IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & KANTAI, JJ.A)

CIVIL APPEAL NO. 327 OF 2018

BETWEEN

MGG.....APPELLANT

AND

GATEWAY INSURANCE CO. LTD.....1ST RESPONDENT

UMAG.....2ND RESPONDENT

QUINVEST LTD.....3RD RESPONDENT

(Being an appeal from the order and the ruling of the High Court of Kenya at Nairobi

***(F. Ochieng, J.) dated 16th April, 2018* in Nairobi HCCC No 86 of 2019** *formerly* **HCCC No 387 of 2014**)

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JUDGMENT OF THE COURT

[1] ***MGG***, (appellant) married ***Dr. BMG*** on 27th August, 2007. On or about 13th November, 2014 she filed suit being **HCCC No 387 of 2014** before the High Court, Nairobi. She stated that the suit was brought on her own behalf and that of her husband ***Dr. BMG*** (Dr. G). In a subsequent affidavit in support of some interim orders that the appellant sought, she stated that her husband was aged about 90 years and was incapacitated as a result of advanced Alzheimer's disease among other ailments; that he had lost memory for a long time and was not in a position to execute documents or make a rational judgment and that he could not be joined as a party to the suit.

[2] Further, in the said suit, the appellant alleged that about the year 2012, ***UMG*** (2nd respondent) fraudulently, unprocedurally and illegally forged transfer of shares held by the appellant's husband in ***Gateway Insurance Co Ltd*** (1st respondent) to ***Quinvest Ltd*** (3rd respondent). The appellant went ahead to give the particulars of the said fraud/forgery and sought *inter alia* orders compelling the 1st respondent to produce for scrutiny the documents that were used to transfer shares that were held by her husband to the 3rd respondent. An injunction restraining the 1st respondent from releasing to 2nd and 3rd respondents a monetary value for 3,283,494 shares which belonged to the appellant's husband; a declaration that the transfer of shares to the 3rd respondent was unprocedural, fraudulent and illegal as they belonged to her husband and by extension to herself and that she as the spouse of ***Dr. BG*** was entitled to the said shares.

[3] The suit was resisted by all the respondents; they denied all the allegations of fraud together with the particulars thereto as being too general to constitute proper particulars. The respondents maintained that the shares were transferred with the knowledge and consent of ***Dr. G***; that the transfer was effected transparently and legally and was not tainted with any fraud or illegality. That a Power of Attorney held by the 2nd respondent was validly given by ***Dr. G***; that the appellant was never a shareholder of the 3rd respondent. Finally that the appellant had filed another suit being **Nairobi ELC No 547** of **2011 MGG vs. Quinvest Limited, UG and the Registrar of Titles** where the same issues were raised and this suit was termed as an abuse of the court process and they called for it to be struck out.

[4] The plaint by the appellant was simultaneously filed with an application seeking *inter alia* some interim orders of injunction. On the part of the 2nd and 3rd respondents, they filed a detailed replying affidavit and also a motion that sought to strike out the suit on the grounds that it did not disclose reasonable cause of action against them. It is the outcome of the later motion that forms the basis of the instant appeal. The 2nd and 3rd respondents argued that the appellant had no interest or right to sue for the shares in the 1st respondent; that she lacked legal capacity to sue on behalf of ***Dr. G*** on the grounds of mental incapacity; that the shares in the 1st respondent which exclusively belonged to

Dr. G were transferred legally and procedurally on his authority before he married the appellant and therefore the 2nd and 3rd respondents had no obligation to seek her consent before transferring the shares.

[5] The aforesaid grounds were further expounded by the matters deposed to in the replying affidavit of the 2nd respondent that gave a detailed account of how ***Dr. G*** started the exercise of planning his estate in February 2007 by doing several things key among them being;

> ***1) On 27th February he called a meeting of the 3rd respondent where the 2nd respondent was appointed as executive chairman.***
>
> ***2) On 9th March, 2007 he executed a deed of transfer of his shares in the 1st respondent in favour of the 3rd respondent and a general power of attorney in favour of the 2nd respondent.***
>
> ***3) He married the applicant on 31st August, 2007.***

[6] The application was opposed by the appellant arguing that she had the *locus standi* to bring the suit on her own behalf as a spouse to ***Dr. G*** and on behalf of her incapacitated husband; that she had a right to move to court to protect her spousal rights and interests; that the appellant had filed another suit being **MGG (***suing on her behalf and as next of friend to* **Dr. BMG) vs. Quinvest Limited & 2 Others Environment and Land Court Civil Case No 547 of 2011**. In the said suit the appellant's claim was in respect of some immoveable property located in Muthaiga Estate Nairobi. The 2nd and 3rd respondents also unsuccessfully sought to strike out the said suit but the learned Judge (Ougo J.,) held that the appellant had sued on her own behalf and that of her husband and directed that in order to determine the mental capacity of ***Dr. G*** an appropriate application should be made under the relevant law so that a proper order can be given on his mental status.

[7] The aforesaid motion seeking to strike out the suit fell for hearing before F. Ochieng, J. and two questions were argued; that is whether the appellant had *locus standi* to file suit on behalf or as the next of friend of ***Dr. G*** and whether she had a right or interest in the shares in the 1st respondent to ground her claim?

After evaluating the matter, the trial Judge agreed with the respondents that the suit was for striking out which he did with costs to the respondents. In doing so the Judge stated that although it was common ground that ***Dr. G*** had advanced Alzheimer's disease, that could not lead to an automatic conclusion that he was suffering from a mental disorder without subjecting him to the processes provided under ***Section 2*** **of the Mental Health Act;** that since there was no finding, under the said Act, the appellant could not assume that her husband was unable to represent himself. As regards the shares in the 1st respondent this is what the Judge posited in his own words:-

> ***"At paragraph 16 of her written submissions, the plaintiff concedes that she does not have any claim for the direct ownership of the shares in Gateway insurance Company Ltd. She says;***
>
> ***"…the fact that the same are owned by her husband and an incapacitated husband, at that, gives her a higher right than anybody else including the children like the 2nd defendant to lay claim over the said shares…"***
>
> ***… first, if the plaintiff's claim was pegged upon her husband's incapacitation, he would have to provide proof of the said incapacitation. Secondly, the plaintiff would have to seek and obtain an order from the court, appointing her as the manager of the estate of her husband as envisaged by*** *Section 26 (1) of the Mental Health Act.* ***As the plaintiff has not obtained an order which would enable her to bring this suit on behalf of her husband, she lacks the legal capacity to institute or to sustain the suit on behalf of Dr. BG. And because the plaintiff concedes that she does not have any direct claim of ownership, in respect to the shares which are subject matter of the suit, she cannot sustain a claim in her own personal capacity…"***

[8] This is what is appealed from by the appellant vide a Memorandum of Appeal that has raised some nine (9) grounds of appeal. The said grounds are rather repetitive, thus we will endeavour to summarize them. That is that the learned Judge erred both in law and fact by; failing to appreciate that the appellant as wife to ***Dr. G*** had a legitimate and legally protectable and enforceable right and interests over her husband's assets which included shares; failing to appreciate that the suit was instituted to protect the appellant's interests besides those of her husband therefore the suit was maintainable and enforceable in law; that the appellant had filed an application under the **Mental Health Act** being **Cause No 77 of 2013** but ***Dr. G*** passed away in December, 2016 before the ruling was delivered and that the suit was decided on technicality notwithstanding the provisions of the 2010 Constitution. The appellant prayed that the appeal be allowed by setting aside the ruling dated 16th April, 2018 and reinstating the suit for hearing on merit with costs.

[9] On 6th February, 2019 during the case management conference, directions were given that parties should file and exchange written submissions. However it was only the respondents who complied and filed submissions. During the plenary hearing ***Miss. Wambua*** learned counsel for the appellant made oral submissions stressing that the suit was filed by the appellant in her own right as the wife of ***Dr. G*** and on her husband's behalf who subsequently passed away before she was appointed a guardian *ad litem* on her application which was made under the **Mental Health Act**. She further submitted that the suit by the appellant should not have been struck out because she had her own independent rights as a wife to pursue the assets of her husband including shares in the 1st respondent. That the Judge erred by finding that the appellant could not pursue a claim on behalf of her husband who was incapacitated by failing to see the bigger picture that the property in shares needed to be protected. Moreover Ougo, J. in another suit filed by the appellant held that the suit could not be struck out and the Judge directed the appellant to seek a certification of her husband's mental capacity under the relevant law. Counsel for the appellant urged us to allow the appeal.

[10] The appeal was opposed; ***Mr Itonga*** for the 1st respondent relied on his written submissions and made some brief highlights. Counsel submitted that there was no way the suit by the appellant could be sustained as it was brought on behalf of ***Dr. G*** who was said to be incapacitated mentally without the appellant first making such an application under the **Mental Health Act** for her to be appointed the

manager or guardian *ad litem* of the estate of her husband. According to counsel, the Judge cannot be faulted for also concluding that the appellant had conceded that the shares she was pursuing were in the name of a company where her husband was a shareholder and that all her claims were tied to her husband. That it was therefore imperative that the appellant needed to have a letter of appointment to represent her husband. That is why the Judge found the appellant had no *locus standi* to sue the respondents as the shares were transferred to the 3rd respondent before she married ***Dr. G***. Counsel for the 1st respondent urged the appeal be dismissed.

[11] The appeal was also opposed by ***Mr. Kimani Kiragu*** learned counsel for the 2nd and 3rd respondents who were the originators of the motion that was successful in striking the appellant's suit. ***Mr. Kiragu*** relied on his written submissions, list and digest of authorities and made some oral highlights. Counsel urged us to consider some facts that were not in dispute, being: -

> ***a) Dr. G solely held the shares the subject matter of the dispute and he started organizing the succession of his estate in February, 2007.***
>
> ***b) Dr. G executed a deed transferring the shares to the 3rd respondent on 9th March, 2007.***
>
> ***c) Dr. G married the appellant on 31st August, 2007.***
>
> ***d) If Dr. G had capacity to marry the appellant on 31st August, 2007, he was certainly entitled or had capacity to deal with his property 5 months prior to the marriage as he wished.***
>
> ***e) The appellant filed suit on 13th November, 2014 contesting the transfer of shares to the 3rd respondent on her own behalf and on behalf of Dr. G.***
>
> ***f) The appellant did not have a certificate of guardianship issued under the Mental Health Act to support the action brought on behalf of Dr. G.***
>
> ***g) Dr. G died intestate on 14th December, 2016 and the appellant together with the 2nd respondent and Mrs Gathoni Dietz petitioned the High Court on 16th April, 2019 for grant of letters of administration in Succession Cause No 937 of 2017.***
>
> ***h) The 2nd respondent is the son of Dr. G.***

[12] ***Mr. Kiragu*** went on to state that the appellant's suit could not be sustained as the appellant had no capacity to sue on her own behalf and/ or that of her husband. The appellant had acknowledged in her submissions that she had no direct ownership of the shares but was pursuing them for her husband who was incapacitated and that gave her a higher right than anybody else. The assertion by the appellant that she moved to court to protect her spousal rights and interest also cannot pass the legal test as the shares were not jointly owned or acquired during the subsistence of her marriage to ***Dr. G***. Counsel cited the provisions of ***Section 6 (1) (c)*** of the **Matrimonial Properties Act** emphasising that the shares were acquired and transferred before the appellant was married to ***Dr. G***. The case of **Nairobi Permanent Markets Society & 11 Others vs. Salima Enterprises & 2 Others [1997] eKLR** was cited for the holding that:-

> **"The appellants have not disclosed what right or interest they had in the suit land. In the absence of that they could not expect the court to interfere with the Company's right of ownership by putting a hold on its activity or development of the suit land. We fully agree with the learned trial Judge that in the circumstances the appellants prima facie did not have locus standi to bring the said action for an injunction against the respondents"**

[13] Submitting on whether the appellant had legal standing to file suit as next friend of ***Dr. G***, it was argued that the management of the affairs of a person suffering from mental incapacities is provided for under the **Mental Health Act**. ***Section 26*** provides that a person has to apply for the management of the estate of any person suffering from mental disorder; while ***Section 27*** provides that a court may appoint a manager with general powers as it considers necessary and proper. The case of; **Grace Wanjiru Munyinyi & Another vs. Gedion Waweru Githunguri & 5 Others [2011] eKLR** was cited for the preposition that: -

> **"It is a very serious thing to say of, and concerning a person, that such person is a person of unsound mind or suffers mental disorder. The law presumes that every person is mentally sound, unless and until he is proved to mentally disordered. And, even where one person is shown to be of unsound mind one must always bear in mind that the degrees of mental disorder are widely variable, and incompetence to do any legal act or inability to protect one's own interests, must not be inferred from a mere name assigned to the malady from which a person may be suffering**…"

Counsel concluded by urging us to dismiss the appeal as the appellant did not follow the law to obtain the necessary appointment so as to file the suit as it will be a sad day if the courts can allow the law to be circumvented because of relationships.

[14] We have considered the record of appeal and deliberated on the respective submissions granted the matter before the High Court was canvassed by way of written submissions. The same questions on whether the appellant had legal standing to sue the respondents as the next friend or on behalf of ***Dr. G*** and whether she had any enforceable right or interest in the said shares persist even in this appeal. To begin with, we appreciate that it is trite that the jurisdiction of a court to strike out pleadings has been described variously as draconian such that the discretionary power is to be exercised sparingly such that no party should be driven from the seat of justice without being accorded a hearing. On the other hand it is also unfair to drag a person to the seat of justice when the case brought against her/him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations.

[15] Although the court exercises discretionary powers in striking out pleadings, because of its far reaching consequences, ***Order 2 rule 15*** of the **Civil Procedure Rules**, has established clear principles which guide the court in the exercise of that power in the following terms;

> ***"15. (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) 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."*** (Our emphasis).

The language as highlighted demonstrates that, as a drastic measure in litigation, the remedy must be resorted to sparingly. It is only where a pleading cannot be salvaged by an amendment that the court will utilise this procedure, hence the use of the word "may". ***Order 2 rule 15*** retains word for word the provisions of the former ***Order VI rule 13*** of the repealed **Civil Procedure Rules**. It has also been interpreted over the years in a long line of cases, both by this Court and the courts below that power to strike out pleadings should be as a matter of last resort. For instance in **Co-Operative Merchant Bank Ltd. vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999** the 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."***

See also **DT Dobie & Company (Kenya) Ltd vs Muchina (1982) KLR 1** and **Nairobi Permanent Markets Society** (supra).

[16] That said, was the appellant's case plain that she had no *locus standi* and that she had no disclosed interest in the shares the subject matter of the suit? These are all factual matters and as far as the record shows the key facts were common ground both in the court below and before us. That is the appellant brought the suit on her behalf and that of her husband ***Dr. G*** is not in dispute. Although the plaint filed by the appellant is silent on why she brought the suit on behalf of ***Dr. G***, she asserted in an affidavit sworn in support of a motion seeking interim orders that:-

> **"That I am the wife of Dr. BMG (hereinafter referred to as "my husband") as per the copy (sic) marriage certificate annexed hereto and marked "MG1". He is now aged about 90 years and incapacitated as a result of advanced Alzheimer's disease among other ailments as per the medical report annexed hereto and marked "MG2". In his current condition his memory is poor and for the last quarter of the last decade and the better part of this decade, he cannot execute any documents consciously nor make any rationale judgment on any issue and cannot thus be enjoined in the instant suit"**

[17] Clearly from the pleadings it is rather obvious that the appellant filed the suit on behalf of ***Dr. G*** because he was incapacitated mentally. It was also not disputed that ***Dr. G*** was incapacitated and perhaps even mentally as stated above. However the appellant was supposed to file proceedings under the **Mental Health Act** seeking to be appointed as manager or guardian *ad litem* before filing the suit in the High Court on behalf of her husband. Having not done so the Judge cannot be faulted for finding that the appellant lacked capacity to file the suit on behalf of her husband as the Judge simply gave effect to the provisions of the law. Even counsel for the appellant seems to have appreciated this fact as she only based her arguments in this appeal on the fact that the trial Judge failed to consider that the appellant was pursuing the shares of her husband on her own behalf as a wife.

[18] We now move to the second issue whether the appellant had an independent cause of action against the respondents besides that of her husband. In reaching the conclusion that appellant had not demonstrated any personal right or interest in the shares in the 1st respondent the Judge considered the submissions by the appellant. In the submissions filed on behalf of the appellant, this is what was stated: -

> **"Yes, the plaintiff does not claim direct ownership of the shares but the fact that the same are owned by her husband and an incapacitated husband at that gives her a higher right than anybody else including the children like the 2nd defendant to lay claim over the said shares and by extension by fraudulent transfer thereof. If a spouse has no right to claim interest over spouse's assets, who else would have rights"**

[19] This issue of the appellant's personal interest in the shares with the 1st respondent has to be considered against the background of the uncontested matters. The first is that the appellant married ***Dr. G*** on 31st August 2007; that before ***Dr. G*** married the appellant, he had transferred the shares to the 3rd respondent and appointed the 2nd respondent as the executive chairman; that if ***Dr. G*** had mental capacity to marry the appellant, he also had the same capacity to transfer the shares and to deal with his property. On whether the shares held by a husband before a marriage can form part of matrimonial property, a reading of the **Matrimonial Properties Act, 2013** although it came in force after the transfer of shares excludes properties acquired before marriage. This is what ***Section 6 (1)*** of the **Matrimonial Properties Act** states: -

> **"For purposes of this Act, matrimonial property means;**

a) The matrimonial home or homes

b) The household goods and effects in the matrimonial home or homes or

c) <u>Any other immovable and movable property jointly owned and acquired during the subsistence of marriage</u>" (Emphasis added)

We also appreciate that the claim in this suit was not about division of matrimonial property as the appellant had filed another suit in that regard.

[20] It was an uncontested fact that the shares were transferred to the 3rd respondent on 9th March, 2007 approximately five (5) months before the appellant married ***Dr. G*** on 31st August, 2007. We find no fault in the manner the learned Judge exercised his discretion, he came to the correct conclusion that the appellant lacked legal capacity to file suit on behalf of ***Dr. G*** and that she had failed to demonstrate any independent interest or right over the shares. In the event there was no need of sustaining a suit merely to subject the respondents to unnecessary expense and inconvenience of defending it.

Accordingly, this appeal lacks substance and it is accordingly dismissed with costs.

Dated and delivered at Nairobi this 7th day of February, 2020.

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

<u>DEPUTY REGISTRAR</u>