



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU & OTIENO-ODEK, J.J.A.)

CIVIL APPEAL NO. 203 OF 2012

BETWEEN

CHARLES MUGANE NJONJO ..... 1<sup>st</sup> APPELLANT

SOLIO RANCH LIMITED ..... 2<sup>nd</sup> APPELLANT

AND

GUCOKANIRIA KIHATO TRADERS AND

FARMERS COMPANY LIMITED ..... 1<sup>st</sup> RESPONDENT

ATTORNEY GENERAL ..... 2<sup>nd</sup> RESPONDENT

*(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Mbogholi Msagah. J.)  
dated 10<sup>th</sup> December 2009*

in

H.C.C. No. 1251 of 2002)

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JUDGMENT OF THE COURT

1. This is an appeal against the decision of the trial court declining to strike out a plaint filed by the 1<sup>st</sup> respondent, **GUCOKANIRIA KIHATO TRADERS AND FARMERS COMPANY LIMITED**, against the 1<sup>st</sup> and 2<sup>nd</sup> appellants, **CHARLES MUGANE NJONJO** and **SOLIO RANCH LIMITED** respectively, in a dispute relating to title and ownership of LR. No. 11571 situated in Laikipia District otherwise known as **Solio Ranch**, and hereinafter referred to as the suit property.

2. The 2<sup>nd</sup> appellant, **Solio Ranch Limited**, is the registered proprietor of the suit property and its Certificate of Title was issued on 26<sup>th</sup> November 1965 under the provisions of the then **Registration of Titles Act, Cap 281** of the Laws of Kenya.

3. In the plaint, the 1<sup>st</sup> respondent, a land buying company contends that the suit property was allocated to its members by the late President Jomo Kenyatta on 10<sup>th</sup> March 1973; that the suit property as at 10<sup>th</sup>

March 1973 was unalienated government land; that on 14<sup>th</sup> March 1973, the 1<sup>st</sup> appellant being the then Attorney General of the Republic of Kenya ordered the Chairman of the 1<sup>st</sup> respondent company to surrender the letter of allotment and other documents of title relating to the respondent's claim to ownership of the suit property; that when the Chairman of the 1<sup>st</sup> respondent company failed to surrender the allotment and ownership documents, the 1<sup>st</sup> appellant in his capacity as the Attorney General instructed the Kenya Police to raid the 1<sup>st</sup> respondent company offices then situated at Cross-Road in Nairobi; that on 16<sup>th</sup> March 1973, the police raided the 1<sup>st</sup> respondent's offices and seized the 1<sup>st</sup> respondent's letter of allocation and documents of ownership to the suit property; that the 1<sup>st</sup> respondents documents were taken away from its offices through acts of abuse of power, corruption, abuse of office and fraud perpetrated by the 1<sup>st</sup> appellant, and that subsequent to the raid, the 1<sup>st</sup> appellant instructed the Police to ensure that no member of the 1<sup>st</sup> respondent company entered the suit property; that the 1<sup>st</sup> appellant then procured registration of the title to the suit property in the name of the 2<sup>nd</sup> appellant.

4. The 1<sup>st</sup> respondent in its plaint seeks against the 2<sup>nd</sup> respondent an order to compel the police to return the documents taken away from its offices; It further seeks an order directed to the Commissioner of Lands and or Chief Land Registrar to issue it with a new allotment letter to the suit property; alternatively, it prays for compensation by way of allotment of an alternative equivalent land and compensation for loss of investment opportunity and or money value of the suit property at current market rate and further prays that the title issued to the 2<sup>nd</sup> appellant in respect of the suit property be nullified.

5. The Attorney General in a defence dated 26<sup>th</sup> October 2003 at paragraph 2a thereof avers that the suit property LR NO. 11571/R is owned by the Government of Kenya by virtue of Notice of Taking Possession which was registered on 15<sup>th</sup> February 1991. At paragraph 5a of the defence, it is averred that the suit property has never been allotted to any one and more particularly to the 1<sup>st</sup> respondent.

6. The 2<sup>nd</sup> appellant herein in its Defence and Counterclaim dated 16<sup>th</sup> March 2007 averred that it is the registered proprietor of the suit property and its Certificate of Title dated 26<sup>th</sup> November 1965 granted it a term of 944 years with effect from 1<sup>st</sup> August 1965. The 2<sup>nd</sup> appellant contends that its Certificate of Title is indefeasible under the provisions of Section 23 of the Registration of Titles Act.

7. The 1<sup>st</sup> appellant in his defence denied in toto the allegations of fraud; he denied the averments of abuse of office and corruption and further denied that he ordered the police to raid the 1<sup>st</sup> respondent company offices. He reiterated that the 2<sup>nd</sup> appellant is the indefeasible registered proprietor of the suit property; and that the said property was not unalienated government land.

8. By a Chamber Summons application dated 29<sup>th</sup> October 2008, the appellants made an application seeking orders to strike out the 1<sup>st</sup> respondent's plaint on the ground that it disclosed no reasonable cause of action; that the claim in the plaint was frivolous, vexatious and otherwise an abuse of court process.

9. Upon hearing the parties, the learned judge dismissed the Chamber Summons application and expressed as follows:

**“Some of the outstanding principles are that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable....It is also an established practice that the courts should strive to maintain suits rather than strike out or dismiss the same. I have related the pleadings, the facts and the cited authorities herein. I am persuaded that the interest of justice shall best be served by maintaining the plaintiff's suit. The amended plaint discloses not one but several triable issues which can only be determined by evidence in a main trial. Summary procedure such as sought....is likely to result in injustice on the part of the plaintiff if allowed. Accordingly, the application dated 29<sup>th</sup> October 2008 is hereby dismissed with costs.”**

10. Aggrieved by the ruling, the appellants have lodged the instant appeal citing the following compressed grounds:

*“(i) The learned judge erred in failing to consider the submissions made by the appellant in support of the application.*

- ii. The judge erred in failing to consider that the 2<sup>nd</sup> appellant had an indefeasible title over LR No. 11571 (the suit property) which was protected by the provisions of Section 23 of the Registration of Titles Act, Cap 281 of the Laws of Kenya and that the suit property was not available for allotment and allocation at any time to the 1<sup>st</sup> respondent.*
- iii. The learned judge erred in finding that the plaint disclosed triable issues and also erred in failing to make findings on the issues said to be triable.*
- iv. That the 1<sup>st</sup> respondent’s case is not sustainable against the appellants and the judge erred in finding that summary procedure is likely to result in injustice on the part of the 1<sup>st</sup> respondent while such procedure is allowed by statute.*
- v. The learned judge erred in failing to find that the plaint did not disclose a reasonable cause of action, was frivolous, vexatious and otherwise an abuse of the court process.”*

11. At the hearing of this appeal, learned counsel Ms Irene Kashindi holding brief for Mr. Kiragu Kimani appeared for the appellants while learned counsel Mr. Anthony Burugu appeared for the 1<sup>st</sup> respondent and learned counsel Ms Damaris Ogama appeared for the 2<sup>nd</sup> respondent. All counsel filed written submissions and made oral highlights during the hearing of the appeal.

12. The appellant reiterated the grounds of appeal and submitted that the learned judge erred in failing to find that the plaint did not disclose a reasonable cause of action; that under **Order 2 Rule 15 (1)** of the **Civil Procedure Act and Rules**; the court has discretion at any stage of the proceedings to strike out or amend any pleading on the ground that it discloses no reasonable cause of action. Citing the decision in **Mary Kalolia Mutisya -v- Joel Ngui Mweu (2005) eKLR** the appellant submitted that an action has some chances of success when only the allegation in the plaint or pleadings are considered (sic). Counsel submitted that the plaint discloses no reasonable cause of action because there is no allegation of wrong doing, fraud or misrepresentation against the 2<sup>nd</sup> appellant and no evidence of wrongdoing on the part of the 1<sup>st</sup> appellant; it was submitted that the Certificate of Title produced by the 2<sup>nd</sup> appellant indicates that the title to the suit property is vested on the 2<sup>nd</sup> appellant and the said title is indefeasible; that as at 10<sup>th</sup> March 1973, the suit property was not unalienated government land and was not available for allotment to the 1<sup>st</sup> respondent; that the alleged allotment made by the late President Jomo Kenyatta does not amount to a grant of title; that the late President Kenyatta could not have allocated land that the government did not own and that only unalienated government land can be allotted and allocated.

13. Counsel emphasized that the 2<sup>nd</sup> appellant’s title was indefeasible pursuant to **Section 23 (1)** of the **Registration of Titles Act**. Citing the dicta in **Muchendu - v- Waita (2003) KLR 419** and **Rosky Traders Limited -v- Getrude Chao Waita & 2 others (2013) eKLR**, the appellants submitted that a Certificate of Title is conclusive evidence that the person named therein is proprietor of the land and is the absolute and indefeasible owner thereof. The appellant also cited the decision in **Wreck Motors -v- Commissioner of Lands Civil Appeal No. 71 of 1997** to support the submission that as the pleadings did not disclose any fraud on the part of the second appellant, the trial court erred in failing to strike out the plaint; that the 2<sup>nd</sup> appellant’s title can only be challenged on grounds of fraud or misrepresentation; that the amended plaint does not contain any allegation of wrong doing against the 2<sup>nd</sup> appellant.

14. The appellant submitted that the 1<sup>st</sup> respondent’s claim in the plaint was frivolous as it is premised on a letter of allotment that cannot overrule a Certificate of Title; that the suit is scandalous as it seeks to disabuse the 2<sup>nd</sup> appellant its quiet possession of the suit property and that the 1<sup>st</sup> respondent failed to

provide any evidence in support of the allegation of abuse of office.

15. In further support of its submission, the appellants submitted that the learned judge erred in not taking into account that the 1<sup>st</sup> respondent's replying affidavit; that the said replying affidavit did not address the allegations of fact raised by the appellant in seeking to strike out the plaint and that the trial court erred in not identifying the trial issues disclosed in the plaint. The appellant cited dicta in the cases of **Pan African Bank Limited -v- Gulmareba Limited & 2 others (2006) eKLR** and **Termco Tank (K) Limited -v- Nyoro Construction Company Limited (2004) eKLR**. In concluding submissions, the appellant cited the case of **Kenya Commercial Bank Limited -v- Suntra Investments Bank Limited (2015) eKLR** and urged this Court to strike out the 1<sup>st</sup> respondent's suit as being frivolous.

16. The 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the appeal. The 1<sup>st</sup> respondent submitted that soon after Kenya's independence, it identified the suit property and applied for the same to be allocated to its members; that on 14<sup>th</sup> March 1973, the 1<sup>st</sup> respondent received a letter authorizing allocation of the suit property to its members; that the letter dated 14<sup>th</sup> March 1973 and other documents were forcibly taken away by Police on instructions of the 1<sup>st</sup> appellant; that due to difficulty in obtaining audience with the late President Jomo Kenyatta, the 1<sup>st</sup> respondent was not able to bring to his attention the new developments; that the 1<sup>st</sup> respondent has pursued to ownership of the suit property diligently and with passion; that the trial judge correctly exercised his discretion and refused to strike out the 1<sup>st</sup> respondent's suit; that the appellants joined the suit so that they could be given an opportunity to be heard and that the 1<sup>st</sup> respondent should not be denied the opportunity to canvass its case on merits.

17. The 1<sup>st</sup> respondent cited the decision in **Mbogo & another -v- Shah (1968) EA 93** to support the principle that this Court should not interfere with the exercise of discretion by the trial judge who correctly declined to strike out the plaint. Also the case of **Dyson -v- Attorney General (1911) KB 410 at 419** was cited to support the proposition that the judicial system should never permit a plaintiff to be driven from the judgment seat without any court having considered his right to be heard except in cases where the cause of action was obviously and almost incontestably bad.

18. The 2<sup>nd</sup> respondent, the Attorney General, in opposing the appeal submitted that the plaint as filed raises a triable issue as to the ownership of the suit property; that other triable issues relate to the regularity and validity of the letter of allotment and title documents to the suit property; the allegation of fraud made in the plaint and the issue of *res judicata* and *non-joinder* of parties. It was submitted that all these issues are alive and require determination on merit in a full hearing and trial of the dispute between the parties. The 2<sup>nd</sup> respondent cited the decision in **Lalji t/a Vakkep Building Contractors -v- Casousel Limited (1989) KLR 386** in support of submissions where this Court held that summary judgment is a draconian measure and should be given in only the clearest of cases. It was submitted that it is trite law that a trial must be ordered if one issue which is fairly arguable is found to exist.

19. We have re-evaluated the record of appeal, considered submissions by counsel and the authorities cited. We have carefully examined the plaint and defences filed to ascertain if any triable issue is disclosed by the pleadings. The appellants' application to strike out the 1<sup>st</sup> respondent's plaint is akin to an application for summary judgment. We concur with the dicta in **Commercial Advertising and General Agencies Ltd. -v- Qureishi (1985) KLR 458** where it was stated that on an application for summary judgment, the plaint, defence, counterclaim and reply to defence, if any, and affidavits in support and in reply as well as all relevant issues and circumstances are all proper material for consideration.

20. The key issue in this appeal is whether the trial judge correctly exercised his discretion in declining to strike out the plaint filed by the 1<sup>st</sup> respondent. It is not in dispute that the decision to strike out a suit or pleading is a discretion bestowed upon the trial court; however, such discretion must be judiciously exercised. We take cognizance of the dicta by Madan, J. in **CA Civil Appeal No. 33 of 1977 B. Gupta -v- Continental Builders Limited** where he stated that if a defendant is able to raise a prima facie triable issue, he is entitled in law to defend.

21. If the appellant's application to strike out the 1<sup>st</sup> respondent's suit is granted, the dispute between the parties shall have been summarily determined without a hearing on merits. The right to be heard which encompasses the right of audience must be jealously guarded. The right to be heard is a fundamental right, and as this Court observed in the case of **Richard Ncharpi Leiyagu -vs- Independent Electoral and Boundaries Commission and 2 Others**, C.A. No. 18 of 2013, Nyeri: **"The right to a hearing has always been a well protected right in our Constitution and is also the cornerstone of the rule of law."**

22. The appellants contend that the trial judge erred in failing to identify the triable issues. The 2<sup>nd</sup> respondent in submissions before this Court identified the triable issues to include contestation as to the ownership of the suit property, regularity and validity of the letter of allotment and consideration of the allegation of fraud as pleaded in the plaint.

23. Triable issues are discernible from the pleadings filed by the parties; a claim in the plaint that is denied in the defence becomes a triable issue. The appellants filed their defences in the suit and denied in entirety the allegations of fact contained in the plaint; the appellants specifically denied the 1<sup>st</sup> respondent's claim to ownership of the suit property; the appellants further averred that the suit property was unalienated government land and was not available for allocation to the 1<sup>st</sup> respondent. In denying the allegations of fact and claims made in the plaint, a joinder of triable issues occurred.

24. It is trite that joinder of issue occurs when the defendant has challenged (denied) some or all of the plaintiffs allegations of fact and/or when it is known which legal questions are in dispute. Joinder of issue is the act by which a party in a dispute by his pleadings asserts a fact to be so, and the other party denies it. In this case, the plaint and the defences filed and the counterclaim disclose joinder of triable issues.

25. The plaint specifically alleges fraud and abuse of office on the part of the 1<sup>st</sup> appellant. A general principle of law is that whenever fraud is pleaded, this issue should not be determined summarily but upon consideration of evidence. We note that the 2<sup>nd</sup> appellant submitted that no allegation of fraud or misconduct has been alleged on its part. This submission is not entirely correct. The plaint specifically alleges that the 2<sup>nd</sup> appellant improperly acquired its title through fraud and abuse of office by the 1<sup>st</sup> appellant. If the allegations against the 1<sup>st</sup> appellant were to be proved, this would taint the Certificate of Title issued to the 2<sup>nd</sup> appellant. The contestation as to fraud and abuse of office by the 1<sup>st</sup> appellant is intertwined with the issue as to whether **Section 23** of the **RTA** is applicable to impeach the 2<sup>nd</sup> appellant's title on ground of fraud.

26. The 2<sup>nd</sup> appellant contends that **Section 23** of the **RTA** confers upon it an indefeasible title to the suit property. Conversely, 1<sup>st</sup> respondent contends that the title issued to the 2<sup>nd</sup> appellant was procured by fraud. In **Sunderji -v- Clyde House Company Limited, (1984) KLR 499** this Court stated that where an issue raised requires reference to applicable law in order to reach a decision, such an issue should be tried with full argument on the law and should not be dealt with summarily. In our view, whether **Section 23** of the **RTA** applies to the Certificate of Title granted to the 2<sup>nd</sup> appellant and whether the said Certificate is impeachable on the basis that it was procured by fraud is a triable issue that requires trial and the taking of evidence.

27. The 1<sup>st</sup> respondent alleges in its plaint that the 1<sup>st</sup> appellant abused his office and exercised his powers as the Attorney General in a fraudulent manner. In **Mbuthia -v- Jimba Credit Finance Corporation & Another (1988) KLR 1**, this Court observed that the question whether an individual has exercised his powers in a fraudulent manner is a matter of evidence and is a dispute of fact to be resolved by trial. We are of the view that the alleged fraud and abuse of office on the part of the 1<sup>st</sup> appellant is a triable issue.

28. We note that the 2<sup>nd</sup> appellant filed a counterclaim alleging it has a right to possession of the suit property and it seeks injunctive orders to restrain the 1<sup>st</sup> appellant and its members from accessing the suit property. The 1<sup>st</sup> respondent averred it has a right to ownership and possession of the suit property. These

diverse contestations constitute triable issues. In **Doge -v- Kenya Cannery Limited, 1985 KLR 942**, it was stated that if a counterclaim contains arguable issues, the counterclaim discloses triable issues that are subject to trial.

29. Guided by the judicial decisions cited above, we are of the considered view that the trial court did not err in declining to strike out the plaint filed by the 1<sup>st</sup> respondent. We are satisfied that there is joinder of various triable issues disclosed in the pleadings; the plaint and defences filed disclose disputed and contested facts whose truth and veracity can only be resolved by way of trial and full hearing. The appellants submitted that there is no evidence of wrongdoing on the part of the 1<sup>st</sup> appellant. Where would the evidence come from without trial and hearing? An indefeasible Certificate of Title shall always remain indefeasible if lawfully acquired. If the 2<sup>nd</sup> appellant's Certificate of Title is indefeasible, we fail to see what prejudice the appellants shall suffer if a full trial and hearing is conducted where its Certificate of Title is produced in evidence.

30. In totality, we find this appeal has no merit and is hereby dismissed with costs.

*Dated and delivered at Nairobi this 6<sup>th</sup> day of May, 2016.*

**M. K. KOOME**

**JUDGE OF APPEAL**

**H. M. OKWENGU**

**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**