IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & KIAGE, JJA)

CIVIL APPEAL NO. 230 OF 2016

BETWEEN

ROSE NJOKI KING'AU.....1ST APPELLANT

MICUGU WAGATHARA.....2ND APPELLANT

VERSUS

SHABA TRUSTEES LIMITED.....1ST RESPONDENT

CITY COUNCIL OF NAIROBI.....2ND RESPONDENT

(Appeal from the Ruling/Order of the High Court of Kenya at Nairobi (R.N. Sitati, J.) Dated 29th April, 2010

in

H.C. Civil Suit No.986 of 2006)

****

JUDGMENT OF THE COURT

This appeal arises from the ruling of the High Court, **R.N. Sitati, J**. dated the 29th day of April, 2010, allowing the 1st respondent's application for striking out of the appellants' amended plaint, and entry of summary judgment against the appellants in terms of the 1st respondent's defence and counterclaim.

The background to the appeal is that the appellants sued the respondents on the 18th day of September, 2008, and as subsequently amended on the 25th day of September, 2006, seeking a declaration that they are the lawful and legal owners of property known as **LR. No. 209/9968**, also known as **Plot No. 209/10/94**, Mai Mahiu Road Nairobi (the suit property), to the exclusion of all and any other claimants; a permanent injunction restraining the 1st and 2nd respondents by themselves, their agents and/or servants from evicting, demolishing any structures on the suit property or in any way interfering with the appellants' possession of the suit property and for costs.

In summary, the appellants' averments were, *inter alia*, that on the 3rd and 6th day of August, 1992, respectively, the 2nd respondent variously allotted to each of them, Plot No. "A" &"B" respectively, being a half (½) undivided share of the suit property; that acting on the 2nd respondent's representations that the suit property was available for allocation to the appellants and that the 2nd respondent had authority to allocate the same to them, and also acting in good faith, the appellants made payments to the 2nd respondent both for the stand premiums and the annual rent for the suit plot and continued to do so until the events triggering the litigation resulting in this appeal arose. That, they took possession of their respective portions of the suit property and commenced developments thereon, until the 2nd respondent fraudulently allotted the suit property to the 1st respondent with the full knowledge that it had earlier allotted the same to the appellants. The appellants gave particulars of fraud attributed to the 2nd respondent as particularized in the amended plaint. In the alternative and without prejudice to the particulars of fraud pleaded and attributed to the 2nd respondent, the appellants contended that the 1st respondent fraudulently caused the Commissioner of Lands to issue it with a grant over the suit property. They undertook to provide particulars of fraud attributed to the 1st respondent at an opportune time.

The first respondent filed a defence and counterclaim dated the 7th day of November, 2006, contending, *inter alia*, that, it was the lawfully

registered proprietor of the suit property, pursuant to a grant issued to it by the President of the Republic of Kenya on the 30th March, 2001. It admitted that the appellants had erected temporary unlicensed structures on the suit property, but denied any knowledge of the other averments in the amended plaint.

Turning to the counterclaim, the first respondent reiterated the contents of its defence and counterclaimed against the appellants jointly and severally for an order of mandatory injunction compelling the appellants, whether by themselves, their agents, servants and/or any other person authorized by them to forthwith vacate the suit property; an order for a permanent injunction restraining the appellants whether by themselves, their agents, servants and or any other persons authorized by them from encroaching, constructing , and or erecting illegal structures upon or otherwise dealing in any other way with the suit property; an order of eviction against the appellants by themselves, their agents; servants and/or any other persons authorized by them to vacate the suit property; costs; and any other relief or further relief the honourable Court would deem fit to grant.

On the said defence and counterclaim, the 1st respondent anchored a chamber summons dated the 16th day of November, 2006, premised on Order **VI** rule **13(1) (b)** and **(d),** Order **XXXV** Rule **(1) (b)** of the Civil Procedure Rules; section **3A** of the Civil Procedure Act, and all other enabling provisions of the law; substantively seeking orders that the appellants' amended plaint as against the 1st respondent be struck out; that summary judgment be entered against the appellants in terms of the prayers set out in the 1st respondent's counter claim; and lastly, that the costs of the application be borne by the appellants.

The application was based on the grounds on its body, and a supporting affidavit of **Brian Kiptoo Kiplagat,** basically reiterating the averments in the defence and counterclaim, already summarized above. It was resisted by a replying affidavit filed by the 1st appellant also basically reiterating the contents of the averments in the amended plaint, also as already summarized above. It was canvased by way of written submissions. The Judge, after analysing the record before her, upheld the 1st respondent's application, struck out the appellants' amended plaint as against the 1st respondent, and ordered the appellants to vacate the suit property, failing which they be evicted, an order for a permanent injunction restraining the appellants from any future encroachment on the suit property either by themselves, their agents and or servants.

The appellants filed this appeal against that decision contending, *inter alia*, that the learned Judge erred when she: failed to properly address the issue of the ownership of the suit property; erroneously held that the 1st respondent was entitled to summary judgment on his counterclaim; failed to address herself properly on the law on striking out of pleadings under the Civil Procedure Rules (repealed); failed to determine as to whether the appellants were entitled to judgment as against the 2nd respondent; failed to rule that the 1st respondent's counterclaim was defective and could not therefore sustain the 1st respondent's application.

The 1st respondent filed grounds to affirm the decision of the learned Judge, contending, *inter alia*, that prior to the allocation of the suit property, it was all along the property of the Kenya Government; that the appellants and the 2nd respondent did not tender any evidence of any title document registered as **L.R. No. 209/10/94**, nor any prior registered or registrable instrument in favour of the 2nd respondent from the government, on the basis of which the 2nd respondent could have acted to allocate the suit property to the appellants. In its view, and in the light of the above contention, any purported allocation of the suit property to the appellants by the 2nd respondent was in vain as the property remained vested in the government which had the lawful and legal authority to issue a grant to the 1st respondent ,as it did; that the grant issued to the 1st respondent by the government was therefore sanctified under section **23(1)** of the Registration of Titles Act (RTA) (now repealed); that neither the 2nd respondent nor the appellants challenged the Commissioner of Land's decision to issue a grant to the suit property to the 1st respondent. Neither did the appellants plead any fraud as against the 1st respondent or the Commissioner of Lands, nor sue him for any wrong doing allegedly committed against them arising from the issue of a grant over the suit property to the 1st respondent.

The appeal was canvased by way of written submissions filed by the appellants and the 1st respondent, fully adopted by the parties but not highlighted. The 2nd respondent filed no written submissions, electing to maintain a neutral position on appeal as it did before the High Court.

With regard to the issue of ownership of the suit property, the appellants urged us to fault the trial Judge for failing to hold that the appellants had sufficiently pleaded particulars of fraud as against the first respondent in paragraph 9(e) of the amended plaint; that the inclusion of the words at paragraph 9(e) of the amended plaint that particulars of fraud were to be provided for at an opportune time was an error which should not have been visited against them; that the Judge misdirected herself when she held that the 1st respondent was the registered proprietor of the suit property, contrary to the supportive evidence they had filed in opposition to the application, which in their view, was more than sufficient to demonstrate that the appellants were not trespassers on the suit property, and that they had a legitimate claim against the respondents jointly and severally which should have been allowed to go to trial.

To buttress the above submissions, the appellants relied on the High Court case of **Rukaya Ali Mohamed versus David Gikonyo Nambacha & Another, Kisumu HCCA No. 9 of 2004** for the proposition that, once an allotment letter is issued and the allotee meets the conditions therein, the land in question is no longer available for allotment; that a letter of allotment confers an absolute right of ownership or proprietorship unless it is challenged by the allotting authority, or is shown to have been acquired through fraud, mistake or, that the allotment was out rightly illegal or it was against the public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled. Also relied on was the case of **Dr. Joseph Arap Ng'ok versus Justice Moijo ole Keiwua & 5 others,** Civil Appeal No. Nai 60 of 1997 for the holding, *inter alia*, that:-

> "***Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity of title otherwise the whole process of registration of Titles and the entire***

system in relation to ownership of property in Kenya would be placed in jeopardy." See also ***ATHI Highway Developers Limited versus West end Butchery Limited & 6 others [2015] eKLR*** for the holding, *inter alia*, that:

> ***"An innocent holder of legal title to land cannot be disposed of that interest by a fraudster and that section 23 protects Title "issued to a purchaser upon the transfer or transmission by the proprietor thereof" Those decisions are the Alberta Mae Gacie case (supra) and the Igbal Singh Rai Case (supra) which emanated from the High Court. With respect, we are persuaded by the reasoning in those cases as it accords with the law. Furthermore, the protection accorded by law in the event of fraud, is to a "****bonafide purchaser without notice****" and even then, only against equitable interests. We have seen the definition of bonafide purchaser" from Black's law Dictionary and from the Katende case (supra). The onus is on the person who wishes to rely on such defence to prove it and the defence is against the claim of any."***

On summary judgment, the appellants urged us to fault the trial Judge for her failure: to appreciate that the procedure provided for in Order **XXXV** Rule **1(b)**, CPR (repealed), applied to the recovery of land in a Landlord and Tenant relationship which relationship did not subsist as between the appellants and the 1st respondent; that the evidence tendered by the appellants in opposition to the 1st respondent's application raised triable issues; and also that the appellants' inability to respond to the 1st respondent's defence and counterclaim was occasioned by the 1st respondent's action of filing the above process simultaneously with the application for striking out of their amended plaint.

Turning to the issues as to whether the Judge properly appreciated the law on striking out of pleadings under the Civil Procedure Rules, the appellants relied on **Gupta versus Continental Builders Limited** [**1978] KLR 83** for the holding, *inter alia,* that if a defendant is able to raise a *prima facie* triable issue, he is entitled in law to an unconditional leave to defend. On the other hand, if no prima facie issue is put forward against the claim of the plaintiff, it is the duty of the court to forthwith enter summary judgment. The appellants also relied on **D.T. Dobie and Company (Kenya) Ltd versus Joseph Mabaria Muchina and Another [1982] KLR 1** to buttress their submissions that the amended plaint should not have been summarily rejected as against the 1st respondent as it was not hopeless. In their view, it plainly and obviously disclosed a reasonable cause of action as against the respondents jointly and severally. Neither was it so weak as to be beyond redemption and incurable by an amendment.

With regard to entitlement to a judgment as against the 2nd respondent, the appellants contended that the Judge failed to appreciate and make a pronouncement on their application for an interlocutory judgment against the 2nd respondent under Order IXA Rule 5 of the Civil Procedure Rules (repealed) for want of a defence against their amended plaint which was on the record pending action as at the time the 1st respondent's application was determined by the trial Judge.

Turning to the issue of a defective counterclaim, the appellants relied on the provisions of order **VII** Rule **1(2)** of the Civil Procedure Rules (repealed), in support of their submission that the 1st respondent's counterclaim was defective for want of a verifying affidavit, verifying its correctness, and should not have been used to sustain the 1st respondent's application for striking out of their amended plaint, and entry of summary judgment against them in terms of the defence and counterclaim.

Opposing the appeal, the 1st respondent reiterated the background to the appeal as already highlighted above, set out the relevant reasoning and conclusions reached by the Judge in the impugned ruling, and then submitted that considering the grounds for affirming the Judge's decision in the light of the record, there is no way the findings of the Judge can be faulted as in their view, these were based on a proper interpretation and application of the provisions of section **23** of the RTA to the rival submission before the Judge. On that account the 1st respondent urged us to affirm the impugned decision.

To buttress the above submissions, counsel cited **Maher Unissa Karim versus Edward Oluoch Odumbe** [**2015] eKLR**, **Joseph N.K. Arap Ng'ok versus Moilo ole Keiwua & 4 others** (supra) **Athi Highway Development Limited versus West end Butchery Limited** (supra), and **Igbal Singh Rai versus Mark Leccchini & another** [**2013] eKLR,** all on the interpretation and application of the principle enshrined in section **23** of the RTA.

This is a first appeal arising from the trial Judge's exercise of judicial discretion to strike out the appellants' amended plaint as against the 1st respondent, and the entry of summary judgment in favour of the 1st respondent, in terms of its defence and counterclaim, with costs. The principles that guide the Court in the exercise of this mandate are well settled. See **Mbogo and another versus Shah** [**1968] E.A.93**, for the holding *inter alia*, that,

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

We have considered the record in the light of the above mandate. It is our finding that the trial Judge after evaluating and analyzing the record in light of the provisions of sections **20, 22(3), 23 (1) 24** and **32** of the RTA, which we find prudent not to reproduce herein, but will bear them in mind when determining the appeal, and more particularly the application of section **23(1)** of the RTA. Relying on **Jaj Super Power Cash & Carry Ltd versus Nairobi City Council, and 2 others, CA 111** of 2002, (**Omolo, Waki & Deverell, JJA**) made findings that, the 1st respondent's title issued on the 30th March, 2001 was absolute and indefeasible; that on the basis of the documentation before the Judge, the appellants had admitted that the 1st respondent was the registered owner of the suit property; that the appellants' documents of title (allotment letters) were invalid as they had not been registered in terms of section **32** of the RTA; that it was also evident from the contents of the amended plaint that the appellants had not pleaded any particulars of fraud as against the 1st respondent, neither had they offered any response to the 1st respondent's claim in the defence and counterclaim that they were trespassers on the suit property and they ought to be evicted; that although the appellants had contended that the 1st respondent had fraudulently caused the Commissioner of Lands to issue it with a grant to the suit property, they had not placed any supportive evidence to support that assertion; that the appellants' failure to

controvert the 1st respondent's assertion against them of being trespassers on the suit property was a confirmation of the 1st respondent's assertion that they (appellants) had no defence against the 1st respondent's allegation of trespass against them. On account of the above findings, the Judge allowed the 1st respondent's application as prayed, triggering this appeal.

We have considered the record in light of the findings of the Judge set out above, the rival submissions and principles of law relied upon by the parties. Only one issue fall for our determination namely, whether the Judge exercised her discretion judiciously when she struck out the appellants' amended plaint as against the 1st respondent and entered summary judgment against the appellants in terms of the 1st respondent's defence and counter claim.

With regard to the issue of ownership of the suit property, it is not disputed that the appellants' claims to proprietorship of the suit property were based on two allotment letters undisputably variously issued to them by the 2nd respondent, while the 1st respondent's claim was based on a grant issued on the 30th day of March, 2001, by the Government of Kenya. Both parties relied on section **23(1)** of the RTA in support of their rival claims. We have construed the aforesaid provision and considered it in light of the findings of the Judge as already summarized above. We agree with the Judge's finding that the appellants tendered no evidence before the trial Judge to show that the letters of allotment on which they had based their claim of proprietorship of the suit property had been registered in accordance with the provision of section **32** of the RTA; neither was there any evidence tendered to show that the 2nd respondent held title to the suit property on the basis of which it could derive authority to allocate it to the appellants.

The trial Judge also made observations, and correctly so in our view, that though the appellants had attributed fraud against the 2nd respondent, the latter neither filed a defence to the appellants' amended plaint, nor a replying affidavit or any other pleading either in support or in opposition to the 1st respondent's application. It elected to play the role of a neutral party both before the trial court and now before this Court. In the circumstances and in light of our reasoning already set out above, we find no basis for faulting the Judge's finding that the instruments of proprietorship relied upon by the appellants to resist the 1st respondent's claim of proprietorship of the suit property stood vitiated for want of registration in terms of the provisions of section **32** of the RTA.

Turning to the instrument of proprietorship relied upon by the 1st respondent, it is not disputed that the same was a grant duly issued, and registered under the provisions of section **23** of the RTA. It is common ground that upon such registration, the said grant became sanctified in terms of section **23** thereof, and could only be defeated by proven fraud in its acquisition, to which the 1st respondent as the title holder was proven to have been a party. Both parties agree that this is the correct position in law. That is why they both relied on the case of **Dr. Joseph Arap Ng'ok versus omoijo ole Keiwa & 2 others** (supra). In light of the holding in the above case, we agree with the Judge's finding that the appellants could only successfully resist the 1st respondent's application upon proof that the title on the basis of which the 1st respondent had moved to summarily defeat the appellants' amended plaint was tainted with fraud to which it was a proven party.

It was the appellants' contention that they had sufficiently pleaded fraud as against the first respondent in paragraph 9 (e) of the amended plaint. This is what was pleaded.

> ***1. "9(e) That alternatively and without prejudice to the foregoing paragraph, the 1st defendant fraudulently caused the Commissioner of lands to issue them with a grant over L.R.209/9968 also known as Plot No. 209/10/94 (the 1st and 2nd Plaintiffs shall crave the leave of the Court to join the Commissioner of Lands as a Defendant at the opportune time).***
>
> ***(Particulars of fraud to be supplied)"***

On consideration of the pleading in the above paragraph, it is our finding that the Judge cannot be faulted for holding that particulars of fraud pleaded by the appellants in the above paragraph were attributed to the 2nd respondent only, whereas those attributable to the 1st respondent were to be supplied at the "opportune time". None had been supplied as at the time the application was determined. The trial Judge cannot therefore in the circumstances, be faulted for holding, and rightly so in our view, that the appellants had not attributed any fraud as against the 1st respondent in the acquisition of the grant pursuant to which it asserted proprietary rights over the suit property and which proprietary right in terms of section **23(1)** of the RTA was indefeasible. In light of the above reasoning, it is our finding that the issue of ownership of the suit property as between the appellants and the first respondent was properly addressed by the Judge who correctly held that in the absence of any proven fraud attributable to the 1st respondent in the acquisition of the suit property, rendered the grant issued to it on the 30th day of March 2001, indefeasible in law. We find no misapprehension of either the facts or the application of the applicable principles of law to those facts.

The question as to whether the Judge properly appreciated the law on summary Judgment and striking out of pleadings are interrelated and will be dealt with as one. Starting with the prayer for striking out, this was premised on Order VI Rule **13(1) (b)** and **(d)** of the CPR (repealed), now Order **2** Rule **(5).** The principles that guide the Court in the exercise of its jurisdiction under the said provisions are as enunciated in **D.T. Dobie & Company (Kenya) Ltd versus Muchina [1982] KLR1**. These are *inter alia,* that, a pleading which does not disclose any reasonable cause of action or defence ought to be dismissed. Likewise, no suit ought to be summarily dismissed unless it appears so hopeless that it plainly discloses no reasonable cause of action and or is so weak as to be beyond redemption by way of an amendment. See also **Corporate Insurance Co. Ltd versus Nyali Beach Hotel Ltd CA No. 270 of 1996 (UR),** for the holding, *inter alia* that, summary procedure like striking out of suits, should not be allowed to become a means of a voiding a trial and obtaining immediate judgment. In other words, this procedure (of striking out) should not be resorted to save in the clearest of cases.

As to what amounts to an abuse of the Court process, in **Muchanga Investments Limited versus Safaris unlimited (Africa) Ltd & 2 others [2009] KLR 229,** the Court stated, *inter alia,* at page 246 line 21-29:- that an abuse of Court process occurs where the proceedings are filed for purposes extraneous to the pursuit of the truth of the claim laid.

Turning to the limb on summary judgment, likewise, the exercise of the Court's jurisdiction under Order **XXXV** Rule **1(1) (b)** (now order **36** Rule **1 (1) (b))** has been delineated by this Court. In **ICDC versus Deber Enterprises Ltd** [**2006] IEA75**, the Court stated, *inter alia*, that the purpose of an application for summary judgment is to enable the plaintiff to obtain a quick judgment where there is plainly no defence to the claim, while in **Kenindia Assurance Co. Ltd versus Commercial Bank of Africa & 2 others Nairobi CA No. 11 of 2000,** the Court stated, *inter alia*, that, summary procedure is a procedure resorted to in the clearest of cases. See also **Dhanjal Investments Ltd versus Shabaha Investments Ltd Civil Appeal No. 232 of 1997** for the reiteration that if the defendant shows a *bona fide* triable issue, he must be allowed to defend without conditions.

As to what constitutes a triable issue, the Court in **Kenya Trade Combine Ltd versus Shah, Civil Appeal No. 193 of 1991**, stated that all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. Second, that a defence which raises triable issues does not mean a defence that must succeed. All that the defendant is expected to do is to show, by whatever means he chooses whether by defence, oral evidence, affidavits or otherwise that his defence raises *bona fide* triable issues. Further, in **Dedan King'ang'i Thiongo versus Mbai Gatune, Civil Appeal No. 292 of 2000,** and **Bangue Indosuez versus DJ Lowe & Co. Ltd, Civil Appeal No. 79 of 2002**, the Court was categorical that where *bona fide* triable issues have been disclosed, the Court has no discretion to exercise with regard to a defendant's right to defend the suit.

Also cited was section 3A of the Civil Procedure Act which enshrines the inherent power of the Court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the Court. In **Equity Bank Ltd versus West Link Mbo Limited** [**2013], eKLR**, Musinga, JA stated *inter alia*, that, by "inherent power" it means that

> ***"Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from the Constitution or statute. Such power enables the judiciary to deliver on their constitutional mandate…..inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion."***

The Supreme Court went further in **Board of Governors, Moi High School Kabarak and another versus Malolm Bel**l [**2013] eKLR, t**o add the following:-

> ***"Inherent powers are endowments to the court as will enable it to remain standing as a constitutional authority and to ensure its internal mechanisms are functional. It includes such powers as enable the Court to regulate its intended conduct, to safeguard itself against contemplation or descriptive intrusion from elsewhere and to ensure that its mode of disclosure or duty is consumable, fair and just."***

Applying the above distilled principles of law to the rival arguments on these two limbs, we agree with the 1st respondent's contention that in the circumstances of this appeal, the appellants could only lay claim to a right to resist the 1st respondent's defence and counterclaim if they could have demonstrated before the trial Court that they had a superior title of proprietorship to the suit property to that of the 1st respondent. Second that the 2nd respondent held title over the suit property superior to that of the Commissioner of lands. Third, that, they had a plausible reply to defence and defence to the 1st respondent's defence and counter claim. Fourth,that they had initiated proceedings against the Commissioner of Lands to challenge his authority to allocate the suit property to the 1st respondent, which in our view, they never demonstrated.

The explanation the appellants advanced for their failure to controvert the 1st respondent's defence and counterclaim on the one hand and to enjoin the Commissioner of Lands to the proceedings on the other hand, was that the defence and counterclaim were filed simultenously with the application for striking out and entry of summary judgment. They however, failed to cite any provision of law or rule of procedure or case law which processes, solely on account of the 1st mentioned processes simultenously. precluded them from filing the above respondent's action of filing the above

It is also our observation from the record that the 1st respondent's application was filed on 16th November, 2006. Directions for the filing of submissions by the parties were first given on 22/07/2007, a period of eight months and six days from the date of the filing of the 1st respondent's application. It was not until the 27th October, 2009, when the 1st respondent filed their submissions, while the appellants filed theirs on the 3rd November, 2009. On 9th November, 2009 parties agreed to have the application canvased by way of written submissions, resulting in the impugned ruling delivered on the 29th April, 2009. It is our further observation that it took close to three years from the date the 1st respondent's application was filed to the date when it was finally set down for disposal.

In light of all the above observations, it is our view, that the appellants had sufficient time from the time the 1st respondent's application was filed and served on them to the time the same was heard *interpartes*, either to file the said process or if caught up with default on meeting timelines as stipulated in the rules, to seek leave of Court to file them out of time. Alternatively, to annex a draft of the said processes, either to the replying affidavit or a further affidavit to that effect. In their default to do so, the Judge had no option but to rule on the rival issues based on the record as it was before her, which record showed that the appellants had not demonstrated existence of any right to defend, in terms of principles of law highlighted above. The only reasonable inference that could be drawn from such default and which the trial Judge drew in our view was that they had none. There was therefore no basis for sustaining their amended plaint as against the 1st respondent.

Turning to the issue of the alleged Judge's failure to both appreciate and pronounce herself on the fact that the appellants were entitled to an interlocutory judgment as against the 2nd respondent for want of a defence against their amended plaint, and in respect of which the appellants had applied for interlocutory judgment against the 2nd respondent, our answers to that complaint is that, what the Judge was seized

of at that point in time was the 1st respondent's application for striking out of the appellants' amended plaint as against it (the 1st respondent); and entry of summary judgment in faour of the 1st respondent as against the appellants in terms of the uncontroverted defence and counterclaim.

Although it is not disputed that as at the time the 1st respondent sought the said relief, the 2nd respondent had infact entered appearance but filed no defence to the appellants' amended plaint and that the particulars of fraud pleaded by the appellants in their amended plaint were all attributed to the 2nd respondent, and which particulars the 2nd respondent had not controverted, the trial Judge could not, in our view, have failed to appreciate that the 1st respondent's application did not affect the appellants' right to pursue their rights over the suit property as against the 2nd respondent. It is also evident that at no time did the appellant invite the Court, either formally or informally, to pronounce itself on the appellants' claims as against the 2nd respondent, concurrently with the determination of the 1st respondent's application against them. The Judge was therefore entitled in the circumstances to refrain from making any pronouncement on matters that had not been specifically raised before her by the parties.

As for the peripheral issues, as to whether the amended plaint was scandalous, vexatious and or frivolous as well as the applicability or otherwise of the inherent power of the Court to the rival issues before the Judge, it is sufficient for us to state that the impugned ruling did not turn on those issues. There is therefore no need for us to belabour their applicability or otherwise to the issues in controversy herein.

Turning to the last issue, it was correctly contended by the appellants that the 1st respondent's counterclaim was devoid of a verifying affidavit as to its correctness in terms of the provisions of order **VII** rule **2(2)** of the Civil Procedure Rules (repealed). In light of the above default, the appellants have invited us to fault the Judge for her failure to address herself to this provision, arguing that the counterclaim being invalid, the 1st respondent's application which was anchored on it was not sustainable. This being an appeal, the guiding principle we are enjoined to apply is that enshrined in rule 104 of the rules of the Court. It provides:

> ***(a) No party shall, without the leave of the Court, argue that the decision of the Superior Court should be reversed or varied except on a ground specified in the Memorandum of Appeal or in a notice of cross-appeal, or support the decision of the Superior Court on any ground not relied on by that Court or specified in a notice given under rule 93 or rule 94.***
>
> ***(b) A respondent shall not, without the leave of the Court, raise any objection to the competence of the appeal which might have been raised by application under rule 84.***
>
> ***(c) The Court shall not an appeal or cross-appeal on any ground not set forth or implicit in the memorandum of appeal or notice of cross-appeal, without affording the respondent, or any person who in relation to that ground should have been made a respondent, or the appellant, as the case may be, an opportunity of being heard on that ground.***
>
> ***(d) The arguments contained in any statement lodged under rule 100 shall receive the same consideration as if they had been advanced orally at the hearing."***

Neither in the appellants' depositions in the replying affidavit nor their submissions on the record, have we traced any complaints raised by appellants with regard to that issue before the trial Judge for determination. The law is that, a party is bound by his/her pleadings. Our hands are therefore tied in terms of the above guiding rule. We cannot consider it now.

The upshot of the above reasoning is that, we find no merit in this appeal. It is accordingly dismissed with costs to the respondents.

Dated and delivered at Nairobi this 26th day of October, 2018.

R.N. NAMBUYE

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

Deputy Registrar