**IN THE COURT OF APPEAL AT NAIROBI**

**(CORAM: OKWENGU, MAKHANDIA & GATEMBU, JJ.A)**

**CIVIL APPEAL NO. 49 OF 2012**

**SAMUEL MUREITHI MURIOKI.....1ST APPELLANT**

**UNCLE SAM'S GITHURAI LIMITED.....2ND APPELLANT**

**AND**

**KAMAHUHA LIMITED.....RESPONDENT**

(An appeal against the Ruling and Order of the High Court of Kenya at Nairobi (M. Koome, J.) *delivered on 10th January, 2011* in **H.C.C.C. No. 286 of 2001)**

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**JUDGMENT OF THE COURT**

At the time of filing **Civil Suit Number 286 of 2001,** in Milimani Commercial Courts, Nairobi, a precursor to this appeal, **Kamahuha Limited** "*the respondent*", was a beer distributor for Kenya Breweries Limited within Githurai and Ruiru areas, its designated distributorship zone. Uncle Sam's Githurai limited "*the 2nd appellant*" then operated a bar at Githurai that stocked Kenya Breweries products supplied by the respondent as aforesaid. **Samuel Mureithi Murioki** "*the 1st appellant"* was a director and shareholder of the 2nd appellant. The relationship between the 2nd appellant and the respondent aforesaid had gone on for a while such that by the year 1995, the 2nd appellant owed the respondent a sum of Kshs. 1,000,000/- on account of Kenya Breweries Products sold and supplied to it but not paid for.

The 1st appellant as a director and shareholder of the 2nd appellant approached the respondent to negotiate the settlement of the aforesaid amount. He first proposed that land parcel No. **Ruiru/Kiu Block 6/228 "***the suit premises*" owned by the 2nd appellant be sold and the sale proceeds thereof of Kshs. 400,000 be utilised towards partial settlement of the debt which proposal the respondent readily accepted. However, the 2nd appellant was unable to get a purchaser of the suit premises. Both the appellants came up with a second option in which they now offered to sell the suit premises to the respondent at an agreed purchase price of Kshs. 4,000,000/- and use the proceeds thereof to fully settle the debt owed to the respondent. The offer was acceptable to the respondent. Before accepting the offer though, the respondent carried out a search at the Lands Registry which revealed that the 2nd appellant was the then registered proprietor of the suit premises. On that basis, the respondent and 2nd appellant executed a sale agreement. The respondent duly paid the agreed purchase price and the suit premises were subsequently transferred to it by the 2nd appellant, with the transfer of the lease being registered on 14th November, 1995, after which the respondent took possession of the suit premises.

Unknown to the respondent however, the 1st appellant had been advanced a loan of Kshs. 3,000,000/- by Standard Chartered Bank "*the bank*" and used the suit premises as security in 1994. As a consequence, a charge was registered over the suit premises in favour of the bank. This was followed by yet a further charge registered on 8th September 1995, again in favour of the bank to secure a loan of Kshs. 700,000/- also advanced to the 1st appellant by the bank. The 1st appellant was unable to service both loans and in or about the year 2000, the bank sent valuers to the suit premises with a view to carrying out a valuation for purposes of forced sale through public auction. It was then that the respondent realised that the suit premises had been charged to the bank long before it came into the picture. It was also at this point that it emerged that there were two title documents in respect of the suit premises dated 18th March, 1994 and 14th November, 1995 respectively in the name of the 2nd appellant.

The bank thereafter advertised the suit premises for sale by public action on or about 26th February 2001. Upon seeing the advertisement, the respondent in panic, sued the appellants as well as the bank as it was not prepared to suffer the loss of the suit premises valued at Kshs. 6,500,000/- at the time, having not only paid Kshs. 4,000,000/- but also spent a further sum of Kshs. 2,600,000/- in putting up an extra floor. Further, by the time of filing suit, it had been in continuous occupation of the suit premises for five years. By virtue of these set of facts, the respondent felt that it had become equitable owner thereof. It therefore offered to redeem the charge on condition that the suit premises would thereafter be transferred to it.

Contemporaneously, with the filing of the suit, the respondent also filed an application for interim injunction to restrain the appellants and the bank from charging, auctioning, advertising, disposing, selling or in any other manner dealing with the suit premises based on the facts

aforestated.

In response to the application, the appellants deponed that the 1st appellant had executed a charge, in favour of the bank, over a separate property being LR. No. Nairobi/Block 119/2847 as security for Kshs. 7,500,000 which the 1st appellant owed the bank. Having thus secured the debt, the 1st appellant believed that the bank should not cling to the suit premises as it would not suffer any irreparable loss. They also argued that the only fair resolution of the dispute was for the respondent to vacate the suit premises as it never owned it in the first place.

The bank also put up a spirited opposition pointing out that the respondent had conceded that the bank was never privy to the sale transaction between the respondent and the appellants; that the respondent having admitted that the documents it used to acquire the suit premises were forgeries, it must be deemed to acknowledge the authenticity of the security documents held by the bank; that since the 1st appellant had failed to make good the loan, the bank had every right to have the suit premises sold by public action, with a view to recovering the outstanding loan.

**Ochieng, J.** heard the application and in a ruling dated 16th November, 2006 granted the injunction against the appellants. He also ordered the respondent to redeem the charge on condition that the bank would hand over to it the title documents in respect of the suit premises together with a duly executed discharge of charge. The respondent duly complied with the terms of the aforesaid order.

Soon thereafter the appellants filed a defence that was subsequently amended. In their amended defence they conceded that there was a sale agreement between the 1st appellant and respondent with regard to the suit premises.

However, the 2nd appellant denied that there was any agreement of sale between it and the respondent, and further that there was no resolution of its directors for any such alleged sale, as it did not in the first place own the suit premises. That the 1st appellant had agreed with the respondent in writing to offer a new security LR No. Nairobi/Block 119/2847 after the previous one had proved unsustainable. The new security was valued at Kshs. 15,000,000/-. That the respondent's advocates then executed a charge in favour of the respondent to cover Kshs. 7,5000,000/-. As a parting shot, they claimed that the respondent could not hold onto the 1st appellant's title documents valued at Kshs. 15,000,000/- and still plead with the court to have the suit premises transferred and registered in its name as that would amount to unjust enrichment.

The defence tendered by the appellants enraged and provoked the respondent as in its opinion, it was scandalous, frivolous and vexatious, without substance and unarguable in view of the ruling by **Ochieng, J**. That it also raised no triable issues(s). That by the said defence, the appellants were merely trifling with the court as it did not answer the respondent's case. It was also the respondent's view that the defence demonstrated the appellants' *mala fides* by denying plain facts already established by the court. The defence too did not explain how the 2nd appellant obtained title documents in respect of the suit premises, and later sold it to the respondent when both appellants were aware that another title document was already in existence and had been charged to the bank. That the admission by the 1st appellant that the title documents were in his name and that he had obtained a loan from the bank against the title and his further admission that he sold the suit premises to the respondent without disclosure about the loan and that another title deed had in fact been issued to the 2nd appellant was fraudulent conduct. That reference to the charge over another property which charge was registered in favour of the respondent, without admitting that he had defaulted in payment of the amounts due over the charge was fraudulent as the charge did not in anyway absolve the appellants from paying the loan due to the bank; that the appellants' defence failed to acknowledge that following the ruling by **Ochieng, J**. the respondent had paid a further Kshs. 5,500,000/- to the bank in order to redeem the charge. The original title documents and discharge of charge had, as a matter of fact, been forwarded to the respondent's advocates by the bank's advocates, a fact well known to the appellants who had not offered to repay the amount at all. Finally, the respondent found the 1st appellant's blunt statement that he was willing to pay the respondent what was found owing yet a further demonstration of his *mala fides* and frivolous defence to the respondent's claim.

On the basis of the foregoing and persuaded that there was no valid defence to its claim, the respondent took out a chamber summons application in which it sought orders that; the appellants' amended statement of defence dated 31st July 2009 be struck out; that the 1st appellant be ordered to execute the transfer of the suit premises in favour of the respondent and to do all acts that are necessary to pass a good and valid title to the respondent; alternatively, the registrar of the Court do sign, seal and execute the said transfer.

The application was premised on the grounds that we have already stated hereinabove. Those grounds were further expounded and elaborated in greater detail in the supporting affidavit of **John Kiereini Kiriika**.

As expected, the application was opposed via a replying affidavit sworn by one, **Karen Wanjiku Thumbi**, "*Karen*" a director of the 2nd appellant. She deponed that the 2nd appellant did not enter into any sale agreement with the respondent.

The 2nd appellant did not also own the suit premises, thus the amended defence raised triable issues which should proceed for trial. Further she contended that the 2nd appellant never passed a resolution to sell the suit premises, moreover the 2nd appellant could not be liable for the acts of the 1st appellant who had no capacity to transact on its behalf.

The bank did not participate in this application as Ochieng, J had dismissed the injunction order sought against it by the respondent in the earlier application.

The application fell before **Koome, J.** (as she then was) for consideration and determination. In a ruling delivered on 10th January, 2011, the learned Judge held thus;

> **"Upon evaluation of the defence contained in the 2nd and 3rd amended statement of defence, it is not denied that the agreement was entered into and a transfer and charge were executed in favour of the plaintiff. Consideration was paid and the defence does not give an explanation of the origins of the fake title documents which were given to the plaintiff. Does this defence raise a triable issue? In the case of STORES VS. PEPCO DISTRIBUTORS LTD (1987) 2 KAR 89 where the**

**defendant used such generalized denial, Plat, J.A., held that: -**

'First of all a mere denial is not a sufficient defence in this type of case. There must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given.'

**The above observation resonates well with the facts of this case. The agreement, transfer, charge and possession of the suit premises were signed and given to the plaintiff. The 2nd defendant was the director of the 3rd defendant when he executed the documents under the 3rd defendants' seal. I am satisfied that plaintiff's case as presented in the plaint, the supporting affidavit and the ruling of Ochieng, J. all present a clear case for the plaintiff. It is clear that no useful purpose would be served by proceeding to hold a trial on the matters issues raised in the amended defence.**

**Accordingly I have no hesitation to grant the orders sought by the plaintiff's application dated 18th September, 2009 in the following manner; -**

**1. The 2nd and 3rd defendant's amended statements of defence dated 31st July, 2009 is hereby struck out.**

**2. The 2nd defendant to execute the transfer of a title No. Ruiru/Kui Block 6/228 in favour of the plaintiff within 30 days failure to do so the Deputy Registrar of this court to sign, seal, execute the transfer in favour of the plaintiff.**

**3. The plaintiff shall also have the costs of this application as against the 2nd and 3rd defendants."**

Aggrieved by the ruling, the appellants preferred this appeal on a plethora of grounds, suffice to say that the pertinent ones are; that the learned judge erred in law and fact in failing to hold that there was no resolution of the board of directors of the 2nd appellant to sanction the transaction between the respondent and 2nd appellant thereby rendering the transaction null and void; to find that when the respondent and the bank entered negotiations on the alleged fraud relating to the suit premises which led to the 1st appellant offering the respondent a substitute security that the respondent readily accepted, rendered the first transaction null and void; by holding that the second transaction was not a substitute, security for the 1st transaction but was for another debt of Kshs. 7,500,000/- which was

practically impossible; in not upholding the claim by the director of the 2nd appellant that her signatures were forged to facilitate the transaction which was a triable issue; in misinterpreting and misapplying the principles of law set out in the case of **Stores v Pepco Distributors Ltd (1987) 2 KAR 89**; in not holding that the issue of the 2nd security as raised by the appellant in their defence was a serious triable issue that warranted a full hearing; not taking into account the ruling by Ochieng, J. to the effect that the suit should proceed to full hearing to determine who was entitled to the suit premises, not considering the weight of the arguments presented in the appellants' submissions and list of authorities and finally, in misinterpreting and misapplying the principles of law with regard to striking out of pleadings.

The appeal came before us for formal hearing on 3rd October, 2018. **Mr. Macharia**, learned counsel for the appellants orally submitted on only two grounds of appeal, that is ground 2 and 3 thereof. They all relate to whether the defence raised a triable issue. To the appellants, paragraphs, 7 8 and 11 of the defence all raised triable issues. He blamed the court for misdirecting itself with regard to acts of fraud attributed to the appellants when there was no evidence. Counsel further submitted that the authority; **Stores vs. Pepco Distributors** (supra) was misinterpreted and misapplied by the learned Judge. Finally, counsel submitted that the appellants' defence was not idle or a mere denial.

Responding, **Mr. Kamaara**, learned counsel for the respondent submitted that the dispute was about the respondent being defrauded by the appellants. That the respondent on purchasing the suit premises took possession and improved it but unknown to it, the suit premises had two titles, one charged to the bank and the other one given to it. That it was forced to pay Kshs. 5,500,000/- to redeem the loan taken by the appellants. Thereafter, when it was in the process of effecting the transfer, it discovered to its horror that the suit premises had been transferred by the appellants to another 3rd party. It was clear therefore, that the appellants were involved in a series of frauds and if this court was to allow this appeal, it will be tantamount to sanitising fraud perpetrated by the appellants. The fraudulent scheme of the appellant ought to be stopped by this court declining the appeal. In a nutshell the respondent maintained that the defence was a sham, frivolous, vexatious, scandalous and mere denial that raised no triable issue(s) and that the trial judge was right in striking it out.

We have duly considered the pleadings, the ruling by the High Court, the record of appeal, respective oral submissions and the law. This is our take on the appeal.

Notwithstanding the maxim that striking out a pleading is a drastic remedy to be exercised with caution and only in plain and obvious cases, (see **D.T. Dobie vs Muchina**, **[1982] KLR 2)** this was to our mind, an appropriate case deserving of such remedy. In an application to strike out a pleading on the grounds that it is scandalous, frivolous and vexatious, the court looks at the pleadings themselves together with the affidavit evidence offered by the parties, as opposed to Order VI Rule 13(i) (a) where no evidence is offered and hence the need to exercise greater caution. Under Rule 13(1)(b), on which the application was hoisted, the court has to look at the pleadings and the affidavit evidence and determine whether they are scandalous, frivolous and vexatious. In the case of **Kobil Petroleum Ltd. v Kissi Petroleum Products Ltd, [2006] eKLR,** it was held that for a defence to be sustainable, it must disclose bona fide triable issues; that if a defence is hollow and contains bare denials devoid of sufficient material particulars, it should be struck out. The court was of course echoing what this Court said in **Postal Corporation of Kenya v I.T. Inamdar & 2 Others [2004] KLR 359,** that a defence that does not raise bona fide triable issues should be struck out. The legal principle and policy was expressed thus:

**"With a view to eliminating delays in the administration of justice which would keep litigants out of their just dues or enjoyment of their property, the court is empowered in an appropriate suit, to enter judgment for the claim by the plaintiff under a summary judgment procedure..."**

In **Mpaka Road Development Limited v Kana [2004] 1 EA 124,** a defence was struck out for being frivolous and vexatious when the court found that the defendant's denial of the existence of a tenancy amounted to metaphorically running with the shares and hunting with the hounds at the same time. The defendant in that suit resisted the plaintiffs' claim to arrears of rent by averring that the lease had been surrendered to a company in which he was a director, but also claimed damages for unlawful distress.

The court found that line of defence taken by the defendant, as well as by the company were contradictory and unmaintanable. The company to which the tenancy had allegedly been surrendered also made a counterclaim for damages for unlawful distress for rent. The court found the defence not to be a serious one even after defendants' counsel stated that they were alternative pleas. The pleas were found both frivolous and vexatious.

In **Kenya Airways Ltd. vs Classical Travel and Tours Ltd., (2003) LLR 2704 (CCK)**, the court held that pleadings were frivolous if they are clearly unsustainable and lacked in substance and unarguable. Quoting English decision based on provision of the Supreme Court Rules which is in *pari materia* with **Order 2 Rule 15**, the court went on to hold that pleadings are also frivolous if putting them forward for trial would be wasting the court's time, lacks foundation or they cannot simply succeed.

As already stated, the respondent's application to strike out the appellants' defence was hinged on the claim that it was scandalous, frivolous, vexatious, lacking in substance and unarguable. However, the appellants took the view that their averments in paragraphs 7, 8 and 11 of the defence raised triable issues which required adjudication by way of a full trial. In paragraph 7, the appellants pleaded that the 1st appellant agreed in writing with the respondent to offer new security in LR. No. NBI/Block/119/2847, whereas in paragraph 8, they pleaded that the respondent's advocates executed a charge in favour of the respondent in respect of the new security. Finally, in paragraph 11, they pleaded that the respondent did not stand to lose the suit premises as its debt had been secured by the new security. Can these pass for triable issues? We do not think so and this is why.

Firstly, the respondent elaborated in its amended plaint as well as in the supporting affidavit, how the 1st appellant as director of the 2nd appellant approached him in November 1995 with a request that the indebtedness by the 2nd appellant to it on account of Kenya Breweries products it had supplied be settled by the sale of the suit premises to it by the 2nd appellant. The request was acceded to, culminating in the signing of the Agreement of Sale. The facts of this sale agreement and the terms thereof were admitted by the appellants in their defence. However, the 1st appellant suddenly made an about turn and stated that there was in fact a separate agreement between him and the respondent for him to sell the suit premises to the respondent. Curiously, the alleged agreement, if at all, was not identified by any date nor was it referred to anywhere in the replying affidavit by the 1st appellant. It was thus scandalous for the 1st appellant to accept or admit the sale agreement between the 2nd appellant and the respondent and simultaneously state that there was a second agreement between him and the respondent for the sale of the same suit premises. The scandal is all the more apparent when it is noted that the 1st appellant as director of the 2nd appellant signed the sale agreement and witnessed the affixing of the Common Seal of the 2nd appellant to the Sale Agreement. Further, the 1st appellant stated nothing in response to a letter dated 19th July, 1998 written by the 2nd appellant and signed by himself as a director of 2nd appellant confirming that indeed the transaction of sale in favour of the respondent by the 1st appellant had been completed, all payments made and title documents released to it.

Secondly, the 1st appellant signed the agreement of sale, the transfer and the letter dated 19th July 1998 with full knowledge that the 2nd appellant was not the registered owner of the suit premises but instead he was not only the registered owner but also that he had borrowed funds against the title and caused a charge and a further charge to be registered against the title of the suit premises in favour of the bank. In doing so, we must accept as indeed the trial judge held that the 1st appellant acted in a fraudulent manner and his statements in the defence to the contrary must be taken with a pinch of salt. It was ridiculous for the 1st appellant to plead in his defence that the 2nd appellant had nothing to sell to the respondent, when he knew all this, but did not disclose it to the respondent at the time of the negotiations leading to the sale agreement. This belated disclosure avails him no defence at all against the respondent's claim to the suit premises. Yet, the 2nd appellant in the same defence denied that it sold the premises to the respondent. The 2nd appellant further denied that there was an agreement of sale between it and the respondent. But the 1st appellant as a director of the 2nd appellant conceded to the agreement. The 2nd appellant then made a radical departure and claimed that there was no sale by the 2nd appellant because there was no resolution by its directors to the transaction and that in any event, it did not own the suit premises.

From this set of facts, there is no doubt that the 2nd appellant's position amounts to admission that it executed the agreement, together with the transfer of lease fraudulently for it knew that it did not own the suit premises yet it presented a false Certificate of Lease dated 3rd October, 1995 to the respondent in which it was shown that it was the registered proprietor of the suit premises.

The 2nd appellant in the amended defence made a mere and bare denial of the facts of the sale of the suit premises to the respondent in terms of the sale agreement whose details, terms and conditions were expressly spelt out in both the amended plaint and in the supporting affidavit. However, in the amended defence, the 2nd appellant denied that there was any agreement of sale between it and the respondent. Surely, this amounts to a mere and bare denial, which does not traverse or answer the substantial pleadings contained in the amended plaint. In the premises, this can only be termed as a sham and idle defence liable to be struck out. A party who has duly executed a sale agreement which is extensively reproduced in the pleadings should not be allowed to answer it with a bare denial of what is clearly a documented fact. There was no better scandalous, frivolous and vexatious defence than this, in our view.

Karen witnessed both the agreement of sale and the transfer. However, in her replying affidavit to the application, she deponed that the 2nd appellant never entered into any sale agreement with the respondent. The respondent had however exhibited the agreement of sale in its supporting affidavit duly sealed by the 2nd respondent and witnessed by Karen as director of the 2nd appellant as well as by the 1st appellant also a director. Given the foregoing, Karen and the 2nd appellant cannot be said to have been truthful in their depositions.

The 2nd appellant also deponed that it never at any one point owned the suit premises and as such had no title to transfer. If the 2nd appellant did not own the suit premises as it claims, it merely denies ownership without explaining how come the Certificate of Lease was issued in its name or what Karen was witnessing when she signed the agreement of sale and the transfer of lease. The replying affidavit by Karen, given the foregoing, amounts, in our view, to admission that the 2nd appellant knowingly, wilfully and fraudulently entered into an agreement for the sale of the suit premises with the respondent at a time when both the 1st appellant and itself knew that the 2nd appellant

did not own the suit premises. Both the 1st appellant and Karen were directors of the 2nd appellant. Both were witnesses to the sealing of the agreement and the transfers. Thus a denial by one of them that the agreement was not entered into by the 2nd appellant is a spurious statement without any foundation whatsoever.

The 2nd appellant claimed that it never passed a resolution to dispose off any of its properties and therefore the 1st appellant never had capacity to act on its behalf and as such, the agreement was null and void *ab initio*. We think this was a convenient way of explaining its fraudulent conduct. It cannot be allowed to blow both hot and cold, to approbate and reprobate both in the defence and in the replying affidavits. In one breath the 2nd appellant took the position that no agreement of sale had been executed in favour of the respondent. In another breath, it stated that no resolution had been passed by it to sell the suit premises. Yet its directors signed and witnessed the sale agreement as well as the transfer. What was the rationale for them to sign and witness these documents knowing only too well that the 2nd appellant did not own the suit premises and secondly, there was no board resolution to sell? It was too late in the day for the 2nd appellant to disown the 1st appellant's capacity to bind the company, after it had taken full advantage of the agreement of sale and the purchase price having been paid to it. The 2nd appellant cannot be allowed to benefit from its wrong doing and mischief. This is an old maxim of law. See the case of **Nebro Properties Limited vs Sky Structures Limited [2002] 2KLR, 299**.

In our view, the 2nd appellant was simply splitting hairs with a view to defeating the respondent's legitimate and valid claim to title of the suit premises. It is instructive that this appellant said nothing regarding the clearing of the debt due to the respondent and also the fact that the respondent had been in possession and occupation of the suit premises since 1995, if there was no agreement of sale of the suit premises. We agree with the respondent's submission that whether a company has or has not complied with its internal procedures as to execution of contracts is an internal management issue and cannot afford a defence to a third party dealing with the company. This is an old principle first propounded in the case of **Royal British Bank v. Turquand** 1856 A 11 E.R. 886 and now commonly known as the rule of Turquand's case. In the case of **Ashok Morjaria v Kenya Batteries [1981] Ltd. & 2 others, [2002] eKLR,** the principle was reiterated thus:

> **"So where, as here, a director of a company executes a loan agreement on behalf of the company and stamps it with a company stamp, as the second defendant did, the company cannot wriggle away from its obligations to pay by contending that the borrowing was not authorised, or one director's signature was not enough or the company seal was not affixed to the agreement if what he did was within his ostensible authority as director of the company as in deed it was."**

Karen also deponed that by a resolution passed on 12th April 2009, she was appointed by the company to be the only director authorised to sign legal documents pertaining to the dispute. It is not lost on us that the resolution was passed on 12th April 2009. The suit was filed way back in 2001, and the sale of the suit premises was in November 1995. Why, one may ask, did it become necessary in April 2009 to expressly pass a resolution regarding the case, which had been pending in court since 2001. Had there been a dispute as to the 1st appellant's lack of authority to bind the company as its director, such resolution would surely have been passed way back in 2001 when the case was filed. Again, although the resolution was purportedly made in April 2009, it was not filed with the Registrar of Companies until 13th October 2009 while the application leading to this appeal was pending hearing. The resolution was nothing more than a desperate attempt on the part of the appellants, to raise an issue that was even not pleaded in the defence.

The 1st appellant on his part did not deny that he was a director of the 2nd appellant. He admitted that there were agreements between him and the respondent, and 2nd appellant and the respondent. However, the alleged agreement between him and respondent was not as already stated, exhibited nor its terms and conditions alluded to either in the defence or in the 1st appellant's replying affidavit. The 1st appellant's simple statement in the defence that there was an agreement between him and the respondent with regard to land parcel No. Ruiru/Kiu Block 6/228 and without such agreement or its terms and conditions being exhibited or spelt out, amounts to no more than a mere and bare statement in defence which truly raises no triable issue at all.

Having stated that there existed an agreement between the 2nd appellant and the respondent for the sale of the suit premises to the respondent, how can he then proceed to state that he himself had an agreement with the respondent for the sale of the same suit premises. How can there be two agreements by two different vendors for the sale of the same suit premises to the same purchaser?

In our view, the 1st appellant was only referring to a nonexistent agreement between himself and the respondent with the intention of clouding the plain, obvious and simple facts of the fraud perpetrated upon the respondent by the appellants. The 1st appellant as director of the 2nd appellant knew only too well that the suit premises were registered in his own personal name. This appellant also knew that he had caused a legal charge of Kshs. 2,000,000/- to be registered against the title as early as 6th September 1994 and a further legal charge for Kshs. 700,000/- registered against the same title on 8th September 1995. Notwithstanding this knowledge, this appellant went ahead and somehow managed to obtain from the lands office, a Certificate of Title in favour of the 2nd appellant on 3rd October 1995, barely thirty days after he had caused the legal charges aforesaid to be registered against the title to the suit premises. The 1st appellant no doubt with full knowledge and connivance of the other director of the 2nd appellant misled the respondent to execute sale agreement for the sale of the suit premises. These facts disclose criminal and fraudulent acts on the part of the appellants which render the defence scandalous, frivolous and vexatious, and a candidate for striking out.

These facts were clearly established by **Ochieng, J** in the earlier application for injunction filed by the respondent. The facts set out in the ruling of the learned judge have not been challenged on appeal or review by the appellants or any one of them. The judge found as a fact that the appellants had acted in a fraudulent manner by holding two title documents to the suit premises, taking one title document to the bank to borrow funds, and purporting to sell the same suit premises to the respondent using the second set of title documents. The Judge also found as a fact that the 1st appellant did not offer any explanation as to why the appellants ended up having two title documents over the same suit premises and why the 1st appellant did not disclose to the respondent that he had borrowed loans from the bank and charges registered against the title. These facts as found by the Judge were uncontroverted. The feeble answers by the 1st appellant in the defence amount to nothing but spurious statements of a scandalous, frivolous and vexatious nature.

In sum, the defence filed by the appellants was not serious and the pleas by the appellants contradictory. The 1st appellant could not be taken seriously when he claimed that he had a sale agreement with the respondent to sell the suit premises and at the same time his company, the 2nd appellant had a similar agreement. There cannot have been two separate agreements to sell the same suit premises from

the appellants at the same time without either one or both of them having manifest intention to defraud the respondent, or to defeat the respondents claim to the suit premises. The defence was made even vainer when the 2nd appellant claimed that there was no agreement of sale between it and the respondent. These contradictory statements rendered the defence unmaintanable, not serious, frivolous, vexatious, leave alone scandalous.

Again, the 2nd appellant cannot itself rely on lack of a board resolution to authorise the sale of the suit premises and at the same time allege that it had never owned the property. This line of defence was no doubt frivolous, vexatious and scandalous. The 2nd appellant could not claim that it had no agreement with the respondent thereby contradicting its own director, the 1st appellant and in the same breathe contend that the 1st appellant had no authority to bind the 2nd appellant.

It is a spurious and sham defence when the appellants resorted to the resolution authorising the director to deal with the case passed after the case was filed and during the pendency of the application to strike out the amended defence. The 2nd appellant could not be taken seriously when it alleged that only Karen had authority to bind it in matters to do with this case, following a company resolution filed after the application was pending in court, and yet the same director had signed the agreement of sale as well as the transfer and witnessed the Common Seal of the company way back in 1995.

The pleadings set out above clearly lack in *bona fides*, and were quite hopeless and oppressive to the respondent. Clearly the contradictory pleas made by both appellants were unarguable and would have led to a waste of the court's valuable judicial time, and could not succeed, as the learned trial judge rightly held.

All the evidence offered by the appellants read together with both the plaint and the defence demonstrated quite clearly that the defence was scandalous, frivolous and vexatious and was rightly struck out with costs.

Lastly, whether or not to grant an order striking out a pleading is an exercise in discretion by the trial court. In other words, at the end of the day, the overriding principle is that striking out a pleading is not granted as of right by the court and the court has discretion to grant or not to grant the order in all situations. Since the court has this wide discretion with the only fetter being that it has to be exercised judiciously and with reason, it is the court's sense of balance and justice to put various competing interests on the scale before giving or refusing the order.

Being a discretionary remedy, there is ample authority that a party who has mis- conducted himself, as the appellants herein, in the eyes of equity will be denied the remedy. See **Kenya Hotels Ltd. Vs Kenya Commercial Bank & Anor [2004] 1 KLR.** Certainly, the conduct of the appellants in the transaction was fraudulent, brazen, capricious, and cavalier, to say the least, hence undeserving of the court's exercise of discretion in their favour by refusing the application.

Since this was a discretionary remedy, it is imperative at this juncture to revisit the principles that guide an appellate court in considering whether to interfere with the exercise of discretion by the trial court. This court in the celebrated case of **Mbogo v Shah [1968] EA 93** conveniently summed up the guidelines. **Sir Charles Newbold P; J.A** summarised the position thus:

> **"A court of appeal should not interfere with exercise of 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 had arrived at a wrong decision or unless it is manifest from the case as a whole that the judge had been clearly wrong in the exercise of his discretion and that as a result there has been misjustice..."**

We are unable to discern any misgivings in the trial court's exercise of discretion, nor has the appellant dislodged the above principles. There was no misdirection in the trial court's exercise of discretion, nor can it be said that the trial court was clearly wrong in the exercise of such discretion. The trial court paid due regard to the principles governing the striking out of pleadings. Indeed the trial court made specific reference to the case of **Stores v Pepco Distributors** (supra) in this regard. We do not agree with submissions by the appellant therefore that the trial court misapplied or misinterpreted the test laid in the aforesaid case.

The appeal accordingly fails and is dismissed with costs to the respondent.

**Dated and delivered at Nairobi this 20th day of December, 2018.**

**H. M. OKWENGU**

**…….....**

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

**…….....**

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb.**

**……..**

**JUDGE OF APPEAL**

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

**D EPUTY REGISTRAR**