



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN THE COURT OF APPEAL
AT MOMBASA

(CORAM: O'KUBASU, AGANYANYA & NYAMU, J.J.A.)

CIVIL APPEAL NO. 237 OF 2006

BETWEEN

JANENDRA RAICHAND SHAH 1ST APPELLANT
VIRCHAND MULJI MALDE 2ND APPELLANT
RATILAL GHELA SAMAT 3RD APPELLANT

AND

MISTRY VALJI NARAN MULJI RESPONDENT

*(Appeal from the ruling, decision and orders of the High Court of Kenya at Mombasa (Njagi, J.) dated
14th September, 2006*

in

H.C.C.C. NO. 84 OF 2005

JUDGMENT OF THE COURT

This is an appeal from the ruling of Njagi, J. dated 14th September, 2006 in which the learned Judge ruled on a preliminary point of law which resulted in the plaint being struck out and the suit dismissed with costs.

The background to this appeal is as follows:-

The three appellants, **JANENDRA RAICHAD SHAH**, **VIRCHAND MULJI MALDE** and **RATILAL GHELA SAMAT** (as the plaintiffs in the High Court) filed a suit against the respondent (as the defendant) seeking judgment for:-

- “(a) Mesne profits amounting to 156,086,545.75.**
- (b) General and punitive damages for trespass, wrongful occupation and loss of user of the suit premises.**
- (c) Costs.**
- (d) Interest on (a), (b), and (c) at commercial rates till payment in full.**

(e) Any other relief that the court may deem fit and just to award.”

The suit was commenced by a plaint which was filed in the High Court on 12th May, 2005. This was closely followed by the respondent’s written statement of defence which was filed on 3rd June, 2005. On 17th May, 2006 the respondent filed, through his advocates, a notice that he would raise a preliminary objection to the suit on the grounds that:-

“1. The suit is time barred as the cause of action arose on 28th June, 1985; and

2. That there are three other pending suits regarding the same cause of action filed earlier and this suit cannot proceed to trial before the hearing and final determination of the other three suits.”

The notice of preliminary objection was followed by an application by chamber summons dated 29th May, 2006, by which the respondent sought orders that the plaint be struck out and the suit dismissed or, alternatively that the suit be stayed pending the hearing and determination of Mombasa High Court Civil Cases Numbers 423 of 2011, 201 of 2001 (O.S.) and 55 of 2005.

The matter was placed before Njagi, J. for determination. In the course of his ruling, the learned Judge stated inter alia:-

“After hearing both counsel against the backdrop of the pleadings, it emerged clearly that three issues arose conspicuously for determination. These were:-

(a) whether this suit is time barred under the provisions of the Limitation of Actions Act;

(b) whether the plaint offends the provisions of Order VII rule 1(1)(e) of the Civil Procedure Rules; and

(c) whether the action ought to be stayed pursuant to section 6 of the Civil Procedure Act.”

The learned Judge considered other aspects of the case before him and concluded his ruling thus:-

“The basis of the plaintiff’s case is summarized in paragraph 8 of the plaint as follows:-

By reason of the matters aforesaid the defendant enjoyed occupation and use of the suit premises throughout the period in question without making just compensation therefor and denied the plaintiffs the use and benefit of the premises.”

Arising out of this paragraph, the inescapable conclusion is that the mesne profits which the plaintiffs now claim relate back to the period during which the defendant enjoyed occupation and use of the suit premises. On the plaintiff’s own admission in paragraph 5 of the plaint, that period spans from June, 1985. That was a good 19 years and 11 1/2 months before the filing of this suit. The plaintiffs were all along alive to the particulars of the alleged fraud pleaded in paragraph 7 of the plaint. It is not like any of those particulars came to light only last night. If the respondents claim were expressly founded in tort, the limitation period would be 3 years. If it was founded on contract, it would be six years. If it was based on an interest in land it would be 12 years. They have come to court almost 20 years after the event. For these reasons, I agree with Mr. Khatib for the defendant that the suit is hopelessly out of time. Being of that persuasion, I uphold the preliminary objection and order that the plaint herein be struck out and the suit be dismissed with costs.”

It is the foregoing that provoked this appeal which was based on the following **four (4)** grounds:-

“1. That the learned judge erred both in law and in fact in finding that the claim for mesne profits and the entire suit was time-barred under the Limitation of Actions Act, Chapter 22 of the Laws of

Kenya.

- 2. That the learned judge erred in law and in fact in failing to exercise judgment and bring his mind to bear on all and/or material factual and legal matters placed before court for determination through pleadings and submissions.**
- 3. The learned judge erred in law and in fact in according undue weight to the evidence favourable to the Respondent and in failing to grant any or any due consideration to evidence adduced by the Appellants.**
- 4. On the whole, the decision of the learned judge is insupportable by law and inconsistent with the facts brought to his attention through pleadings and submissions.”**

The appeal came up for hearing before us on 21st July, 2011 when Mr. Thomas K’Bahati appeared for the appellants, while Mr. M.F. Khatib appeared for the respondent.

In his submissions, Mr. K’Bahati took us through the history of the dispute and the thrust of his arguments was that as this was a claim for mesne profit the learned Judge was wrong in concluding that the claim was time barred. It was submitted that the learned Judge ought to have considered when the cause of action arose. It was further submitted that there was confusion as regards the claim for recovery of land and claim for mesne profits. We were urged to consider that delivery of possession was in November, 2004 and hence the limitation period of three years should be counted from that date. It was Mr. K’Bahati’s view that since the appellants filed the suit in 2005 the suit was filed within time whichever way we looked at the matter. He therefore urged us to allow the appeal.

In opposing the appeal, Mr. Khatib submitted that the cause of action arose on 28th June, 1985 as the appellants acquired the property in 1985 when the respondent was already in occupation. He pointed out that the appellants wrote several letters to the respondent that the respondent was a trespasser but the appellants took no further action. It was Mr. Khatib’s contention that the claim for mesne profits was hopelessly out of time. He therefore asked us to dismiss this appeal with costs.

As already stated at the commencement of this judgment, the dispute herein was based on a plaint filed by the appellants in the High Court. The pertinent paragraphs of the plaint were as follows:-

- “3. The plaintiffs were the registered owners of all that piece or parcel of land known as Mombasa/Block XII/4 situate along Lumumba Road in Mombasa (“the Suit Premises”) between 28th June, 1985 and November, 2004.**
- 4. In November, 2004 the Plaintiffs sold the Suit Premises to Vantage Road Transporters Ltd. who thereafter became the registered proprietors thereof and took possession of the suit premises.**
- 5. The plaintiffs aver that the Defendant wrongfully and unlawfully occupied the suit premises from 28th June, 1985 till November, 2004 when the plaintiffs were the registered owners of the suit premises and refused and/or neglected to vacate the suit premises despite several demands from the plaintiff.**
- 6. The plaintiffs aver that at all material times during the period of the wrongful occupation of the suit premises aforesaid, the defendant expressly and impliedly recognized and admitted the plaintiffs’ title and ownership of the suit premises.**
- 7. The plaintiffs further aver that during the time of the wrongful occupation aforesaid the defendant fraudulently attempted to defeat the plaintiff’s title to the suit premises.**

PARTICULARS OF FRAUD

(a) Refusing to vacate the suit premises while knowing the plaintiffs are the registered owners and despite demands from the plaintiffs.

(b) While on the suit premises demanding that the plaintiffs sell to him the suit premises at Kshs.3 million instead of the true market value.

(c) Lobbying and using the then Minister for Lands and Housing, the then Provincial Commissioner, Coast Province and other executive officers to coerce the plaintiffs to sell to him the suit premises at the aforementioned gross undervalue.

(d) Lobbying members of Parliament and other government officers from Coast Province where the suit premises is situate to coerce the plaintiffs to forcibly sell the transfer to him the suit premises at the aforementioned gross undervalue.

(e) Placing cautions over the suit premises, while having no interest thereon with the fraudulent and singular intention of preventing the plaintiffs from dealing in the suit premises and to coerce the plaintiffs to sell and transfer to him the suit premises at the aforementioned gross undervalue.

(f) Using a plethora of court applications to defeat genuine efforts by the plaintiffs to get him to vacate.

(g) Fraudulently claiming that he had acquired rights to the property by adverse possession.

8. By reason of the matters aforesaid the defendant enjoyed occupation and use of the suit premises throughout the period in question without making just compensation therefor and denied the plaintiffs the use and benefit of the premises.

9. In their capacity as owners the plaintiff filed HCCC No.423 of 2001 against the defendant seeking damages for wrongful occupation of and ejectment from the suit premises.

10. In an effort to fraudulently defeat the plaintiffs title, the defendant filed HCCC No. 204 (O.S.) of 2001 against the plaintiffs. The defendants have abandoned HCCC No. 204 (O.S.) of 2001 and filed HCCC No. 55 of 2005 against the plaintiffs and other parties seeking orders of mandatory injunction and damages from the current owners of the suit premises.

11. By reasons of the matters aforesaid, the plaintiffs have jointly and severally suffered loss and damages.

12. There is no suit pending and there have been no previous suit or proceedings between the parties over the same cause of action herein.

13. The plaintiffs aver the cause of action herein is new and arose following the sale and transfer of the Suit Premises to Vantage Road Transporters Ltd., a third party, in November, 2004 as aforesaid.”

The foregoing sets out the appellants’ case which they sought to prove in the High Court by way of adducing relevant evidence.

In reaction to the said plaint, the respondent filed a statement of defence in which it was averred, inter alia:-

“3. The plaintiffs have no locus standi to file the suit since the title of the plaintiffs to the suit property was extinguished at the expiry of 12 years from date of adverse possession by “the defendant who has been in continuous, uninterrupted and hostile possession and occupation of the suit premises since the beginning of 1980 and in regard to which the defendant instituted, on 30th August, 2001, High Court Civil Suit Number 204 of 2001 (O.S.) at Mombasa by way of Originating Summons against the Plaintiffs and one Premac properties Limited which suit is still pending as is another suit, namely,

High Court Civil Case No. 423 of 2001 instituted on 16th August, 2001 by the plaintiffs against this Defendant and a second defendant, Mistry V. Naran Mulji & Company, instituted on 16th August, 2001 in which the plaintiffs prayed for, inter alia, (1) a declaration that the defendants are mere occupants of and (ii) an order of ejection of the Defendants from the suit land and (iv) damages for use and occupation and damages for occupation for the period from 20th June, 1985 to the date of institution of that suit, namely, 16th August, 2001. Consequently, the plaintiffs having sued the Defendant for damages (and for recovery of possession of the suit property) the plaintiffs have relinquished their alleged claim to mesne (sic) profits in the suit herein. Alternatively they have duplicated their claim to the alleged mesne (sic) profits which in any event they have no right to claim since their title to the suit premises became extinguished in the beginning of 1992. Further and in any event the plaintiffs have become disentitled to file this suit now or to proceed with it since the matter in issue is also directly and substantially in issues in the previously instituted suit, namely Civil Suit Number 423 of 2001 and the same ought to be stayed. Further and in any event any alleged claim of the plaintiffs in this suit based in tort is barred by limitation under the Limitation Act Cap. 22. In any event the plaintiffs have no cause of action of any kind against the Defendant whether limited to the alleged mesne (sic) profits or at all. No order for ejection or possession of the suit premises has ever been made and this suit of the plaintiff is misconceived both in fact and in law.

4. The plaint discloses no reasonable cause of action and offends the provisions of Order 7 of the Civil Procedure Rules and further more lacks sufficient particulars of the alleged claim and is otherwise an abuse of the process of Court as it pleads evidence not statement of material facts, as also contains scandalous, frivolous and vexatious allegations prejudicing and embarrassing a fair trial and is otherwise an abuse of the process of the court.

5. The defendant states that he was at all material times and is entitled to be registered as the proprietor of the suit property under Section 38(1) of the Limitation of Actions Act Cap.22.

6. Subject as aforesaid the defendant admits paragraph 3 of the plaint but adds that at all material times ever since the plaintiffs purchased the suit premises and indeed well before they purchased it, the defendant had been in exclusive and open possession thereof and like the previous owners of the suit property the plaintiffs have also refused to recognize the defendant as a lawful tenant. The plaintiff's have throughout insisted since they purchased this property, with the defendant in occupation thereof, that the defendant has throughout defied the plaintiffs and continues to occupy the suit property openly and adversely to the plaintiffs and the previous owners.

7. Save as hereinbefore stated and entirely without prejudice to the foregoing averments of the Defendant he denies each and every contention, assertions and matters stated in paragraphs 6, 7, 8, 9, 10, 11, 12 and 13 of the Plaint and puts the plaintiffs to strict proof thereof. He reiterates he never acted fraudulently as alleged or at all and maintains he was never liable to compensate the plaintiffs for occupation, use and benefit of the suit property over which the plaintiffs have ceased to have any right of ownership after the expiry of the period of 12 years as aforesaid. The plaintiffs well knew that the defendant had clearly prescribed right to the suit property and in any event he had secured the overriding interest under Section 30(f)(g) of the Registered Land Act. The plaintiffs conspired to sell the suit property, fraudulently and wrongfully to defraud and defeat the Defendant's overriding interest and right title interest in and over the suit property. Furthermore the plaintiffs have been fully aware of the pendency of the suits of the Defendant, namely Civil Suit Number 204 of 2001 (O.S.) and their own suit, namely Civil Suit Number 423 of 2001 relating to the suit property and without applying and obtaining consent from this Honourable court under Section 52 of the Transfer of Property Act to transfer the suit property, fraudulently did so. The defendant has at no time ever abandoned the suit No. 204 of 2001 (O.S.) and has no intention whatever of doing so.

8. The Defendant reiterates that the plaintiff's suit is misconceived, bad in law and otherwise is an abuse of the process of the Court and ought to be struck out."

The foregoing paragraphs of the plaint and written statement of defence set out the nature of the dispute between the parties. The respondent took a preliminary objection against the appellants' suit on

the ground that the suit was time barred having been filed out time. The appellants, on the other hand contended that the suit was filed well within time. This was the issue that was raised as a preliminary point.

We have considered the pleadings, the rival submissions by counsel and we are of the view that the issue for determination is whether what was urged before the learned Judge was a preliminary objection on a point of law. Looking at the pleadings as captured in the paragraphs that we have reproduced in this judgment, it would appear that the question of limitation was raised and disputed.

That being the case, it may have been necessary for evidence to be adduced by either side to the dispute. It cannot be said that all the facts pleaded by one side are correct. From the pleadings, facts were in serious dispute. With due respect to the learned Judge, this was not a proper case for determination by way of preliminary objection on a point of law.

In **MUKISA BISCUIT MANUFACTURING CO. LTD. V. WEST END DISTRIBUTORS LTD.** [1969] E.A. 696 at p. 701 Newbold P. said:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

The foregoing applies to the appeal before us since the preliminary objection on a point of law was raised when the facts were in serious dispute. The suit should have proceeded to full hearing where parties would have led evidence to prove their respective positions to the dispute. We therefore hold that the learned Judge was in error when he proceeded to determine the dispute on a preliminary objection on a point of law. It follows that this appeal must be allowed. Accordingly, we allow this appeal, set aside the decision of the learned Judge and direct that the suit be heard on merit in the High Court. The appellants shall have the costs of this appeal. It is so ordered.

Dated and delivered at Mombasa this 7th day of October, 2011.

E.O. O’KUBASU

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JUDGE OF APPEAL

D.K.S. AGANYANYA

.....
JUDGE OF APPEAL

J.G. NYAMU

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR