IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: KARANJA, GATEMBU & SICHALE, JJ.A)

CIVIL APPEAL NO. 86 OF 2018

BETWEEN

PURITY ACHIENG OUKO……..……..……..……..…...……APPELLANT

AND

TOM OTIENO OMBOYA……..……..……RESPONDENT

(Being an Appeal from the ruling and order of the Environment and Land Court at Mombasa (C. Yano, J) delivered on 18th April 2018

in

ELC Case No. 230 of 2013)

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JUDGMENT OF THE COURT

1. **Tom Otieno Omboya** (**the respondent**) instituted proceedings before the Environment and Land Court in Mombasa, ("ELC Court") by way of Plaint dated 10th of September, 2013 to assert his rights over property known as **Title No.;CR3383.1, subdivision CR1705/3, Subdivision No.7446 (orig 1482/120) Section II/MN Mombasa** (suit property) together with all the buildings, improvements and structures thereon.

2. He sued Zum Zum Investment Limited (Zum Zum), Habitat and Housing in Africa (Shelter Afrique) and Purity Achieng Ouko (the appellant) as 1st, 2nd and 3rd defendants respectively. Zum Zum and Shelter Afrique are named as interested parties in this appeal. The suit property was registered in the name of Zum Zum and the same was charged to Shelter Afrique, the 2nd interested party in the appeal. According to the respondent, on 29th April, 2004, Zum Zum sold the suit property to the appellant who is then said to have sold it the same day to the respondent at an agreed consideration of Ksh 2,200,000 which the respondent said he paid in full. The appellant nonetheless refused to transfer the property to him.

3. As the suit was pending determination, the respondent got wind that the appellant had since entered into another agreement for sale of the suit property with one Michael Okach Omondi and in furtherance thereof duly executed a transfer to that effect.

4. Consequently, the respondent moved the trial Court under Certificate of urgency on the 18th May, 2014 through a motion on notice of even date by the respondent's affidavit sworn on the 16th May, 2014 where he sought orders under **Order 40 rule 10(1)(a) of the Civil Procedure Rules** seeking, *inter alia,* **an order of inhibition inhibiting the registration of any dealings in the suit property pending the hearing and determination of the substantive suit.**

5. When the said application was placed before the ELC in the first instance on the 19th May, 2014, the Court issued orders that the status quo be maintained in respect of the suit property. The said application came up for inter-partes hearing on the 4th June, 2014 before the Mukunya, J and the same was allowed in terms of prayer 2, 3 and 4 as prayed as the same was unopposed.

6. Aggrieved by the said orders, the appellant moved the court vide a motion on notice dated 18th April, 2017 as amended on 21st June, 2017 under **Sections 1A** and **3A of the Civil Procedure Act, Order 51 Rule 15** and **Order 2 Rule 15(1)(b)** and **(d) of the Civil Procedure Rules**, seeking orders to set aside the injunctive orders issued on the 4th June, 2014 and all other proceedings as against the appellant and to have the suit as against the appellant struck out with costs for being frivolous, vexatious and/or an abuse of the court process.

7. The application was premised on the following grounds :-

"1) THAT the defendant/ applicant herein has never been served with the pleadings and summons herein, yet the injunctive orders pending suit have long been confirmed.

2) THAT the effect of the orders on record which have also been served upon the Land Registrar at Mombasa have the effect of unfairly stifling the defendant/applicant's right to deal with the suit property.

3) THAT indeed, the applicant has long executed a transfer in favour of a third party but now faces the prospect of defaulting on a fundamental term of the contract of sale – to deliver good title.

4) THAT on the plaintiff's own pleading and this being an action for sale of land, there is not a suitable claim before the court upon which any orders as have been sought by the plaintiff can stand, and the suit is but an abuse of the court process intended to facilitate the contrivance of a fictitious claim upon the suit property.

5) THAT the suit is frivolous, vexatious and otherwise an abuse of the court process.

6) THAT it will be in line with the overriding objectives that the application before court was canvassed, considered and or disposed of in the manner amended."

8. Through the affidavit in support of the application, the appellant deposed that the affidavits of service on record to the effect that she was served with documents in relation to the suit and summons to enter appearance contained falsehoods. She deposed that she did not have a place of residence or place of abode in Kiembeni Mombasa, as stated in the affidavit of service nor does she know the person referred to as Kilo mentioned in the affidavit of 1st November, 2013; that in May 2014 she was in Germany and only returned to Kenya on 29th February, 2016 and therefore all alleged service upon her before then was false and the injunctive orders were therefore obtained fraudulently.

9. She deponed that her defence had merit; that she had neither been privy to an agreement for sale of the suit property with the respondent nor received any consideration to that effect; that sometime in the year 2014 she entered into an agreement for sale of the suit property with one Michael Okach Omondi and in furtherance thereof duly executed a transfer to that effect but later learnt that injunctive orders had been issued in her absence and served upon the land Registrar at Mombasa. She denied having entered into any sale agreement with the respondent herein.

10. In opposition to the application, the respondent filed an affidavit on 20th June, 2017. He deposed *inter alia* that he believed the applicant was in Kenya when service was effected in May 2014 and her contention that she was in Germany at the time was misleading. He further contended that he had no objection to the applicant being granted leave to file her defence and consent to that effect was recorded between parties on 21st June, 2017. That the only issue to be determined was whether the order ought to be set aside on the alleged grounds that it had been obtained irregularly and/or was an abuse of the court process; he opposed the setting aside of the conservatory orders stating that it would defeat justice as status quo would not be preserved which would render the substantive suit an academic exercise.

11. After a careful consideration of the application, the learned Judge noted that it was common ground that the ownership of the suit property was contested; that the applicant admitted having sold and transferred the suit property to a third party, one Michael Okach Omondi though the transfer had not been registered due to the preservatory orders granted in favour of the respondent on 4th June, 2014.

12. The issues for determination by the trial Judge were inter alia; - whether the respondent's claim of the suit property had merit; whether the injunctive orders ought to be set aside and; whether the respondent's suit ought to be struck out for being frivolous, vexatious and/or an abuse of the court process.

13. On the question of the ultimate ownership of the suit property, the learned Judge expressed himself as follows, ***"It is apparent that both the Plaintiff and the 3rd Defendant claim the suit property. Whereas it should be noted that it is difficult at this stage for the court to ascertain the correct position from the disputed affidavits and documents, it is my belief that that does not preclude the court from making a determination on the application before court".***

14. As to whether the injunctive orders granted on 4th June, 2014 ought to be set aside the learned Judge was of the finding that the injunctive orders granted by the Court on 4th June, 2014 were for purposes of maintaining the respective parties' position in the suit properties until the substantive suit was determined and therefore it was only fair and in the interest of justice to make orders that safeguard and maintain the status quo until the suit was determined. He therefore exercised his discretion not to set aside the said orders.

15. On whether the respondent's suit ought to be struck out the learned Judge was guided by the principles laid out by this Court in the case of **D.T Dobie & Company Kenya Limited v. Muchina (1980) KLR** and **Yaya Towers Limited v. Trade Bank Limited (In Liquidation) Civil appeal No. 35 of 2000.** Relying on the aforementioned authorities he expressed himself as follows, ***"The law is that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable and where the hearing involves the parties in a trial of the action by affidavits, it is not a plain and obvious case on its face."*** Citing Article **50(1)** and **Article 25** of the Constitution the learned Judge emphasised that every person has a right to a fair and public hearing before a Court of law and such right should not be limited.

16. Ultimately the learned Judge granted the applicant's orders that the 3rd defendant be granted leave to file and serve her defence as already agreed by consent of the parties and disallowed the orders to set aside the injunctive orders as well as the orders for striking out the respondent's suit.

17. The appellant being aggrieved by the said ruling, filed the present appeal raising two grounds as set out in the Memorandum of appeal dated the 27th June, 2018. She faulted the learned Judge for not striking out the claim for specific performance and instead ordering that the suit proceed to full trial when on the uncontested material before the court there was not, in respect of the suit property a contract for the sale

and purchase thereof executed between the appellant and the respondent or at all in accordance with **Section 3 of the Law of Contract Act**, and that in any event the Judge erred in failing to appreciate that the claim before the court was on the respondent's (plaintiff) own pleading, time barred by virtue of **Section 4 of the Limitation of Actions Act**, and there was therefore no sustainable claim before the court.

18. The Parties exchanged written submissions pursuant to directions by the Court given on the 26th July, 2018. The appellant filed her submissions on the 16th August, 2018 while the respondent filed his submissions on the 21st September 2018.

19. In the submissions, the appellant submits that based on the crystalized facts as stands out in the pleadings, the learned Judge was wrong to dismiss the prayer for striking out of the suit. Counsel submitted that the prayer was premised on the provisions of **Order 2 rule 15(1)(b)(c)(d)** on the grounds that the suit as couched was frivolous, vexatious and otherwise constituted an abuse of the court process. In urging this position, counsel submitted that the suit was undoubtedly one for specific performance of an agreement subject to **Section 3 Law of Contract Act**, which provides that a contract must be in writing and that based on the fact that the sale agreement presented by the respondent had never been executed between him and the appellant, there was nothing to take to trial.

20. Citing **Section 107** and **109 of the Evidence Act,** counsel maintained that the burden of proving the existence of the executed sale agreement over the suit land reposed on the respondent and further that in absence of a duly executed contract, the order of specific performance could not lie and there was therefore no triable issue to take to trial.

21. The respondent on the other hand maintained that the ruling of the ELC directing that the suit be heard and determined on merit was fair and reasonable. Further that when the appellant filed the application, which is the subject of the appeal, there was no defence on record but the parties had subsequently recorded a consent allowing the respondent to file a defence. On the order of inhibition, counsel submitted that the same was necessary for purposes of preservation of the subject land, which was for the benefit of all parties to the suit. He contended that the same was informed by the actions of the appellant where she sought to have the property transferred to a third party. In conclusion the respondent submitted that if the order of inhibition is lifted the subject matter of the property would be transferred to a third party thereby defeating the whole purpose of the case.

22. At the plenary hearing of the appeal, learned counsel Mr. Mwakisha and Mr. Atancha appeared for the appellant and the respondent respectively. They adopted their written submissions and made brief oral highlights. Mr. Mwakisha reiterated that there was nothing to take to trial as far as the prayer for specific performance was concerned, there being no written sale agreement for the property in question. Moreover, the respondent's claim was statutorily time barred as it was based on contract, yet the respondent had filed his claim after nine years. He urged the Court to allow the appeal.

23. On his part, Mr. Atancha submitted that the respondent has a formidable claim against the appellant. He stated that even if the agreement is not signed by the vendor, it is signed by the purchaser. He cited a letter from the appellant's advocate requesting for fees so that he could execute the transfer which to him demonstrated that the parties believed that the transfer could have been effected on the basis of the sale agreement in absence of the vendor's signature. He concluded by urging the Court to consider the submissions and allow his client to have her day in court.

24. We have considered the record of appeal, the rival submissions by learned counsel and the applicable law. We discern only one issue for our determination, which is whether the trial Judge properly exercised his discretion in declining to strike out the suit. It is evident that the nature of the orders sought before the High Court were discretionary in nature. An appellate court, as this one, will not interfere with exercise of discretion by the trial court on a whim. There are settled principles that guide the appellate Court when called upon to interfere with such exercise of discretion. These were succinctly set out in the *locus classicus* case of **Mbogo Vs Shah (1968) EA 93** at page 94 as follows;-

> ***"It is well settled that this Court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."***

The President of the Court, **Sir Charles Newbold** expounded these principles in the following words at page 96, thus:-

> ***"A court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision or unless, it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."***

25. These are the principles we must apply in determining this appeal. Did the learned Judge err in declining the invitation to strike out the suit and ordering that the matter should proceed to full hearing for determination on merit? While considering the foregoing argument the learned Judge expressed himself as follows;-

> ***"Whereas the court retains the jurisdiction to strike out pleadings in deserving cases, each case must be viewed on its own peculiar facts and circumstances. The law is that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable and where the hearing involves the parties in trial of the action by affidavits, it is not plain and obvious case on its face.***
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> ***In this case, the plaintiff alleges that he purchased the suit property from the 3rd defendant. The 3rd defendant on the other hand, denies entering into any agreement to sell the land to the plaintiff. I would have to make a finding as to which party between the plaintiff and the 3rd defendant is to be believed. Taking all the circumstances of this case into consideration, I am not satisfied that the justice of the case will be attained by terminating the suit against the 3rd defendant at this stage. Under article 50(1) of the Constitution, every person has the right to have any dispute that can be resolved by the application of the law***

decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal and body. Under article 25 that right cannot be limited. Whereas I agree that the form of a hearing does not necessarily connote adducing oral evidence and that in appropriate cases hearing may take the form of affidavit evidence, to determine a suit by way of affidavit evidence ought to be resorted to in clear and plain cases. I am not satisfied that the present case can be termed as clean and plain case."

26. From the above observations and findings by the trial court, it is evident that the learned Judge considered all the material placed before him along with the applicable law before disallowing the application to strike out the respondent's suit. We do not see anything to suggest that the Judge considered any irrelevant or extraneous matters before arriving at the above decision. The learned Judge found, and rightly so in our view, that the validity of the sale agreement was contested and needed to be proved by way of adducing evidence. An order for specific performance could not be issued summarily when the sale agreement sought to be relied on was shrouded with allegations of fraud, and other unanswered questions. As long as the defence proffered disclosed at least one triable issue, then the respondent was entitled to have his day in court.

27. The issue of limitation of time can also be canvassed at the trial. There will be no prejudice occasioned to the appellant if this matter goes to full trial to allow for a determination on merit. We think we have said enough to show that this appeal is devoid of merit. We dismiss it with costs to the respondent.

Dated and delivered at Mombasa this 17th day of October, 2019.

W. KARANJA

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JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR