IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MWILU & KIAGE JJA.)

CIVIL APPEAL NO. 117 OF 2005

BETWEEN

KUTIMA INVESTMENTS LIMITED …………….…….……….APPELLANT

AND

MUTHONI KIHARA …………………..……………………..……1ST RESPONDENT

COMMISSIONER FOR MINES & GEOLOGY …………………. 2ND RESPONDENT

(Being an appeal from the Ruling and Decree of the High Court of Kenya at Nairobi (P. Kihara Kariuki, J.)

dated 26th April, 2005

in

HCCC NO. 990 OF 1999)

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JUDGMENT OF THE COURT

This appeal by Kutima Investments Ltd (the appellant) is against the ruling and order of the High Court (Kihara Kariuki, J. as he then was) made on 26th April 2005, by which its suit against Muthoni Kihara (the 1st respondents) and the Commissioner of Mines and Geology (the 2nd respondent) was struck out on separate applications by the two respondents. Those applications, made a few weeks before the scheduled hearing of the suit, were on the basis that the suit disclosed no cause of action and was time barred on the part of both respondents, and that it did not lie against the 2nd respondent by reason of non-compliance with certain provisions of the Government Proceedings Act, Cap 40.

The suit as presented before the High Court had been premised on the appellant's claim that the 1st respondent was a trespasser on the appellant's Land Reference Number 12199/4 situated in Taita Taveta District. She was on the land conducting mineral prospecting but without the consent or permission of the appellant, which had previously granted such licence to one Kihara Kibugi (deceased), who was her

husband. The appellant was apprehensive that the 2nd respondent would grant the 1st respondent a prospecting or mining licence notwithstanding the absence of the consent of the appellant as the proprietor of the subject land.

The appellant sought as against the 1st respondent orders of injunction, account for proceeds of mining, general damages for illegal un authorized mining, for degrading and polluting its land and the cost of restoring the same. As against the 2nd respondent, the appellant craved a declaration that he had no right or power to grant any prospecting or mining licence without the appellant's consent, and for an injunction to restrain the 2nd respondent from unlawfully granting such licence.

The appellant was aggrieved by the order striking out its suit and filed a notice of appeal against the entire ruling. It then filed a record of appeal on which is contained a memorandum of appeal raising no less than forty-six grounds of appeal. With respect, we find it mind-boggling that a brief 8-page ruling should lead to such a lengthy memorandum of appeal that is itself longer than the ruling sought to be appealed against. We have stated before, and it bears repeating, that counsel must go back to basics and pay due regard to **Rule 86(1)** of the **Court of Appeal Rules** which spells out the contents of a memorandum of appeal as follows;

"A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make."

The memorandum of appeal herein is a study on what that document ought *not* to be. Arguments, narrations, pleas, submissions and explanations all in a hotch-potch of prolixity which serve only to obfuscate, waste time and vex the reader. Brief is better especially for a memorandum of appeal.

Mercifully, in written submissions, which the oral submissions later made before us closely mirrored, the appellant condensed the grounds of appeal into six distinct grievances, namely that the learned judge erred by;

(a) ***holding that the appellant's suit was statute barred under the Limitation of Actions Act.***

(b) ***holding that the appellant's suit was statute barred under Section 3(1) of the Public Authorities Limitation Act***

(c) ***holding that the appellant's suit was statute barred under Section 16(1) of the Government Proceedings Act***

(d) ***holding that the 1st respondent most likely had acquired certain legal rights recognized by law which could not be ignored***

(e) ***striking the suit out on account of alleged statute bar, fatal defect and incompetence under Section 12 of the Government Proceedings Act and for non-joinder of the Attorney-General and misjoinder of the 2nd respondent.***

(f) ***summarily dismissing the appellant's claim allegedly for being hopeless, vexatious and incurable by amendment.***

(g) ***failing to take into account the appellant's superior title in summarily dismissing the appellant's suit.***

At the hearing of the appeal, **Mr. Riunga Raiji** appeared with **Mr. Victor Odhiambo** as learned counsel for the appellant. For the 1st respondent, **Mr. Charles Kanjama** learned counsel was present while **Mr.**

Kaumba Odiwour learned counsel represented the 2nd respondent.

Mr. Raiji first took issue with the timing of the two applications; which led to the striking out of the appellant's suit against the respondents. He pointed out that as at the time the applications were filed in January 2005, the suit already had a hearing date; the issues having already been agreed on by the parties, and all interlocutory applications disposed of. Counsel read mischief and a lack of *bona fides* in the bringing of the applications to strike the suite so belatedly.

Turning to the question of limitation by statute, **Mr. Raiji** submitted that it was a wholly novel issue not raised by the respondent parties in their pleadings and making its sudden appearance only on the two applications. He faulted the learned judge for entertaining the limitation plea and going ahead to determine the application on this basis quite contrary to the provision of Order VI. **Rule 4** which mandatorily required a party to specifically plead any relevant statute of limitation. He stated that under sub rule 2 of the same order, a plea of possession was in and of itself insufficient, which, according to counsel, is all that had been pleaded. He proceeded to submit that the 1st respondent never raised any plea of limitation and made no counterclaim against the appellant. She only went as far as to state at paragraph 5 of her plaint, without more, that she would at the first hearing of the suit,

"adduce evidence to establish that she had a legal right to carry out the mining activities …". Such hearing did not, in the event, take place and would not have been the proper way to introduce such issues as limitation. He cited the decision of this Court in **SANDE Vs. KENYA CO-OPERATIVE LTD** [1992] KLR 314 for the proposition that the learned judge had no power or jurisdiction to decide on an issue not raised before him, the only way for doing so being through pleadings. He also cited the case of **NAIROBI CITY COUNCIL Vs. THABITI ENTERPRISES LTD** [1995-1998] EA 231 (CAK).

Counsel next submitted that in so far as the 1st respondent's possession was pursuant to a licence, it was always terminable and could not therefore form a basis for a claim in land. He specifically submitted that under the Mining Act, a person cannot enter upon and mine on private land without the consent of the owner. The High Court had previously recognized this in its rejection of an application made in an attempt made to set aside the injunction orders earlier obtained by the appellant. That rejection of the application to set aside the order of injunction was affirmed by this

Court in **Civil Application No. Nai 33 of 2000** which dismissed an application seeking to stay the dismissal orders.

Mr. Raiji faulted the learned judge for taking the drastic step of deciding in a summary fashion that the appellant did not have a case deserving of ventilation at a trial proper. Relying on the case of **D.T. DOBIE COMPANY (K) LTD Vs. JOSEPH MBARIA MUCHINA & ANOR** [1982-88] 1KAR 1, counsel submitted that striking out or summary dismissal of a litigant's claims should be resorted to most sparingly as every court is enjoined to look at the wider interests of substantive justice and as far as possible litigants should be availed and accorded their day in court.

Counsel also assailed the learned judge for striking out the appellant's suit on the basis of the technical position taken by the 2nd respondent both in its defence and in the application before the learned judge, namely, that the appellant could not seek an injunction against the Government. He asserted that what was essentially sought against the 2nd defendant was a declaration. The plea for injunction was purposely to obtain relief because the 2nd respondent was on the verge of issuing a licence to a trespasser to conduct mining activities on private land.

Counsel therefore urged us to allow the appeal, set aside the learned judge's orders and allow the parties to go back to where they were, ready to have a full hearing of the suit on its merits at the High Court.

First to oppose the appeal; **Mr. Kanjama** first recalled the history of the matter stating that the 1st respondent's husband obtained consent in 1983 from the appellant's predecessor in title. The 1st respondent succeeded to operate under that consent upon the death of her husband. He proceeded to urge

that once the owner of land has given his consent, he does not have a right to later withhold it.

On the competency of the application that the 1st respondent made before the learned judge, counsel submitted that under **Order 6 Rule 13**, such application could be made at *any stage* and there was nothing improper about its having been made virtually on the eve of the scheduled hearing. He went on to submit that even though the 1st respondent had not pleaded limitation of actions expressly, a reasonable construction of her defence disclosed the plea. At any rate, he argued, since the defence of limitation arises out of a statute, its applicability could not be limited by the Civil Procedure Rules, which are subsidiary legislation. This was more so because time limitation is a plea that goes to jurisdiction in accordance with the Supreme Court's decision in several cases including **MARY WAMBUI MUNENE Vs. PETER GICHUKI KINGARA & 2 OTHERS** [2014] eKLR and **HASSAN ALI JOHO & ANOR Vs. SULEIMAN SAID SHAHBAL & OTHERS,** Supreme Court Petition No. 10 of 2013. He added that in the case before the learned judge the period of limitation could not be extended and so the claim founded on trespass, having been brought outside the period of three years, was a nullity and could not aid the appellant, even when the 1st respondent was not making any claim of ownership over the subject property.

Mr. Kanjama went on to distinguish the case of **NAIROBI CITY COUNCIL Vs. THABITI ENTERPRISES** (supra) on the basis that the plea there had been made after a full hearing whereas herein the hearing had not taken place and so the appellant had sufficient notice of the objection. He reiterated, in a significant submission that;

> ***"We are not challenging the title of the owner, just asserting mining rights over its lands."***

On his part, **Mr. Kaumba** started by asserting that the 2nd respondent was improperly joined in the suit that was between two private individuals on which there was no cause of action against him. Instead, the appellant couched its pleadings in anticipatory terms and made prayers that were tantamount to a clog of the exercise of the 2nd respondent's discretion. In answer to a question by the Court, learned counsel made this concession;

> ***"That discretion does not extend to granting a licence over private property without the owner's consent."***

Mr. Kaumba then criticized the appellant's prayers in the plaint in that "*though couched as declaratory, the orders sought were actually injunctive."* He stated that the appellant had sought an injunction camouflaged as a declaration in an attempt to comply with **Section 16(1)** of the Government Proceedings Act. He also criticized the appellant's choice of approaching the Court by ordinary suit which has to be predicated on crystallized causes of action, which it did not have, instead of by way of judicial review where orders of prohibition might issue.

In in reply to those submissions, **Mr. Raiji** contended that a landowner's consent cannot last in perpetuity as the 1st appellant sought to argue, though it was never her pleaded case. He was emphatic that there were issues of fact and law deserving of exploration at a full trial so that the learned judge was wrong to drive the appellant away from the seat of judgment unheard. Counsel next sought to distinguish the line of cases cited like **WAMBUI** and **JOHO** (supra) on the basis that they concerned elections which are notorious and published within the time lines well known. He then referred to the correspondence between the appellant and the 1st respondent and submitted that contrary to the respondent's assertions that the suit was time barred, the cause of action actually arose on 3rd August 1998 when the 1st respondent rejected the invitation to enter into an agreement on the terms upon which she could access the appellant's land; so that the suit was filed within time.

As to the claim that the appellant's suit was merely anticipatory, **Mr. Raiji** submitted that the mischief threatened by the 2nd respondent by being on the brink of issuing a licence to the 1st respondent to mine on the appellant's land without the appellant's consent was sufficient reason for going to court since a

violation of law was imminent. The apprehended injury was genuine, real and present and the 2nd respondent, as a servant of the law, was a proper party to sue in the circumstances.

Having considered the record before us, the written and oral submissions and the authorities cited, we are of the opinion that the only issue we need to decide is whether the learned judge was correct in granting the applications to strike out the suit in all the circumstances of this case. Should we decide that he was correct we would be entitled to delve into an expanded discourse on why we so hold, including merit pronouncements on all the issues raised in the suit while, should we think the judge should not have struck the suit out, we would refrain from making any pronouncements on the merits since that would be for the court that will hear the suit on its merits.

Did the learned judge err in entertaining and granting the two applications for striking out the appellant's suit as contended in this appeal? We think he did.

As we have already noted, the suit had already been allocated a hearing date in the month of March 2005 when the two applications to strike it out were filed. Indeed, the application by the 1st respondent dated 12th January 2005 was supported by a certificate of urgency seeking its urgent disposal on priority because the suit was scheduled for hearing on 8th and 9th March 2005. Considering that the suit had been filed nearly six years previously in 1999 and all manner of interlocutory applications had been disposed of and issues for determination crystallized, we do not think that substantial justice was seen to have been done for a merit determination of the issues in controversy between the parties to have been scuttled at the altar of technical objections brought on the eve of the hearing. Parties are entitled to a determination of the real questions in dispute and it behoves courts to favour the hearing of cases on merit especially where, as here, the suit was ready and set down for hearing and disposal. While cognizant, therefore, that an application to strike out a suit may be brought at any time, the learned judge should in this case have directed the parties to await the hearing of the suit that was imminent, and to raise the objections they had during the hearing. There seems to us to have been merit in the grounds of opposition filed by the appellant, which the learned judge made no serious consideration of, in which it had contended that;

> ***"This Court and the Court of Appeal, in their rulings, copies of which are on record, have found and held that the plaint discloses a cause of action with a high probability of success. The present application is therefore an attempt to circumvent these rulings and to avoid or delay the upcoming hearing …."***

The timing aside, it does not seem to us that the learned judge sufficiently or at all considered the authorities cited before him on whether or not a plea of limitation of action could be relied on to strike out a plaint if the said plea was never raised in the statement of defence. It is common ground that the 1st respondent did not raise it although **Mr. Kanjama**, her learned counsel would have us believe that it is discoverable by a process of construction. We are not satisfied that the learned judge did sufficient justice to that aspect of the case given the clear and mandatory provisions of **Order VI Rule 4** of the Civil Procedure Rules (Rev. 1998) that were then in force. The Rule is relevant to both the statute of limitation which the 1st respondent should have expressly pleaded and to the fact that a plea of being in possession of land would not avail a defendant: he is required to plead specifically the grounds on which he relies;

> ***"4(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, <u>any statute of limitation</u> or any fact showing illegality –***
>
> ***(a) which he alleges makes any claim or defence of the opposite party not maintainable; or***
>
> (b) ***which, if not specifically pleaded, might take the opposite side by surprise; or***
>
> (c) ***which raises issues of fact not arising out of the preceding pleading.***

(2) without prejudice to sub-rule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession by himself or his tenant shall not be sufficient."

(Our emphasis)

The duty that the 1st defendant bore to specifically plead the statute of limitation in her defence is plain, express and inescapable from a reading of that provision, which is in terms such as are found in Halsbury's Laws of England, 4th Edition, Vol. 36 at paragraph 48(p38). This Court has itself pronounced on this in **STEPHEN ONYANGO ACHOLA & ANOR Vs. EDWARD SULE HONGO & ANOR** Civ. Appeal No. 209 of 2001 when overturning the decision of the High Court that upheld a preliminary objection and struck out a plaint on the basis of a matter that had not been pleaded as required. The Court was emphatic that;

"The second respondent having failed to specifically place the issue of limitation in its defence, it was not entitled to rely on that issue and base its preliminary objection on it; nor will the second respondent be entitled to rely on that defence during the trial of the suit unless it amends its defence. It is trite law that cases must be decided on the issues pleaded and we need not cite any authority for that proposition."

We associate ourselves fully with that statement of the law and have had difficulty finding that the striking out of the appellant's suit on the basis of the issue of limitation unpleaded by the 1st respondent was in error and must be reversed.

On a more fundamental basis, we also take the view that the learned judge did not give due consideration to the fact that the striking out of a litigant's suit is a drastic and draconian action that should not be lightly undertaken. Rather, the court should proceed with caution and circumspection, resorting to it only in the clearest cases where there is plainly no cause of action and the pleading in question is so hopelessly bad and devoid of substance as to be incapable of cure or salvage even by amendment. The suit at the High Court was not one that was beyond redemption if anything, it seems to us that it raised serious, substantial issues of fact and law deserving of judicial investigation. Had the learned judge remembered the words of Madan J.A. in **D.T. DOBIE & CO (K) LTD Vs. MUCHINA** [1982-88] 1 KAR 1 that the court should aim at sustaining rather than terminating a suit, he would in all likelihood not have struck out the appellant's suit.

What the High Court was called upon to determine was the *bona fide* and serious issue of whether the second appellant could issue a mining licence to a person to conduct mining activities on private land where the owner of the said land had not only not given its consent or permission, but is on record as strenuously protesting against such licence being granted to a person it describes as a trespasser. That was not a frivolous or academic question and it definitely could not be answered by a striking out of the plaint. It is enough for us to simply point out, that under **Section 7(1)(m)** of the

Mining Act, private lands are excluded from mining and prospecting *except with the consent of the owner thereof*. **Mr. Kaumba** conceded this legal position and no party has contested the appellant's ownership of the subject land. We note that this same issue has been the subject of this Court's pronouncement in **KASIGAU RANCHING (D.A.) LTD Vs. JOHN GITONGA KIHARA & OTHERS,** Civil Application No. Nai 105 of 1998, that once the landowner withdraws his licence to prospect, then the licence issued by the Commissioner of Mines and Geology stands terminated. It was reiterated in the appeal then pending, being **JOHN GITONGA KIHARA & OTHERS Vs. KASIGAU RANCHING (D.A) LTD**, Civil Appeal No. 134 of 1994, where the Court stated that once a licence granted to the defendants expired and was not renewed, then the plaintiff's withholding of his consent rendered the defendants trespassers. In doing so, the Court cited with approval a passage from Salmond on Torts, 17th Edn. At P 74;

> ***"Under a bare licence no interest in property passes; the licencee is simply not a trespasser. A licence of this kind may be either gratuitous or contained in a contract for valuable consideration; in either case at common law it was revocable at the will of the licensor and was therefore no justification for any act done in exercise of at after revocation ….. If, however, the licensee insists, notwithstanding the revocation of his licence …in entering or remaining on the land or in***
>
> ***otherwise exercising his licence, he became at common law a trespasser or other wrong doer …."***

We cite these authorities not in a bid to decide finally the issues in controversy between the parties in the struck out suit, but only to demonstrate that the suit was weighty and substantial and definately unfit for striking out under **Order VI Rule 13** for purportedly disclosing no reasonable cause of action.

We are also satisfied that the objections by the 2nd respondent, which formed the basis of his application, including whether or not the suit against him sought declaratory or injunctive relief and whether the suit against him was anticipatory, are amenable to a factual or legal answers from the pleadings before the High Court. A judge would have to make a finding on them after evidence is tendered and the parties get to be fully heard at trial. See **B. Vs. ATTORNEY GENERAL** [2004] 1 KLR 431, **MURIITHI Vs. ATTORNEY GENERAL** [1983] KLR 1.

Being of that firm opinion, we find that some of the decisions of this Court upholding the striking out of suits cited by the respondents such as **ABUBAKAR ZAIN AHMED Vs. PREMIER SAVINGS & FINANCE LTD & OTHERS** [2007] eKLR and **FREMAR CONSTRUCTION CO. LTD Vs. MINAKSHI NAVIN SHAH** [2005]

eKLR, while correct in their own context, cannot apply to the facts and to the issues raised in the appeal before us.

In the final result, we are not convinced that the learned judge arrived at the correct decision in striking out the appellant's claim. In the circumstances of the case, it would have accorded with the constitutional ideal of doing substantial justice untrammeled by technicalities, and would also have conduced to the attainment of the overriding objectives of the Civil Procedure Act and the Rules hereunder. The learned judge should have declined the invitation to wield and strike the appellants suit with the draconian and drastic sword.

This appeal therefore succeeds. The ruling and order dated 26th April 2005 are accordingly set aside and substituted with an order dismissing the respondents' applications dated 12th January 2005, and 27th January 2005 with costs. The suit at the High Court is restored to proceed to full hearing in the normal manner expeditiously, given its age.

The appellant shall have the costs of this appeal.

Dated and delivered at Nairobi this 24th day of April, 2015.

M. K. KOOME

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JUDGE OF APPEAL

P.M. MWILU

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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