IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A)

CIVIL APPEAL NO. 217 OF 2015

KIVANGA ESTATES LIMITED …….. APPELLANT

VERSUS

NATIONAL BANK OF KENYA LIMITED ……...…….. RESPONDENT

(An appeal from a Ruling and Orders of the High Court of Kenya at Nairobi (Havelock, J.) dated 31st day of July, 2014

in

H.C.C.C. NO. 479 OF 2010)

****

JUDGMENT OF THE COURT

It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction, capable of bringing a suit to an end before it has even been heard on merit, yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations.

Although the court exercises discretionary powers in striking out pleadings, because of its far reaching consequences, **order 2 rule 15** of the Civil Procedure Rules, has established clear principles which guide the court in the exercise of that power in the following terms;

> ***"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 <u>to be stayed or dismissed or judgment to be entered</u> accordingly, as the case may be." (Our emphasis).

The language as highlighted demonstrates that, as a drastic measure in litigation, the remedy must be resorted to sparingly. It is only where a pleading cannot be salvaged by an amendment that the court will utilise this procedure, hence the use of the word "may". **Order 2 rule 15** which retains word for word

Order VI rule 13 of the repealed Civil Procedure Rules has been construed over the years in a long line of cases, both by this Court and the courts below. For instance in **<u>Co-Operative Merchant Bank Ltd.</u> vs <u>George Fredrick Wekesa</u>** Civil Appeal No. 54 of 1999 the Court summarized the principles as follows;:

"The power of the Court to strike out a pleading under Order 6 rule 13(1) (b) (c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong.....Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact....A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment."

See **<u>Yaya Towers Limited</u> vs Trade Bank Limited (In Liquidation)** CivilAppeal No. 35 of 2000 and **<u>DT Dobie & Company (Kenya) Ltd</u> vs <u>Muchina</u>**(1982) KLR 1.

We think we have set out the law sufficiently for us to turn to its application to the facts in this appeal.The appellant, Kivanga Estates Limited obtained certain financial facilities from the predecessor in title of the respondent, Kenya National Capital Corporation Limited in 1987 on the security of **PLOT NO.1112/19 Embu Township**. "the suit property" When the respondent threatened to realize the security in the exercise of its statutory power of sale alleging default on the part of the appellant, the latter instituted Meru H.C.C.C No. 320 of 1990. Oguk, J. heard the application for injunction which had simultaneously been brought with the suit and rejected it. It is not clear what became of the suit after the dismissal of the application.

It was however argued by the respondent that when it advertised the sale of the suit property following the dismissal of the application, the appellant rushed to court once again, in 1996, this time in Nairobi and filed H.C.C.C No. 3011 of 1996 (O.S) to restrain the respondent from selling the suit property. Seven (7) years later the suit remained unprosecuted and was dismissed on 17th July, 2003 for want of prosecution. Undeterred, the appellant, yet again filed in the High Court at Meru, H. C. C. C No.111 of 2004 for declarations that the attempts to recover the money under the charge was time barred, that the appellant was entitled to an unconditional discharge, and that the appellant's obligation under the charge had become frustrated and it was discharged from further performance. For those reasons the appellant applied that the respondent be restrained by an order of permanent injunction from interfering with the suit property. That suit, for reasons which are not apparent from the record, was transferred to Nairobi and allocated H. C. C. C No. 2 of 2004. On 25th February, 2010 that suit was dismissed for failure to comply with the orders of 27th January, 2009 on discovery.

Then on 13th July, 2010 came Nbi H. C. C. C No. 479 of 2010, which is the subject of this appeal. In it the appellant, once more sought to have the respondent?s claim declared out of time, the charge and debenture discharged and an order for permanent injunction to stop the sale of suit property.

Apparently, there may have been more than these four suits. According to the ruling of Njagi, J. dismissing H. C. C. C. No. 2 of 2004, in 1991 after the filing of No.320 of 1990 in Meru, the learned Judge alluded to the existence of Embu PMCC No.74 of 1991 filed by the appellant in the subordinate court at Embu. It's outcome, again, is not apparent from the record

The respondent in reaction to this latest challenge on its statutory power to sell the suit property took out a motion on notice pursuant to **order 2 rule 15 (1) (b)** and **(d)** of the Civil Procedure Rules to have the suit struck out with costs for being frivolous, vexatious and an abuse of the court process. Specifically the

respondent was vexed by the fact that the appellant had filed multiplicity of suits over the same subject matter for many years with no prospects in sight of stopping; that the appellant through these suits is determined to prevent it from exercising its statutory power of sale, yet the appellant remains in default of the facility; and that the latest suit, to which this appeal relates, was just another attempt to bar the respondent from realizing its rightful security.

Havelock, J. considered the arguments made before him on the application by both sides and concluded that, from the history of the dispute, the appellant, in instituting the present suit, was in clear breach of **section 7** of Civil Procedure Act, that suit was *res judicata* previous suits; that all the previous suits were unanimous that it was within the respondent?s statutory power to realize the security hence the re litigation on the same subject matter involving the same cause of action and parties was *res judicata.*

Guided by the decisions of this Court and those of the High Court in **Nicholas Njeru v The Attorney General & 8 Others**, HCCC No. 60 of 2012, **Geoffrey M. Kabethi** v **Peter W. Njogu & Another** ., ELC No. 411 of 2013, **Loise M. Gachinga & Ano**. v **Stephen Kiiru Mugo & Another** ., ELC No. 62 of 2013, **Michael C. Toroitich** v **Peter M. Y. Chebii**, HCCC No. 58 of 2012 , **Enock K. Muhanji** v **Hamid Abdalla Mbarak** Malindi Civil Suit No. 58 of 2012 (2013) eKLR, and **Mwaniki Kibui** v **Jane M. Waweru & 6 Others**. ELC No. 66 of 2012, the learned Judge concluded that;

> ***"I find that not only has the Defendant succeeded in so far as the plea in bar of res judicata is concerned but and more particularly, I fully concur with its submission that this suit is a gross abuse of the***
>
> ***Court's process, it is frivolous, it is intended to vex and unnecessarily embarrass the Defendant. I have no hesitation in striking out the suit on the basis of Order 2 rule 15 (1) (b) and (d) as above. The Defendant will have the costs of this suit accordingly. Further, the advocates for the Plaintiff should note that a following the principle of finality in litigation, they run the risk of being condemned in costs themselves by continuing to advise their client, the Plaintiff, to pursue what amounts to an abuse of the Court's process."***

At the beginning of this judgment we have set out what guides courts in an application for striking out of pleadings. We reharsh them here one more time. Striking out a pleading, though draconian, the court will, in its discretion resort to it, where, for instance, the court is satisfied that the pleading has been brought in abuse of its process or where it is found to be scandalous, frivolous or vexatious. Where the court below has properly addressed itself on these principles, and is satisfied, upon assessment of the material before it that any of the grounds enumerated under order **2 rule 15** exists, as an appellate court, this Court will not interfere with the exercise of the former?s discretionary power to strike out the pleading.

We entertain no doubt whatsoever that by engaging nearly all levels of the court system for the last 27years!, filing one suit in one court after the other, moving from Embu, Meru, to Nairobi, amounts to gross abuse of the process of the court. The learned Judge properly balanced the two competing interests: the public interest in ensuring that there is finality in litigation (and that a party should not be „stung? twice in the same matter), and the private interest of a party guaranteed by the Constitution to access the courts. He kept in mind the fact that in all the circumstances, the appellant was misusing or abusing the court process by seeking to raise before it the issue which it had raised before in previous suits, some of which may still be pending. The court will look closely at the conduct of the party bringing subsequent proceedings in respect of the same matter in order to prevent abuse of its process and it has the power, in case of abuse of its process to *ex debito justitiae* prevent it.

There is no greater duty for the court than to ensure that it maintains the integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by, amongst other measures, stopping litigations brought for ulterior and extraneous considerations. The courts, litigants and counsel are enjoined by both the Constitution and the law to assist the court to further the overriding objective for the just determination of the proceedings; the efficient disposal of the business of the court; the efficient use of the available judicial and administrative resources; the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the parties.We believe the

learned Judge had this in mind when he warned counsel for the appellant of the risk of an order of costs being made personally against him if he continued to bring more actions on the same dispute.

In the result and with respect we agree with the conclusion of the learned Judge that although none of the previous suits were determined on merit, the fact that they were abandoned before determination and fresh ones brought was in itself an abuse of the process of the court sufficient under **order 2 rule 15 (1) (b)** and **(d)** to justify striking out.

The appellant also relied on **rule 15 (b),** that the application was scandalous, frivolous and vexatious.

> ***"A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action?"*** *See* ***Trust Bank Limited v Amin Company Ltd & Another*** (2000) KLR 164.

There cannot be any doubt that the foregoing sentiments represent what the appellant has been engaged in. It is our duty as it was the learned Judge's to remind the appellant that the sooner it sorts out this dispute by settling the debt the better for it and that, the stage at which it has reached, it does not matter how long it takes, it will still settle it.

We find no fault in the manner the learned Judge exercised his discretion. He came to the correct conclusion that what the appellant has been engaged in over the years was not only an abuse of the process of the court but also actuated by bad faith, meant to cause the respondent anxiety and unnecessary expense.

This appeal lacks substance and is just another venture to vex the respondent. It is accordingly dismissed with costs.

Dated and delivered at Nairobi this 24th day of March, 2017

ASIKE-MAKHANDIA

……..……

JUDGE OF APPEAL

W. OUKO

……..……

JUDGE OF APPEAL

K. M'INOTI

……..

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR