IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPEAL NO. 9 OF 2015

BETWEEN

WATER RESOURCES MANAGEMENT AUTHORITY…….....…APPELLANT

AND

KENSALT LIMITED…………………………...……………..RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court at Malindi (Angote, J.) dated 17th October, 2014

in

E.L.C. C. No. 28 of 2013)

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JUDGMENT OF THE COURT

The issues in controversy in the case giving rise to this appeal are not only novel but also fairly complex and highly contested. It is the summary manner in which those issues were determined by the Environment and Land Court (**Angote, J.)** that has aggrieved the appellant. This, in brief, is how the dispute arose.

The appellant is a statutory body established under **Section 7** of the Water Act with the following powers and function donated by **Section 8 (1):**

> **"(a) to develop principles, guidelines and procedures for the allocation of water resources;**
>
> **(b) to monitor, and from time to time re-assess, the national water resources management strategy;**
>
> **(c) to receive and determine applications for permits for water use;**
>
> **(d) to monitor and enforce conditions attached to permits for water use;**
>
> **(e) to regulate and protect water resources quality from adverse impacts;**

(f) to manage and protect water catchments;

(g) in accordance with guidelines in the national water resources management strategy, to determine charges to be imposed for the use of water from any water resource;

(h) to gather and maintain information on water resources and from time to time publish forecasts, projections and information on water resources;

(i) to liaise with other bodies for the better regulation and management of water resources;

(j) to advise the Minister concerning any matter in connection with water resources."

In exercise of those powers, specifically section **8 (1) (g**), and pursuant to the Water Resource Management Rules, 2007, as well as Legal Notice No. 171 of 28th September, 2007, the appellant demanded Kshs.270,295,759.90 as the outstanding water use charges for the period between 1st October, 2007 to 31st September, 2013 together with interest from the respondent, a limited liability company in the business of manufacturing salt from sea water.

The respondent denied owing the appellant the sums claimed prompting the latter to institute an action in the Environment and Land Court claiming from the respondent the above sums plus costs and interest.

In response to the suit the respondent denied liability arguing, *inter alia* that:-

"(i) Under Section 25 of the Water Act, Cap 372 (the "Act") a permit is only required for the use of water that emanates from a water resource;

(ii) sea water is not a water resource as defined under section 2 of the Act;

(iii) the Defendant does not "abstract" any sea water as alleged;

(iv) the Defendant uses naturally flowing sea water into its land for the manufacture of salt;

(v) the Defendant does not require a permit for the use of sea water;

(vi) the Plaintiff has no jurisdiction over sea water whether under the provisions of the Act or any other written law; and

(vii) sea water is *res nullius* and is incapable of ownership or control by any person including the Plaintiff both in equity and in law."

Arising from these depositions, the respondent took out a motion on notice inviting the court to strike out and dismiss the suit with costs pursuant to **Order 2 Rule 15 (i) (a) and (d)** of the Civil Procedure Rules. In effect, the respondent argued that the suit disclosed no reasonable cause of action in law and that it was otherwise an abuse of the process of court. The respondent particularly maintained that the appellant had no *locus standi* or jurisdiction to demand water use charges for the use of sea water.

In opposing the application the appellant, through Eng.Philip. J. Olumi its Chief Executive Officer argued, that under **Articles 66** and **260** of the Constitution the State has power to regulate the use of sea water within the territorial sea and the exclusive economic zone and that the appellant as a State agency is mandated by the Water Act to regulate use of water resources including the use of sea water within the territorial sea and to levy charges over sea water; that the National Land Commission does not have any powers over this area; that the respondent was engaged in large production of salt using raw sea water from which it makes huge profits; and that for those reasons the charges for water use were proper and necessary.

The learned Judge considered these rival arguments and from the submissions presented on behalf of the parties he framed the following issues for determination:-

i. whether the appellant had the power to control or regulate the use and levy charges for the use of sea water.

ii. whether sea water is *res nullius* and incapable of ownership.

iii. whether the Water Act is a taxing or a regulatory statute,

iv. whether sea water is a water resource within the meaning of the Water Act, and

v. as between the appellant and the National Land Commission which one has the mandate to regulate the use of water resource?

In determining these questions, the learned Judge found that for the purpose of its salt manufacturing process, the respondent drains sea water from the Kenya territorial sea into stabilizing ponds located within its private land. Relying on **Article62 (1) (i)** of the Constitution, which provides that all rivers, lakes and other water bodies as defined in an Act of Parliament is public land, and relying further on **Article 260** of the Constitution which defines land to include anybody of water on or under the surface, marine waters in the territorial sea and exclusive economic zone, **section 5** of the Maritime Zones Act as well as **Article 2(1)** of Part II of the United Nations Convention on the Law of the Sea, the learned Judge held, in relation to the question whether or not sea water is *res nullius,* that:-

> ***"Sea water, otherwise known as marine water in the territorial sea, just like land as is traditionally known and the internal waters, is vested in the State notwithstanding the fact that it is unidentifiable and keeps on moving. …Marine water in the territorial sea is indeed "public land" and can only be used in accordance with the laws of this country, including international law."***

By that holding the learned Judge distinguished and departed from this Court's decision in **Kenya Ports Authority vs. East African Power &Lighting Co.** (1982) KLR 410 in which it was held that since sea water has an element of moving, shifting, evaporating and vanishing and since it cannot be contained in a fixed area, it was incapable of ownership by anyone; that no Government or person has any proprietary rights in the water above the sea.

The departure by the learned Judge from this decision is the subject of the cross-appeal in which the respondent is contending that the learned Judge erred in finding that sea water is capable of ownership and in this instance, by the State on behalf of the people of Kenya; and that he further erred in holding that the enactment of the Environment Management and Co-ordination Act, 1999, the proclamation of the Constitution of Kenya, 2010 and the ratification by Kenya of the United Nations Convention on the Law of the Sea meant that sea water was no longer *res nullius* and instead its ownership was now vested in the people of Kenya.

On the other framed issues, the learned Judge held that by the provisions of **Articles 62(3)** and **67 (2) (a)** as well as **section 5 (1) (a)** of the National Land Commission Act, 2012, it is only the National Land Commission and no other State organ that is charged with the administration and management of public land, including territorial sea, the exclusive economic zone and the sea bed on behalf of the people of Kenya; that, although the Commission is the only body with this mandate, it cannot however levy taxes on the usage of public land; that it is only the national Government, through its organs that can impose tax or licensing fee for the usage of sea water, which is a national resource. The learned Judge concluded on this question that;

> ***"The plaintiff cannot therefore lawfully levy taxes for the usage of a water resource as defined in the Water Act on behalf of the National Government… Sea Water is not included in the definition of the word water resource. Consequently … the plaintiff***

> ***cannot impose charges for the use of such water pursuant to the provisions of the Water Act… The intention of Parliament to confer jurisdiction on the plaintiff to levy charges for the use of only "internal waters" and not "sea water' can also be discerned from the Water Resource Management Rules, 2007… The meaning of "a water resource" as defined in the Act must be confined to the water resources that exist on the mainland … If Parliament had intended to include sea water in the definition of "a water source"… nothing would have been easier than for it to state so, considering that the definition of sea or ocean is quite distinct from other standing or flowing water within the internal boundaries of a country… The plaintiff therefore does not have the locus standi to levy charges for the use of sea water under the Water Act and Water Resource Management Rules …. I find and hold that the plaintiff's suit does not disclose a reasonable cause of action in law"***

The appellant was aggrieved by this decision and has challenged it in this Court on 21 grounds which were argued in the written submissions broadly as 4, asking the questions, who, as between the appellant and the National Land Commission has the mandate to regulate the use of water resources? , whether the water use charge is a tax, whether the appellant has jurisdiction to levy water use charges in respect of sea water and, whether the applicant's suit raised a reasonable course of action.

The respondent, as adverted to earlier, has also cross-appealed on the grounds that the learned Judge erred in finding that sea water is capable of ownership by reason of it being vested in the State; and that sea water is no longer *res nullius* following the proclamation of the Constitution of Kenya, 2010 and the ratification by Kenya of the United Nations Convention on the Law of the Sea.

The application having been brought on the allegation that it disclosed no reasonable cause of action, by **sub-rule (2)**of **order 2** of the Civil Procedure Rules no evidence was admissible but the respondent was required to state concisely the grounds on which the application was made. But, of course, evidence is necessary to show that it is an abuse of the court process. See **D.T. Dobie & Co.(K) Ltd** v **Joseph Muchina & Another** (1982) KLR I.

Because of its far-reaching and drastic nature, the remedy of striking out any pleadings is resorted to very sparingly and as a last resort, hence the alternative recourse in **rule 15(1)** of amendment instead of striking out. In addition, the requirement that no evidence is to be presented in such application if based on **Rule 15 (a),** is a demonstration that the court is not expected to engage in a mini-trial. Consequently the following principles have evolved;

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 418
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 **The Co-operative Merchant Bank Ltd** v **George Fredrick Wekesa**, 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 **Vensan Insurance Brokers Ltd & Another** v **Kenindia Assurance Co-Ltd**, Civil Application No.94 of 1997. The famous **Case of Walter** v **Sunday Pictorial Newspaper Ltd** [1961] 2 All ER 158 reminds us that:-

> **"The drastic remedy of striking out a pleading or part of a pleading cannot be resorted to unless it is quite clear that the pleading objected to disclose no arguable case. Indeed, it has been concluded before us that the rule is applicable only in clear and obvious cases."**

Madan CJ, in **D.T. Dobie** (supra) succinctly put it this way;

> ***"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the Judge at the trial as the court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way……. As far as possible, indeed not at all, there should be no opinion expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial Judge in disposing of the case in the way he thinks right."***

In that same decision, the court noted that no action ought to be summarily dismissed unless it is obviously hopeless and clearly discloses no reasonable cause of action; so weak as to be beyond redemption. But if it shows some semblance of a cause of action, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.

v. Whether or not a case is clear or plain is a matter of fact and an appellate court on first appeal is entitled to re evaluate the evidence which was placed before the trial court to satisfy itself that no error of principle was committed by the court. See **The Co-operative Merchant Bank Ltd** (supra)

vi. "Reasonable cause of action" means a cause of action with some chance of success when only the allegations in the plaint are considered. Therefore a pleading will not be struck out unless it is demurrable and discloses no semblance of a cause of action. The court must see that the plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavit as he may rely on, and must not dismiss an action merely because the story told in the pleadings was highly improbable as there can be no temptation in the practice of civil administration of the courts to have a preliminary hearing or anticipation of the ultimate result of the trial. See **D.T.Dobie** case (supra). See **also Baldey Raj Aggarwal** v **Kamal Kishore Aggarwal**, Civil Appeal No.48 of 1985. In other words, the application for striking out of pleadings can only be determined on the basis of an examination of the pleadings only and the court's function is not to determine whether the action or defence as framed will or will not succeed. That is the duty of the trial court. The parties' ultimate rights cannot be decided at an interlocutory stage except in the most clear circumstances. See **Bullen & Leake's Precedents of Pleadings** (12 ed) 1972.

vii. On the other hand the court has inherent jurisdiction to dismiss that which is clearly an abuse of its process. In addition, and pursuant to **Article 159** of the Constitution the defendant is entitled to have his defence proceed to trial, as the plaintiff is equally entitled to efficacious and speedy determination of the claim. See **Diamond Trust Bank (K) Ltd** V **Martin Ngombo & 8 others**, (2005) eKLR

In our view striking out is not suitable in cases involving areas of the law that are in a state of development. Of course, conversely, as we have said here below, there may be good commercial or pragmatic reasons to seek the striking out of pleadings.

Right from the issues framed by the learned Judge, the submissions before him, through to his ultimate decision, we think, with respect, the learned Judge clearly misunderstood the import of the application before him and engaged in a full-fledged hearing yet the question before him was simply whether the appellant's suit disclosed a reasonable cause of action or was an abuse of the court process in terms of **order 2 rule 15** of the Civil Procedure Rules. He dealt only with the first question but in doing so missed two critical procedural rules of pleading, one, that under **sub-rule (2)** as we have said earlier, evidence is not admissible in an application anchored in sub rule **(1) (a),** except that the application must state concisely the grounds on which it is made. Secondly, as a rule, every pleading must contain, and contain only, a statement in a summary form of the material facts on which a party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits. See **Order 2 Rule 3**. We emphasise this to show that it is inappropriate to

rely on pleadings without oral hearing to determine a contested action on merit.

The manner in which the application was argued and determined defied these two rules of pleading. Upon the restrictive nature and summary form of pleadings no trial can be had. The questions whether or not the appellant had the power to control or regulate the use of sea water or levy charges for its use, whether sea water is *res nullius* and who between the appellant and the National Land Commission has the power to regulate the use of water resource, were all questions which could only be determined on merit at the trial at which, perhaps expert evidence would have been called to resolve some of the technical aspects of the dispute and, even involve a visit to the *locus in quo*. The answers to those questions were not plain, obvious or clear. In the same vein we do not think the action was demurrable and that it could be determined by the summary procedure employed.

On the whole and for the foregoing reasons, we think the claim raised issues that ought to have gone to trial. Indeed, the result of the summary determination was such that even the respondent itself was aggrieved by it with regard to the holding that sea water is no longer *res nullius*.

We allow both the appeal and the cross appeal with costs and set aside the ruling and order rendered on 17th October, 2014. The action will be tried by a judge in the Environment and Land Court other than Angote, J.

Dated and delivered at Mombasa this 22nd day of April, 2016

ASIKE-MAKHANDIA

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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