Francis Wasuna t/a Wasuna & Co. Advocates v Bharadia (Civil Appeal 184 of 2018) [2024] KEHC 9057 (KLR) (Civ) (26 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9057 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 184 OF 2018

HI ONG'UDI, J

JULY 26, 2024

BETWEEN

FRANCIS WASUNA T/A WASUNA & CO. ADVOCATES ..... APPELLANT

AND

KASSIM E. BHARADIA ..... RESPONDENT

(Being an appeal against the Ruling delivered by the Hon. Mr. Ocharo on 16th March 2018 in Milimani CMCC No. 11598 of 2005)

JUDGMENT

1. The Appellant who is the plaintiff in the lower court filed a claim against the respondent who is the defendant seeking payment of the sum of Ksh 203,360/= plus interest and costs. The said sum is said to be in respect of professional fees rendered to the respondent in respect of the sale of Land Ref. No. Kisumu/Municipality Block 7/9, the buildings thereon and all moveable assets of Kenya Iron Mongers (1989) Ltd to General Equipment (1978) Company Ltd or its nominee at Ksh 22,500,000/=.

2. The respondent filed his defence dated 23rd November, 2005 denying the claim, and raising several issues namely:Suit is bad in law, no cause of action established, appellant lacks locus standi to sueThe appellant could not sue the respondent in his personal capacity.The court lacks jurisdiction to hear the suit as no leave was sought by the appellant to sue the respondent as a Receiver ManagerThe respondent then filed a preliminary objection dated 31st October, 2006 covering the above points among others.

3. The preliminary objection was heard by way of written submissions and a ruling striking out the appellant's case was delivered on 16th March, 2018. The trial court found merit in the preliminary objection.

4. The appellant being dissatisfied with the said ruling filed this Appeal on the following grounds.

i. The learned Magistrate erred in law and in fact in upholding the Respondent's preliminary objection dated 31st October, 2006 contrary to the law.

ii. The learned Magistrate erred in law and in fact by making a finding contrary to the law and evidence presented that the Defendant is wrongly sued and or joined in the suit.

iii. The learned Magistrate erred in law and in fact by making a finding that the suit violates the provisions of Sections 47 and 48 of the *Advocates Act*.

iv. The learned Magistrate misapprehended the provisions of Section 228 of the *Companies Act* and made a wrong finding that offends the provisions of the *companies Act*.

v. The learned Magistrate erred in law and in fact by failing to consider the submissions by the Appellant and therefore misdirected himself in his ruling of upholding the Respondent's preliminary objection

vi. The learned Magistrate erred in law and in fact and misdirected himself on the law relating to Receivers and Managers.

5. The Appeal was canvassed by way of written submissions.

Appellant's submissions

6. These were filed by Chacha Sammy of M/s Mogeni & Co. Advocates and are dated 21st February, 2024. Counsel explained that the Appeal was filed within time. On grounds 1 and 2 of the Appeal he submits that it was the respondent who instructed him to act for him in the sale of the mentioned items. So, all he was asking for was his lawful legal fees. He referred to paragraph *14*(d) in Rosephine Mumbe & others v Blue Edge Hotels Cause No. 541 of 2015 – Mombasa ELRC.

7. It is counsel's submission that the respondent's contention that a Receiver or Company in receivership cannot be sued before seeking leave is wrong. Citing section 235 of the *Companies Act* he argued that it is only the Company under receivership that cannot be sued without leave, not the Receiver & Manager.

8. On ground 3 counsel submitted that sections 47 & 48 of the *Advocates Act* and subsidiary legislation 67 do not apply in this case, since there was an agreement between the appellant and respondent in regard to payment of fees. In respect to this the bill of costs was drawn and sent to the respondent even before the suit was filed, and the bill was never contested. He adds that though the bill was sent to Kenya Iron Mongers the same remains payable by the respondent.

Respondent's submissions

9. The same are dated 3rd November, 2023, were filed by Njoroge Regeru & Co Advocates and they raise three issues. The 1st issue is the appellant's failure to comply with court directions. Counsel submits that the court issued directions on the filing of submissions twice (25th July, 2023 and 9th October, 2023) but the appellant never complied. It forced the respondent to file his submissions without the benefit of perusing the appellant's submissions.

10. Counsel next submitted that the Appeal is incompetent having been filed out of time. The impugned ruling was delivered on 16th March, 2018, and the Appeal herein filed on 16th April 2023 (sic) instead of 15th April 2023 (sic). That the appellant never sought leave to file appeal out of time. Counsel supported the judgment of the lower court dismissing the appellant's suit against the respondent

whom he had sued personally for liabilities allegedly incurred by him in his capacity as Receiver Manager, thus an agent of Kenya Iron Manager [1989] Ltd.

11. To support this argument, he cited the case of Martin John Whitehead and Another Vs Industrial Court and another [2016] eKLR where the Court of Appeal stated:

> " In our view, the excess of jurisdiction in the circumstances of this matter related to the order that the receivers bore personal liability to settle the award as per the Collective Bargaining Agreement that was entered into with the company.... This was a dispute against The House of Manji, a company under receivership and the Receivers were acting as agents thus any award is supposed to be settled by the company or by the Receivers on behalf of the company from the assets of the company. Personal liability can only be ordered if the Receivers are found culpable of fraud or negligence in the discharge of their duties...."
>
> Also see Lubega v Barclays Bank (U) Ltd (1990 – 1994) E.A 294.

12. Secondly that the appellant as an advocate could not sue for legal fees allegedly earned without first carrying out taxation proceedings which was contrary to section 48 of the Advocate's Act. In his supplementary submissions filed upon receipt of the appellant's submissions counsel reiterated his earlier submissions. He urged the court to dismiss the Appeal.

Analysis and determination

13. This being a first appeal I am guided by the dictum in the case of Selle vs Associated Motor Boat Co. Ltd [1968] E.A 123, which held that the first appellant court has the duty to re-consider and re-evaluate the evidence on record and come to its own conclusion.

14. Similarly, in Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR the court opined that:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"

15. I have carefully considered the grounds of appeal, the record of appeal, submissions by both parties and the law. I find the following issues to fall for determination.

    i. Whether the Appeal herein is incompetent.

    ii. Whether the appellant was in breach of section 48 of the *Advocates Act*.

    iii. Whether the respondent as a Receiver Manager could be sued in his personal capacity.

Issue No (i) Whether the Appeal herein is incompetent

16. Section 79G of the Civil Procedure Rules provides that:

> " Every appeal from the subordinate court to the High Court shall be filed within a period of thirty days from the date of decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time"

17. In this matter the impugned ruling was delivered on 16th March, 2018. Any appeal ought to have been filed on or before 15th April, 2018. A perusal of the record shows that this appeal was filed on 16th April, 2018 and not 16th April, 2023 as submitted by counsel for the respondent. Going by the law this was one (1) day behind schedule. Would this necessitate the striking out of the Appeal as submitted by the respondent?

18. One of the principles enunciated under Article 159 of the 2010 Constitution is "Access to Justice"

Article 159(2)(d) of *the constitution* provides:

(2) In exercising judicial authority, the court and tribunals shall be guided by the following principles –

(a) .....

(b) .....

(c) .....

(d) Justice shall be administered without undue regard to procedural technicalities

From the record the appellant was only one day late in filing the Appeal. It may even be less than a day since this court does not know the exact time of the day the appeal was filed. I therefore find this to be an excusable mistake for which the appellant will not be penalized. The Appeal is hereby deemed to have been properly filed.

Issue No. (ii) Whether the appellant was in breach of section 48 of the *Advocates Act*.

19. The respondent argued that the appellant should not have filed his claim for legal fees before the bill was taxed. He relied on section 48 of the *Advocates Act* to support this argument. Counsel submitted that the bill if any ought to have been sent to the respondent at least 30 days before commencing action. This was not done.

20. On his end the appellant argued that sections 47 and 48 of the *Advocates Act* do not apply in this case as there was an agreement between him and the respondent.

21. There is no dispute that the claim by the appellant is for recovery of costs based on professional legal fees for services rendered. Section 48 of the *Advocates Act* provides that:

"(1)Subject to this Act no suit shall be brought for the recovery of any costs due to an advocate or his firm until the expiry of one month after a bill for such costs, which may be in summarized form, signed by the advocate or a partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause, to be verified by affidavit filed with the plaint, for believing that the party chargeable therewith is about to quit Kenya or abscond from the local limits of the Court's jurisdiction, in which event action may be commenced before expiry of the period of one month".

22. The appellant submitted that the provisions of the *Advocates Act* did apply to him and the respondent because they had an agreement as regards the payment of fees. This alleged agreement was not produced as evidence before the trial court. I have also not seen it in the record of appeal. Had it been produced

it would have been considered as one of the exceptions under section 48 of the *Advocates Act*. I do not therefore find any error that was committed by the trial court on this issue.

Issue No. (iii) Whether the respondent as a Receiver Manager could be sued in his personal capacity.

23. There is no dispute that the respondent was the Receiver and Manager for Kenya Iron Mongers Kisumu Ltd. The transaction he conducted and in which the appellant was involved was the sale of property and assets comprising of (Land and buildings, stock, motor vehicles, furniture and equipment) on behalf of the company for the benefit of the bank. This is all reflected in the documents at page 19 – 36 of the Record of Appeal.

24. The above being the facts I now wish to refer to some decided cases. In Lochab brothers v Kenya Fufural Co. Ltd (supra) the court held that a Receiver cannot sue in his own name as receiver since he had no property vested in him, and so acquires no right of action by his appointment. The court cannot also give a receiver leave to sue as a receiver.

25. The same position was upheld in Joseph Ashioya & 165 others v Kenya United Steel Co. [2006] Ltd & Another [2013] eKLR; Rosabel Wagicuyu Nyamu v Kieran Day Ian Small [2014] eKLR

26. Counsel for the appellant on the other hand cited the case of Rosephine & others v Blue Edge Hotels Ltd and another ELRC Mombasa No. 541/215 as consolidated with cause No. 16, 17, 18, and 19 of 2015 in support of the appellant's position.

27. In the above mentioned case Justice Rika held that Receiver Managers should be held liable when in breach of contract authored personally by them. He was dealing with a case involving an Employer and Employees. He therefore found that the position that a Receiver and Manager cannot be sued in his own name is not without exception. In the case Justice Rika was addressing, he found an exception in relation to the contracts the employer and employees had. His Lordship found that a Receiver Manager could not commit an illegality and hide under the law.

28. In the present case, there is no employer and employee contract. All that the respondent did was on behalf of the Kenya Iron Mongers (Kisumu) Company. The appellant did not avail any material before the trial court to show that what the respondent did in the transaction was for his personal benefit and/or gain as was in the case of Rosephine Mumbe Munyoki & Others (supra).

29. Going by the S235 (repealed) of the *Companies Act* the appellant should have sought the leave of the Court to file a claim against the "Company" the respondent was serving. See Githara & Associates Advocates – V Dimken (K) Limited [2014] eKLR.

30. I therefore find that the appellant has not satisfied the court that the present case would be one of those exceptional ones where the Receiver and Manager can be personally sued.

31. The upshot is that the Appeal lacks merit and is hereby dismissed with costs. The Ruling by the trial court is upheld.

32. Orders accordingly

DELIVERED VIRTUALLY DATED AND SINGED THIS 26TH DAY OF JULY, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE