IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MURGOR & KANTAI, JJ,A)

CIVIL APPEAL NO. 266 OF 2015

BETWEEN

NGURUMAN LIMITED.....APPELLANT

AND

JAN BONDE NEILSEN.....1ST RESPONDENT

HERMAN PHILIPUS STEYN

Also known as Hermannus Phillipus Steyn.....2ND RESPONDENT

HEDDA STEYN.....3RD RESPONDENT

(Appeal from the Ruling and order of the High Court of Kenya at Milimani Commercial Court (J. Kamau, J.) dated 25th September 2015 and delivered on 2nd October 2015

in

HCCC No. 332 of 2010)

****

JUDGMENT OF THE COURT

This appeal arises out of a ruling of the High Court which declined to grant orders to ***Nguruman Limited,*** the appellant to strike out ***Jan Bonde Neilsen, the 1st respondent's*** Plaint dated 17th May 2010 that instituted proceedings against the appellant, ***Hermannus Philipus Steyn*** and ***Hedda Steyn, the 2nd and 3rd respondents,*** also referred to herein as, *the defendants.*

By a Notice of Motion dated 6th February 2014 brought under ***sections 1A*** and ***B, 3, 3A of the Civil Procedure Act, Order 2 rule 15 (1) (b), (c) & (d), order 51 rules 1*** and ***3*** of the ***Civil Procedure Rules*** and the inherent powers of the court, the appellant sought the following orders;

1. *That the appellant's suit be struck out with costs for being an abuse of the court process;*

2. *That the Honourable court give such consequential, further or other orders as it may deem just; and*

3. *That the costs of the application be provided for.*

The appellant's application was said to be grounded on the 1st respondent misrepresentations in the Plaint, that he had personally suffered legal injury by way of violation of his rights which were protected under a partnership arrangement between the appellant, the 2nd respondent and the 1st respondent and that the 2nd and 3rd respondents had obtained new evidence which showed that the 1st respondent's allegations in the Plaint were false and fraudulent since he had admitted that he did not and had never held any legal or beneficial interest in any asset in Kenya and especially not in any of the appellant's shares or the assets.

The application was supported by the affidavit sworn by ***Moses Loontasati Ololowuaya*** on 6th February 2014 on behalf of the appellant, of which the crux of the averments was that fresh evidence, obtained from the Bankruptcy Court in London had been discovered which revealed that the 1st respondent had no *locus standii* to institute the suit against the defendants, and that this was not a *bona fide* mistake. It was further averred that the statements made by the 1st respondent in the Plaint, and the representations made in a supporting affidavit he had sworn on 30th August 2010, his further affidavit of 9th November 2011 and the submissions of his counsel, Mr. George Oraro were a lie, untrue and fraudulent.

Of importance, it was averred that, the 1st respondent had presented a signed proposal dated 3rd December 1996 to enter into an Individual Voluntary Arrangement (IVA) with his creditors in the Bankruptcy court wherein he had stated that, *"I have no personal assets or resources at this time…"* and that the signed proposal did not refer to any of the 1st respondent's activities in Kenya or his having invested heavily in the venture between 1986 and 1991. And when the defendants sought further clarification on the issue, the respondent's UK English solicitor, one Mr. Daniel Schaffer responded on 19th November 2013 that;

> ***"It is our Client's position that;-***
>
> ***1. He did not and has never beneficially owned any of the Kenyan assets;…"***

Whereupon Mr. Ololowuaya concluded that the declaration was an admission that the 1st respondent did not have any legal or beneficial interest in any asset in Kenya and more particularly in the appellant's shares.

The facts central to this appeal are that the 1st respondent filed a Plaint against the defendants seeking a declaration that a partnership arrangement existed between the 1st respondent and the 2nd respondent; that the appellant's corporate veil be lifted; that 50% of the appellant's shares held by the 2nd and 3rd respondents be held on constructive trust for the 1st respondent; that 50% of shares held on trust by the 2nd and 3rd respondents be transferred to the 1st respondent; that an injunction do issue to restrain the 2nd and 3rd respondents from using the corporate veil to interfere with the 1st respondent and that the 2nd respondent be restrained from interfering with the management of the partnership assets.

It was contended that arising from a friendship that existed between them, in 1986, the 1st and 2nd respondents agreed to establish a joint venture partnership that would construct luxury tourist camps on the Nguruman property. It was further agreed that the parties would acquire shares in Nguruman Limited, and undertake to develop its property. The 1st respondent claimed that he remitted substantial sums to the 2nd and 3rd respondents for the purposes of acquiring the Nguruman property and developing it, that he, had instructed an advocate called Mr. Anthony Gross to acquire the shares in Nguruman Limited, which shares were to be apportioned equally between himself and the 2nd respondent once the complexities of his foreign status were resolved. But later, upon realizing that the 2nd respondent was reluctant to transfer the 50% portion of the acquired shares he held in the appellant, the 1st respondent instituted the instant proceedings to claim his portion of the shares in the partnership.

The defendants generally denied the 1st respondent's representations set out in the plaint and further denied that, there was any agreement to set up a joint venture, or that he provided any consideration to purchase shares, or that any accounts were to be rendered to the 1st respondent. The 2nd and 3rd respondents did not file any response to the application.

But in reply to the motion, the 1st respondent deponed that the appellant had made a similar application to strike out the suit that was dismissed by Mabeya, J; that concerning the fresh evidence, it was deponed that one Ms. Rachael Ellen McConahghie on behalf of the 1st respondent disclosed that the statement of affairs prepared to support the IVA did not contain any particulars of the partnership, and consequently nothing new was obtained from the bankruptcy proceedings which the defendants were not already aware of.

In determining the application, the learned judge, *(J. Kamau, J)* declined to grant the orders sought on the premises that the issues in contention went to the merits of the suit, and that the striking out application was not the appropriate forum in which to determine the issue of the 1st respondent's *locus standii* in the suit.

Aggrieved by the ruling of the High Court, the appellant lodged the instant appeal on grounds, which in summary are that; the learned judge fell into error when she failed to find and determine that the 1st respondent did not have *locus standii* to institute, maintain and prosecute the suit, notwithstanding that the appellant had placed material before the court to show that the 1st respondent did not have an interest in the subject matter; that after finding that *locus standii* was a preliminary issue, the learned judge failed to determine the issue which was a matter within the remit of the learned judge's mandate; that the learned judge failed to find that the appellant and the 2nd and 3rd respondents did not suffer any prejudice; and that the learned judge misapprehended the law and facts and took into account considerations which she should not have taken into account, failed to take into account considerations which she should have taken into account, and that as a consequence arrived at the wrong decision.

During the hearing of the appeal, learned Senior Counsel Mr. Pheroze Nowrojee appeared together with Mr. Nyaencha for the appellant, learned Senior Counsel Mr. Ahmednasir appeared for the 2nd and 3rd respondents, while Mr. Amoko appeared for the 1st respondent.

The appellant filed written submissions on 5th June 2017, which were highlighted by learned Senior Counsel ***Mr. Nowrojee.*** It was submitted that, the application sought to strike out the suit for want of cause, because the 1st respondent through his own admission had brought material to show that he had no *locus standii* in the suit, which as a consequence, did not belong to him.

Counsel submitted further that, whether the 1st respondent owned the suit, was not a matter of belief, but was dependent upon evidence; that he had initially brought the suit in a personal capacity having stated that he personally advanced the funds to the joint venture partnership; that in a further affidavit dated 9th November 2011, the 1st respondent later stated that he was pursuing the monies as an agent of the family trust, yet International

Fiscal Services of Netherlands were the appointed trustees, and should have been the person or entity responsible for recovering the monies on the trust's behalf. Counsel also submitted that for the 1st respondent to have instituted proceedings as trustee on behalf of the family trust, he ought to have produced an authorization, as required by ***Order 31*** of the ***Civil Procedure Rules***, but had not. Furthermore it was asserted that in 1996, the 1st appellant told a UK Bankruptcy court that he did not have any interest in any assets in Kenya or globally which was an admission that he had nothing to claim against the defendants. Counsel contended that the learned judge had misunderstood the purport of the decision in the case of ***DT Dobie & Co (Kenya) Ltd vs Muchina [1982] eKLR***, which did not address the question of lack of *locus standii* and that ***Alfred Njau vs Nairobi City Council [1983] KLR 625*** set out the distinction between *locus standii* and cause of action, in that where a person lacked locus *standii* he or she cannot be heard, whereas a cause of action relates to facts which give rise to a right to sue. Counsel also cited the case of ***Jason Pickthall vs Dickinson & another [2009] EWCA Civ 543*** for the proposition that where a person has no *locus standii* or standing and knows that the suit does not belong to him, such suit should be struck out, and that in this case, the High Court ought to have struck out the 1st respondent's suit as he lacked the right to sue.

Learned Senior Counsel ***Mr. Ahmednasir*** stated that he would adopt the written submission filed on 28th March 2018. Counsel submitted that in the Plaint, the 1st respondent filed a suit in the High Court wherein on the one hand, he claimed 50% of the shares held by the 2nd respondent in the appellant company; that it was alleged that he made advances towards the joint venture partnership to the tune of US$ 1.9 million; and simultaneously with the filing of the Plaint, the 1st respondent filed a verifying affidavit, and under a certificate of urgency where on the other hand he sought orders to restrain the defendants from evicting him from his homestead which he claimed was his personal property.

Counsel further stated that the 1st respondent had initially brought the suit in a personal capacity, and then in a replying affidavit later claimed the monies as an agent on behalf of the Happy Valley, United Dutch and Chester Court, a family trust structure that was alleged to have made payments to the joint venture between 1991 and 1998 and whose trustees were International Fiscal Services of Netherlands, so that if the family trust had appointed trustees, then they, and not the 1st respondent were the proper claimants. Counsel surmised that the averments in the affidavits as presented were inconsistent and incapable of coexisting with the contents of the plaint.

On the UK bankruptcy proceedings, counsel explained that in the course of the proceedings, the 1st respondent had declared that he did not hold any assets in Kenya, and that it was on the basis of these averments that the appellant had brought the Notice of Motion of 6th February 2014 seeking to strike out the plaint. Counsel faulted the learned judge for failing to determine whether or not the 1st respondent had *locus standii* to bring the suit; that having regard to the case of ***Jason Pickthall (supra)*** and ***Alfred Njau vs Nairobi City Council (supra)*** the 1st respondent knew that he lacked standing, and for this reason the suit ought to have been struck out.

Mr. Amoko began by submitting that the 2nd and 3rd respondents were using the appellant as a pawn to avoid responding to the question of whether they held a proprietary trust in favour of the 1st respondent. It was asserted that the joint venture partnership was established between the 1st and 2nd respondents, where the 1st respondent was to provide the funding and in return, was to acquire 50% of the 2nd respondent's shares in the appellant company; that it was on this basis that a constructive trust had come into existence. Counsel asserted that this was not a dispute about *locus standii* as there are instances where a beneficial owner may enforce their rights against third parties. Citing "***The Law of Trusts and Equitable Obligations"*** counsel stated that for instance in a marriage where a wife provides the funding for purchase of a property, and the property was registered in the husband's name, the wife would be the principal and the husband would hold the property as the nominee; so that any documents relating to the ownership would appear in the nominee's name, but the wife's beneficial owner's rights could be enforced by the husband, who would hold the property in a non-beneficial trust capacity; that in this case, to the extent that the 1st respondent funded the project with the proceeds from a family trust and acquired the shares on behalf of the trust, he had the necessary *locus* to enforce the trust rights as the holder.

Counsel questioned how the defendants could accuse the learned judge of misapprehending the issues, yet it was trite that she was not in a position to evaluate all the evidence that was before her, as this was the preserve of the trial court. Counsel urged us to decline to take up the invitation to entertain the allegations, but to allow the dispute to be heard and determined on its merits. Also citing ***Jason Pickthall (supra),*** counsel explained that the question of locus in the ***Jason Pickthall (supra),*** was determined after a full hearing of the dispute on its merits.

On the contention that ***Order 31 rule 1*** of the ***Civil Procedure Rules,*** was disregarded, counsel submitted that the provision only applied where both the 1st respondent and the beneficiaries were parties to the agreement; that since the agreement was between the 1st and 2nd respondents, as title holder, the 1st respondent was the proper person to bring the suit.

In reply, Mr. Nowrojee submitted that the claim had shifted from one of personal ownership to one of a constructive trust, the latter which had not been pleaded; and that only the persons who funded the project were eligible to bring the suit and that this did not include the 1st

respondent.

We have considered the issues, and are of the opinion that the question for our consideration is whether in declining to determine the question of *locus standii*, the learned judge was right in deciding not to exercise her discretion to strike out the Plaint. In addressing the issue we must defer to the dictates of the holding in the case of ***Mbogo vs Shah [1968] EA 93*** which specify that this Court should not interfere with the exercise of discretion of the trial judge unless it is satisfied that the court misdirected itself in some matter and as a result arrived at the wrong decision, or unless it is manifest from the facts that the judge was clearly wrong in the exercise of discretion and that as a result the decision has given rise to a misjustice.

We also accede to the caution set out in the case of ***Crescent Construction Co Ltd vs Delphis Bank Limited [2007] eKLR*** which is 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."***

Guided by these principles we turn to address the issue of whether the 1st respondent had *locus standii* to institute the suit, and whether the learned judge was right to decline to exercise her discretion to strike out the plaint.

When the motion is considered, there is no question that the appellant's application to strike out the suit was grounded on the assertion that the 1st respondent lacked standing to institute these proceedings. And in determining the issue, the court declined to make such determination, and instead observed that in the Plaint, the 1st respondent stated that he had provided the architectural designs, all finances to construct the tourist sites, and that he had a fifty percent share of the subject parcel of land. The court also noted that the 1st respondent would from time to time remit monies to the 2nd and 3rd respondents at the 2nd respondent's request for the purposes of the joint venture, and to operate the affairs of Nguruman. In view of these considerations, the court concluded that;

> ***"Be that as it may, the question of whether or not the suit was truly based on a trust and on the companies' funds on behalf of the trust, the credibility, admissibility or relevance of evidence the Plaintiff furnished the court to demonstrate where the monies for the investment came from, whether or not he was a trustee of the family trust, whether or not he had authority to act on behalf of the family as a trustee, whether or not there was a contractual, quasi contractual or non-contractual fiduciary relationship between himself and the family trust structure, the fact that the beneficiary of the trust was Lone Bonde Neilsen and not him, the fact that the trustee was International Fiscal Services (Antilles) NV and not him and generally, the question of whether or not the trustees that were in existence and who had capacity to sue in such circumstances were all issues this court found would need further interrogation during trial and could not be dealt with at this interlocutory stage."***

In other words, though the court appreciated that *locus* was a preliminary issue for determination, it was not satisfied that the striking out application was an appropriate forum within which to determine the issue having regard to the intricate circumstances of the case. Instead, the court was of the view that it was a matter that ought to be left for the trial court to determine.

It is on the basis of this perceived failure that the defendants have brought this appeal, of which we are required to determine whether the learned judge rightly declined the invitation to determine the question of the 1st respondent's *locus standii* in relation to the suit one way or the other.

Thus in addressing the issue of *locus standii*, the question would be whether, the appellant had standing to institute the suit, or did the suit belong to other persons or entities; that it amounted to an abuse of the court process.

As stated above, the application was brought under ***Order 2 rules 15 (1) (b), (c) and (d)*** of the ***Civil Procedure Rules***. The provisions stipulate that;

> ***(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—***
>
> ***a. …***
>
> ***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".***

More particularly, what was alleged was that the 1st respondent lacked the *locus standii* to institute the suit as, in the plaint he asserted that he had brought the suit to claim monies advanced to the defendants in his personal capacity, and that later he had changed his status in various

affidavits to that of a trustee suing on behalf of family trusts and yet, he had not produced any authority to support the change of status, leading to the conclusion that he was the wrong claimant, and his actions an abuse of the court process.

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 as follows;

> ***"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).

While ***Black's Law Dictionary, 9th Edition, page 1026*** defines ***"locus standii"*** as, ***"The right to bring an action or to be heard in a given forum…"***

The 2nd and 3rd respondents advanced various arguments to suggest that the 1st respondent lacked standing to bring the suit. They charged that in the Plaint, the 1st respondent had initially claimed that he had invested his personal monies in the partnership or joint venture, and then later in a replying affidavit had averred that the cause of action was vested in family trust companies which were separate and distinct entities, which had in any event been wound up. It was also alleged that he had not produced any evidence to show that the cause of action was vested in him in a non-beneficial trust capacity.

Next, the defendants claimed that, the 1st respondent's standing was further compromised by what was referred to as the discovery of fresh evidence concerning an IVA that he had entered into with his creditors, where during the bankruptcy hearings, the 1st respondent had informed the Bankruptcy Court that he did not hold any assets or interests in Kenya or globally. In the appellant's view, this assertion was tantamount to a declaration that he did not hold any shares in the appellant, or in the partnership, and without such ownership, he lacked capacity to bring a claim in a suit such as this.

In response, the 1st respondent argued that the appellant's allegations were based on a misunderstanding of the 1st respondent's claims and the evidence produced, as the defendants had failed to appreciate that two separate sets of payments were made to the 2nd and 3rd respondents by the 1st respondent. The first being the money that emanated from the family trust between the period 1986 and 1990 and which was operated by various companies on behalf of those family trusts, and the other being post 1999 payments paid directly by the 1st respondent.

It was further argued that the disclosure of the existence of the family trusts was merely intended to show the source of the funds, and did not change the 1st respondent's status as a nominee, who was not only obliged to account to the beneficiaries, but to also seek redress against third parties, such as the defendants to whom he remained the legal beneficial owner of the moneys advanced.

Given the above did the 1st respondent have the requisite *locus standii* to institute the suit? To answer this question, the lower court would have had to interrogate evidence comprised in lengthy affidavits to which voluminous documents were attached to discern whether the 1st respondent had personally advanced monies to the defendants, and so had the right to institute proceedings to demand the amounts advanced. It would also have been necessary for the court to ascertain whether the 1st respondent was authorized to act in an agent or trustee capacity. Other issues to be discerned would inter alia, be whether a joint venture arrangement existed between the parties, whether the sums came from a family trust, whether the 1st respondent was a trustee or a nominee, whether the assets or interests allegedly held on constructive trust were referred to in the bankruptcy proceedings.

Again, whether the declaration denying ownership of the shares and interest in a UK Bankruptcy court negated the existence of *locus*, we think that it would be necessary for a court to inquire into, amongst other issues, how unspecified shares or interests, for which no ownership was ascribed in the earlier bankruptcy proceedings could be perceived as being the same or connected to the interests claimed in these proceedings. Essentially, what the defendants were asking the court to do was to conduct a trial within a trial into the 1st respondent's capacity on evidence that would not have been tested for authenticity under cross examination.

In the case of ***DT Dobie & Company Ltd (supra)*** it was stated thus;

> ***"The Court ought to act very cautiously and carefully and consider all the facts of the case without embarking upon a trial before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the Court. At this stage, the Court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the Court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross examination in the ordinary way. As far as possible indeed, there should be no opinions expressed upon the Application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right."*** **(**emphasis ours)

As is evident from above, unless, the answer to the question of *locus* is plain and obvious to the eye, which is not the case here, a court considering such an application should refrain from descending into a trial court's arena. Indeed, the circumstances of this case are so intrinsically tied to the substantive claim, so that when it is considered together with the extensive and contested affidavit evidence produced,

it would be a herculean feat to attempt to ascertain the 1st respondent's *locus* without going into the substantive merits of the suit. With respect, this cannot have been the intended purpose of the court charged with the responsibility of determining a striking out application such as the one before the High Court. Hence the learned judge's conclusion that *"…an application for striking out a suit would not be a proper forum for it to consider whether or not the suit herein had been properly instituted. Indeed this was not an issue that can be dealt with in an interlocutory stage based on affidavit evidence…"* We therefore find that the issue of *locus standii* was not capable of being determined at an interlocutory stage, having regard to the circumstances of the case.

But that is not all. It was also alleged that in bringing the suit in the manner that he did, the 1st respondent's actions were an abuse of the court process.

To address this allegation, we turn to the authorities placed before us, where in particular, the case of ***Jason Pickthall (supra)*** that all the parties cited to support their disparate positions stands out. The following excerpt was quoted where that court explained the issue thus;

> ***"In my view the starting point is that where a man starts proceedings knowing that the cause of action is vested in someone else, then it is hard to see why those proceedings are not an abuse. He has started proceedings in which, even if he proves all the facts, he wants to prove and establishes all the law that he wants to establish, he will still lose because he does not have a right to sue. It is hard to see how that cannot be an abuse. Only people who own the cause of action or who have an appropriate interest in the proceedings, have any business asserting the cause of action or starting proceedings. Any other use of the court's proceedings is improper. The position would be likely to be otherwise if the claimant does not know, or is uncertain as to whether he has title to the relevant cause of action. In those circumstances, at least until it is authoritatively determined that the claimant does not own the cause of action, it may well not be appropriate to characterize the proceedings as an abuse, but that is different from the case currently under consideration."***

In the above case, Mr. Pickthall, the claimant filed a claim in negligence against the defendant after he, (the claimant), was adjudicated bankrupt, and the Official Trustee had become the legal owner of his residual assets in bankruptcy. The court found that when he instituted the proceedings, he knew that the cause of action was not vested in him, but in the Official Receiver, and as a consequence was aware that he was not the proper claimant in the suit. The court took the view that, to determine whether a party had the necessary *locus*, what ought to be taken into account was whether that person knew that he was the right person, and that anything short of this was an abuse of the court process. See also ***Rajesh Pathania vs Edmond Adefolu Adedeji & others (2014) EWCA Civ 681.*** The court went further to add that, where the claimant did not know or was uncertain of whether the ownership of the cause of action was properly vested in him or her, then, the proceedings may not be an abuse, until it is authoritatively determined that he or she does not own the cause of action.

What in effect this means is that for a court to reach a conclusion, that the claimant did not have *locus standii* and so that his actions were an abuse of the court process, it must satisfy itself that, (i) the claimant did not have *locus standii*, (ii) he or she knew that they did not have *locus standii* or, ownership of the subject matter and (iii) that they instituted the suit knowing that they were the wrong claimant. So that where the court is satisfied that the claimant was not aware that he or she lacked *locus standii*, or that it could not be said with certainty that the claimant knew that he or she did not own the cause of action, a finding of abuse will not be established.

Applying the above criteria to the circumstances of the instant case, we have found that it cannot be said with certainty that at this stage of the proceedings, the 1st respondent knows that he is the wrong person to sue thereby resulting in an abuse of the court process. And unlike the facts in ***Jason Pickthall (supra)*** where from the outset, Mr. Pickthall knew that having been declared bankrupt, he had no capacity *ab initio* to institute the proceedings in his own name, and yet still went ahead to do so, in this case, it is yet to be authoritatively established that the 1st respondent did not know that the cause of action belonged elsewhere, or that he lacked standing to institute the suit. A finding on this can only be reached after it has been established that the claimant was the wrong person. So that, without such a finding, it cannot conclusively be held that by the time he instituted the suit, the claimant knew that he lacked the necessary *locus*, which was an abuse of the court process.

As concerns the learned judge's reluctance to pronounce herself on the question of the 1st respondent's *locus standii* or lack thereof, despite the issue having been placed before her, in view of our conclusion above, we consider that the appellants' grievance is misplaced. It was clearly untenable for the learned judge to have to delve into the merits of the suit, to address matters that were unreservedly the preserve of the trial court. This being the case, we are satisfied that the Judge rightly declined to determine the issue, and instead also rightly ordered that the suit proceed to be heard and determined on a priority basis.

That said, we are satisfied that the proceedings in the High Court thus far, are not an abuse of the court process, and the 1st respondent should be allowed to proceed to trial, on the basis of the pleadings and the evidence to be produced and tested before the trial court.

In the case of ***Yaya Towers Limited vs Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000*** this Court expressed 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."

We adopt the above sentiments, and would add that we do not think that the persistence of the suit will in any way prejudice the defendants, but this notwithstanding, whatever prejudice that may arise would be capable of being compensated in damages.

In sum, we find that the lower court rightly declined to exercise its discretion to strike out the suit, and we therefore have no reason to interfere with that decision. The appeal is dismissed with costs to the 1st respondent.

It is so ordered.

Dated and delivered at Nairobi this 25th day of January, 2019.

R.N. NAMBUYE

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JUDGE OF APPEAL

A.K. MURGOR

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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

DEPUTY REGISTRAR