



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GITHINJI, MAKHANDIA, MURGOR, J.J.A

CIVIL APPEAL NO. 202 OF 2009

BETWEEN

1. JAMSHED AHMED BUTT

2. FEHMIDA BEGUM BUTT..... APPELLANTS

AND

1. MR.MOSES

2. MR.IBRAHIM

3. FAROUK AHMED BUTT.....RESPONDENTS

(Being an appeal from the Ruling and Decree of the High Court of Kenya at Mombasa (Sergon J) dated 20th May, 2009

in

H.C.C.C. No. 122 of 2009)

JUDGMENT OF THE COURT

This is an appeal from the Ruling and Order of the High Court (*Sergon, J.*) dated 20th May 2009 whereby the High Court upheld the respondents preliminary objection and struck out the suit and the accompanying application.

The two appellants who are husband wife filed a suit against *Moses, Ibrahim* and *Farouk Ahmed Butt (Farouk)*, the 1st, 2nd and 3rd respondent respectively. They averred in the plaint that they were the registered owners as tenants in common in equal shares of Mombasa/M.S/ Block 1/416 Shelly Beach South Coast and that the 1st and 2nd respondents who had been put in possession by the 3rd respondent were unlawfully in possession. The relief sought against the 1st and 2nd respondents was an order of eviction.

The appellants also sought an order of injunction against Farouk from assuming or resuming actual or physical possession.

The appellants averred in paragraph 9 of the plaint that:-

“there has been no previous proceedings concerning the matters in issue in this suit.”

The plaint was accompanied by Verifying Affidavit sworn by **Hillary Kuindwa** in which he deposed, *inter-alia*, that he was a lawful Attorney of the appellants by way of the Power of Attorney dated 19th January, 2009 and that the averments in the plaint were correct.

The Plaint was accompanied by a chamber summons brought under a certificate of urgency seeking two main prayers in paragraphs c and d namely; (c) an eviction order against 1st and 2nd respondents or alternatively the appellants be allowed to put their own guards, and, (d) – an order of injunction restraining the three respondents from removing any items, furniture, fixtures fittings and materials from the suit premises.

The application was supported by a long affidavit sworn by the 1st appellant on 22nd April 2009.

The application was fixed before **Odero, J.** for hearing *ex parte* who granted the order of eviction against the 1st and 2nd respondents.

The learned judge further ordered that the hearing date for *inter partes* hearing of the application be taken at the registry.

On 8th May 2009 the appellants filed a Notice of Withdrawal and Discontinuance of the suit against Farouk.

On 4th May 2009 Farouk while indicating that he had not been served with the application or the plaint filed a defence and also a Replying Affidavit to the application sworn on 13th May 2009.

When the application dated 29th April, 2009 came for hearing on 20th May, 2009, **Mr. Kaburu**, learned counsel for the respondents, raised an oral preliminary objection apparently to the suit and application. **Mr. Kaburu** contended *inter alia* that the appellants did not comply with Order VIII of the Civil Procedure Rules (CPR): that the suit having been withdrawn against Farouk, the suit against 1st and 2nd respondents - his agents cannot be maintained, that Hillary Kuindwa did not annex the Power of Attorney and that appellants falsely stated that there was no other suit pending.

The learned judge ruled as follows:-

“it is admitted that the Power of Attorney is not annexed to the verifying affidavit of Hillary Kuindwa. That is at fatal error. There is also an admission that another suit is pending there not involving the defendants herein (sic). That suit i.e. Mombasa Hccc No. 196 of 2008 is still pending. It has not abated. The plaintiff therefor made a wrong averment in paragraph 9 of the plaintiff that there is no pending suit. For above reasons I find the Preliminary Objection properly founded ...”

The appellants are aggrieved by the exercise of the judge's discretion to strike out the suit on the grounds stated in the order.

Before we deal with the appeal it is expedient to sketch out the nature of the dispute as disclosed by the appellants' affidavit sworn on 22nd April 2009 and the replying affidavit of Farouk sworn on 13th May 2009.

The appellants are permanently resident in England. Sometime in 2004 they bought

Mombasa/M.S./Block 1/416 leasehold residential property at Shelly Beach comprising of 0.914 of an acre from Alan John Wilson, (suit property). One Khurshed Butt (deceased) who is a first cousin of the appellants was acting as agent for the seller. However, Farouk says that the deceased is the one who facilitated the sale.

At the time of purchase of the property it had 8 years unexpired lease. The appellants entrusted the deceased with obtaining an extension of the lease and gave him a power of attorney to look after the property and also to act on behalf of the appellants.

In April 2008 the deceased sent an invoice for shs 8,500,000/= for services rendered including extension of the lease to 50 years and construction of extensions to the house. A dispute arose about the deceased claim.

The appellants also claimed that they had lent the deceased GBP 10,000 which was to be repaid with interest. The deceased ultimately refused to handover possession of the suit property to the appellants.

Sometimes in 2008 the appellants filed a suit, Mombasa **H.C.C.C. No. 196 of 2008** against the deceased for recovery of GBP 10,000 and also for recovery of possession of the suit property. The deceased filed a defence and counter-claim. He pleaded that his claim on the house is a lieu for the unpaid Kshs.8,589,956/= which he counter-claimed.

According to Farouk – brother of the deceased, the deceased was murdered on 4th March 2009 and he believes that his death was related to the dispute between him and the appellant. Farouk claimed in the affidavit that he is keeping possession of the house to protect the properties which were in actual physical possession of his deceased brother pending the issue of a letters of administration in Nairobi **Probate and Administration Cause No. 693 of 2009**. The certificate of extended Lease given on 12th July 2006 verify that the two appellants are the proprietors of the leasehold.

Turning to the appeal, **Order VII (I) (e)** of Civil Procedure Rules (CPR)

now repealed, provided that a plaint shall contain an averment that there is no other suit pending and that there has been no previous proceedings in court:-

“between the plaintiff and defendant over the same subject matter”

Rule 1(2) of **Order VII** Civil Procedure Rules required a plaint to be accompanied by an affidavit verifying the correctness of averments contained in the plaint.

Rule 1(3) Civil Procedure Rules provided -

“The court may of its own motion or on the application of the defendant order to be struck out any plaint which does not comply with sub-rule 2 of this rules”

Order VII has been re-enacted as Rule 4 and the same rules have been retained in **Order 4** Civil Procedure Rules 2010.

It is clear from **sub-rule 1(3)** that the power to strike out plaint is discretionary and only applies if **sub-rule 1(2)** is breached – that is when the plaint is not accompanied by a verifying affidavit.

Rule 1 of **Order VII** does not specifically give the court power to strike out a plaint where the breach is failure to aver in the plaint that there is no other suit pending and that there has been no previous proceedings.

Even in that case, the rule is breached only if the pending suit or the previous proceedings are between the same parties over the same subject

matter. In the instant case, the suit was not between same parties as in **H.C.C.C. No. 196 of 2008**. Farouk had not yet obtained a Grant of Letter of Administration in the respect of estate of his deceased brother nor joined party in the previous suit. Moreover, the claim against him had already been withdrawn in the current suit before the learned judge struck out the suit.

The plaint was accompanied by the affidavit of Hillary Kuindwa, an attorney of the appellants which verified the correctness of the averments in the plaint in compliance with **sub-rule 1(2)**. The finding of the learned judge that failure to annex the Power of Attorney was fatal, is with respect, not supported by law and is erroneous. The existence of such Power of Attorney was not challenged and it could have probably been produced in court if it was required. Had the respondents made a formal application for striking out the plaint on that ground instead of making an oral preliminary objection, the appellants would have had an opportunity of availing the Power of Attorney. The effect of the orders of the learned judge was to give a remedy to Farouk who was not a party in either suit and who had not made any application in the suit.

Farouk has a remedy. He can obtain a Grant and apply to be joined in both suits and then apply for stay of current suit pending the determination of the previous suit.

For the foregoing reasons, we are satisfied that there was no valid grounds for striking out the suit and the application and that the learned Judge did not exercise his discretion judicially.

Accordingly, the appeal is allowed. The order striking out the suit and the application dated 29th April 2009 is set aside. The result is that the suit and the application are restored for hearing on the merits. The costs of the appeal to be in the suit.

Dated and delivered at Malindi this 26th day of June, 2013.

E. M. GITHINJI

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JUDGE OF APPEAL

ASIKE-MAKHANDI

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR