Mumo v HFC Limited & another (Civil Appeal 17 of 2019)
[2024] KEHC 11855 (KLR) (Commercial and Tax) (27 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11855 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL APPEAL 17 OF 2019

FG MUGAMBI, J

SEPTEMBER 27, 2024

BETWEEN

WINNIE KASYOKA MUMO ..... APPELLANT

AND

HFC LIMITED ..... 1ST RESPONDENT

PAUL KIBICHY BIEGO ..... 2ND RESPONDENT

RULING

Introduction and Background

1. There are three applications before the Court all arising from proceedings in Nairobi Chief Magistrates' Court Civil Case No. 6207 of 2018. A summary of the applications is as follows.

Appellant's application dated 3rd May 2023:

2. The application is brought under Article 165 of *the Constitution*, Section 5 of the *Judicature Act*, Part 81 (Applications and Proceedings in Relation to Contempt of Court) of the Civil Procedure (Amendment No. 2) Rules, 2012 of England and Sections 3A and 63 of the *Civil Procedure Act*.

3. The appellant seeks orders for committal to civil jail of HFC Limited, Paul Kibichiy Biego, Jane Kithei Kilonzo, John Nicholas Ashfordhodges, Peter Mugeni Oduori, Dorcas Muthoni Gachari, Benson Irungu Wairegi, Robert Ngugi Ibaara, Kausi-Iik Liladhar Manek, Gladys Ong'ayo Ogallo and Shilpa Prabhulal Shah for being in contempt of this court's orders issued on 22/5/2019 and confirmed on 3/10/2019. The 11 are named as 1st to 11th respondents in the application.

4. The application is supported by the affidavit sworn on 3/5/2023 by the appellant. The respondents are sued for having caused the registration of the suit property in favour of the 2nd respondent against the said status quo orders.

5. The application is opposed. The 1st respondent (the Bank) denies being in contempt of the said Orders arguing that it sold the suit property to one Paul Kibichy Biego, the 2nd respondent in a public auction held on 15/11/2018 in exercise of its chargee's statutory power of sale. Following the successful sale, the Bank forwarded the duly executed Transfer to the said purchaser by letter dated 29/3/2019.

6. The Bank further contends that the appellant had not sought orders to restrain the registration of the transfer of the property. Further, that the ruling of 3/10/2019, did not grant any order of injunction but instead ordered maintenance of the status quo then obtaining in the suit property. The Bank denies that it has interfered with the status quo in the suit property after the court order was issued. It notes that its interest in the suit property ceased upon the public auction.

7. The 2nd respondent in opposition to the application filed a preliminary objection (PO) dated 19/3/2024. The PO is based on the grounds that the application for contempt is premised on non-existent Orders having been filed more than 12 months after the Orders were issued. As such, he argues that the application is fatally defective, incompetent, bad in law and should be struck out with costs.

8. He also filed a replying affidavit in which he further confirms that he was not a party to the suit in the lower court or when the orders of 30/10/2019 were issued. For this reason, he was not served with the orders and therefore did not have personal knowledge of the same. He further notes that the Bank was free to exercise its statutory power of sale upon the dismissal of the appellant's injunction application by the lower court.

9. As such, he contends that he is the registered owner of the suit property, having purchased it from the public auction conducted at the instructions of the Bank on 15/11/2018. He does however confirm that he lodged the document for registration at the Land Registry, which process was concluded on 15/3/2023.

10. In response to the PO, the appellant, through Grounds of Opposition dated 9/5/2024, terms the PO as an afterthought. She contends that the issue had never been raised in all the instances where parties had appeared before the court to take directions on the hearing of the pending applications. She acknowledges that there was no order of injunction issued by this court on which her application was premised, but orders for maintenance of status quo.

11. The 3rd to 11th respondents also opposed to the application through a replying affidavit sworn by the Bank's Director, Robert Ngugi Kibaara on 29/12/2023. He deposed that apart from him, the Bank's Board of Directors is composed of Shilpa Prabhulal Shah, (the 11th respondent), Dorcas Muthoni Gachari (the 6th respondent), Peter Mugeni Oduori (the 5th respondent) and Jane Kithei Kilonzo (the 3rd respondent).

12. He contends that contempt proceedings against the 4th, 7th and 10th respondents, that is, John Nicholas Ashford Hodges, Benson Irungu Wairegi and Gladys Ong'ayo Ogallo cannot be sustained because they ceased to be directors of the Bank on 26/5/2023. He also contends that at the time the court orders were issued, the 3rd, 5th and 6th respondents were not Board members and as such no allegation of contempt can lie as against them.

13. It is also their case that in any case, the application for contempt is incompetent because the directors of the Bank were not parties in the proceedings relating to this matter before the trial court and no

order for their joinder was sought or granted by the court. Secondly, no relief has been sought from the court for lifting the veil of incorporation of the Bank.

14. Even if this had been done, it is further contended that the Bank is a subsidiary of HF Group PLC, a public company listed on the Nairobi Securities Exchange and that its directors do not perform any executive functions and are not involved in the Bank's day to day operations or the making of decisions in connection with such daily operations.

15. It is also the Bank's case that none of its Board members were made aware of or personally served with the court orders alleged to have been disobeyed. Finally, that there is no evidence that the status quo obtaining in the suit property as at the date of the Ruling has since been disturbed at the instance of the Bank.

Appellant's application dated 23rd May 2023:

16. The Motion dated 23/5/2023 seeks leave to amend the first Motion of 3/5/2023. It is brought under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 8 Rules 3, 4, 5 and 7 of the Civil Procedure Rules. The appellant argues that there was a procedural error in failing to apply for the lifting of the corporate veil of the Bank while citing its directors for contempt. The application seeks to correct that error.

17. The application is opposed by the respondents through Grounds of Opposition dated 5/3/2024.

Proposed 2nd respondent's application dated 10th March 2023:

18. The application is brought under Order 10 rule 11, Order 22 and Order 40 of the *Civil Procedure Act* as well as sections 2A and 2B of the Civil Procedure Rules. The proposed 2nd respondent seeks to be enjoined to this appeal. It is premised on the grounds that he is a necessary party to these proceedings by virtue of his ownership of the suit property, having purchased it at an auction organized by the 1st defendant. He contends that despite the appellant being aware that he was the beneficial owner of the suit property, she had failed to enjoin him in the appeal.

19. The proposed 2nd respondent further seeks to have the injunctive orders issued on 3/10/2019 vacated and the appellant ordered to yield vacant possession to him. The application is supported by the affidavit sworn by the 2nd proposed respondent on 10/3/2023.

20. It is opposed by the appellant vide a replying affidavit sworn on 3/5/2023. She contends that she is the registered owner of the suit property and that she lives at the property with her family. That status quo was ordered by the court vide a ruling dated 3.10.2019, pending the hearing and determination of the main appeal.

21. The appellant notes that the court expressed doubt as to whether or not the sale had actually taken place. The appellant also contends that the intended 2nd respondent has not furnished proof of transfer to himself of the suit property.

22. The appellant further contends that the proposed 2nd respondent did not participate in the proceedings under appeal and has not even applied to be enjoined as a party at the lower court. He cannot therefore cannot make an application for joinder at this stage. Her argument is also based on the fact that her appeal is an interlocutory appeal.

23. She further contends that the presence of the intended 2nd respondent will not in any way assist the court to come to a just determination. That since he is already in contempt of court orders having transferred the suit property to himself, he should not be heard until he purges the contempt.

Analysis and Determination

24. I have carefully considered the pleadings, submissions, authorities and evidence presented by all the parties in respect of the said applications. In totality the issues arising for determination are:

    i. Whether the intended 2nd respondent should be enjoined in these proceedings;

    ii. Whether the preliminary objection raised against the appellant's application for contempt is merited;

    iii. Whether the appellant has made a case for the amendment of the application for contempt;

    iv. Whether the appellant has made a case for grant of contempt orders against the respondents; and

    v. Whether the appellant has met the threshold for lifting the corporate veil of the Bank;

25. For good order I shall first address the issue as to whether the intended 2nd respondent ought to be enjoined to this appeal. Reference is made to Order 1 Rule 10(2) of the Civil Procedure Rules which provides that:

> " The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added." (emphasis mine)

26. The legal position is that a party may be enjoined at any stage of the proceedings provided that they are a proper and necessary party. This undermines the appellant's argument against joinder, which was based on the fact that the intended second respondent did not seek joinder during the lower court proceedings.

27. In Appollos Kennedy Mwangi V Margaret Wanjiku Chege & 3 Others, [2019] eKLR, the Court of Appeal observed that:

> " As was stated by this Court in *Attorney General V Kenya Bureau of Standards & another [2018] eKLR, (Civil Appeal (Application) No. 132 of 2017*, the power of this Court to join a party to an appeal...can be exercised at any stage of the proceedings including at the appellate stage. Indeed, a party can be joined even without applying. We also bear in mind the principle that no suit shall be defeated by reason only of the misjoinder or non-joinder of a party; and that the court may proceed to determine the matter in controversy so far as the rights and interests of the parties actually before it are concerned."

28. The pertinent question is whether the proposed 2nd respondent is a proper and necessary party in this Appeal. In answering the question as to who is a 'proper and necessary party' to proceedings, the court in Kingori V Chege & 3 Others, [2002] 2 KLR 243, observed as follows:

> " ... in the case of a defendant two conditions must be met:
>
> 1. There must be a right to some relief against him respect of the matter involved in the suit.

2. That his presence should be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions involved in the suit...

A proper party was one without whom no decree can be made effectively. A proper party is one in whose absence on effective order can be made but whose presence is necessary for a complete and final decision on the questions involved in the proceedings...a proper party is one who has a designed subsisting direct and substantive interest in the issues arising in the litigation. An interest which will be cognizable in the court of law. That is an interest which the law recognizes and in which the court will enforce. A person who is only indicated or commercially interested in the proceedings is not entitled to be added as a party... a person may be added as a defendant to a suit though no relief may be claimed against him provided his presence for a complete and final decision of the question involved in the suit. Such a person is called a proper party as distinguished from a necessary party.

When the above principles are applied to the facts of these applications it is clear that the guiding principles when an intending party is to be joined are as follows:

a. He must be a necessary party

b. He must be a proper party.

c. In the case of a defendant there must be a relief flowing from that defendant to the plaintiff.

The ultimate order or decree cannot be enforced without his presence in the matter. His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit."

29. Guided by the above authorities and the law, I find that nothing prevents this court from enjoining the intended 2nd respondent to these proceedings, even in the context of an interlocutory appeal. The fact that he has not applied to be enjoined as the 2nd defendant in that suit is also not a bar to his being enjoined in the appeal. This raises the question as to why the appellant did not in any case deem it fit to enjoin a party with whom there was a dispute as to ownership of the suit property to the suit for the court to determine the issues with finality.

30. I say this noting the pronouncements of this court contained in the ruling of 3/10/2019. The court particularly noted at paragraph *25* that:

> " In effect. this court finds that the issue of whether or not the suit property was sold in an issue that the court cannot verify with certainty."

Further, the court observed that:

> " To my mind therefore, there is more than meets the eye in the challenged sale/auction. This is not to say that this court is making any conclusive finding on the issue of the sale. which is a matter to be canvassed at a different forum. This court is of the view that the ends of justice would be met if the fundamental questions regarding the rights and' liabilities of the parties herein are canvassed at the hearing of the appeal."

31. Ultimately the court will have to determine the issue of ownership. In my view, it is essential that both parties claiming ownership to the suit property be heard so as to finally determine the real issues with

the real facts and the evidence before the court. It is not disputed that the proposed 2nd respondent has been adversely mentioned in the proceedings at the lower court and in this court with respect to the suit property. There is a sale agreement and a memorandum of sale both of which name him as the purchaser of the suit property which is at the centre of this dispute.

32. I would however add at this stage that, for the reasons outlined above, the 2nd respondent's prayer for vacant possession cannot be granted at this time. As this court has already noted, the matter must be resolved in a substantive hearing.

33. Moreover, the fact that the appellant seeks to cite the 2nd proposed respondent for contempt makes him more than a 'passer-by' in this matter. It is a fundamental principle of justice that orders cannot be issued against someone who is not a party to a suit, as doing so would deprive them of the essential right to be heard.

34. The 2nd proposed respondent's submission is compelling, that his participation is crucial for this court to effectively and comprehensively adjudicate all issues arising in this appeal. Without his involvement, any ruling may be incomplete or unenforceable against him. Accordingly, I find that the application dated 10/3/2024 for joinder is merited it is allowed as prayed.

35. The next issue is whether the preliminary objection against the appellant's application for contempt is merited. The evidence before the court indicates that the orders issued on 22/5/2019 were in response to an application seeking, among other things, a temporary injunction against the respondents.

36. In its ruling dated 3/10/2019, the court observed that granting the temporary injunction would potentially compromise the pending appeal, as the injunction remains a central issue in that appeal. Consequently, the court ordered that the status quo regarding the suit property be maintained until the appeal is heard and determined.

37. In response to the appellant's argument that orders to maintain status quo do not constitute an injunction and are therefore not subject to the maximum 12-month rule, it's important to consider the rationale behind this principle. The rule exists to prevent indefinite restraints or obligations on parties without a full hearing. It ensures that temporary measures remain temporary and do not become de facto permanent solutions, which could unfairly prejudice one party or unnecessarily delay the resolution of the case.

38. In Erick Kimingichi Wapang'ana & Another V Equity Bank Limited & Another, [2015] eKLR, the Court of Appeal held that:

> " Rule 6 of Order 40 was made in clear cognizance of the preceding Rules in that order. It therefore follows that notwithstanding the wording of any order of interlocutory injunction, the same lapses if the suit in which it was made is not determined within twelve months "unless," as the Rule further provides, "for any sufficient reason the court orders otherwise.
>
> In this case there was no subsequent order extending the injunction. Having been issued on 11th October 2011, the injunction order therefore lapsed on 12th October 2012. We agree with counsel for the appellants that Mukunya, J's order of 16th December 2014 declaring that the injunction of 11th October 2011 had lapsed was inevitable." (emphasis mine).

39. Status quo orders though not injunctive, are indeed interlocutory orders. They are intended to preserve the existing state of affairs pending the hearing and determination of a case. Since they are temporary

measures rather than final resolutions of the underlying dispute, they fall within the category of interlocutory orders.

40. Technically therefore, the status quo orders that were issued on 24/10/2019 lapsed on 24/10/2020 by effluxion of time pursuant to Order 40 Rule 6. There was no application for their extension. It cannot have been the intention of the Rules Committee to permit situations like the present one, where an appeal drags on for over four years, allowing the applicant to continue benefiting from interlocutory orders while the respondents are unfairly disadvantaged. Such prolonged advantage undermines the very purpose of interlocutory orders, which are meant to be temporary measures, not tools for indefinite delay.

41. This court must decisively prevent this kind of misuse of the legal process. To hold otherwise would be an affront to the overarching objectives espoused in Sections 1A and 1B of the *Civil Procedure Act*, which are to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

42. In this regard, the Court of Appeal in Barclays Bank of Kenya Limited V Henry Ndungu Kinuthia & Another, [2018] eKLR observed as follows:

> "We take note of the fact that in applying the Civil Procedure Rules the High Court was obligated under Section 1A and IB of the *Civil Procedure Act*, to be guided by and to further the overriding objective of the *civil Procedure Act* and Rules which includes to facilitate the just determination of the proceedings; the efficient disposal of the business of the court; and the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties. The importance of Order 40 Rule 6 of the Civil Procedure Rules in furthering the overriding objective was underscored by the High Court (Gikonyo J) in David Wambua Ngii V Abed Silas Alembi & 6 others, [2014] eKLR:
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> "It is important to first deal with the scope and purpose of order 40 Rule 6 of the Civil Procedure Rules on lapse of an injunction. Order 40 rule 6 of the Civil Procedure Rules could be said to be the enabler of the overriding objective in real practical sense. The rule is intended to prevent a situation where an unscrupulous Applicant goes to slumber on the suit after obtaining an injunction. I say this because it is not uncommon for a party who is enjoying an injunction to temporize in a case for as long as possible without making serious efforts to conclude it. That is the mischief it was intended to cure."

43. In light of the above judicial pronouncements, I have reviewed the ruling of this court of 3/10/2019. It is quite obvious that the court while granting the status quo orders was keen to ensure that the appellant did not go to slumber after obtaining the orders. The court made the following final orders amongst others:

> "(a) The status quo currently obtaining in the suit property shall be maintained pending the hearing and determination of the appeal.
>
> (b) That the applicant/appellant shall move expeditiously and, in any event, within 30 days of the date hereof, to secure a date for the hearing of the appeal, which date, shall be given on priority basis flailing of which the respondent shall be at liberty to make an appropriate application." (emphasis mine)

44. It is not lost on me that the said orders were issued in 2019, over 3 years ago. Even though the orders were issued pending the hearing and determination of the appeal, they were conditional upon the appellant securing a date for the hearing of the appeal within 30 days. The appeal is yet to be heard to date. The submission by the 2nd respondent that the application for contempt was filed 42 months

after the status quo orders had been issued, by which time the orders had since lapsed, is therefore convincing.

45. It is therefore my finding that there were no interlocutory orders in place as at 24/10/2020 capable of being disobeyed. As such, the application for contempt of court and the application for leave to amend the contempt application cannot stand.

Disposition

46. Accordingly, the 2nd respondent's preliminary objection dated 19/3/2024 is merited. The upshot of this is that:

    i. The 2nd respondent's application dated 10/3/2024 is merited and it is allowed as prayed;

    ii. The appellant's applications dated 3/5/2023 and 23/5/2023 are hereby struck out.

    iii. The costs of the applications to be in the cause.

DATED, SIGNED AND DELIVERED IN NAIROBI HIS 27TH DAY OF SEPTEMBER 2024.

F. MUGAMBI

JUDGE