IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & M'INOTI, JJ.A)

CIVIL APPEAL NO. 90 OF 2007

BETWEEN

GRACE WANGUI MBURU.....1ST APPELLANT

PETER MUGUTI KAHUNYA.....2ND APPELLANT

AND

PETER MBURU NGURI.....1ST RESPONDENT

GODFREY NG'ANG'A NYOIKE.....2ND RESPONDENT

HOSEA MUTHAMA MWIKA.....3RD RESPONDENT

KARAGITA SELF HELP MIXED GROUP.....4TH RESPONDENT

JOSEPH NG'ANG'A KANYUKII

T/A EXCELLENT AUCTIONEERS.....5TH RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Njagi, J.)

delivered on 6th November, 2006

in

HIGH COURT CIVIL CASE NO. 1133 OF 2003)

JUDGMENT OF THE COURT

1. In this appeal, the appellants, Grace Wangui Mburu and Peter Muguti Kahunya, have challenged the decision of the High Court (L. Njagi, J.) given on 6th November 2006 striking out their suit against the respondents. Their suit was struck out on the grounds that the 4th respondent, Karagita Self Help Mixed Group, has no personality known to the law and cannot as such be sued and that the proper defendants who are members of that Group were not before the court. The sole question that arises in this appeal is whether the High Court erred in striking out the suit.

Background

2. In their re-amended plaint filed in the High Court on 26th November 2004, the appellants pleaded that the 1st to 3rd respondents are officials of the 4th respondent, a self help group involved in land buying for its members; that the 1st to 3rd respondents were "*sued in their own personal capacity and/or as representatives or office bearer (sic) of the 4th*" respondent; that the appellants agreed to purchase from the respondents who agreed to sell to them two pieces of undivided portions of land being L. R. Numbers 396/29 and 30 Naivasha (the properties); that the appellants paid part of the purchase price and took possession of the land; that the appellants built commercial and residential accommodation on the properties; that following disagreement the appellants filed suit in the magistrates court and obtained restraining orders which the respondents subsequently appealed to the High Court; that the respondents trespassed upon the properties, demolished the appellants' buildings and evicted them from the properties; and that the appellants have suffered loss and damage. The appellants accordingly sought judgment for special damages of Kshs. 3,475,780.00; general damages and costs of the suit.

3. In their defence and counterclaim filed on 17th December 2004 the respondents admitted the description of the parties and the agreement for the purchase of the properties as pleaded by the appellants; they averred that the appellants had failed to disclose material facts; namely that the appellants, in breach of the agreement, failed to pay the balance of purchase price of Kshs. 119,000.00 and Kshs. 120,000.00 respectively on the properties; and that the demolition and eviction of the appellants from the properties was legal as it was carried out in execution of a court order. The respondents denied liability, prayed for dismissal of the appellants' suit and counterclaimed for the balance of the purchase price of Kshs. 119,000.00 and Kshs. 120,000.00 and damages.

4. On 19th April 2005, the respondents presented an application to the High Court under the then Order VI rule 13(a)-(d) of the Civil Procedure Rules presently rule 15 of order 2 of the Civil Procedure Rules, 2010) seeking an order that the "*re-amended plaint dated 25th November 2004 be struck out with costs to the defendants*" on the grounds that the suit "*discloses no reasonable cause of action*" and that it is "*frivolous and vexatious*" and that it is "*an abuse of [the] court's process and is fatally defective*." In the supporting affidavit, the 2nd respondent deposed that the matters complained of by the appellants in their suit arose from execution of court orders; that the *res judicata* having been adjudicated upon in HCCC 2561 of 1994 and SPMCC 35 of 2002; that the 1st appellant was a party to HCCC 1335 of 2003, a suit involving the same subject matter also pending before the High Court; that the suit is fatally defective for non compliance with procedural rules and is invalid as "*there is no authority to sue the 1st to 4th defendants who have no locus standi to be sued*…"

5. In his replying affidavit sworn on 24th May 2005 and filed in the High Court on 3rd June 2005 the 2nd appellant deposed that the alleged court order allowing eviction excluded the appellants; that the court broker, the 5th respondent, illegally executed the order for eviction; that the matters raised in the appellants' suit have never been heard and decided by any court and the principle of res judicata did not therefore apply; that any prior proceedings did not relate to claims for compensation of the properties and that the appellants' suit was not defective and complied with all relevant procedural rules.

6. After hearing the parties, the learned Judge of the High Court delivered the impugned ruling on 6th November 2006 in which he held that the appellants were entitled to file the re-amended plaint having sought and obtained leave to do so; that considering that the High Court has unlimited territorial and pecuniary jurisdiction the appellants' suit was properly filed in the High Court at Nairobi notwithstanding that the properties are situated in Nakuru District; that the complaint that the suit was defective because it was not accompanied by verifying affidavits was devoid of merit as there is no requirement for amended or re amended or further amended plaints to be accompanied by verifying affidavits; that the issue raised in the appellants' suit was not raised and could not have been raised in the previous suit and the same is not res judicata; that the court would have to hear evidence regarding whether the 5th respondent had authority to evict the appellants. With all of those holdings, the appellants have no grievance.

7. On the question whether the respondents were properly before the court, the learned Judge stated (and it is necessary to quote from his ruling at length) that:

> ***"This brings us to the final issue which is whether the parties are properly before the court. This is especially so for the defendants. The fourth defendant is Karagita Self Help Mixed Group. It is not a body corporate. Such association has no personality known to the law and as such it cannot be used. I understood Mr. Mugo to contend that O.XXIXX of the Civil Procedure Rules allows persons who are not legal persons to be sued. That is so, but only when such persons carry on business together with a view of profit. In that case the number must not exceed 20. That does not and cannot apply to an association of the nature of Karagita Self Mixed Group which is more of an amorphous association made up of an indeterminate number of persons. Although O.XXIX has solved the problem in respect of suits by or against partnerships, in the case of other unincorporated bodies, such as Karagita Self Mixed Group, the problems of suit are still serious. The safest course in suing such bodies is to proceed by way of a representative action, whereby one or more persons may sue or be sued on behalf of all the interested parties. Resort to this procedure is available only subject to compliance with the provisions of 0.1 rule 8 of the Civil Procedure Rules. With leave of the court, the first three defendants could therefore be sued on behalf of themselves and all the other members of the 4th defendant; but not on behalf of the 4th defendant per se, as there is no such a person in law.***
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> ***For the above reasons, I find that the proper defendants who are members of Karagita Self Help Mixed Group, are not before the court. The action is therefore not properly constituted and the plaint herein is consequently struck out"***

8. According to the appellants, the learned Judge erred in arriving at that conclusion in that he failed to appreciate that the appellants as plaintiffs did not require leave of the court before filing a representative suit; that the court failed to appreciate that the appellants had made an application for leave for the 1st, 2nd and 3rd respondents to represent members of the 4th respondent in the suit; that the 1st, 2nd and 3rd respondents were sued in their own capacity as well as representing the 4th respondent; that an action cannot under rule 1 of Order 9 of the Civil Procedure Rules be defeated by reason of mis joinder or non joinder of a party; that the re-amended plaint that was struck out had been allowed by the court; and that in the circumstances the learned Judge wrongly exercised the court's discretion to strike out the suit.

Submissions by counsel

9. At the hearing of the appeal learned counsel for the appellants Mr. P. N. Mugo submitted that the appellants' suit was wrongly struck out by the High Court; that the 4th respondent is a land buying company in which the appellants were members; that they purchased land from that company and developed it; that their developments on that land were wrongly demolished and the appellants evicted; that the 1st to 3rd respondents were sued both in their personal capacity as well as office bearers of the 4th respondent; that the learned Judge was wrong in his conclusion that the 4th respondent could not be sued; that even assuming the learned Judge of the High Court was right that the 4th respondent was not capable of being sued, that did not warrant the striking out of the suit against all the respondents; that the learned Judge misconstrued the provision of Order 29 of the Civil Procedure Rules; that in any event a suit cannot by reason of rule 8 of Order 1 be defeated for misjoinder or non joinder of parties; and that this is therefore a proper case for the order striking out the appellants suit to be set aside and the suit to be reinstated and referred to the High Court for hearing and disposal.

10. Though served with notice of hearing of the appeal, the advocates for the respondents did not attend.

Determination

11. We have considered the appeal and the submissions by learned counsel. As Madan, JA, (as he then was) stated in **DT Dobie Co Ltd vs. Muchina [1982] KLR 1** at page 9:

> ***"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so week as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can injected with real life by amendment, 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."***

12. It is evident from the ruling by the learned Judge of the High Court and particularly from the portion of the ruling we have reproduced at paragraph 7 above that what impelled the Judge to strike out the suit was his conclusion that the 4th respondent "*is not a body corporate. Such an association has no personality known to the law and as such it cannot be sued*." Assuming for a moment that that conclusion was well founded, it could not have been the basis, in our view, for striking out the suit in its entirety as against the other respondents. It could only have invited an order to strike out the suit as against the 4th respondent.

13. Furthermore, the conclusion by the learned Judge that the 4th respondent "*is an amorphous association made up of an indeterminate number of persons*" appears on the face of it to go against the pleadings. The respondents in their statement of defence expressly admitted the plea by the appellants in the re-amended plaint that "*the 4th Defendant is a registered Self Help Group.*" We have reviewed the affidavits that were before the learned Judge, and there was no material before the Judge on the basis of which his conclusion was based. Given the state of the pleadings, we think the learned Judge's conclusion was premature and was reached without the aid of any evidence. It seems to us therefore that the learned Judge delved into matters of evidence that should have been left for the trial court. The result is that the learned Judge erred in striking out the appellants' suit *in limine*.

14. The appeal therefore succeeds. The ruling and order of the High Court given on 6th November 2006 is hereby set aside and substituted with an order dismissing the respondents' chamber summons dated 18th April 2005 and filed in the High Court on 19th April 2005 with costs to the appellants. The appellants will also have the costs of this appeal.

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

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR