IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), NAMBUYE & M'INOTI, JJ.A)

CIVIL APPEAL NO. 325 OF 2013

BETWEEN

KENYA ANTI-CORRUPTION COMMISSION.....APPELLANT

AND

WILLESDEN INVESTMENTS LIMITED.....1ST RESPONDENT

BEN MULI.....2ND RESPONDENT

JATIN PATEL.....3RD RESPONDENT

HITESH RATHOOD.....4TH RESPONDENT

MARTHA KIMWELE.....5TH RESPONDENT

KENYA HOTEL PROPERTIES LIMITED.....6TH RESPONDENT

WILSON GACHANJA.....7TH RESPONDENT

CITY COUNCIL OF NAIROBI.....8TH RESPONDENT

(Being an Appeal from the Ruling and Decree of the High Court at Nairobi (Muchelule, J) dated 27th May, 2010

in

HCCC No.35 of 2010)

****

JUDGMENT OF THE COURT

A brief history of the events leading to the filing of this appeal are as follows: The long running dispute relates to a parcel of land known as L.R No. 209/12748 situated between Nyayo House and Hotel Intercontinental and linking Uhuru Highway to the central business district of Nairobi.

The 1st respondent has all along held the only grant to the suit property issued to it by the Government of Kenya on 1st January, 1994 for a term of 99 years. At some point either before or after that date, the 6th respondent occupied the property on a lease granted to it by the then City Council of Nairobi. After several attempts to have the 6th respondent vacate the property and compensate the 1st respondent failed, the latter filed **HCCC No. 367 of 2000** against the 6th respondent for;

> a) a declaration that it (the 1st respondent) was the lawful owner of the property; and that the occupation of the property by the 6th respondent was unlawful, null and void;

b) vacant possession

c) *mesne* profits; and

d) damages for trespass to property.

The trial court, (Mutungi, J.) entered judgment in favour of the 1st respondent and awarded it *mesne* profits from January 1994 to February 1998 in the sum of Kshs. 54,902,400 with interest at court rates from January 1994 till payment in full, general damages for trespass in the sum of Kshs. 10,000,000, Kshs. 6,000,000 as damages for loss of business opportunity as well as costs of the suit and interest, at court rates, from the date of filing of the suit till payment in full.

Naturally, aggrieved by this decision, the 6th respondent filed **Civil Appeal No. 149 of 2007** in this Court. The appeal was partially successful in that the Court found no substance in the claims for general damages for trespass and set aside the award of Kshs. 10,000,000. The Court also set aside the award of damages of Kshs. 6,000,000 for loss of business opportunity. On the other hand, the award of Kshs. 54,902,400 for mesne profits was reduced to Kshs. 22,729,800.

At some point the 8th respondent lodged a complaint with the defunct Kenya Anti- Corruption Commission, the predecessor of the appellant, alleging that the suit property was originally part of a road reserve on Kaunda Street; and that it had unlawfully been alienated. Following this complaint, the appellant is said to have carried out investigations and consequently filed **HCCC No. 35 of 2010** in which it claimed that there was fraud in the allocation of the property to the 1st respondent; that although the letter of allotment was issued to a company known as Centre Park Limited, the grant was instead issued to the 1st respondent without any nexus between the two companies; that Central Park Limited did not exist, according to communication from the Registrar of Companies; and that the property was carved out of a road whose dimensions were altered by reducing its width. Together with the suit, the appellant also filed an application for an order of temporary injunction to restrain the respondents from damaging, alienating or interfering with the suit property pending the hearing of the suit; an injunction restraining the 6th respondent from paying the 1st respondent the award or decretal sum awarded in **HCCC 367 of 2000** and varied by this Court in **Civil Appeal No. 149 of 2007**, pending the determination of the ownership of the suit property; and in the alternative that the decretal sum aforementioned be paid into court or in an interest earning account pending the hearing and determination of the suit.

On 12th February, 2010, the 1st respondent reacted to the appellant's suit by filling a notice of preliminary objection challenging the jurisdiction of the trial court to entertain the suit on the grounds that: the suit was time barred; it was defective as it sought to restrain payment pursuant to execution of final orders granted in **Civil Appeal No. 149 of 2007**; that the principal prayers were against a party (Centre Park Limited) which was not a party to the suit; that the application offended **section 34** of the Civil Procedure Act; and that the suit and application create a conflict between the respective jurisdictions of the High Court and Court of Appeal.

Three days after the filing of the objection, the 6th respondent filed an application to stay proceedings in **HCCC No. 367 of 2000** and **HCCC No. 24 of 2008**; to restrain the 1st respondent from dealing with the suit property; and to join in the proceedings, the Nairobi City Council as an interested party. Only the prayer for joinder was granted by Mbogholi J, *ex parte*. But that was not the end. Without prosecuting its notice of preliminary objection, and even before the application by the 6th respondent could be heard *inter partes*, the 1st respondent filed an application dated 2nd March, 2010 to strike out the 6th respondent's application on the grounds, *inter alia* that there was material non-disclosure of facts by the 6th respondent in obtaining the *ex parte* orders; that the application offended **section 7** of the Civil Procedure Act; and that the 6th respondent failed to comply with the provisions of **Order 1 Rule 21** of the Civil Procedure Rules.

On 4th March, 2010 when the application dated 2nd March, 2010 came before Muchelule, J he specifically directed that it be heard on priority basis and ordered the filing of submissions. On 16th March, 2010 during the hearing of the application, counsel for the appellant Mr. Ngaah (now a Judge of the High Court) took a neutral stand deeming that the contest was between the 1st and 6th respondent and did not submit on the same. This decision was informed by his belief that his application for injunction was yet to be listed for hearing.

On 27th May 2010, Muchelule, J. in the ruling impugned in this appeal, accepted the invitation and struck out, not only the 6th respondent's application but also the entire suit on the grounds that they were *res judicata* for raising the very issues which had earlier on been determined in **HCCC No. 367 of 2010** and by this Court in **Civil Appeal No.149 of 2007**.

Following this ruling, the appellant has filed this appeal on 15 grounds which we have condensed as follows; that the learned Judge erred in: striking out the chamber summons dated 3rd February, 2010, which was filed by the appellant simultaneously with the plaint, without being heard on the application; striking out the appellant's entire suit when there was no application or substantive prayer for doing so; granting, *suo motu* reliefs which had not been prayed for; holding that the principle of *res judicata* applied against the appellant when the appellant had not been a party to the previous proceedings between the 1st and 6th respondent over the ownership of the suit property; applying the principle of *res judicata* against the appellant when the conditions precedent for such application were not satisfied; holding that the appellant should have joined any previous proceedings between the 1st and 6th respondents to pursue its interest in the suit property yet there was no provision in law for such a procedure; holding that the issue of title to the suit property had been determined yet such determination could not have been made as between the appellant and the 1st respondent; making a ruling on the legality of title to the suit property when he had sustained the appellant's counsel's objection during the hearing of the 1st respondent's application that such issue could only be addressed during the hearing of the appellant's chamber summons; failing to take notice that the Grant in favour of the 1st respondent is a nullity; and striking out and dismissing the appellant's suit at the same time.

These are the grounds upon which counsel anchored their submissions. We understand the appellant to be complaining that the four conditions to be satisfied under **section 7** aforesaid which were considered in the case of **Uhuru Highway Development Ltd V. Central Bank of Kenya** Civil Appeal No. 36 of 1996, were not satisfied to warrant the striking out of the application and the suit; that **HCCC No. 367 of 2000** and **HCCC No. 35 of 2010** raised and determined different issues, the latter challenging the appellant's title of the suit property,

on the ground that it was fraudulently and illegally obtained, which issue was never argued or determined on merit by the court in the former suit; that what was in the former suit were claims for *mesne* profits, general damages for trespass and damages for loss of business opportunity; that the parties in the two suits are not identical and are not litigating under the same title; that the appellant was not a party to the former suit; and that the issues raised in the present suit were not determined in the previous suit.

Given the history of the 6th respondent and the 1st respondent, the former naturally agrees with these submissions, that the appellant ought to have been heard before striking out its suit; and that the doctrine of *res judicata* was inapplicable in the circumstances of the case.

The rest of the remaining 7 respondents stood on the side that argued that the learned Judge properly found that the legality of the 1st respondent's title to the suit property had previously been decided in **HCCC 367 of 2000** and **Civil Appeal No. 149 of 2007** where the issues of ownership were substantially addressed, hence the question raised in the appellant's suit was *res judicata*; that the appellant having filed submissions in response to the 1st respondent's preliminary objection could not be heard to complain that it was denied the opportunity to be heard; and that the appellant was to blame for failure to apply for joinder in **HCCC 367 of 2000** and **Civil Appeal No. 149 of 2007** having completed its investigations before the two actions were concluded. It is as strange as it is baffling that the 8th respondent that had complained to the appellant about the 1st respondent's title was now on the same side with the 1st respondent.

Although the appellant in its memorandum of appeal listed 15 grounds, condensed in its submissions into 3 and further summarized by us, to our mind the only issue before us is, whether by striking out the appellant's suit the learned Judge properly and judicially exercised his discretion.

The first complaint by the appellant is that, without hearing it the Judge went ahead and struck out its suit and by extension its application for a temporary injunction. Besides the appellant's amended plaint together with chamber summons dated 3rd February, 2010, on record were several applications pending hearing. They included the 1st respondent's notice of preliminary objection of 12th February, 2010, the 2nd, 3rd, 4th and 5th respondents' summons and the 1st respondent's notice of motion dated 2nd March, 2010. Of interest to us in this appeal is the latter application. The application sought only two substantive orders; that the *ex parte* orders granted by Msagha, J to the 6th respondent's on 18th February, 2010 be set aside and that the 6th respondent's application dated 15th February, 2010 be struck out for offending **section 7** of the Civil Procedure Act; that by bringing the aforesaid application the 6th respondent intended to re-open **HCCC No. 367 of 2000**, which was heard and concluded; that the matter having gone to the Court of Appeal in **Civil Appeal No. 149 of 2007,** having been heard and determined, that decision was final and binding on the High Court under the doctrine of *stare decisis* and*;* that the application had been brought after inordinate delay of 15 years.

On 4th and 16th March, 2010 Muchelule, J. was clear that what was to be argued was the 1st respondent's application of 2nd March, 2010. The Judge specifically gave the following directions;

> **"The application that was coming for hearing on 4.3.2010 was that by the Plaintiff and 6th respondent. The applicant/1st Defendant took objection to the application by 6th Defendant by his application dated 2nd March 2010 when it was alleged that as between the two parties the matter was *res judicata* and by so doing attacked the jurisdiction of this court to deal with the same. There is 6th Defendant's preliminary objection dated 15th March 2010 questioning the capacity of the 1st Defendant lawyers to act in the matter. The affidavit of the 1st Defendant similarly raised issues of jurisdiction. Where the jurisdiction of the court to deal with the suit or any application therein is raised that has to be resolved first before anything else. I direct that the motion by first defendant dated 2.3.2010 be heard first and subject to its resolution the other matters being raised can then be addressed."**

It was those directions that led Mr. Ngaah to say that;

> " **In view of the fact that I still have my application for injunction on record. Its (sic) reluctant to enter into the contest between the 1st and 6th Defendants. Applicant is in court to recover the suit property. I will argue that application when it comes. I leave the matter to court."**

It is also apparent from the terms of the directions reproduced above that the learned Judge was himself alive to the pending applications.

For the purpose of this appeal, it was averred in paragraphs 9, 10, 11, 12, and 21 of the application by the 6th respondent as follows;

> **"9. The 6th defendant has failed to disclose to this Court that it made a similar Application dated 3rd November 2004 in HCCC No. 367 of 2006 but abandoned the same. The said application was based on similar grounds as the present application.**
>
> **10. The entire suit and Application offend section 34 of the Civil Procedure Act; Cap 21 Laws of Kenya**
>
> **11. At all material times, the 6th Defendant against whom Judgment was made for trespass in HCCC No. 367 of 2006 and the said City Council of Nairobi have and continue to use the subject property as a parking lot for gain and NOT as a road reserve as now alleged.**
>
> **12. The said Judgment in rem is binding and conclusive**
>
> **....**

21. The Plaintiff and the 6th Defendant have no cause of action against the 1st Defendant in this Suit on which the said Orders can be predicated."

From the above pleadings, directions, proceedings and submissions there is no doubt that at the center of those arguments was the question of jurisdiction. Jurisdiction of the court to entertain the 6th respondent's application dated 2nd March, 2010. **Section 34** alluded to above requires that all questions arising between the parties to a suit be determined by the court executing the decree and not by a separate suit.

Although the appellant failed to cite the correct provision of the Civil Procedure Rules, it is not in doubt, from the solitary relief sought that the intention was to invoke **Order 2 rule 15** which stipulates that;

"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".

The Judge, in his ruling also did not allude to this provision. It is, however established firmly that the court in considering whether or not to strike out pleadings exercises discretionary powers; that those powers have far reaching and drastic consequences, and ought therefore, to be exercised only in accordance with clear principles.

We reiterate what this Court said in **Co-operative Merchant Bank Ltd. V. George Fredrick Wekesa,** Civil Appeal No. 54 of 1999;

"The power of the Court to strike out a pleading.....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."

In the famous **D.T. Dobie & Company (K) Ltd V. Joseph Mbaria Muchina** & **Another**, Civil Appeal 37 of 1978, Madan JA, as he then was, cautioned that;

"As the power to strike out pleadings is exercised without the court being fully informed on the merits of the case, through discovery and oral evidence, it should be used sparingly and cautiously."

We may add that even a single *bona fide* triable issue will be sufficient to entitle a party to be heard in his cause. See **Postal Corporation of Kenya V. Inamdar & 2 Others** (2004) 1 KLR 359. A triable issue is not one that must succeed at trial; it is a *prima facie* cause of action or defence, which deserves to go to trial for adjudication. See **Patel V. East Africa Cargo Handling Services Ltd** (1974) EA 75).

In our own assessment of the matters set out above, we are convinced that it was erroneous for the Judge to deal with a matter that was not before him; and to strike out the suit without according the appellant a chance to be heard. Having himself expressly given clear directions on what was to be canvassed before him on that date, the learned Judge mistakenly, and incorrectly tagged the suit along with the 6th respondent's application. The importance of a fair hearing before one is condemned was stressed in the **County Assembly of Kisumu & 2 others V. Kisumu County Assembly Service Board & 6 Others,** Civil Appeal Nos. 17 & 18 of 2015 as follows;

"72. Due process is a fundamental aspect of the rule of law. Due process is the right to a fair hearing. The right to a fair hearing encapsulated in the *audi alteram partem* rule (no person should be condemned unheard) and founded on the well-established principles of natural justice, is not a privilege to be graciously accorded by courts or any quasi-judicial body to parties before them. As is clear from Articles 47 and 50 of our Constitution, it is a constitutional imperative.

73. Whereas the right to a fair hearing varies from one case to another depending on the subject of the matter in issue, its irreducible minimum is now well settled".

We believe that had the learned Judge properly directed himself by having the 1st respondent's application heard, say together with the notice of preliminary objection, he would probably have arrived at different or the same conclusion but he would have had the benefit of considering the appellant's arguments through Mr. Ngaah and thereafter form his opinion if the suit was *bona fide* or hopelessly unmeritorious. As we have observed earlier in the notice of preliminary objection, the 1st respondent is challenging the court's jurisdiction to entertain the appellant's suit and application of 3rd February, 2010 on seven grounds. There is yet another chamber summons dated 24th February, 2010 taken out by the 2nd, 3rd, 4th and 5th respondents under **Order VI Rule 13 (1) (a) & (b)** of the former edition of the Civil Procedure Rules (now repealed) praying that the amended plaint be struck out for not disclosing reasonable cause of action against them.

For the 6th respondent we have no hesitation in categorically stating that its application was properly found to be *res judicata*. We ourselves

think that what the 6th respondent has been engaged in all along amounts to an abuse of the court process. After the High Court condemned it in **HCCC No 367 of 2000** to compensate the 1st respondent in the sum of Kshs. 54,902,400 for *mesne* profits, general damages for trespass and loss of business opportunity, which decision was upheld by the Court of Appeal in **Civil Appeal No 149 of 2007** save that the award was adjusted to Kshs. 22,729,800; the 6th respondent has for the last 18 years since this determination, in more than nine ways that we have been able to pick, attempted, without success to evade settlement of the decretal sum. **HCC Appl. No. 322 of 2006**, **Civil Appeal No. 149 of 2007**, **Civil Appeal No. 131 of 2010**, **ELC No. 350 of 2010**, **HC Petition No. 13 of 2011**, **Civil Application No. 24 of 2012**, **Civil Appeal No. 184 of 2013** and **HC Petition 438 of 2015**, instituted by the 6th respondent have all been dismissed. This appeal therefore presented another perfect opportunity to piggyback ride on.

It is apposite to state that, upon our own assessment of the facts and the law, the strictures laid down in **Uhuru Highway Development Limited V. Central Bank of Kenya & 2 others** (supra) and many other authorities were not met in so far as the appellant's suit is concerned. Those principles were summarized in the case as follows:

> **"In order to rely on the defence of *res judicata* there must be:**
>
> **i. a previous suit in which the matter was in issue;**
>
> **ii. the parties were the same or litigating under the same title.**
>
> **iii. a competent court heard the matter in issue;**
>
> **iv. the issue has been raised once again in a fresh suit."**

While it is common factor that both the court below and this Court have consistently confirmed that the 1st respondent is the registered proprietor, the issue of the regularity and legality of its title has never been canvassed. Until the emergence of the appellant the dispute had all along pitted the 1st respondent and the 6th respondent. The 1st respondent's grievance was that, without any colour of right the 6th respondent had trespassed on its property. In its suit, **HCCC 367 of 2000**, the 1st respondent prayed for *mesne* profits, general damages, and damages for loss of business opportunity. The High Court and the Court of Appeal (in Civil Appeal No. 149 of 2007) confirmed that indeed the 6th respondent had trespassed on the 1st respondent's property. As a matter of fact, the latter did not claim ownership but admitted that it had occupied the property as tenant of the City Council of Nairobi in the honest belief that the City Council of Nairobi was the lawful owner of the property. The 6th respondent vacated the property in July 1997 at the end of the lease. Clearly the question whether the property was public land, whether irregularly or illegally alienated was never in issue. We are fortified in this view by the previous consistent holdings by this Court. For example, in **Kenya Hotel Properties Limited V. Willesden Investments Limited & Kenya Revenue Authority**, Civil Appeal No. 184 of 2013, this Court (Ouko, (P), Gatembu & M'Inoti, JJA) at para 42 noted that;

> **"Counsel addressed us at length on the doctrine of res judicata. It was argued that the question whether the property was public property that was unlawfully alienated had already been litigated and therefore *res judicata.***
>
> **.....**
>
> **47. The question of the legality of the Willesden's title to the property or the manner in which the property was alienated did not arise in either HCCC 367 of 2000 or in Civil Appeal No. 149 of 2007. In other words the question of revocation of the title to the property was not an issue in the High Court in HCCC 367 of 2000 nor in the subsequent appeal therefrom to this Court in Civil Appeal No. 149 of 2007. The cause of action on the basis of which that suit was instituted was the tort of trespass. The question of whether the property was public land that was irregularly and illegally alienated was not raised or litigated.**
>
> **..... Consequently, we are not satisfied that the matters raised in Petition No.13 of 2011 are *res judicata* by reason of the proceedings in the High Court in HCCC 367 of 2000 nor by reason of the subsequent appeal therefrom to this Court in Civil Appeal No. 149 of 2007".**

Earlier in Civil Application No. Nai 24 of 2012, when considering a 5(2) (b) application the bench of this Court comprising Nambuye, Koome & Odek, JJ.A expressed a similar view as that held above. The Court after reviewing some of the cases involved in this dispute, such as, Milimani HCCC No. 367 of 2000, **Willesden Investments Limited – v- Kenya Hotel Properties Limited**, Civil Appeal No. 149 of 2007, **Kenya Hotel Properties V. Willesden Investments Limited**, **H.C.C.C No. 35 of 2010, Civil Application No. Nai. 131 of 2010 Kenya Hotel Properties V. Willesden Investments Limited** and **HCC Petition No. 13 of 2011** said;

> **"15. The first issue is whether the matter is *res judicata* that is whether the matters raised in this application have substantially been in issue and have been fully decided**
>
> **.....**
>
> **19. Upon comparing the causes of action in the aforesaid suits, we are satisfied that whereas, the subject matter namely the suit property is the same, the causes of action in each case involved different parties and approaches.**
>
> **We are satisfied the issue introduced in the application before us as to whether the Willesden's title to the suit property was acquired fraudulently or not as an issue intended to be investigated as a matter of Public interest by the Land Commission**

has never been determined in the previous aforementioned litigation. In the premises we are satisfied that all the ingredients required in sustaining the doctrine of *res judicata* stand ousted".

In other words, therefore the learned Judge committed an error in failing to appreciate that the issues in the previous suit were not in issue in the present suit; that the appellant was not a party in the previous suit; nor was it demonstrated that the appellant was litigating under the same title as the 6th respondent.

The Grant to the suit property was issued to the 1st respondent for 99 years from 1st January, 1994 under the Registration of Titles Act (repealed), which was in force at the time the impugned decision was made. Although under **section 23** the certificate of title issued by the registrar is to be taken by courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, such title is not subject to challenge, except on the ground of fraud or misrepresentation to which the person named in the certificate is proved to be a party. In the suit the appellant has claimed that the suit property previously formed part of Kaunda Street and a public road running between Nyayo House and Hotel Intercontinental, linking Uhuru Highway and the Central Business District of Nairobi. It has been contended that as early as 1967 that the original width of the public road was 80 feet (24.4 metres); that it was altered in 1995 through an illegal survey to 37.76 feet (11.51 metres); that through these maneuvers the suit property was created; and that therefore the suit property is a public road or is on a public road. It is further stated that the original letter of allotment was issued to Central Park Limited, a non-existent entity; and that it is unclear how the grant was subsequently issued to the 1st respondent. These, to our mind are compelling and grave issues, which have not been interrogated in the previous suits.

For these reasons, we find merit in this appeal which we accordingly allow. We set aside the ruling rendered and orders issued on 27th May, 2010. We reinstate the amended plaint filed in the court below on 18th February, 2010 as well as the chamber summons dated 3rd February, 2010 for hearing on merit. We make no orders as to costs.

Dated and delivered at Nairobi this 22nd Day of March, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

R. N. NAMBUYE

…….

JUDGE OF APPEAL

K. M'INOTI

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR