IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 53 OF 2016

BETWEEN

MICHAEL BETT SIROR.....APPELLANT

AND

JACKSON KOECH.....RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Kitale

(Obaga, J.)** dated **27th April, 2016

in

ELC. CASE NO. 96 OF 2015)

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JUDGMENT OF THE COURT

[1] By a plaint dated 17th July, 2015, **Jackson Koech,** who is now the respondent sought judgment against **Michael Bett Siror,** now the appellant, for a declaration that the appellant who is the registered owner of L.R. No. 6614/6 is holding 300 acres out of that land (herein disputed portion), in trust for the respondent, and that the trust be terminated and the appellant ordered to subdivide L.R. No. 6614/6 and transfer the 300 acres to the respondent.

[2] The appellant filed a defence in which he admitted being the proprietor of L.R. No. 6614/6, but denied that he was holding the disputed portion as trustee for the respondent or any other person. Without prejudice to that denial, the appellant maintained that the respondent had no *locus standi* to assert a trust on behalf of undisclosed persons; that the action for a declaration of trust was not enforceable for want of Land Control Board Consent; that L.R. No. 6614/6, was charged to Agricultural Finance Corporation and no dealings could take place without the consent of the Corporation; that the appellant's cause of action was time barred by virtue of **section 7** of the **Limitation of Actions Act,** and **section 8** of the **Civil Procedure Act;** and was also an abuse of the court process by virtue of previous litigation.

[3] By a notice of motion dated 2nd November, 2015, the appellant moved the court under **Order 2 Rule 15(1)(b),(c)&(d)** of the **Civil Procedure Rules, 2010**; **sections 4 & 7** of the **Limitation of Actions Act;** and **section 6, 8 & 22** of the **Land Control Act**. In the motion, the appellant sought to have the respondent's plaint struck out and the suit dismissed on the grounds that the respondent's action was frivolous, vexatious, and an abuse of court process.

[4] In the affidavit sworn in support of that motion, the appellant reiterated that the respondent's suit was frivolous and an abuse of court process, as the transaction subject of the suit lacked the mandatory Land Control Board Consent; that the action was statute barred having been filed outside the period provided under **section 4** and **7** of the **Limitation of Actions Act;** and that the respondents suit was an abuse of court process as the respondent had instituted several other suits in respect of the same matter.

[5] In response to the motion, the respondent filed a replying affidavit to which he annexed a consent issued by the Land Control Board in regard to a transfer of L.R. No. 6614/6, from the appellant to himself and 13 other persons. The respondent maintained that his claim was not statute barred. In regard to the previous suits, the respondent explained that Nairobi HCCC No. 2028 of 1998 in which he had jointly

with twenty (20) others sued the appellant was dismissed for want of prosecution; that HCCC No. 136 of 2000 Kitale, was withdrawn; and therefore, the merits of the suits had not been determined. The respondent therefore argued that the issue of *res judicata* did not arise.

[6] Having heard the application, the trial judge found that the circumstances before the court did not present such a clear case as would justify granting the remedy of striking out. He therefore, rejected the application for striking out and ordered that the suit proceed to hearing. The appellant is aggrieved by that ruling and has lodged a memorandum of appeal in which he has raised eleven (11) grounds.

[7] The grounds of appeal include, *inter alia,* that the trial judge erred: in failing to find that the suit was *res judicata* when there were several other previous suits between the parties; in failing to find that there was a legal estoppel stopping any further consideration of the issues that had been considered in the previous suits; in failing to find that the respondent's suit was an abuse of the court process; in failing to find that no suit could be sustained against the appellant in the absence of a Land Control Board consent to the creation of the trust; in failing to find that the respondent's suit was time barred; and in failing to find that the respondent could not assert rights on behalf of unnamed persons.

[8] During the hearing of the appeal, the appellant was represented by Ms Jeptanoi who was holding brief for Ms Katwa & Kemboi Advocates, while Mr. P. N. Kiarie appeared for the respondent. Each party filed and relied on written submissions, which were also orally highlighted.

[9] The appellant submitted that there had been several previous suits between him and the respondent, which rendered the respondent's suit before the High Court an abuse of the court process, and *res judicata* as the respondent is estopped from raising the same issues between the same parties when they have already been determined by a competent court. On the doctrine of *res judicata, h*e relied on **A.N.M. Vs P.M.N. [2016] eKLR;** and **Mwambeja Ranching Company Limited & another vs Kenya National Capital Corporation Limited (Kenya) & 6 others [2015] eKLR.**

[10] The appellant argued that dismissal of a suit for non-attendance of the plaintiff or for want of prosecution, amounted to a judgment. In this regard, **Peter Ngome vs Plantex Company Limited [1983] eKLR,** wherein it was held that dismissal of a suit for want of prosecution was final judgment was relied upon. The appellant pointed out that, the dismissal of Nairobi HCCC No. 2028 of 1988; and Kitale HCCC No. 129 of 2001, both involving the appellant and the respondent, and withdrawal of Kitale HCCC No. 136 of 2000, also involving the appellant and the respondent, all yielded final judgments deciding and determining the issues in dispute, and therefore the respondent's suit was *res judicata.*

[11] In regard to the issue of Limitation of Actions Act, the appellant submitted that the respondent suit was barred by **section 4(1)&(7)** of the **Limitation of Actions Act Cap 22,** that requires actions based on a contract to be instituted within six(6) years; that the issues raised in the suit stem from contractual obligations arising from the sale agreement entered into between the appellant and the respondent in 1971, that the agreement had expired or lapsed and the respondent's suit which was filed in July, 2015, was statute barred; that equity does not aid the indolent and the respondent's suit should be dismissed as the action is frivolous, vexatious and an abuse of the court process.

[12] In addition, it was argued that the respondent having entered on to the disputed portion, at the invitation and or agreement of the appellant, the respondent's claim could not lie on a trust, as it does not meet the conditions for existence of a trust; that the respondent had not made any effort to prove the existence of a trust and therefore **section 28** of the **Registered Land Act** (repealed), does not apply; that under **section 3(3)** of the **Law of Contract Act,** contracts for the disposition of land are required to be in writing; that the respondent had not established that he took possession of the disputed portion in part performance of the oral contract; and that allowing the respondent to retain the disputed portion would amount to unjust enrichment.

[13] The appellant faulted the trial court for making determinative and conclusive findings that were prejudicial to the appellant. These included the existence of a Land Control Board Consent in favour of the respondent and others; the existence of an agreement by which the respondent and others were entitled to the disputed portion; the entitlement of the respondent to the disputed portion; and the existence of a trust over L.R. No. 6614/6.

[14] Further, the appellant argued that he never applied for nor obtained the Land Control Board Consent for transfer of L.R. No. 6614/6; that **section 6** of the **Land Control Act**, requires the Land Control Board to give its consent to all dealings in land, and a declaration of a trust of agricultural land situated within a land control area is deemed to be a dealing in land requiring consent. The appellant maintained that in the absence of the Land Control Board Consent, the transaction for the sale of L.R. No. 6614/6 was void. The appellant challenged the respondent's occupation of the disputed portion maintaining that it constituted a criminal offence under **section 22** of the **Land Control Act**.

[15] The appellant concluded that the respondent had no right to the disputed portion, and therefore urged the Court to allow the appeal, set aside the judgment of the trial judge, and substitute it with an order dismissing the respondent's suit. In the alternative, that the application dated 2nd November, 2015, be disallowed without prejudicing the substantive merits of the appellants case, and that the suit be heard by a judge other than Obaga J.

[16] In his submissions, the respondent first urged the Court to strike out the appeal contending that it was incompetent and incurably defective as there was no extract of a certified copy of the Order appealed from included in the record of appeal; that this was a mandatory requirement of **Rule 87(1)(h)** of the **Court of Appeal Rules**; and that the Court has powers to strike out such an appeal *suo motto* because of such incompetence.

[17] In regard to the substantive appeal, the respondent submitted that the application in the High Court was not premised *on res judicata* as this was not pleaded or alluded to in the affidavit in support of the motion; that no arguments based on *res judicata* were urged before the High Court nor was the issue of *res judicata* addressed in the ruling; that it is therefore not open to the appellant to introduce the issue of *res judicata* at this stage; that in any case, the previous suits were not determined on merit and therefore, the question of *res judicata* would not arise. The respondent also argued that the issue of legal estoppel was not raised in the motion that was argued before the High Court, and the learned judge of the High Court could not therefore be faulted for failing to consider an issue that was not before him.

[18] In regard to the issue whether the respondent's suit was an abuse of the court process, the respondent maintained, that the court considered three previous suits and noted that one was dismissed for want of prosecution, and that an application by the appellant to reinstate the suit was also dismissed; and that the filing of the respondent's suit was not an abuse of the court process nor was the suit filed in bad faith; that although it was in public interest that litigation should come to an end, it was also important that the matters be determined on merit.

[19] The respondent pointed out that contrary to the appellant's contention that there was no consent of the Land Control Board, the consent of the Land Control Board for transfer of L.R. No. 6614/6 from the appellant to the respondent and 13 others was annexed to the respondent's replying affidavit sworn in support of the motion. On the issue of limitation, the respondent drew the court's attention to the written memorandum signed between the parties' on how L.R. No. 6614/6 was to be shared with the appellant retaining 400 acres, while the respondent retaining the disputed portion (300 acres) for himself and people claiming under him. The respondent maintained that at all material time, he has been in occupation of the disputed portion together with the people claiming under him, as they were joint purchases in occupation; that section 7 of the Limitation of Actions Act was not applicable; that the respondent's claim was for a declaration that the appellant as the registered owner of L.R. No. 6614/6 was holding the disputed portion which was part of that land in trust for the respondent.

[20] The respondent asserted that the learned judge properly held that his suit was not a proper suit for striking out, as the issues raised were not clear cut and required determination following a hearing of oral evidence and production of necessary documents. In this regard the respondent relied on Nairobi Civil Appeal No. 37 of 1978 **D.T. Dobie & Company (Kenya) Limited vs Muchina.** The respondent disputed the contention that in his ruling the learned judge made conclusive findings. He therefore urged the Court to dismiss the appeal with costs.

[21] We have carefully considered this appeal, the rival submissions and the authorities cited. Before we address the substantive appeal, we wish to address the submission of the respondent on the competence of the appeal, urging the court to strike out the appeal *suo moto* for non-compliance with **Rule 87(1)(h)** of the **Court Rules.** This is an issue that the respondent ought to have raised as a preliminary issue by way of an application brought under Rule 84 of the Court Rules. The respondent not having brought such an application, and having failed to obtain leave of this Court to raise the objection at this stage, he is estopped by Rule 104(2) of the Court Rules from raising the objection. Nor can he purport to do so indirectly by urging the Court to act *suo moto*. We decline to be so used and overrule that objection.

[22] As regards the substantive appeal, it stems from a ruling in an application for striking out brought under **Order 2 Rule 15(1)(b),(c) & (d)** of the **Civil Procedure Rules**. That Rule gives a court discretion to strike out pleadings that fall under any of three categories. First, pleadings that are either scandalous, frivolous, or vexatious; second, pleadings that may delay embarrass or prejudice the fair trial; and thirdly, pleadings that are an abuse of the court process.

[23] We also take note of the fact that a Court of Appeal can only interfere with the exercise of discretion by the trial judge if it is satisfied that the judge in exercise of his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or if it is manifest on the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been misjustice **(Mbogo vs Shah [1968] EA 93)**.

[24] The *locus classicus* case on striking out pleadings is **D.T. Dobie & Company (Kenya) Limited vs Muchina** (supra) in which Madan JA in the leading judgment gave the following incisive guidance in dealing with applications for striking out pleadings.

> ***"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process 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". (Sellers, LJ (supra). 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.***
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> ***If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overact by considering itself in a bid summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.***
>
> ***No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."***

[25] In dismissing the appellant's motion the learned judge properly guided himself using the definition of abuse of process contained in **Bullen Leake and Jacob's Precedents of Pleading 12th edition** at page 148. However, in applying the definition the learned Judge stated as follows:

> ***"There is no indication that the plaintiff's suit has been filed in bad faith or that it is being used as a means of vexation. There is therefore no ground to hold that the process of this court is being abused. There is no bar to a litigant bringing a suit after dismissal of a previous one. The only bar is limitation which I shall hereinafter address."***

[26] While the learned judge appeared to have addressed himself to the issue whether the respondent's suit was vexatious or brought in bad faith, the learned judge misdirected himself as he failed to recognize that the appellant's contention at paragraph 7 of his affidavit sworn in support of his motion, was that the respondent had severally instituted suits in respect of the suit land, on the same cause of action which actions had either been withdrawn or dismissed, hence his action was an abuse of court process. Although there was no mention of *res*

judicata, the appellant's contention was effectively a plea of *res judicata*. That is, that the respondent's suit was an abuse of the court process because it was offending the doctrine of *res judicata* there having been previous suits between the parties.

[27] The doctrine of *res judicata* is provided under **section 7** of the **Civil Procedure Act** as follows:

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."***

[28] The appellant was contending that there were previous suits between the same parties' arising from the same cause of action. The doctrine of *res judicata* bars the bringing of another suit where there has been a previous suit between the same parties that has been heard and finally determined by a competent court. The rationale is that it would be pointless and a waste of judicial time, to re-litigate issues that have already been addressed and determined by the court. It was not disputed that there were previous proceedings between the parties and/or parties claiming under them. The question that the learned judge ought to have addressed is whether these previous suits involved the same issues as the respondent's current suit and if so, whether, the issues in the previous suits were finally determined.

[29] Both the appellant and the respondent in their affidavit sworn in support and in response to the appellant's motion, were in agreement that two of the previous suits filed by the respondent were dismissed for want of prosecution, while another was abandoned and withdrawn by the respondent. This means that none of the suits was fully argued nor were the issues finally determined.

[30] We accept that dismissal of a suit for non-attendance or for want of prosecution can amount to a judgment, however, such a judgment does not satisfy the requirements of **section 7** of the **Civil Procedure Act,** as the issues raised in the suit has not been addressed and finally determined by the court, but the judgment is the result of what may be described as a technical knockout.

[31] Thus, we reject the appellant's contention and find that the application of the doctrine of *res judicata* was very contentious and required full investigation at the trial, more so in a longstanding land dispute involving a big parcel of land and several other people.

[32] As to the issue whether the respondent's suit could be an abuse of the court process because the agreement relied upon was void for want of Land Control Board consent, or whether the respondents claim was barred by the statute of limitation, these were issues of law to be determined by the trial court on the evidence. The motion before the court was an interlocutory application, in which the court did not have the benefit of full evidence. It was premature and prejudicial for the court to determine such crucial issues on the basis of affidavit evidence without the benefit of hearing the suit or having the affidavit evidence tested through cross examination.

[33] Moreover, **section 8** of the **Land Control Act** requires an application for consent from the Land Control Board to be made in the prescribed form within six months of the making of the agreement. In making a conclusive finding that the consent of the Land Control Board was obtained, and that the fact that it was obtained seven years after the agreement was immaterial, the learned judge did not address section 8 of the Land Control Act. In addition, the learned judge made a finding at that interlocutory stage that the respondents claim had not been caught up by limitation. Again, without hearing evidence and addressing the circumstances in which the cause of action arose, such a finding was premature.

[34] Thus, the issues concerning limitation and the propriety of the appellant's cause of action could only be determined on the basis of the evidence after a full trial. Needless to state that the remedy of striking out was not appropriate in the circumstances of this case.

[35] We uphold the finding of the learned judge that the respondent's suit was not for striking out, and find that the appellant's motion was properly dismissed. Nevertheless, we find that the learned judge erred in making prejudicial conclusive findings in regard to the obtaining of the Land Control Board Consent and the issue of limitation. We order that these findings be expunged from the record, and that the respondent's suit be fully heard by a judge other than Obaga J, and that the judge be at liberty to determine all the issues both of fact and law, raised in the pleadings, including the issue of limitation, *res judicata*, and the Land Control Board Consent. The costs of this appeal shall be costs at the trial.

Those shall be the orders of the Court.

DATED and delivered at Eldoret this 6th day of March, 2019

E. M. GITHINJI

JUDGE OF APPEAL

HANNAH OKWENGU

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.