IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), OKWENGU & SICHALE, JJ.A)

CIVIL APPEAL NO. 388 OF 2017

BETWEEN

TIARA PROPERTIES LIMITED…….....APPELLANT

AND

SHADRACK MUSYOKA.....RESPONDENT

(An Appeal from the Ruling and Order of the Environment & Land Court at Nairobi (E. Obaga, J.) dated 10th May, 2017

in

ELC NO. 660 OF 2015

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JUDGMENT OF THE COURT

1. This is an appeal against the ruling of the Environment and Land Court (Obaga, J) delivered on 10th May, 2017 in which the learned Judge rejected an application by **TIARA PROPERTIES LIMITED** (the appellant herein), to strike out a plaint that had been filed by **SHADRACK MUSYOKA** (the respondent).

2. In the suit filed against the appellant through a plaint dated 9th July, 2015, the respondent sought orders of specific performance compelling the appellant to execute an agreement of sale in respect of office suit number **2A II on L.R No. 3734/619** (suit property); and a permanent injunction restraining the appellant from dealing with the suit property. In the alternative, the respondent sought special damages of Kshs. 11,176,000/-.

3. According to the pleadings in the plaint, the appellant is the registered proprietor of Nairobi L.R No. 3734/619 Mugumo Road Lavington, which he had developed by putting up a commercial property comprising various shops and offices, including the suit property. The respondent?s cause of action as pleaded, arose at the commencement of the development, from an agreement entered into between the appellant and the respondent, through an offer letter dated 3rd July 2012, for sell of the suit property, to the respondent, off plan at a price of Kshs 8,000,000. In accordance with the terms of offer, the respondent executed the letter of offer and paid 20% of the agreed price as deposit (i.e Kshs 1,600,000), at the time of execution of the letter of offer.

4. The respondent pleaded that the execution of the letter of offer together with the payment of 20% deposit created a valid and legally binding contract between the two parties. However, when the development of the commercial property was almost complete, the appellant purported to unilaterally terminate the agreement to sell the suit property to the respondent by attempting to refund the deposit price of Kshs. 1,600,000/-. This was despite the fact that the respondent was able and willing to complete the purchase of the suit property. The respondent contended that the value of the suit property had appreciated and estimated it to be worth Kshs. 17,000,000/- and thus claimed loss of bargain in respect of the investment to purchase the suit property hence the prayers for special damages.

5. In its defence the appellant denied that the parties executed any agreement capable of transferring any interest in the suit property; that the letter of offer is not an agreement for sale for purposes of dealing with an immovable property; that the letter of offer is not an agreement upon which proceedings for specific performance can be anchored as the parties never actualized the intent set out in the letter of offer; and that the appellant sought to refund the 20% deposit paid by the respondent, but the respondent declined to accept the deposit.

6. By a Notice of Motion dated 28th September 2015, the appellant moved the Environment and Land Court under Order 2 Rule 15(1)(a) of the Civil Procedure Rules, for an order that the respondent?s plaint be struck out and suit dismissed. The motion which was grounded on the

affidavit of Kenneth Luusa, was based on three grounds. First, that the respondent?s suit is an abuse of the process of the court "to the extent that they seek to enforce an agreement in respect of an immovable property; secondly, that the letter of offer dated 3rd July 2016 is not capable of being enforced in view of section 3 of the Law of Contract Act, Cap 23, Laws of Kenya; and thirdly that the pendency of the proceedings is otherwise an abuse of the process of the court.

7. In a replying affidavit opposing the motion, the respondent deponed that since he had executed the letter of offer and paid a deposit as consideration, there was a valid and binding contract as all ingredients of a contract were present, and that the appellant?s act of purporting to refund the deposit of the purchase price amounted to a breach of contract: In addition, that the appellant could not seek to benefit from its own breach.

8. The learned Judge after considering arguments by both parties declined to strike out the suit and rendered himself as follows:

> ***"Both parties have cited very good authorities which are relevant. The offer letter did not provide any refund of the deposit. To this extent, there is an issue on what happens to the deposit paid which is returned. Does it attract interest or not. Is the respondent entitled to claim loss of bargain? All these are issue which are to be determined…***
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> ***There are also issues to be addressed whether a letter of offer which refers to a contract which is to be signed in future but which contract is not given as per the offer letter can be taken as part of the documents forming the contract which was anticipated… The applicants kept the Respondent's money for close to three full years before it purported to return the same. There are triable issues whether the Respondent is entitled to refund with or without interest."***

9. It is this decision that the appellant now seeks to challenge in this appeal. The appellant's memorandum of appeal lists three grounds of appeal namely;

> ***(i) The learned Judge erred in law and in fact in failing to hold that the Letter of Offer dated 3rd July 2016 was not capable of being enforced in light of the provisions of Section 3 of the Law of Contract Act, Chapter 23 Laws of Kenya;***
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> ***(ii) The learned Judge erred in law and in fact in failing to hold that the proceedings in Nairobi ELC Case No. 660 of 2015 (Shadrack Musyoka –vs-Tiara Properties Limited) were an abuse of the process of the Superior Court to the extent that they sought to enforce an agreement in respect of an immovable property;***
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> ***(iii) That the learned Judge erred in failing to strike out the plaint dated 9th July 2015.***

10. At the hearing of the appeal, learned counsel Ms. Venessa Lwila appeared for the appellant, while Mr Eric Masese appeared for the respondent. Both parties duly filed and exchanged written submissions which were also orally highlighted in Court.

11. For the appellant it was submitted that in considering the application for striking out the plaint, the learned judge was restricted to matters discerned from the pleadings, and therefore misdirected himself in interrogating the adequacy of the terms of the letter of offer; that the learned judge erred in failing to determine whether there was an agreement of sale in terms of section 3(3) of the Law of Contract Act and section 38 of the Land Act 2012 on the basis of which the respondent?s action could be maintained.

12. The appellant maintained that the letter of offer did not amount to a legally binding contract as defined under Section 3(3) of the Law of Contract Act, Cap 23 Laws of Kenya; that the letter of offer did not meet the mandatory requirement of the law as the signatures of both parties were not attested by a witness; that the learned Judge erred in failing to find that there was no existing contract that could give life to the ELC suit; and that he therefore exercised his discretion in a manner that calls for this Court?s interference.

13. Further the appellant submitted that the letter of offer was conditional as it was "subject to contract;" that the intention was that no enforceable obligation was intended to arise before the execution of a formal document; that the words „subject to contract? indicated that a formal contract was being prepared, and until then there was no binding contract. In addition, that no triable issues were raised in the pleadings as the letter of offer was silent on whether the deposit was refundable or interest thereon payable, and that the appellant took steps to actually refund the deposit to the respondent.

14. The Court was urged to interfere with the exercise of discretion by the learned Judge as the Judge went beyond the scope of his jurisdiction and misdirected himself by considering whether there were triable issues to warrant a full trial instead of considering whether the respondent?s suit was sustainable in view of section 3(3) of the Law of Contract Act. In support of his submissions the appellant relied on Halsbury?s Laws of England 4th Edn. Vol 9. Par 227; ***Kukal Properties Development Ltd vs. Tafazzal H. Maloo & 3 Others*** **[1993] eKLR;** ***Doris Morgan vs. Stubenitsky*** ***[1977] eKLR*** amongst others, and urged the Court to set aside the ruling and dismiss the respondent?s suit.

15. In opposing the appeal, learned counsel Mr Masese submitted that Order 2 Rule 15(1) of the Civil Procedure Rules under which the appellant's motion was anchored, required the learned Judge of the ELC to exercise his discretion. Relying on ***Mbogo vs. Shah [1968] EA 93,*** counsel submitted that the Court can only interfere with the exercise of discretion by a Judge of the superior court if it is demonstrated that the learned Judge had misdirected himself in some matter and has as a result arrived at a wrong decision; that the respondent?s suit raised several triable issues that could only be properly addressed at a full trial; and that the learned Judge rightly found that the suit disclosed a reasonable cause of action, and judiciously exercised his discretion in dismissing the appellant?s motion. Counsel, relying on **Mumias Sugar Company Limited –vs- Freight Forwarders (K) Limited [2005] eKLR**; and **D.T. Dobie & Company (Kenya) Ltd vs. Muchina & Another** (supra), argued that the respondent was not precluded from filing a suit seeking specific performance as the letter of offer signed by both parties signified the existence of a binding contract between the parties; that since there was an existing valid contract, it was up to the trial court to hear both parties and determine whether or not, it would issue the order for specific performance; and that it would amount to a miscarriage of justice if the appellant is allowed to benefit from a breach of its own contract.

16. What is in issue in this appeal is the exercise of discretion by the Judge of ELC in dismissing the appellant's motion for striking out the respondent's plaint. The *locus classicus* case dealing with an appeal of this nature is **Mbogo vs. Shah** (supra) in which Sir Charles Newbold set out the position as follows:

> ***" For myself I like to put it in the words that 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 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 has misdirected himself in some matter and that 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."***

17. Another case on the question of striking out pleadings is **D.T. Dobie & Company (Kenya) Ltd vs. Muchina & Another** (supra), in which Madan JA in the leading judgment in a similar appeal against a ruling where the the High Court declined to strike out a plaint, stated as follows:

> ***"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 not at all, 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 it right.***
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> ***If an action is explainable as likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind 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.***
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> ***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."***

18. We also bear in mind **Crescent Construction Co.Ltd vs Delphis Bank Ltd [2007] eKLR** where this Court rendered itself as follows:

> **"...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-honored 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."**

19. The appellant is essentially claiming that the learned Judge erred in exercising his discretion by refusing to strike out the plaint that was filed before the trial court. We note that the appellant had brought his motion under **Order 2 Rule 15(1)(a**) of the Civil Procedure Rules, which provides for striking of pleadings that do not disclose a reasonable cause of action. **Rule 15(2)** of that order states that:

> ***"No evidence shall be admissible on an application under sub-rule (1)(a) but the application shall state concisely the grounds on which it is made."***

20. This means that in considering whether the respondent?s plaint discloses any reasonable action the court had to be guided by the pleadings only and not revert to the affidavit that was filed in support of the applicant?s motion. The extract of the judgment of the learned judge that we have reproduced (see paragraph 8), shows that the learned judge was not persuaded that the respondent?s plaint did not disclose a reasonable cause of action as there were triable issues raised in the pleadings. The learned judge properly addressed himself in identifying triable issues from the pleadings in a bid to show that at that stage it could not be concluded that the plaint did not disclose a reasonable cause of action. We cannot see any reason to fault this approach.

21. Although his motion was brought under rule **15(1)(a)** the appellant tried to have the best of both worlds by bringing in a ground under **Rule 15(1)(d)** that provides for striking out pleadings that are an abuse of the court process, and which allowed him to support the ground through an affidavit. In the motion to have the suit struck out the appellant had urged that the respondent's suit was an abuse of the court process as it was not maintainable in law. The appellant's main argument was that notwithstanding the fact that both parties signed the letter of offer with respect to the suit property, the letter of offer was not a binding contract as it failed to meet the requirements of a contract as stipulated under the provisions of Section 3(3) of the Law of Contract Act; and that since the letter failed to meet the threshold for it to be a contract for the disposition of land, the letter of offer could not form the basis for the respondent?s suit.

22. It is important to bear in mind that the learned judge was dealing with an interlocutory application and therefore did not have the benefit of full evidence. In this regard the appeal before us is distinguishable from ***Kukal Properties Development Ltd vs. Tafazzal H. Maloo & 3 Others*** (supra); and ***Doris Morgan vs. Stubenitsky*** (supra) that were cited by the appellant and in which the Court had the benefit of addressing and determining the issues after hearing full evidence.

23. In our view the issue whether the letter of offer could be the basis of a contract between the appellant and the respondent was raised prematurely at the interlocutory stage. It is an issue that could not be addressed by looking at the letter of offer in isolation, without the

benefit of full evidence. On the face of it, the letter of offer though indicating subject to contract included terms such as, a booking fee payable in July 2012, and balance payable on completion, and other costs including stamp duty of 4% of the purchase price or government valuation, and an important clause: that “the vendors lawyer will prepare the sale agreement and sub leases and the purchaser agrees to execute the same within 7 days. Therefore, whether the letter of offer was capable of creating a binding contract separate from the contract for sale of land is a conclusion that could not be arrived at without evidence from the parties regarding these issues.

24. The respondent?s plaint cannot be said to have been an abuse of the process of the court as it is clear that it was only intended to facilitate the pursuit of justice in the transaction entered into between the appellant and the respondent. Moreover, as properly noted by the learned Judge the respondent?s plaint included an alternative prayer for damage for loss of bargain a claim that was separate from the claim for specific performance.

Given the contents of the letter of offer, the claim for damages was not groundless.

25. In light of the above we are satisfied that the learned Judge properly exercised his discretion by taking into account relevant factors and exercising appropriate caution in not addressing the merits of the case at the interlocutory stage. The respondents claim was not so hopeless, or frivolous as to justify the striking out of the plaint either as having no cause of action or an abuse of the court process. In the circumstances we find no substance in this appeal.

The appeal is therefore dismissed with costs. It is so ordered.

Dated and delivered at Nairobi this 8th day of November, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

HANNAH OKWENGU

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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