



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KOOME & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 112 OF 2017

BETWEEN

TAJ VILLAS MANAGEMENT LIMITED..... APPELLANT

AND

TAJ MALL LIMITED.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi, (Njuguna, J.) dated 15th December 2015 in HCCC NO. 607 OF 2011)

JUDGMENT OF THE COURT

This second appeal traces its origin to a ruling by the Chief Magistrate's Court, Nairobi, in which the court dismissed an application by the respondent, **Taj Mall Ltd** seeking to strike out a plaint by the appellant, **Taj Villas Management Ltd**. The subordinate court found that contrary to the respondent's claim, the appellant's plaint disclosed a reasonable cause of action. The respondent was aggrieved by the ruling and lodged an appeal in the High Court. By the judgment impugned in this appeal, the learned judge (**Njuguna, J.**) reversed the finding of the subordinate court, allowed the appeal and struck out the plaint. The appellant was equally aggrieved and filed this appeal in which it faults the learned judge, primarily for considering evidence in an application made under **Order 2 Rule 15(1) (a)** of the **Civil Procedure Rules**.

By way of background, on 19th May 2011, the appellant filed a suit in the subordinate court in which it pleaded that the respondent, after constructing 37 residential maisonettes on its property known as **LR No 9116**, sold the leasehold interests therein to buyers, who incorporated the appellant for purposes of holding LR No 9116 and managing the properties erected thereon. Those buyers also became shareholders and members of appellant. The appellant pleaded further that under the leases between the buyers and the respondent, it was the respondent's duty to keep the driveways, car parks, paths, boundary walls or fences, gardens, swimming pools and common water pipes, drains, gutters, sewers and electric cables in good repair and condition. In the year 2006 or 2007, the appellant averred that in breach of its obligations under the lease, the respondent, negligently, shoddily and unprofessionally constructed a boundary wall near one of the houses, to wit, **House No. C2** that posed a real and present danger to the occupants of the said house. Particulars of negligence were pleaded and the appellant added that after due demand and failure by the respondent to remedy the defects, it was forced to undertake proper construction of the wall at a total cost of **Kshs 2,156,815** which it claimed from the respondent together with interest and costs.

On 22nd June 2011 the respondent filed a defence under protest contending that the appellant had no *locus standi* in the matter because there was no privity of contract between the two parties. It followed subsequently with an application to strike out the plaint under Order 2 Rule 15(1) (a) of the Civil Procedure Rules, on the ground that the plaint did not disclose a reasonable cause of action.

The appellant opposed the application by an affidavit sworn by its advocate, **Stephen Owino** on 22nd July 2011, to which was annexed the appellant's certificate of incorporation and its Memorandum and Articles of Association as well as a copy of one of the standard leases between the appellant and the respondent pertaining to LR No 9116. It maintained that the suit disclosed a cause of action. For its part, the respondent filed an affidavit on 15th August 2011.

The trial magistrate, quite correctly in our view, stated that under Order 2 rule 15(1) (a) of the Civil Procedure Rules under which the respondent's application was brought, no evidence was admissible and that all he was required to do was to look at the pleadings alone. He ultimately concluded that from the pleadings, a cause of action was disclosed and dismissed the application with costs.

In the High Court, the learned judge cited ***D T Dobie & Co (K) Ltd v. Muchina [1982] KLR 1*** on what constitutes a reasonable cause of action and reiterated that in determining the appeal, the court should only look at the pleadings. However, the learned judge immediately thereafter stated that she could not make a finding on *locus standi* without perusing the lease. After considering the lease in detail, she relied on **clause 5(v)** thereof regarding transfer of the reversionary interest and held that since the reversionary interest had not yet been transferred to the appellant, it had no *locus standi* to institute the suit. Accordingly the learned judge allowed the appeal and struck out the appellant's plaint.

That is essentially what the appellant has a problem with in this appeal. Prosecuting the appeal, it submitted that the annexures to its affidavit in opposition of the application to strike out the plaint were included by mistake since no evidence is required in an application of the nature that was before the subordinate court and that in any event during the proceedings before the subordinate court, that evidence was never considered or relied upon. It was submitted that the learned judge therefore fell into serious error by admitting, considering and relying on the lease agreement, which is evidence, to determine a matter where the law does not allow such evidence. It was also submitted that the learned judge erred in not appreciating that the trial court had deliberately avoided considering the affidavit evidence even though it was on record before it. The appellant cited a number of authorities in support of its submissions, among them ***Mosi v. National Bank of Kenya Ltd [2001] KLR 333; Said Hamad Shamisi v. Diamond Trust of Kenya Ltd [2010] eKLR; and D T Dobie & Co (K) Ltd v. Muchina (supra)***.

Opposing the appeal, the respondent submitted that the High Court properly found that the appellant had no *locus standi* in the matter because it was not the registered owner of House No C2 or leasee or occupier of any of the properties erected on LR No 9116 and that under the lease its duties were limited to management and maintenance of those properties.

Next the respondent submitted that as pleaded, the appellant's cause of action was in contract and not in the tort of negligence and that the learned judge could not determine the issue of *locus standi* without delving into the terms of the lease. In the respondent's view, the learned judge properly considered the terms of the lease and concluded that because the reversionary interest had not expired, the property was still vested in the respondent and that no enforceable interest had been transferred to the appellant. It was also submitted that the appellant could not sustain a claim in negligence because it did not suffer any personal injury.

Lastly the respondent submitted that under order 2 rule 15 the court had discretionary power to strike out any suit at any stage of the proceedings and that this was a clear and obvious case where the plaint deserved to be struck out.

In our view, as we pointed out earlier, there is only one issue in this interlocutory appeal, namely whether the learned judge erred by considering evidence and striking out the appellant's suit. The application that was before the subordinate court was explicit that it was taken out under order 2 rule 15(1)(a) of the Civil

Procedure Rules. The other provisions that were cited were order 51 rule 1 on the procedure of making applications and section 3A of the Civil Procedure Act on the inherent powers of the Court. Order 2 rules 15 (1) and (2) provide as follows:

“15 (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

a. it discloses no reasonable cause of action or defence in law; or

b. it is scandalous, frivolous or vexatious; or

c. it may prejudice, embarrass or delay the fair trial of the action; or

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.

2. No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.” Emphasis added.

Where a party opts to make an application for striking out a pleading solely under order 2 rule 15 (1)(a), order 2 rule 15(2) denies him the right to rely on any evidence. All that such a party is required to do is to state concisely the grounds on which the application is founded. Thus for example, in *Mosi v. National Bank of Kenya (supra)*, interpreting order VI rule 13 (1) (a) which is now order 2 rule 15 (1) (a), the court stated thus:

“Order VI rule 13 specifies four distinct grounds on which an application to strike out a pleading may be grounded. These are that it discloses no reasonable cause of action or defence; that it is scandalous, frivolous or vexatious; that it may prejudice, embarrass or delay the fair trial of the action; or that it is otherwise an abuse of the process of the court. If the application is made under the first ground, no evidence shall be admissible thereon but grounds on which it is made shall be stated concisely. It is established practice that an application could be grounded on any or all of the grounds prescribed in rule 13(1). All that is required is that the grounds relied on be specified in the application and if they be other than the first one, then affidavit evidence is expected.”

Similarly in *EPCO Builders Ltd v Marjan & Another [2006] 2 KLR 1*, this Court held that the former order VI rule 13(2) of the Civil Procedure Rules, absolutely barred the court from admitting evidence in an application brought under it and that any evidence tendered was inadmissible. The court was only obliged to look at the averments in the pleadings and no more to satisfy itself whether or not a cause of action was disclosed. Lastly in *Crescent Construction Co Ltd v Delphis Bank Ltd [2007] eKLR*, this Court reiterated that in all cases brought under order VI rule 13(1) (a), the court is obliged in law to look at no evidence, that is to say, no affidavit or any evidence from the bar in considering whether or not a plaint or a pleading raises a cause of action and that the court must look at the pleadings only and not go beyond the pleadings.

In our view the order 2 rule 15 (1) (a) as read with rule 15(2) is clear beyond peradventure and does not require more elaboration. The learned trial magistrate was right in declining to look at the affidavit evidence placed on record by the parties. We note that the learned judge also made a correct statement of the law when she stated that she was not required to look at any evidence. However, immediately after that, she literally went off the rails and dove headlong into the lease agreement, which she irregularly used to reach the conclusion that the appellant had no *locus standi*. With respect, that was a fundamental error because the learned judge was supposed to look only at the pleadings. The question of the lease agreement and its interpretation were matters for the trial. It was not the function of the court at that stage to examine evidence in detail to see whether the appellant’s case could succeed. Looking at the pleadings alone as was required by order 2 rule 15 (91) (a), the appellant’s plaint clearly disclosed a course of action.

Accordingly we are satisfied that the learned judge misdirected herself in striking out the appellant's suit on the basis of evidence which she was not supposed to look at. We allow this appeal, set aside the judgment of the High court dated 10th December 2017 and substitute therefore an order dismissing the respondent's appeal. The appellant shall have costs both in the High Court and in this Court. It is so ordered.

Dated and delivered at Nairobi this 19th day of January, 2018

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR