IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & MURGOR, JJ.A)

CIVIL APPEAL NO. 34 OF 2013

BETWEEN

JOHN MBUCHO MURAGA *substituting* MUTHONI MURAGA

(DECEASED) & NJOKI MURAGA (DECEASED).....APPELLANT

AND

WAWERU MUCHATHI *Substituting* MUMBI

(DECEASED) & WANJIKU MBUCHO (DECEASED)..…….RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Kalpana Rawal, J.) dated 28th day of October 2010 in HCC No. 1414 of 1976)

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JUDGMENT OF THE COURT

This dispute has had a chequered and controversial history. The original parties have all died and those left litigating are their children. The dispute started in 1976 when Muthoni Muraga and Njoki Muraga, (**Muthoni and Njoki**) widows of the late Muraga Waweru sued Mumbi Mbucho and Wanjiku Mbucho, (**Mumbi and Wanjiku**) widows of the late Mbucho Waweru in Nairobi HCCC No. 1414 of 1976. Muraga Waweru and Mbucho Waweru were step brothers. Their father, who incidentally was also called Mbucho Waweru was the registered proprietor of **Kiganjo/Nembu/86** measuring **7.5 acres** (the suit property)**.**

In Nairobi HCCC No. 1414 of 1976, Muthoni and Njoki alleged that after the death of their father in-law, it was agreed by the dependents that the suit property would be inherited and shared equally between the two step brothers; that in breach of that understanding, Mbucho Waweru secretly filed succession cause No. 108 of 1975 at Gatundu where he sought to be registered as the sole absolute owner of the suit property. The two widows prayed that Mbucho Waweru be declared a trustee holding the suit property on his own behalf and on behalf of the family of the late Mbucho Waweru,; that the title be rectified to include the names of Muthoni and Njoki as holders of half share and Mumbi and Wanjiku holders of the other half; and that the suit property be subdivided to reflect this distribution.

Mumbi and Wanjiku denied, in their joint defence, that Mbucho Waweru held the suit property in trust for Muraga Waweru. Instead they asserted that the suit property was the former's share of their late father's estate; that Muraga Waweru had sold his share of the land; that on humanitarian grounds Mbucho

Waweru permitted him to occupy the suit property; and that the case was *res judicata* the succession cause where Muraga Waweru's claim, based on the same facts was dismissed.

Subsequently Mumbi and Wanjiku took out chamber summons under **Order VI Rule 13** of the repealed Civil Procedure Rules for orders that the suit be struck out for not disclosing reasonable cause of action and for being scandalous, frivolous and vexatious. In the main they argued that the suit property was all along registered in the name of their father in law, Mbucho Waweru; that as a matter of fact Gatundu Court Succession Cause No. 108 of 1975 was still pending determination at that time due to this dispute; and that the filing of Nairobi HCCC No. 1414 of 1976 was meant to frustrate the determination of the succession cause. For these reasons, they asked the court to find that the suit disclosed no reasonable cause of action, was scandalous, frivolous and vexatious and to strike it out.

In reply counsel then representing Muthoni and Njoki deposed that indeed Mbucho Waweru held the suit property in trust for his step brother, Muraga Waweru; that the case was intended to determine that question; that by seeking to strike it out, Mumbi and Wanjiku were not acting in good faith; that they went to court with unclean hands; and that the dispute being land-related ought to be referred to arbitration.

Shields, J in a terse ruling rendered on 30th May, 1989 and comprising only five sentences struck out the suit holding that Mumbi and Wanjiku were not the registered owners of the suit property and could not therefore be sued; that their husband, Mbucho Waweru who was the registered owner, and against whom a

trust was claimed had **".....been dead for 20 years and the trust does not survive against his widows".**

That, in brief is the extent to which this history goes. The appeal before us involves the children of the original parties. As alluded to earlier, after passage of many years the present appellant, John Mbucho Muraga was appointed the administrator of the estate of Muthoni and Njoki while the respondent, Waweru Muchathi represented the estate of Mumbi and Wanjiku. On 6th September, 2010 the appellant, acting in person brought a motion on notice in which he sought the setting aside of the aforesaid ruling of Shields, J on the grounds that the original parties died and had to be substituted by the present appellant and respondent; that the suit was referred to arbitration, award read and entered as judgment of the court; that the judgment was subsequently set aside in 1983 and eventually the suit was struck out; that their mothers were very old and senile and could not properly instruct their advocates; and that they have lived on the suit property for decades and know of no other home but the suit property. The appellant also deposed that he was not aware of the fact that the suit had been struck out until he perused the court file.

Rawal, J (as she then was) heard the arguments in that application and, in a similarly terse ruling comprised in half a page and delivered after hearing only the appellant in the absence of the respondent, said;

> **"After the judgment, there have been proceedings for taxation execution** (sic) **and mention thereon up to 1998. The applicant has not given one any** (sic) **good reason to set aside the judgment and thus regrettably I have to dismiss the application dated 6th September, 2010…..No need to make any order as to costs".**

That decision is the subject of this appeal in which the appellant, again acting in person has urged us to find that, by dismissing the application the learned Judge disregarded the fact that the subject matter of the dispute was a family land; that he (the appellant) had offered sufficient explanation for the delay; that the delay could only be attributed to their parents' erstwhile advocates who were expected to appraise them on the status of the case; that they cannot therefore be blamed for the mistakes of their advocates; that the learned Judge ought to have been lenient with the appellant given the reason proffered for the delay; that she ought to have appreciated the loss the appellant stood to suffer by the summary procedure adopted by Shields, J which threw him out of the seat of justice.

The respondent, who was represented by the firm of **Wanyoike & Macharia Advocates**, supported the

striking out and in a replying affidavit to the appeal, which is an unusual procedure, submitted at length on the merits of the case. But relevant to this appeal, it was submitted that the appeal has been brought after an inordinate delay; that it is deceptive for the appellant to claim that the suit property was a family land; that as far back as 1990 the appellant's family had engaged an advocate who applied for the proceedings, but did not appeal or seek to set aside the decision of Shields, J ; that after the striking out of the suit, notices to show cause were issued between 1996 and 1998; and that, due to laches the appellant could not bring the application after 20 years.

Under **Order VI Rule 13 (1)** of the repealed Civil Procedure Rules upon which the application was premised any pleading can be struck out at any stage of the proceedings, if the court is satisfied that it discloses no reasonable cause of action or defence; or that it is scandalous, frivolous or vexatious; or that it may prejudice, embarrass or delay the fair trial of the action; or that it is otherwise an abuse of the process of the court.

For the reasons that Muthoni and Njoki sued Mumbi and Wanjiku instead of their husband who was the registered proprietor of the suit property and the fact that the latter had died 20 years before the action was instituted, Shields, J struck out the amended plaint, basing his decision, perhaps on all the grounds under **Order VI Rule 13.** Twenty one (21) years later the appellant sought to set that order aside. Although no provision of the law or procedure upon which the application was anchored was cited, we bear in mind that the appellant did have the services of an advocate and as such the omission was excusable. Secondly, that question has not arisen in this appeal, save only to confirm that there is no express provision in the Civil Procedure Rules for the main relief the appellant was seeking namely, setting aside of the order made by Shields, J. The only provisions in the Civil Procedure Rules dealing with setting aside are order 10 rule 11 (former **order IXA)** on setting aside judgment in default of appearance or defence, **order 12 rule 7** (former **order IXB rule 8)** on setting aside judgment in default of attendance at the hearing and **order 36 rule 10** (former **XXXV**) under the summary procedure. In the alternative, the appellant applied for the order striking out the suit be reviewed. That could only be premised on the former **Order XLIV.** In that case the appellant was required to prove that he had discovered a new and important matter or evidence, or that there was a mistake or error which was apparent on the face of the record, or that there was some other sufficient reason to warrant a review of that decision. See **Shanzu Investments Limited v. Commissioner for Lands**, Civil Appeal No. 100 of 1993.None of these grounds was proved. Since the application was for setting aside or review of the order, the learned Judge in dismissing it was exercising a discretionary power, a power that must be exercised judicially, not arbitrarily and idiosyncratically as was explained in **Smith v Middleton** (1972) SC 30, 8. Our jurisdiction to interfere with a decision where a court below has exercised a discretionary power is circumscribed, thus;

> **" … a Court of Appeal should not interfere with the exercise of the 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 has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."**
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> See per Newbold P in **Mbogo v Shah** (1968) EA 93 at 96.

Having looked at the history of this dispute, we find no fault with the finding of the learned Judge that, in view of the 20 year time lapse it would be unconscionable to set aside or review the decision of Shields, J. There was no good reason shown why the application was not brought earlier. It could not have been that the appellant was not aware of the fact that the suit had been struck out. On the date the suit was struck out the appellant's family was represented by counsel. It is apparent from the record that different counsel continued to appear for the appellant before the Deputy Registrar for taxation of the bill of costs between 1989 and 1998.

Although we cannot confirm the status of Gatundu Succession Cause No.108 of 1975, in applying to strike out the suit, Mumbi and Wanjiku insisted that they were improperly sued as the suit property had not devolved to them. They annexed to the application a copy of a certificate of search issued

30th September, 1987 showing that Mbucu Waweru, their father-in-law was still the registered owner of the suit property. With that disclosure, it was clear that the suit was brought prematurely. Indeed in bringing it, **Muthoni** and **Njoki** deposed that **Mumbi** and **Wanjiku** had filed the cause in which they intended to be declared the sole owners of the suit property.

With regard to this appeal we conclude that the appellant was simply guilty of laches and acquiescence. We find no substance in the appeal which we accordingly dismiss. Being a family dispute with a long history, we make no orders as to costs.

Dated and delivered at Nairobi this 14th day of July, 2017.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR