IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 53 OF 2011

BETWEEN

BOARD OF TRUSTEES, NATIONAL SOCIAL SECURITY FUND.....… APPELLANT

AND

JAPHETH KILONZO KASANGA ……..……..…….....…...1ST RESPONDENT

JOSHUA MWITI MIRITI ……..……...…….....2ND RESPONDENT

LAWI NYATENG' ……..……..…....3RD RESPONDENT

PETER OMONDI MCODIDA ……..….…..…..... 4TH RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya at

Nairobi, (Muchelule, J.) dated 28th January, 2011

in

E.L.C. Civil Suit No. 160 of 2009)

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JUDGMENT OF THE COURT

The issue that falls for our decision in this interlocutory appeal is whether High Court Judge Muchelule, J erred in rejecting the appellant's application dated 20th August, 2009 which sought to strike out the respondents plaint for the reason, in relevant part, of the suit being unenforceable for absence of a contract as envisaged by **Section 3(3)** of the Law of Contract Act, Cap 23, Laws of Kenya.

After hearing the opposing sides on that application, the learned Judge in a necessarily brief and considered ruling dismissed it. In doing so, he in particular delivered himself as follows;

> **"The second challenge to the suit was that there was no contract between the plaintiff and the 2nd defendant in terms of section 3(3) of the Law of Contract Act. The plaintiff says there was a contract in the documents he annexed to the application filed with the suit seeking**

temporary injunction. In the plaint the plaintiff alleged to have bought various plots from the 2nd defendant. The affidavit sworn on 21st October 2010 by Aggrey Nyandong, Assistance Manager of the 2nd defendant, states, among other things, that the 2nd defendant sold only one plot to the plaintiff and that the transaction was completed. However, he denied that the plot in dispute, that is L.R. No. Nairobi/Block 97/1181/071 Tassia II, was one of them. The plaintiff says it was one of the plots. These allegations will be subjected to inquiry through hearing and cross examination. The court will have to look at every document between the parties to be able to determine whether a contract envisaged under the Act was executed between the parties. In other words, this is not a plain and obvious case that can invite the court to invoke its draconian power to strike out the plaint. (Waruru vs. Oyatsi [2002] EA 664)."

The appellant was unhappy with that ruling and after filing a notice of appeal, filed a record of appeal with a memorandum of appeal charging that the learned Judge erred in law and fact by;

(a) Holding that the issue of whether the disputed property was one of the plots purchased from itself will be determined by examination of all documents between the parties yet the contract was absent from documents annexed to an interlocutory application or the reply to the striking out application.

(b) Holding that the matter proceed to full hearing which would be unnecessary or superfluous in the absence of a contract on record.

Those grounds were expounded upon by the appellant's learned counsel **Mr. Mburu,** the thrust of whose submissions was that all the existing documentation was placed before the High Court at the hearing of the application for interlocutory injunction and the contract for the purchase of the suit property was not one of them. Such absence, in counsel's submission, was fatal to the suit, and he cited in aid this Court's decision of ***Kirkdale Ltd Vs. Mount Agencies Ltd*** & ***3 Others [2009] eKLR.*** He concluded by stating that the respondents' failure to produce a contract despite opportunity to do so demonstrates absence of the same without which the suit could not stand.

Miss Mutemi, the 1st respondent's learned counsel opposed the appeal and supported the learned Judge's holding that the issues raised before him deserved interrogation at a full trial. To her, whether there did exist a contract as envisaged under the statute or not could only be decided after evidence, especially because the appellant's own affidavit had confirmed that there was a contract between the parties.

For the 2nd respondent, learned counsel **Miss Muthiani** merely stated, as he was entitled to, that she was associating herself fully with the submissions made by **Mr. Mburu** in support of the appeal. He, in his brief reply, asserted that what was before the learned Judge was a plain and obvious case calling for striking out as it died in the water from the moment of conception.

The 3rd and 4th respondents did not participate in this appeal a default judgment having been entered against them in the court below on 21st December, 2009.

It is plain to see that the learned Judge in declining to strike out the plaint was exercising his discretion. Judicial discretion, as long as it is not exercised capriciously, perversely or in violation of principle will not be interfered with by an appellate court. Thus, we are always very slow to disturb a Judge's decision in a matter within his discretionary purview, doing so in very rare cases where it is shown that the Judge failed to taken into account some relevant matter or considered some irrelevant matter, or, looking at the case as a whole, his decision was plainly wrong. All of these formulations really boil down to this: we will interfere only when it is quite plain that the learned Judge was clearly wrong in deciding as he did. We are still true to the considerations that were set out nearly half a century ago in ***MBOGO & ANOTHER vs. SHAH*** **[1968] EA** 93 where Sir Charles Newbold, P, stated, at p96;

"We come now to the second matter which arises on this appeal, and that is the circumstances in which this court should upset the exercise of a discretion of a trial judge where his

discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words 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 a 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 as a result there has been misjustice."

Did the learned Judge in refusing to strike out the plaint and ordering instead that the issues in contestation be interrogated at a full trial commit a reversible error? We think not.

It bears repeating that citizens file their cases in court in expectation that their rights and grievances will be adjudicated upon in a just, expeditious and efficient manner. The rights and wrongs of contending parties are best determined when all the evidence is in and has been tested at trial through the normal methods of direct examination, cross-examination and re-examination. That of course is the function of the trial judge. Ordinarily, cases are not meant to be tried by affidavit without the opportunity for confrontation, challenge and probing that a trial presents. The conclusion of cases at that level, therefore, must be seen as the exception rather than the rule and should be resorted to most sparingly and in the most obvious and deserving of cases. See ***D.T. Dobie & Co. Kenya Ltd Vs. Muchina*** **[1982] KLR 1.**

When a party applies for the striking out of another's pleading be it a statement of claim or a defence, such application if granted effectively means that the party whose pleading in so stricken is essentially thrown out and excluded from the seat of justice. It is a prior restraint and exclusion which by definition is the antithesis of the right of access to justice. Thus, both from doctrine and a simple appreciation of the *raisin d'etre* of courts of law, such applications can only be granted when the pleading to be struck out is hopelessly bad and beyond salvation by amendment or otherwise. It has to be so dead that it is beyond vivification or resuscitation by any known means so that the striking out is no more than a declaration of the obvious so as to give way to interment without further ado.

Courts appreciate that the striking out jurisdiction is draconian in nature and far reaching in its implications hence the necessity for caution and circumspection before its deployment as a tool of fatal resort. And if there is any sign of life or any real possibility that the pleading has any potential to sustain the pleader's case, then the court should reject any plea to strike it out and proceed to hear the case.

The application was brought pursuant to Order VI Rule 13(1) (b) and (d) of the repealed Civil Procedure Rules under which the court may at any stage order the suit to be either stayed or dismissed or direct that judgment be entered, as the case may be, if it does not disclose any reasonable cause of action or defence; or if is scandalous, frivolous or vexatious; or if is otherwise an abuse of the process of the court.

Before the learned Judge were rival submissions on whether or not the suit was competent on the basis of the alleged non-existence of a contract of sale. Such contract was alleged to have bound the parties but the question was whether the physical document complying with the provisions of the Law of Contract Act did in fact exist. At the point of the application to strike out, the time had not come when the plaintiff would have been required to produce the contract. That he did not exhibit one at the application for interlocutory injunction did not *ipso facto* mean that no contract existed in the eye of the statute, and that is the view the learned Judge took.

We think upon our consideration of this matter that the learned Judge did not err. To strike out a party's pleading on the basis of non-existence of a certain document without discovery having been undertaken, or a request having been made and not complied with, would in the circumstances of this case appear to be harsh and unconscionable. Such contract may or may not exist physically but the learned Judge was in no position to decide that issue one way or the other at that stage hence his holding that it was a matter for evidence at trial. We see nothing perverse about that exercise of discretion and the learned Judge was perfectly entitled to proceed carefully as he did. Evidently, justice is best served by the matter proceeding to full trial expeditiously so that the issue in controversy is dealt with conclusively.

The upshot is that we find this appeal to be destitute of merit and did not meet the strictures under Order VI Rule 13 aforesaid. Accordingly we dismiss it with costs to the 1st respondent.

Dated and delivered at Nairobi this 22nd day of September, 2017.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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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