



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: KARANJA, KIAGE & M'INOTI, J.J.A.**

**CIVIL APPEAL NO. 150 OF 2004**

**BETWEEN**

**KUNVARJI SHIVJI VARSHANI.....1<sup>ST</sup> APPELLANT**

**SHAMJI SHIVJI VARSHANI.....2<sup>ND</sup> APPELLANT**

**AND**

**YURIKO LIMITED.....RESPONDENT**

***(Appeal from the Ruling and order of the High Court of Kenya at Nairobi (Hon. Commissioner Philip Ransley, CA) dated 17<sup>th</sup> January, 2000***

***in***

***HCCC NO. 357 OF 1999***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The subject matter of this appeal is the property described as **L.R. No. 209/107/1/5 VALMIKI Road Parklands, Nairobi.**

The genesis of the matter is an agreement between the Bank of Credit and Commerce International Overseas Limited (BCCI) and the appellants herein to provide overdraft facilities to the two appellants and two others who are nonetheless not parties in this appeal. BCCI advanced the appellants and two others an overdraft facility which was not to exceed Ksh 3,000,000/=. The appellants herein executed personal guarantees to secure the facility. They defaulted in payment and so BCCI filed HCCC No. 4875 of 1987 for recovery of the same and accrued interest thereon.

Summary judgment was entered against the appellants for Ksh 3,485,487/= on 15<sup>th</sup> June, 1988. The appellants failed to satisfy the decree and so the decree holder (BCCI) issued a notification of sale of the property in question. The said property was subsequently sold by way of public auction where the respondent herein, a limited liability company, emerged as the highest bidder. The property was transferred to it.

An application for stay of execution of the said order to this Court made under **Rule 5(2) b** of the **Court**

**of Appeal Rules** was dismissed on 4<sup>th</sup> December, 1997 for being incompetent as there was no notice of appeal filed in respect of the decree in question.

The suit property was assigned to the respondent on 22<sup>nd</sup> June, 1998 and the assignment was duly entered against the Title on 21<sup>st</sup> July, 1998.

The appellants refused to vacate the premises and instead filed **HCCC No. 312 of 1999** against the respondent seeking injunctive orders to restrain the respondent from evicting them, and also for a declaration that the respondent had no proprietary rights in the said property. Before the suit could be heard, the respondent filed an application dated 26<sup>th</sup> October, 1999 seeking orders of striking out the plaint for disclosing no reasonable cause of action. That application was heard by Philip Ransley, Commissioner of Assize ( as he then was). He allowed the application and struck out the plaint vide his ruling dated 17<sup>th</sup> January 2000.

It is that ruling that provoked this appeal. It is worth of note that the appellants had filed several other suits in respect of the same subject matter. These include **HCCC No. 3132 of 1997, HCCC No. 2161 of 1990** and **HCCC No. 276 of 2000** but none of them has been heard to conclusion. HCCC No. 2161 of 1990 in which stay orders had been issued did not involve the respondent herein but the two appellants and (BCCI).

It is clear however, that the same was filed after judgment in HCCC No. 4875 of 1987 had already been entered in favour of BCCI and no appeal had been preferred against that judgment. If there was any disobedience or contempt of court orders in respect of that Ruling that granted the stay orders, then the disobedience was not on the part of the respondent herein.

It is also instructive that HCCC No. 276 of 2000 which is still pending before the High Court against Delphis Bank Limited seeks the same prayers as in the suit from which this appeal arises. Those matters are nonetheless not before us for purposes of this appeal and so we say no more.

In support of his appeal, the appellant has proffered twenty seven (27) grounds and seeks the following orders:-

- a. ***The ruling of Hon. Philip Ransley C.A. dated 17<sup>th</sup> January 2000 and all the consequential orders thereto be quashed and or set aside with costs.***
- b. ***The HCCC No. 357 of 1999 be reinstated and set down for hearing on merits.***
- c. ***That the record of the Registrar of the suit property be rectified so that the ownership of the suit property reverts into the names it was on or before 20<sup>th</sup> July 1998 that is to say: KUNVARJI SHIVJI and SHAMJI SHIVJI VARSHANI pending the hearing of HCCC No. 357 of 1999 on merits.***
- d. ***In the alternative and without prejudice to the foregoing the status quo between the parties herein in respect to the suit property be maintained pending the hearing of HCCC No. 357 of 1999 on merits.***
- e. ***Costs of this appeal be provided for.***

In the said grounds of appeal, the appellants fault the learned Commissioner of Assize for arriving at his decision without reference to any written submissions of counsel, saying that the learned Commissioner relied on his memory to prepare the said ruling.

They also challenge the learned Commissioner's finding that the respondent herein was an innocent purchaser/transferee for value without notice. They fault the said transfer as fraudulent and that the same was incurably defective and unlawful. They also maintain that the learned Commissioner erred when he

failed to hold that the respondent held title to the said land subject to the overriding interests of and or in trust for the appellants.

*Mr. Nabutete*, the learned counsel for the appellants expounded these grounds in his written submissions filed in court on 27<sup>th</sup> April 2013. He gave a list of the several cases which have been filed in respect of this matter. We have mentioned some of them above.

They revolve around the same issue of the sale and transfer of the suit premises to the respondent which according to the appellants was fraudulent, and which should therefore be quashed or set aside. As noted earlier on in this ruling some of those matters are still pending before the High Court. According to *Mr. Nabutete*, HCCC No. 357 of 1999 (from which this appeal arises) and HCCC No. 332 of 1997 had already been consolidated and were meant to be heard together. Learned counsel emphasised the fact that failure to place all the files in respect of these suits before Commissioner Ransley amounted to a miscarriage of justice as he did not consider the pleadings therein before preparing his ruling.

He drew this Court's attention to an earlier ruling of this Court in civil application No. Nai 68 of 1992 delivered on 22<sup>nd</sup> May, 1992 which stopped BCCI from selling the property in question until the intended appeal was heard and determined. It was his submission therefore, that the sale of the suit property to the respondent was unlawful. He urged us to allow this appeal.

On his part, *Mr. Kosgey*, learned counsel for the respondents opposed the appeal and urged us to dismiss it. He relied on his submissions filed in court on 15<sup>th</sup> November, 2011 which he highlighted on 29<sup>th</sup> April, 2013.

The gist of his submissions was that the plaint in question was properly struck out for having not disclosed any cause of action. He submitted that the appellants' property was sold by way of public auction in satisfaction of the decree in HCCC No. 4875 of 1987. He told the court that the decree in the said suit had not been appealed from; the suit property was properly advertised for sale by way of public auction in the East African Standard on 7<sup>th</sup> August 1997; the sale was conducted and an agent of the respondent successfully bid for the same and purchased it for Ksh 13,100,000/=.

He submitted that the respondent had paid the full purchase price on 22<sup>nd</sup> June, 1998 and the assignment was duly registered against the Title on 21<sup>st</sup> July 1998. According to counsel, everything was done above board and the respondent herein was a bona fide purchaser for value without notice who had through his agent bided for the suit property at a public auction and paid Ksh 13.1 Million for it. Thereafter, the property was assigned to him and registered in his name and a certificate of Title issued to him.

It was learned counsel's contention that the appellants were the ones at fault for refusing to vacate the suit premises after the same was sold to the respondent. Instead of vacating the premises the appellants went ahead and filed civil suit no. 357 of 1999 on 16<sup>th</sup> February 1999 seeking *inter alia* an order of injunction against the respondent herein and a declaration that It had no proprietary interest or rights in the suit premises. It is in respect of this suit that the respondent filed the chamber Summons dated 26<sup>th</sup> October, 1999 seeking the striking out of the same for disclosing no reasonable cause of action.

That is the application that was heard and allowed by Commissioner Ransley in his ruling rendered on 17<sup>th</sup> January, 2000.

According to the learned counsel for the respondent, in the absence of fraud on the part of the respondent, its title to the suit property is conclusive evidence of proprietorship and cannot be challenged. On this proposition, he referred us to the case of ***Mbothu & 8 Others vs Waitimu & 11 Others (Civil Appeal No. 22 of 1984)*** where this Court made the following finding;

***“Under Section 23(1) of the Registration of Titles Act, a certificate of Title issued to a purchaser***

***of land upon a transfer or transmission by the proprietor is conclusive evidence of proprietorship and the Title shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party.”***

He submitted that the learned Commissioner of Assize properly struck out the said suit. He urged us to dismiss this appeal terming the same frivolous and an abuse of the process of this Court.

We appreciate the fact that this is a first appeal and we are therefore, obligated to re-evaluate and re-assess the evidence adduced before the trial court and arrive at our own independent decision – see **Selle vs Associated Motor Boat Company [1968] E.A. 123**; and **Jivanji vs Sanyo Electrical Company Ltd [2003] KLR 425**.

We have recapitulated the circumstances surrounding this matter and the multiple suits filed in respect of the suit premises. Strictly speaking, the issue here should be whether or not the learned Commissioner of Assize properly exercised his discretion in striking out the plaint in HCCC No. 357 of 1999. We have nonetheless endeavored to peruse the entire record and considered even the contents of those other related cases that are not subject of this appeal. As opined earlier on in this ruling, some of those suits are still pending and we must eschew commenting on them in order not to embarrass the court that may eventually be tasked with hearing and determining them.

From the record before us, it is instructive to note that the decree in HCCC No. 4875 of 1987 dated 21<sup>st</sup> April, 1989 was never appealed against and it was pursuant to that decree that the property in question was sold. Indeed there is no evidence that the court that gave the stay order of 22<sup>nd</sup> May 1992 was ever made aware of that case. The plaint in HCCC No. 2161 of 1990 is silent on the previous suit and the fact that the matter had already been determined. In our view, the subsequent suit was purely meant to circumvent the earlier decree which had already settled the issue of the debt in question.

According to learned counsel for the respondent, and we have no reason to believe the contrary, the court order stopping the sale was not brought to the attention of the learned Commissioner of Assize. In any event, that ruling was given on 22<sup>nd</sup> May 1992, yet there is no mention as to why the appeal had not been prosecuted eight years down the line as at the time when the said plaint was struck out. Even as at this point, we have not been apprised on the fate of that appeal.

The learned counsel for the appellant has accused the learned Commissioner of Assize of writing the impugned ruling from memory and not from any record.

We have read the said ruling. If indeed it was written from the learned Commissioner’s memory, then a good memory he must possess!

The ruling refers to contents of affidavits. It also refers to HCCC NO. 3132 of 1997 and the order said to have emanated therefrom. The learned Commissioner also referred to HCCC NO. 4875 of 1987 which was the original suit in respect of the suit property. He even referred to HCCC No. 68 of 1992 and all the relevant entries in the register in respect of the suit land. All this cannot have been done in the abstract. Even if we were to presume that it was, then in our view, the learned Commissioner did a very good job of it and waded through the several court cases in respect of the same subject matter and penned the detailed ruling he came up with.

The learned Commissioner addressed the issue of the validity of the respondent’s title to that property. He made reference to **Section 69(3)** of the **Transfer of Property Act** and to the MULLA’s Treatise on transfer of property and after analysing the law applicable arrived at the conclusion that the respondent had no notice of any irregularity or impropriety in the seller’s exercise of its power of sale.

It is after considering all this that he made a considered finding that indeed the plaint disclosed no reasonable cause of action. He therefore exercised his discretion and struck out the suit. The power to strike out a pleading is discretionary. In order for this Court to interfere with the same the following principles as succinctly set out in the case of **Mbogo vs Shah [1968] E.A. 93** must be satisfied;

- i. ***The court must be satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision;***
- ii. ***The Judge took into account matters or issues he should not have taken into account;***
- iii. ***The Judge did not take into account matters/issues he should have taken into account and therefore, reached a decision that was plainly wrong.***

We have carefully dissected the ruling in question. It is our view that the learned Commissioner did not leave out any relevant matters/issues that were brought to his attention; nor did he consider any extraneous matters before he arrived at his decision. We are of the firm view that he exercised his discretion judicially and we have no basis for interfering with his well-reasoned ruling.

The other issue that falls for our determination is whether the matter was for striking out. Striking out a pleading is indeed a draconian action which must be taken with the greatest circumspection, and judiciousness. If an action is sustainable, then the court should see it to the end and summary dismissal or striking out should not be an option. 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 weak as to be beyond redemption and is otherwise incurable by way of amendments (see **D.T. Dobie & Company (Kenya) Ltd vs Muchina [1982] KLR 1.**) There are however, some instances where a case is so hopelessly bad, and where it is clear that the same is only meant to circumvent justice, that the court would be justified to put a premature end to it.

In the suit before the learned Commissioner of Assize, it was clear that there were already a multiplicity of suits- some concluded, some seemingly abandoned (e.g the intended appeal from which Civil Application No. Nai 68 of 1992 emanated) and yet others which had not been prosecuted.

The learned Commissioner appreciated the fact that there was a decree in HCCC No. 4875 of 1987 which had never been appealed against. He was not shown any court order stopping the public auction in which the respondent purchased the property in question. It was the duty of the appellants to place that order before the learned Commissioner if they intended to benefit from the same.

The learned Commissioner of Assize also noted that indeed the respondent was not privy to any fraud or irregularities in the sale in question, and further that it had been registered as proprietor of the property in question. The Commissioner also appreciated the purport of **Section 69(3)** of the **Transfer of Property Act** which avails recourse to the appellants by way of damages against the seller (in this case Delphis Bank) if indeed the court were to find the sale of the property unlawful.

With all this in mind, the learned Commissioner of Assize decided to exercise his discretion against the appellants and thus struck out the suit.

We are of the view that he exercised his discretion judicially. There was indeed nothing in the plaint to be carried to the end. We also note that the appellants had already filed HCCC No. 3132 of 1997 against Delphis Bank where they were claiming *inter alia* special and general damages resulting from the said sale.

The striking out of HCCC No. 357 of 1999 did not leave the appellant without recourse. Having gone through the entire record, along with the able submissions of both learned counsel herein, we are satisfied that the appellants case was indeed for striking out for failing to disclose any reasonable cause of action. We cannot find fault in the decision of the learned Commissioner of Assize.

In the circumstances, we find this appeal devoid of merit and we dismiss the same with costs to the respondent, and affirm the decision of the learned Commissioner of Assize.

***Dated and delivered at Nairobi this 19<sup>th</sup> day of July, 2013.***

**W. KARANJA**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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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**

*rm;*