



REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

(CORAM: WAKI, WARSAME & MURGOR, J.J.A)

CIVIL APPEAL NO. 192 OF 2008

UCHUMI SUPERMARKETS LIMITED.....1ST APPELLANT

KASARANI MALL LIMITED.....2ND APPELLANT

VERSUS

SIDHI INVESTMENTS LIMITED.....RESPONDENT

*(Being an Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Honourable Mr. Justice Osiemo) delivered on the 19th day of October 2007*

*in*

*H.C. Civil Case No. 311 of 2005)*

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JUDGMENT OF THE COURT

By way of an amended plaint dated 12th April 2005, the Respondent herein, filed a suit against the Appellants alleging they had agreed to sell two parcels of land known as L.R No. 5875/2 and L.R No. 23393 located along Thika Road, Nairobi at an agreed purchase price of KShs. 118,000,000. The Respondent sent an offer letter which was accepted by a letter dated 9th March 2005. The Respondent then issued a cheque in favour of the 1st Appellant for the sum of KShs.11,800,000 being 10% deposit. While the Respondent awaited a formal agreement for sale, the Appellants' caused an advertisement in the Daily Nation Newspaper dated 11th March 2005 placing the suit property among others, for sale without any reference to the Respondent.

The Respondent therefore sought an injunction restraining the Appellants from selling, alienating or disposing the parcels of land to anyone other than itself and also sought an order of specific performance compelling them to complete the sale and transfer of the parcels to itself by executing a sale agreement. The Respondent also filed a chamber summons dated 17th March 2005 seeking among other orders, an injunction as per the Plaint pending the hearing and determination of that suit.

In response, the Appellants filed grounds of opposition denying the Respondent's claims. They maintained that the offer to purchase the suit was never accepted, there was no written contract between the parties as required in contracts for disposition of interests in land and that they did not accept any payment made in respect of the parcels of land. They subsequently, filed a chamber summons dated 20th day of April 2005 supported by an Affidavit and Further Affidavit of **Alfred L. Mugambi** the Company Secretary of the 1st Appellant both dated 21st April 2005, seeking to strike out the suit. The Application was brought under **Order VI Rule 13(1) (b) and (d)** of the **Civil Procedure Rules** (now repealed) which states as follows:

***“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) .....; 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*

The Respondent consequently filed a Replying Affidavit sworn by **Jayant Asher**, its director, dated 5th September 2006.

In a considered Ruling, delivered on 19th October 2007, the trial court (Osiemo, J.) dismissed the application and stated that the Respondent's claim was arguable and not an abuse of the court process. The Court then directed that the suit proceed to trial. It is this decision that triggered the current appeal to this Court.

In their Memorandum of Appeal dated 6th September 2008, the Appellants raised eight (8) grounds of appeal against the High Court's decision. In his submissions before us learned counsel for the Appellants Mr. Mwithuri, stated that section 3(3) of the Law of Contract Act was never complied with given that the dispute was founded on the sale of suit properties hence no contract existed between the parties. He further contended that a constructive trust was never created in favour of the Respondent and that the deposit of KShs. 11.8 Million was never agreed or accepted by the appellants.

Learned counsel for the Respondent, Miss Millie Odari, submitted that the 10% deposit was forwarded to the Appellants' Advocate and the offer and acceptance formed a valid contract. She further stated that the 10% deposit was never returned and the . of a constructive trust under Section 3(3) of the Law of Contract Act was to be proved at trial.

We have considered the record of appeal, the submissions by learned counsel and the law. This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way (see **Abok James Odera t/a A.J Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR.**)

An application to strike out pleadings involves the exercise of judicial discretion on the part of the court. In **Crescent Construction Co. Ltd vs. Delphis Bank Ltd [2007] eKLR** the Court stated that:-

***“... one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realisation that the rules of natural justice require that the court must not drive away any litigant, however weak his case may be, from the seat of justice. This is a time-honoured legal 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.”***

We are alive to the fact that the circumstances in which we, as an appellate court, can interfere with the exercise of judicial discretion are limited. For us to do so, we must be satisfied that the lower court misdirected itself in some matter and as a result arrived at a wrong decision or that it is manifest from the case as a whole that the lower court was clearly wrong in the exercise of its discretion and that as a result there has been misjustice (**Mbogo and Another vs. Shah [1968] E. A 93.**)

The striking out of a pleading, has time and time again been described as draconian and an order of last resort. A court will therefore only resort to it, in its discretion, where it has properly addressed itself on the principles enumerated under **Order VI Rule 13(1) (b) and (d)** of the **Civil Procedure Rules** (now repealed), and is satisfied, upon assessment of the material before it that any of the grounds enumerated exists or do not exist. In such circumstances, this Court will not interfere with the exercise of the trial Court's discretion.

Alive to those considerations, the proposition advanced by the Appellants in this appeal is that the Respondent's Plaintiff is scandalous, frivolous or vexatious and that it is an abuse of the court's process and that it ought to have been struck out on the grounds presented before the High Court. In their submissions, they contended that there was no contract made between them and the Respondent hence there was nothing to enforce. Moreover, they stated that the elements of a constructive trust did not arise. The Respondent maintained that there was a valid contract before the parties and that the creation of a constructive trust was a triable issue to warrant a trial.

In our view, the issue before us is whether the trial judge was right in his failure to strike out the plaintiff and whether the Plaintiff as filed has triable issues. This Court must however be careful not to usurp the position of the trial judge. In the same way, the power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice the fair trial and would restrict the freedom of the trial judge in disposing the case. (**D.T. Dobie & Company (Kenya) Limited vs. Joseph Mbaria Muchina & Another [1980] eKLR.**)

Order VI rule 13 of the repealed Civil Procedure Rules has been interpreted in various cases. 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.”***

As stated in the case of **Trust Bank Limited v Amin Company Ltd & Another (2000) KLR 164**, a pleading or an action is frivolous when it is without substance or is groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. In addition, an action should not be treated as an abuse of the process of the court unless it is plain beyond a peradventure at the interlocutory stage that the action cannot succeed (**D.T. Dobie & Company (Kenya) Limited vs. Muchina) Supra.**)

According to the Respondent, there are two issues for trial, namely whether the offer was accepted and whether there was a constructive trust. On our part, we agree that the trial judge was right in refusing to strike out the Plaintiff, for it discussed issues of fact and law which could only be determined upon hearing both sides of the dispute. In his ruling, the learned judge stated as follows:-

***“...and if it is proved that Shs. 11,800,000/= representing 10% of the purchase price was forwarded by the plaintiff’s to the defendants and was received and accepted about 2 1/2 years ago then a constructive trust was created. And where the contract of sale is specifically enforceable the equitable doctrine of conversion looks on that as done which ought to be done.”***

With regards to the Respondent’s allegation that the suit was an abuse of the court process the Court in finding that the statement of claim was arguable stated:-

***“My own understanding of the statute is that it was not meant to aid a party in furtherance of his fraudulent acts i.e. one cannot advertise his land for sale, negotiate the price, accept 10% deposit and retain it and turn round and say that there was no valid contract because the statute says that:***

***“No suit shall be brought upon a contract for the disposition of an interest in land unless the contract upon which the court is ground is in writing, signed by both parties and the signatures attested.”***

***This was subject to abuse and that is why the legislature in their wisdom amended the Section through Statute Law Miscellaneous Amendments Act No. 2 of 2002 as stated above which brought in two categories of contract through disposing an interest is said (sic) do not require to be in writing, signed by parties thereto and attested namely contracts made in course of a public auction and creation of an resulting (sic), implied or constructive trust.”***

Can the Judge be said to have arrived at a wrong decision which failed to consider the law and the *prima-facie* facts before him, or that he failed to exercise his discretion correctly? We think not.

We are therefore satisfied that the trial Judge rightly exercised his discretion in accordance with the correct principles of law. Again, we think that the trial judge did not omit or take into consideration extraneous or irrelevant matters which made his decision manifestly wrong. The combination of correct exercise of discretion and consideration of all relevant and pertinent factors leads us to the conclusion that there is no basis for interfering with the decision of the trial Judge. Accordingly, we dismiss the Appeal with costs to the Respondent.

Orders accordingly.

**Dated and Delivered at Nairobi this 22nd day of March, 2019.**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**M. WARSAME**

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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**