IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO.73 OF 2016

BETWEEN

EVANSON JIDRAPH KAMAU WAITIKI……..APPELLANT

AND

KENYA POWER & LIGHTING COMPANY LTD ….RESPONDENT

(Being An Appeal From The Ruling And Order of the Environment and Land Court of Kenya at Mombasa (A. Omollo, J.), dated 13th July, 2016 in ELRC Case No. 346 of 2014)

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JUDGMENT OF THE COURT

The history of Waitiki farm is well documented. Part of that history is related in the pleadings filed in the court below. It is a history of how, in 1975 or thereabouts, the attention of a young Evanson Kamau Waitiki, was drawn to an advertisement in the then *East African Standard* for the sale of a farm measuring over 900 acres in the Likoni area, Mombasa known as **LR. MOMBASA/MAINLAND SOUTH/BLOCK 1/363, 1/1031, V/109** and **V/110** (the suit land). At the time he was only 30 years old and had briefly returned home from Japan where he was working with an international geothermal energy company. After negotiating with the owner, a Canadian who was, for some reason in a hurry to leave the country, an agreement was reached and in 1975 the appellant and his late wife **Bertha Wanjiru Kamau** jointly bought the farm from Gulb Wood Company Limited, in whose name it was registered. After this he decided to relocate to Kenya and embarked on full-scale farming producing fresh milk, beef, chicken and fruits which he sold in South Africa, Europe and Saudi Arabia.

Then in 1999 came the infamous Likoni clashes whose result led to, among other things, the forceful eviction of the appellant from the suit land. In the process, the raiders destroyed property, slaughtering cattle and chickens. In the period subsequent to these events, squatters invaded and settled on the suit property. Even though the clashes ended soon thereafter, it has taken over 18 years for the appellant to get a relief, despite many court orders in his favour for vacant possession. Last year (2016) the Government reached an agreement with him to purchase the suit land from him for the benefit of those who had settled on it to avoid protracted law suits and future conflicts.

The matter before us has very little to do with this history. Its only relevance to this appeal is that, while the appellant was in court trying to evict those in illegal occupation of the suit land, the Kenya Power & Lighting Company Limited, the respondent, without the appellant's permission was busy erecting electricity poles, installing transformers, laying out electricity cables and connecting electricity power

supply to the houses and structures on the suit land.

On 14th May, 2012 the appellant instituted an action against the respondent for general damages, an order directing them to remove all the power lines, transformers, meters and other installations and an order for a permanent injunction to restrain the respondent from trespassing upon the suit land.

Following the aforesaid recently concluded negotiations and the ultimate agreement between the Government and the appellant over the sale of the suit land, on 7th April, 2016 the respondent took out a notice on motion in the High Court for orders that the appellant's suit be struck out on the grounds that it was scandalous and an abuse of the process of court. The application was premised on the events of January, 2016 when the Government issued title deeds to those in occupation of the suit land. The respondent believed that that could only happen after the Government had compensated the appellant, using public funds; that the respondent as a public limited liability company and an agency of the Government, the appellant's claim against it was indeed a claim against the public; that it was obvious that in negotiating with the Government, the appellant being aware of the installations by the respondent, must have borne in mind the installations and included them in the agreement his claim against the respondent in so far as those installations were concerned; that, therefore the compensation awarded by the Government to the appellant must have taken into account the respondent's claim in the suit pending before the High Court; that the appellant's claim would amount to unjust enrichment and against public policy; and that the minute the Government paid him for the suit land, the appellant ceased to be the owner and cannot pursue any claim in respect of it.

In reply, the appellant conceded that on 6th January, 2016 he entered into an agreement with the Government over the sale and transfer of the suit land; that the respondent's attempt in the course of negotiations leading to the agreement between him (the appellant) and the Government to have the suit against it by the appellant compromised on these very grounds was rejected; that the respondent was guilty of trespass on the suit land where it had connected power to over 10000 households; that the appellant was only concerned with the claim of trespass committed before the sale and transfer of the suit land and not after; that other than trespass, the appellant was also seeking to enforce against the respondent a claim for breach of statutory duty under **Sections 46** and **52** of the Energy Act.

Omollo, J heard the arguments and collapsed the issues involved into two; **whether the plaintiff's claim was extinguished upon purchase of the land by the Government of Kenya and whether the claim was statute barred.**

She found that it was a conceded fact and a matter of public knowledge for which she took judicial notice that the suit land was purchased by the Government after which the Government issued title deeds to the squatters on the land; that thereafter the appellant had no interest on the suit land; that following the purchase and transfer of the suit land the claim for mandatory injunction to direct the respondent to remove the installation and one for permanent injunction were inapplicable, leaving only the claim for damages for trespass. On that question the learned Judge reached this conclusion;

> ***"My interpretation of this is that whatever action that previously was an act of trespass now ceased to be. If the squatters are no longer called trespassers but now are owners of the suit land then I do not see why the defendant's infrastructure on the land would still amount to trespass. In my opinion the transaction between the plaintiff and the government compromised the suit."***

Appreciating the centrality of the terms of settlement contained in an agreement between the Government and the appellant, the learned Judge held the view that the agreement ought to have been produced by the appellant who failed to do so; and that under **Sections 107** and **108** of the Evidence Act it was the party alleging who was required to prove the alleged facts. She stated that;

> ***"The respondent has not denied receipt of compensation from the Government of Kenya. In this instant, (sic) it was also incumbent upon him to rebut the allegation put forth by the defendant that the compensation paid did not include a settlement of this claim to enable him to***

sustain this suit. He intentionally did not annex a copy of the settlement agreement.

In light of the above observation, I am of the opinion that the effect of the settlement having regularised what was previously an action of trespass, the plaintiff's claim cannot be sustained against the defendant due to that settlement. The tort of trespass is only maintained where the claimant is the owner of the land".

On the second issue, whether the claim was time barred the learned Judge found the respondent's actions on the suit land constituted acts of "continued trespass", hence the action could not be time barred. In the whole she came to the conclusion that the application was merited. She allowed it and went ahead to strike out the appellant's suit but ordered each party to bear their own respective costs.

This appeal challenging that decision has been brought on 12 grounds which were argued in six clusters, with the first cluster faulting the manner in which the learned Judge exercised her discretion to strike out the suit. The appellant in support of this submission relied on the oft-cited passages from ***D.T. Dobie & Company (Kenya) Limited v. Muchina (1983)KLR 1, Kisii Farmers Cooperative Union Limited & Another v. Sanjay Natwarlal Chauhan T/A Oriental Motors Civil Appeal No.32 0f 2003*** and ***Nitin Properties Ltd v. Kalsi and Another (1995-1998) 2 EA 257***.The second ground is to the effect that the learned Judge failed to appreciate that the suit was based both on the torts of trespass and breach of statutory duty; that the learned Judge misdirected himself by shifting the burden of proof to the appellant to prove, by producing the sale agreement between it and the Government, its terms and the fact that the suit had been compromised; that the learned Judge overlooked the doctrine of privity of contract since the respondent was not involved in the negotiations and the eventual sale agreement; that the respondent with its corporate character could be sued for trespass; and that the learned Judge erred in making final determination of important issues without hearing the parties.

The respondent for its part insisted that it was a matter of public knowledge that the Government fully compensated the appellant and there was nothing left in respect of the suit land that the appellant could claim; that the sale agreement was broad enough to constitute an all inclusive compensation leaving nothing in the suit to go for trial; that the burden was upon the appellant to prove, by producing the sale agreement, that the payment of Kshs.1.1 billion was not all inclusive; that in the absence of that proof it followed that the appellant admitted the assertion that the payment was all inclusive; that there was no burden on the respondent to prove that the payment included the claim that was pending in court.

We have considered these submissions as well as the authorities cited in support of each party's arguments. The point raised in this appeal is, in our opinion quite straightforward. The application that was before Omollo, J was brought pursuant to ***Order 2 rule 15(1) (d)*** of the Civil Procedure Rules. That provision has been the subject of interpretation in numerous decisions, as such we do not intend to spend more time than is necessary on its application to the facts before the trial judge. The application having been brought specifically under ***rule 15(1)(d)***, the respondent was expected, indeed required to present evidence to show that the pending suit is an abuse of the court process. It has repeatedly been stressed that, because of its far-reaching and drastic nature, the remedy of striking out pleadings is resorted to very sparingly and only as a remedy of a last resort. Instead courts are encouraged to have recourse to amendment. An application for striking out pleadings does not require the court to engage in a mini-trial. In **Water Resources Management Authority v. Kensalt Limited**, ***Civil Appeal No.9 of 2015*** the Court summarised the following broad principles under order ***2 rule 15***;

"i. a court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. See D.T. Dobie case (supra).

ii. The Court must exercise tremendous caution because a litigant who is genuinely aggrieved must never be driven from the seat of justice without being heard, except in cases where the cause of action is obviously and almost incontestably bad. See Dyson v Attorney General (1911) IKB 410 at 41.

iii. The question whether or not to strike out a pleading for not raising reasonable cause of

action is one of judicial discretion with which an appellate court will not interfere unless it is clear to it that there was either an error on principle or that the trial judge was plainly wrong. See <u>The Co-operative Merchant Bank Ltd v George Fredrick Wekesa</u>, Civil Appeal No.54 of 1990.

iv. Because striking out is draconian in nature the court will resort to it (first,) with extreme caution and only in plain and clearest cases see <u>Vensan Insurance Brokers Ltd & Another v Kenindia Assurance Co-Ltd</u>, Civil Application No.94 of 1997".

Further the Court in ***<u>Muchanga Investments Limited v. Safaris Unlimited (Africa) Ltd & 2 Others</u> Civil Appeal No. 25 of 2002 [2009] KLR 229*** described what would constitute abuse of court process as follows:

"The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it... The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice. Examples of the abuse of the judicial process are: -

……., or

Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness".

See also ***<u>Jetlink Express Limited v. East African Safari Air Express Ltd</u> Civil Appeal No. 281 of 2009.***

Consequently, what constitutes an abuse of process of the court will depend on and be determined by the circumstances of each case. Therefore there can be no general definition of what amounts to abuse of court process. But generally speaking an abuse of process of the court takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective**.**

There is no dispute that at the time the appellant and the Government of Kenya resolved the long standing squatter problem on the suit land, the action brought by the appellant alleging trespass by the respondent was pending determination before the court.

It is conceded that the Government paid to the appellant over Kshs.1,000,000,000 in final settlement of the dispute. According to the respondent the payment settled, not only the land acquisition for the squatters but also all the pending claims relating to the suit land, including the claim for trespass against the respondent. The appellant, for his part denied this, and maintained that no such settlement was reached and that the terms of the agreement between him and the Government did not include compensation for trespass against the respondent.

The main thrust of the respondent's application for striking out the suit is aptly encapsulated in paragraph (k) of the grounds in support of the application, where it was stared that;

"(k). The applicant is aware through the parent ministry (Ministry of Energy) that part of the agenda covered in the ongoing negotiations between the respondent and the Government of Kenya is compensation. In this suit the respondent is asking for compensation but which (sic) ***the applicant has denied. The applicant is persuaded to be believe*** (sic) ***that once the agreement is reached between the respondent and the Government of Kenya the compensation to follow***

may include the category of compensation the plaintiff is seeking in this case. That compensation by the Government may then indirectly settle this suit".

There was no assertion that the action against the respondent was compromised by the settlement but only a supposition and a desire based on speculation. For one to seek a drastic action like the striking of a suit, such a course must have a firm foundation. Because it was the respondent who sought to have the suit struck out, the burden to prove that it was an abuse of the court process lay squarely on it. See **Sections 107** and **108** of the Evidence Act. With respect to the learned Judge the appellant bore no burden at all at the stage of the application to disclose the terms of the settlement. That is an issue to be determined at the trial. But since the respondent made a specific allegation that the agreement also settled the matters claimed in the suit, it was upon it to so prove.

The learned Judge, in the entire seven page ruling made no reference the well-known principles for the striking out of pleadings as enunciated in numerous decided cases, none of which was cited by her. In the result she went into the merits of the dispute by conducting a mini-trial without hearing evidence, erroneously shifted the burden of proof to the appellant and in the process driving him from the seat of justice without being heard, yet the issue of compensation was not plain and obvious. The learned Judge, by striking out the suit, we conclude improperly exercised her judicial discretion for which we are justified to interfere.

For those reasons the appeal succeeds and is accordingly allowed with costs. The order to strike out the suit issued on 13th July, 2016 is set aside and the suit hereby restored.

Dated and delivered at Mombasa this 11th day of May, 2017.

ASIKE - MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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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