



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: ASIKE-MAKHANDIA, KIAGE & OTIENO-ODEK, JJA)**

**CIVIL APPEAL No. 15 of 2017**

**BETWEEN**

**GEORGE OTIENO GACHE.....1<sup>st</sup> APPELLANT**

**COVENANT OF PEACE CHURCH..... 2<sup>nd</sup> APPELLANT**

**AND**

**JUDITH AKINYI BONYO..... 1<sup>st</sup> RESPONDENT**

**JOSHUA OMOLLO.....2<sup>nd</sup> RESPONDENT**

**RICHARD OTIENO.....3<sup>rd</sup> RESPONDENT**

**JAMES OTIENO..... 4<sup>th</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR..... 5<sup>th</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION.....6<sup>th</sup> RESPONDENT**

*(Being an appeal from the Ruling and decision of the Environment and Land Court of Kenya at Kisumu, ( Kibunja, J) delivered on 12<sup>th</sup> November 2015*

**in**

***Land Case No. 3 of 2014)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

1. By a Complaint dated 14<sup>th</sup> June 2014, the appellants filed suit against the respondents seeking declaratory orders that the appellants were the legal registered owners of all that parcel of land known as Plot No. 15155 Kisumu “the suit property” and a rectification of the register. The appellants also sought a permanent injunction to restrain the 1<sup>st</sup> to 4<sup>th</sup> respondents and their agents or servants from entering, remaining or erecting any structure on the suit property.

2. In the Complaint, there is no individual description of the appellants. All that is averred is that the plaintiff is a church registered under the Societies Rules. It is averred that on or about 15<sup>th</sup> May 1991, the appellant was issued with a letter of allotment by the Commissioner of Lands in respect of the suit property. That the 2<sup>nd</sup> appellant secured rate clearance certificate upon settling the requisite land rates. That in breach of its statutory duty, the 6<sup>th</sup> respondent issued to the 1<sup>st</sup> to 4<sup>th</sup> respondents a letter of allotment over the suit property. That the 1<sup>st</sup> to 4<sup>th</sup> respondents jointly and severally have attempted to fraudulently procure registration of title over the property.

3. In the Complaint, the particulars of the alleged fraud on the part of the respondents are itemized. More specifically it is alleged *inter alia* that the respondents made an allotment in respect of land upon which a grant had already been issued; that no due diligence was done to ascertain

that the suit property had been allotted to the appellants.

4. Prior to serving the Complaint upon the respondents, the appellants filed a Notice of Motion dated 13<sup>th</sup> January 2014 seeking orders to restrain the respondents from entering or dealing with the suit property. In the said Motion, the 1<sup>st</sup> appellant sought leave to file and prosecute the suit on behalf of the 2<sup>nd</sup> appellant Church and its members.

5. Upon being served with the Notice of Motion, the respondents filed a Notice of Preliminary Objection dated 18<sup>th</sup> March 2015. In the objection, it was averred that the suit/application is bad in law as it offends the provisions of **Sections 24, 25, 26 and 35 of the Land Registration Act, Chapter 300 of the Laws of Kenya**; that the suit does not raise a reasonable cause of action against the 1<sup>st</sup> to 4<sup>th</sup> respondents; that the 1<sup>st</sup> to 4<sup>th</sup> respondents are non-suited and that the application as drawn and filed is irregular, incompetent and fatally defective. In reply, the appellants filed Grounds of Opposition to the effect that the Preliminary Objection was an abuse of court process.

6. Upon hearing the Preliminary Objection, the learned judge (Kibunja J.) upheld the same and struck out the appellant's suit with costs to the 1<sup>st</sup> to 4<sup>th</sup> respondents.

7. Aggrieved by the striking out of the suit, the appellants have lodged the instant appeal citing *inter alia* the following grounds in the memorandum of appeal.

(i) The judge erred in finding that the failure of the 1<sup>st</sup> appellant to state that he was instituting the suit on his own behalf and on behalf of the 2<sup>nd</sup> appellant was a fundamental and fatal defect.

(ii) The judge erred in failing to appreciate the merits of the plaint and further erred in failing to appreciate that a court of justice should aim at sustaining a suit rather than terminating it by summary dismissal.

(iii) The judge erred in finding that the 2<sup>nd</sup> appellant being an association has no capacity to sue and be sued.

(iv) The judge erred in finding that the Notice of Motion dated 13<sup>th</sup> January 2014 seeking a temporary injunction was fatally defective.

(v) The judge erred in failing to appreciate that the defect of failure to disclose the capacity in which the 1<sup>st</sup> appellant was suing was duly cured by an authorization document dated 13<sup>th</sup> January 2012 signed by the Board of Directors of Covenant of Peace Church, the 2<sup>nd</sup> respondent herein.

8. In the memorandum of appeal, the appellants pray that the suit and plaint filed before the Environment and Land Court as Civil Case No. 3 of 2014 be reinstated.

9. At the hearing of this appeal, learned counsel Mr. James Mwamu appeared for the appellants while learned counsel Ms June O. Ashioya appeared for the respondents. Both counsels filed written submissions.

#### **APPELLANT'S SUBMISSIONS**

10. Counsel for the appellant faulted the learned judge in finding that the 1<sup>st</sup> appellant had no legal capacity to bring suit on behalf of the 2<sup>nd</sup> appellant or its members. It was submitted that under the Societies Act, a society is not a legal person with capacity to sue or be sued and that a society can only sue through its officers. That the plaint and the applications filed and all supporting documents left no doubt on whose behalf the 1<sup>st</sup> appellant filed the suit. That the 1<sup>st</sup> appellant in his verifying affidavit attached to the plaint clearly stated he had authority to file the suit as given by the Board of Directors of the 2<sup>nd</sup> appellant Church. That the 1<sup>st</sup> appellant attached the authority to file suit which was signed by all the Directors of the 2<sup>nd</sup> appellant Church. That failure by the 1<sup>st</sup> appellant to indicate in the plaint that he was suing on behalf of the 2<sup>nd</sup> appellant church is a defect curable by **Article 159 of the Constitution** that enjoins courts in the administering justice to be guided by substantive rather than procedural justice. That the omission to state in what capacity the 1<sup>st</sup> appellant filed suit is not a nullity that renders the plaint as filed to be fatally defective.

11. The appellant submitted that the learned judge erred in striking out the suit as he based his decision on disputed facts not law. That a preliminary objection should raise matters of law not disputed facts. Counsel cited the decisions in **Mukisa Biscuit Manufacturing Co Ltd – v- West End Distributors Ltd [1969] EA 696** to support the submission that a preliminary objection should raise matters of pure points of law which is argued on the assumption that all facts as pleaded are correct. It was submitted the judge erred in arriving at the final decision when he delved into the legality of the letter of allotment without according the appellants an opportunity to be heard. That in so doing, the judge erred as he delved into contested matters of fact that do not constitute a matter of law to be urged in a preliminary objection.

#### **1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> RESPONDENTS SUBMISSIONS**

12. The respondents rehashed the background facts leading to the filing of the Notice of Preliminary Objection. It was submitted that the judge did not err in finding that the appellant's suit was fatally defective. The essence of the respondents' submission was that the appellants claimed they were allotted the suit property in 1991 yet the 2<sup>nd</sup> appellant was not in existence as a church as of 1991. That the 2<sup>nd</sup> respondent was registered under the Societies Act on 21<sup>st</sup> September 2010 and there is no way a letter of allotment could have been given to a society that never existed in 1991. That the mere fact that the allotment letter was issued in 1991 when the 2<sup>nd</sup> appellant was not in existence makes the appellants claim to the suit property *void ab initio*. That if a court were to uphold an allotment letter that is void, this would be asking the

court to entertain an illegality. Counsel cited the decision of this Court in **David Sironga Ole Tukai – v- Francis arap Muge & 2 others [2014] eKLR** to support the submission that no court ought to enforce an illegal contract or allow itself to be an instrument of enforcing illegal obligations arising out of an illegal transaction.

13. Counsel emphasized that as the allotment letter allegedly issued in 1991 was void, the appellants have no cause of action against the respondents. Further, that the appellants did not demonstrate that the terms and conditions in the letter of allotment were complied with. That the description of the property in the plaint does not correctly describe the suit property as the plaint only refers to Plot No. 15155 Kisumu whereas the certificate of title dated 9<sup>th</sup> December 2013 refers to LR No. 15155/Kanyakwar/Kisumu. That the omission of the word “Kanyakwar” and the inclusion of the word “municipality” in the allotment letter refers to two different parcels of land. That no evidence or explanation was produced to confirm that the different numbers refer to the same parcel of land.

14. Counsel further submitted that the appellants being a registered society under the Societies Act has no *locus standi* to file a suit in its own name. That a society can only file suit in the name of its registered trustees (see **African Orthodox Church of Kenya – v- Charles Omuroka & another**). It was submitted the 1<sup>st</sup> appellant is not a trustee of the 2<sup>nd</sup> appellant and neither is it pleaded in the plaint that he was filing suit in a representative capacity on behalf of the 2<sup>nd</sup> appellant. For this reason, counsel submitted the learned judge was correct in law to strike out the plaint as filed.

#### **ANALYSIS and DETERMINATION**

15. The impugned ruling by the learned judge was delivered after the hearing of preliminary objection filed by the respondents. We have examined the ruling and reasoning of the court and the question that comes to our mind is whether the grounds stated in the Notice of Preliminary Objection raise pure points of law. We have also considered whether the impugned ruling is grounded on a point of law or disputed facts.

16. The starting point is to restate what constitutes a preliminary point of law that can be urged by way of preliminary objection. In **Mukisa Biscuit Manufacturing Co Ltd –vs- West End Distributors Ltd [1969] EA 696**, the defunct Court of Appeal of East Africa defined a preliminary objection as follows:

*"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."*

17. In the present case, the facts relied upon by the learned judge in arriving at his decision are contested facts. The validity of the letter of allotment issued in 1991, the alleged fraud as pleaded and particularized in the plaint and the legal capacity of the 1<sup>st</sup> and 2<sup>nd</sup> respondents to file the suit are all contested and disputed facts. It would require trial to determine the veracity and probative value of the evidence adduced towards proof of these contested facts.

18. We note that the appellants pleaded and particularized allegations of fraud. It is well settled that fraud cannot be proved or disproved summarily but by way of trial.

19. The learned judge in upholding the preliminary objection and making an order to strike out the suit analyzed the letter of allotment dated 15<sup>th</sup> May 1991 issued to the appellant in respect of the suit property. In analyzing the same, the judge raised the issue that the letter of allotment referred to Plot No. 15155 and the title issued to the respondents refers to LR No. 15155 (IR 151210) Kisumu Municipality. The respondents in their submissions before this Court observed that it is not clear whether the numbers in the parcels of land as referred to in the letter of allotment and certificate of title relate to one and same parcel of land. We concur with the respondent's observation – whether the difference in numbers relate to the same parcel of land is a matter that can only be determined by way of hearing during trial. Such a matter cannot be disposed of by way of preliminary objection.

20. Furthermore, the evidence offered by the respondents in support of the preliminary objection and the application to strike out the appellant's suit and the annexures thereto were not proved. It would be necessary to place the witness in the witness box to give sworn evidence and be cross-examined on the documents. Furthermore, issues raised by appellants as to their ownership of the suit property and the alleged fraudulent acquisition of title can only be determined by the court of law at a trial upon hearing of evidence.

21. The respondents submitted before the trial court that the appellants' suit did not disclose a cause of action. This is an arguable point that cannot be summarily determined by way of preliminary objection. The Indian Supreme Court in **A.B.C. Laminart Pvt. Ltd & Another vs A.P. Agencies Salem [1989] 2, SCC, 163**, explained the meaning of “cause of action” as follows:

*A cause of action means every fact, which, if traversed, it would be necessary for the Plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the Plaintiff a right to relief against the Defendant. It must include some act done by the Defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove the facts but every fact necessary for the Plaintiff to prove to enable him to obtain decree. Everything which if not proved would give the Defendant a right to an immediate judgment must be part of the cause of action. It is, in other words, a bundle of facts, which it is necessary for the Plaintiff to prove in order to succeed in the suit. But it has no relation whatever to the Defence which may be set up by the Defendant, nor does it depend upon the character of the relief prayed for by the Plaintiff.*

22. In the instant matter, in the plaint it is averred the appellants are owners of the suit property. Facts in support of this allegation have been given. Allegations on infringement of the appellants' property rights is pleaded. In our view, these allegations need to be proved by way of

trial and cannot summarily be determined not to constitute a cause of action. Further, it is also arguable if the plaint as filed is an abuse of due process of law. Such contestations of fact do not constitute a preliminary point of law that can dispose of a suit without trial. In the case of **Attorney General - v- Oluoch (1972) EA page 392**, it was held that the question of whether a plaint discloses a cause of action is determined upon perusal of the plaint and attachments thereto with an assumption that the facts pleaded or implied therein are true.

23. In the instant matter, in determining the preliminary objection, the learned judge not only perused the plaint but erroneously delved into the merits of the claim. This is an error of law. Further, the judge erred in simultaneously considering a preliminary objection and an application to strike out the suit. A preliminary objection should be prosecuted as a stand- alone objection to be determined on its own founded on pure points of law. Combining a hearing on preliminary objection with a hearing on disputed and contested facts results negates the merits and purpose of a preliminary objection.

24. We note that the learned judge in striking out the appellants’ suit stated that the issue of legal capacity to commence an action in court is not an issue of procedural technicality capable of being cured under the substantive justice Oxygen principle provided for under **Sections 1A, 1B, 3B of the Civil Procedure Act and Article 159 of the Constitution**.

25. With due respect, the learned judge did not take into account the dicta in **Central Kenya Limited – v- Trust Bank & 4 Others, CA NO. 222 OF 1998**, where it was held that an *amendment to pleadings should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs. In our considered view, the learned judge erred in striking out the appellants’ suit without considering the guiding principles on amendment of pleadings.*

26. In penultimate, this Court in **Blue Shield Insurance Company Ltd - v - Joseph Mboya Oguttu [2009] eKLR**, stated as follows:

*... The power to strike out should be exercised after the court has considered all 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 opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”*

*...the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.*

27. In the instant matter, the learned judge in striking out the appellants’ suit embarked on the merits of the case itself and violated the rules of natural justice that a party cannot be condemned unheard.

28. For the various reasons stated above, we are satisfied that the learned judge erred in law in striking out the plaint as filed on the basis of preliminary objection. The appeal has merit and is hereby allowed. We set aside in entirety the ruling and orders made on 12<sup>th</sup> November 2015. We reinstate the appellants suit/plaint filed in HCCC No. 3 of 2014. We direct that the suit proceeds for trial. Each party to bear their own costs in the court below and in this appeal.

**Dated and Delivered at Kisumu this 31<sup>st</sup> day of July, 2019.**

**ASIKE MAKHANDIA**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**OTIENO-ODEK**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**