1996. On 16th May 2000, another suit for eviction was filed which has not been determined. It is clear that the deceased or the Applicants cannot claim to have been in uninterrupted occupation or possession for 12 years. The deceased was in occupation both as purchaser and as tenant both acts having been allowed by the owner."

Order VI rule 13 (1) (b) and (d) of the **Civil Procedure Rules** (now replaced by **Order 2 rule 15 (1) (a-d)** specifies that;

"13. (1) 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).....;

(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”.*

In the case of Co-operative Merchant Bank Ltd vs George Fredrick Wekesa, Civil Appeal No. 54 of 1999 this Court observed;

“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.”[Emphasis ours]

And in the case of Yaya Towers Limited vs Trade Bank Limited (supra) this Court pronounced itself thus;

“A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court

has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved... The issue has nothing to

do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the Court or is

unarguable... No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment.” [Emphasis ours]

Additionally, in the case of Wenlock vs Moloney, [1965] 2 All E.R 871 at page 874 Danckwerts L.J succinctly opined, that;

“There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and 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. The learned master stated the relevant principles and practice correctly enough, and then, I am afraid, failed to apply them to the case.” [Emphasis ours]

The above decisions are clear that, in determining whether the suit ought to be struck out under **Order 6 rule 13(1)(a)(b)(c) and (d)**, of the **Civil Procedure rules**, what the learned judge was required to do was to ascertain whether the facts as presented in the pleadings were so plain and clear, as to lead to the conclusion that the appellants’ case had no chance of success or that it was hopelessly incapable of being argued. However, what the Judge was not entitled to do was to undertake a thorough or detailed examination of the evidence or analyse the different features of the case. It is trite that whether or not the pleadings were plain and clear is a matter of fact.

Having regard to the facts of the instant case, on the one hand the appellants contend that they have been in continuous and uninterrupted occupation of the subject properties for over twelve years, and that, since the respondents’ father had rescinded the contract, their father’s occupation of the subject properties became adverse to that of the respondents’ father, because they had remained in occupation from the date the agreement was rescinded to this day. On the other hand, the respondents assert that the appellants were not in uninterrupted continuous occupation of the subject properties, since the sale agreement was rescinded and the respondents’ father had instituted proceedings against the appellants’ father on two occasions.

Given the facts and contestations set out in the parties’ pleadings, we are satisfied that the dispute was far from being one that was plain and clear cut as to warrant the suit being struck out.

More particularly, it is apparent from the ruling that the learned judge disregarded of the dictates of **Order 6 rule 13(1)(b)(c) and (d)** and delved into the averments comprised in the respective affidavits and the annexed documents to reach a finding that the appellants’ case was frivolous, vexatious and an abuse of the court process. In so finding the learned judge had this to say;

“I do not find that the court is precluded from dealing with the merits of the ground that the suit is frivolous and an abuse of the

process of the court.”

In other words, the learned judge was satisfied that he was entitled to interrogate the parties’ pleadings and determine the suit on its merits before striking it out.

We are of the view that this was where the learned judge went wrong. By analysing the merits of the case including the contested facts and particulars and weighing out the parties’ arguments at an early stage in the proceedings, we find that the learned judge went too far, and ended up usurping the role of the trial court. By striking out the Originating summons, the judge denied the appellants the opportunity to have their suit heard and determined in a full trial where they would have had the benefit of testing the evidence during the hearing.

But that is not all, after striking out the appellants’ suit, several questions were left unanswered, including the computation of when time for adverse possession began to run, when it came to an end, whether the deposit paid by the appellants’ to the respondent’s father was ever refunded, the effect of rescission of the agreement for sale and the continued possession of the subject properties by the appellants. All these facts are not plain and obvious issues to give rise to the conclusion that the suit is so hopeless that it cannot even be remedied by an amendment.

And contemporaneously with the above, it has not gone unnoticed that the reasons that led the trial court to conclude that the appellant’s suit was an abuse of the court process were not specified.

In the case of *Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd and 2 Others [2009] eKLR* this Court sought to define the phrase ‘abuse of the court process’ thus;

“What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of abuse of process. It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of the court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.” (emphasis added).

Our analysis of the pleadings does not disclose that extraneous materials were imported into the appellants’ case, or that the suit was laced with malice or that it was designed to irritate or annoy or was oppressive and therefore amounted to an abuse of the court process. To the contrary, what we are able to discern is that the focus of the appellants’ case was limited to their claim for adverse possession, which they assert they should be allowed to ventilate during the trial. In our view therefore that was a semblance of a cause of action, capable of being termed as vexatious.

With the different arguments and counter arguments advanced by both parties, and in view of the allegations that were canvassed backwards and forwards, it is apparent to us that this was not a fit case to be struck out under **Order 6 rule 13(1)(b)(c) and (d)** and, the learned judge ought to have declined the invitation to strike it out, and we so find.

We have said enough to demonstrate that the learned judge misdirected himself and as such, we must interfere with the decision of the High Court dated 15th December 2011, with the consequences that the other two prayers in the application dated 4th February, 2010 is dismissed with costs. The appeal is allowed. The respondents shall pay the costs of the appeal and of the motion before the High Court. The suit should proceed to full hearing before any Judge of the Environment and Land Court other than Hon. Justice A.O. Muchelule.

It is so ordered.

Dated and delivered at Nairobi this 23rd day of July 2021.

M. WARSAME

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR