REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 649 OF 1996

KABUNDU HOLDINGS LTD. ……...……..…….1ST PLAINTIFF

RUTH WAKONYO KABUNDU……...…..2ND PLAINTIFF

-VERSUS-

PATRICK MUKIRI KABUNDU…….....…..…1ST DEFENDANT

JACOB MWONGO……...….2ND DEFENDANT

JASON KAMBIU……3RD DEFENDANT

BISHOP LAWI IMATHIU…….....4TH DEFENDANT

RULING

There is a multiplicity of applications on this file. These are:

(i) Chamber Summons of 7th September, 2004 — by the 2nd plaintiff, seeking to set aside the interlocutory judgement of 7th May, 2004;

(ii) Chamber Summons of 28th October, 2004 — by more members of the family of the benefactor (***Mukuongo)*** to be enjoined in the proceedings; these applicants were: ***Catherine Kabundu, Jane Wangui Kabundu*** and ***Stephen Kabundu;***

(iii) Notice of Motion of 7th September, 2004, by aggrieved-party advocates seeking stay of decree of 7th May, 2004 and of orders of 31st August, 2004;

(iv) Notice of Motion of 25th October, 2004 — by the 1st defendant;

(v) Notice of Motion of 19th November, 2004 by the 1st defendant;

(vi) Notice of Motion of 19th November, 2004.

The large number of applications so far made in the long history of the suit, is testimony to the numerous conflicting claims abiding within one family, which have created a confusing trail that hardly lends itself to resolution through normal judicial methods. The main suit was, in effect, terminated by ***Mr. Justice Ombija*** who on 10th February, 2004 held it to have been void *ab initio*, and struck it out. It is not

possible, on account of vital rules of *jurisdiction*, to return to that point, which must necessarily be taken only on *appeal.* In the intervening period this matter came up before the Deputy Registrar who, in performance of his duty, on 19th February, 2004 entered interlocutory judgement.

And so when this matter came before me subsequently, it could not have come for anything except *formal proof;* and I discharged my task and gave judgement on 7th May, 2004; and further orders were later made, on 31st August, 2004 dealing with nothing but points of detail ensuing from the judgement.

Delivery of judgement as indicated, now brought home to the various parties the gravity of the matter and, although their only recourse, under the law, lay in appeals, they have moved the same High Court with a plurality of applications. I have to state as a matter of law that such applications cannot lead to orders capable of reversing the finality of the Court's orders on the merits of the case. This is not to say the applicants have no recourse; their recourse is an appellate recourse and nothing else, so far as issues of merits are concerned.

The foregoing principles provide the framework within which I will now consider the submissions of counsel in their several applications. The 2nd plaintiff in her application by Chamber Summons of 7th September, 2004 states:

> "THAT it is only just, fair and equitable that the said *ex parte* proceedings before the Honourable Mr. Justice J.B. Ojwang be set aside *ex debito justitiae*."

She also states:

> "THAT unless a stay of execution of the decree herein is granted, the present application will be rendered nugatory."

She avers too:

> "THAT the decree holders are likely to take steps to execute the decree herein much to the 2nd plaintiff/judgement debtor's detriment."

She asserts as well:

> "THAT this Honourable Court was misled as to the service of the Hearing Notice."

The objector-advocates, M/s. Lubulellah & Associates, for their part, in their Notice of Motion of 7th September, 2004 pray —

> "THAT there be a stay of execution of the decree given on 7th May, 2004 and further order made on 31st August, 2004 pending the hearing and determination of this application."

They also pray —

> "THAT this Court do grant leave to the applicant to appeal against the order of 31st August, 2004."

All along, the proceedings showed strife and intense rivalry involving members of one family; so that even as the several applications came before me to give directions for their hearing, one party was reporting, on 22nd November, 2004 that he had *on his own,* already appeared before the Duty Judge and secured a date, namely 18th January, 2005 for the hearing of his separate application. After hearing the concerns of the parties and counsel on this matter, I gave directions as follows:

> **"The proceedings in this matter started in 1996 and the documentation as well as the issues**

accumulated to such a point that, clear direction is often lost.

"At the moment there are many applications pending. These applications have raised controversy on such a scale that conflicting directions have sometimes been made by the Court.

"My purpose in giving these directions is to take away the potential for conflicting orders.

"On 9th November, 2004 I had ruled that the issue of joinder of parties be resolved first, before the issues of merit in the applications can be considered.

"**However, earlier today *Mr. Patrick Kabundu*, the first defendant, was able to obtain *ex parte* orders which would require that a particular application — the one by the 2nd plaintiff — be the one to be heard first.**

"This matter can readily be resolved on the basis of one direction which *Mr. Justice Ransley* gave this morning — that the date 18th January, 2005 be dedicated to a hearing of [all the applications].

….

"It is [now] directed that the applications on this file be given all the time to be heard on 18th January, 2005…"

On 18th January, 2005 the 1st defendant, ***Mr. Patrick Kabundu,*** urged that his two applications be granted automatically, as no responses had been filed. This contention was challenged by learned counsel, ***Mr. Lubulellah***, who apparently had not received service of those applications; he had, besides, the substantive point that even if no affidavits or grounds of opposition had been filed in response, there would still be *issues of law* to be argued before the Court. He urged that there was a duty to serve upon him the applications, since his firm was mentioned in a decree issued in favour of the applicant. As there were, in consequence, costs implications, the 1st defendant had a duty to serve upon his firm of advocates the applications in question. ***Mr. Lubulellah*** stated that he had already filed an appeal, and so in that respect too, the inevitability of costs dictated that the 1st defendant should effect service of his applications upon him, ***Mr. Lubulellah***.

Learned counsel for the 2nd plaintiff, ***Mr. Akoto,*** observed that the 1st defendant's two applications essentially revolved around the issues raised in the 2nd plaintiff's application which was concerned with issues of law only. Both ***Mr. Akoto*** and ***Mr. Lubulellah*** urged that all the applications be heard together.

After hearing the various submissions I directed that the several applications on file — Chamber Summonses of 7th September, 2004 and 28th October, 2004 and the Notices of Motion of 7th September, 2004, 25th October, 2004 and 19th November, 2004 — be all consolidated and heard together, with ***Mr. Lubulellah*** making submissions first, being followed by other counsel.

On that basis, learned counsel, ***Mr. Lubulellah*** entered upon his submissions on 18th January, 2004.

Mr. Lubullellah remarked the many pleadings that lay in the background to the case: 1st and 2nd plaintiffs had filed a reply to 2nd and 3rd defendants' defence and defence to counterclaim; interlocutory judgement had been entered for 2nd, 3rd and 4th defendants — on the basis of the counterclaim. Counsel noted that the Deputy Registrar had entered interlocutory judgement on 19th February, 2004. He then submitted that "The case by the 1st and 2nd plaintiffs is said to have been dismissed; but the dismissal does not operate to remove a defence to counterclaim." That, I think, is an intriguing point and one which ought to be made only in the context of supporting case authority. I would, *prima facie*, be of the view

that when ***Mr. Justice Ombija*** declared the suit void *ab initio* on 10th February, 2004 he would have been stating that nothing done under that suit carried any validity in law; in which case it is *not a tenable point that the interlocutory judgement did not compromise the defence to counterclaim* — subject, of course, to such different decision as only the Court of Appeal has the jurisdiction to make. It resolves into the point I have made earlier that, right or wrong, ***Ombija, J's*** decision stands, unless and until it is reversed on appeal; and if it stands for the moment, then *all decrees and orders made under its authority will similarly stand on the merits*, unless and until reversed in the Court of Appeal.

Mr. Lubulellah raised the further point that it was not right for the Deputy Registrar to enter interlocutory judgement, because the monies involved were not liquidated, and for this proposition he referred to the case, ***Abraham Kiptanui v. Delphis Bank,*** HCCC No. 1864 of 1999. I think the legal point raised by counsel cannot be faulted, except that it is a debatable point whether the demands, in this case, were truly unliquidated and therefore ruling out entry of interlocutory judgement by the Deputy Registrar. As I believe the matter is not obvious, the applicant's remedy was in any event a *recourse to appeal*, and it is there that a solution should primarily be sought. Yet learned counsel courageously maintained, even at this somewhat belated stage, that the interlocutory judgement had been obtained irregularly.

Mr. Lubulellah further attributed irregularity to the judgement favouring the 1st defendant, for the reason that this party, ***Mr. Patrick Kabundu***, was relying on a power of attorney executed on 14th March, 1997 — that is, a time when the case had already been filed; and it was ***Mr. Kabundu*** himself rather than the company who had filed the notice of appointment. Learned counsel submitted that the said power of attorney had no validity and, indeed, that ***Visram, J***. had declared it null and void in a ruling on 9th December, 2003 in another matter, HCCC No. 1531 of 2002.

Against this background, learned counsel submitted that the judgement ought to be set aside *ex debito justitiae*, especially as the 2nd, 3rd and 4th defendants had not attended Court and had not given evidence during formal proof. Counsel submitted that the counterclaims of those absent defendants should have been dismissed, by virtue of Order IXB of the Civil Procedure Rules.

That ***Mr. Lubulellah's*** submissions were on primary questions of law which must be taken to have been resolved in the judgement, is obvious from his assertion: *"One beneficiary is using the Court as a vehicle for disinheriting his siblings, and it is necessary that all the parties be heard…The estate in question is large. To leave the same under the control of one beneficiary, to the exclusion of all the rest, is dangerous."*

It is clear to me that the claims of several of the applicants are being brought essentially by way of a second track in the quest for redress. As I have remarked already, good and professional practice would dictate that the applicants urge their claims in the Court of Appeal; but, from the submissions of ***Mr. Lubulellah,*** these parties would prefer some *other* solution. In the words of learned counsel:

> *"If [the orders in question] are set aside, then the Notice of Appeal and the intended appeal will have been overtaken by events, and will be withdrawn."*

Nonetheless, counsel was "seeking leave to appeal against the orders of August, 2004." He urged that the intended appeal was not without substance: orders for costs had been made against his firm and other firms, yet they were not aware of the hearing.

Such an argument may sound reasonable, but it must be seen in the context of the *jurisdiction* exercised by the High Court when, on 10th February, 2004 it struck out the plaint as having been filed without authority. The *implication in law* is that costs would rest upon certain persons. And so the *main decision* of the Court, that of 10th February, 2004 must be challenged in order to validly contest the *consequential decrees and orders.* Such a challenge can only be made on appeal.

In his submission, learned counsel, ***Mr. Akoto,*** adopted ***Mr. Lubulellah's*** position, and urged that certain members of the ***Kabundu*** family (all being beneficiaries of ***Mukuongo,*** the benefactor) be enjoined in the

proceedings. His reasoning was as follows: *"Those are the biological sons and daughters of the 2nd plaintiff, the siblings of* ***Patrick Mukiri Kabundu*** *[1st defendant]. The turn of events would affect them; they are beneficiaries. These individuals want to be heard on all questions for trial."* The proposed new parties had each filed an affidavit in support of their prayer for joinder — ***Catherine Kabundu's*** dated 23rd October, 2004; ***Ruth W. Kabundu's*** dated 7th September, 2004 and 25th October, 2004.

Mr. Akoto went on to submit that the contentions in the said affidavits be the basis for setting aside all the decrees and orders so far made. This particular contention has not, with respect, impressed me as being meritorious, especially in the light of the age of this case, and the fact that a fundamental, singular decision had been reached by ***Ombija, J*** on 10th February, 2004 — striking out the suit. All the decrees and orders now being challenged are consequential on the decision of 10th February, 2004. It is, on this account, inappropriate to lodge lateral attacks on that important decision, which can only be questioned on appeal.

The burden of ***Mr. Akoto's*** submissions is that ***Mr. Patrick Mukiri Kabundu's*** siblings be accorded a hearing which they have not had before. This plea leads me to the inference that the question here is a *property and inheritance* question essentially. If that is the case, then I wonder whether the design of this case was not an attempt to achieve probate-and-administration ends through the *ordinary civil law*. Could this matter not have been disposed of through motions in probate and administration, in the Family Division of the High Court? I want to leave this option open to the individual members of the ***Mukuongo*** family. If it makes sense to them, then they should consider consent to withdraw the proceedings herein, and to focus their attention on probate and administration. If this choice, however, does not appeal to them, then their only proper recourse now is the Court of Appeal.

And that raises basic questions about joinder of new parties at this stage. If the case is to go on appeal, what purpose does it serve for new parties to be enjoined, given that issues on appeal will have been well defined and will already involve properly–identified parties? I think new parties being enjoined at this stage can be no more than interested parties, with leave to be in attendance or even to be represented, but for no other reason than their being family members and beneficiaries of an estate the assets of which lie at the bottom of the dispute. Such leave, moreover, can only properly be granted by the Court of Appeal.

Mr. Nyaberi who represented the 2nd, 3rd and 4th defendants opposed the applications by the 2nd plaintiff and by the aggrieved advocates both of 7th September, 2004 and that of the ***Mukuongo*** family members of 28th October, 2004. Those applications, in the view of learned counsel, were an abuse of Court process especially as they sought the setting aside of orders founded upon the proceedings before ***Ombija, J*** leading to the decision of 10th February, 2004 *which decision had not at all been challenged*. Learned counsel noted in this regard that the applicants herein had not moved the Court to set aside even the orders of the Deputy Registrar by which he entered interlocutory judgement in favour of the 1st defendant. He contested the application made by M/s. Lubulellah & Associates, on the ground that this applicant had not been a *party* to the suit. Counsel noted that the 2nd, 3rd and 4th respondents had been represented on the occasion of the formal proof, which resulted in the judgement of 7th May, 2004 and hence they could not now challenge the decree carried in that judgement. He urged that the applications be dismissed with costs to the 2nd, 3rd and 4th Defendants as there was nothing irregular in the judgement of 7th May, 2004. Counsel urged, moreover, that the application for joinder of new parties be disallowed, as there was now no suit pending before the Court.

Mr. Patrick Kabundu, the 1st defendant, submitted that the order of 4th March, 2004 had been drawn to effect the decision of ***Ombija, J*** rendered on 10th February, 2004 and was duly signed by the Deputy Registrar — and this led to the preliminary decree to the effect that the suit had been disposed of, and what was left was the counterclaim under which the suit properties were stated to be the property of the 1st plaintiff. He argued that the points raised by M/s. Lubulellah & Associates Advocates had already been considered in broad terms by ***Ombija, J*** in his decision of 10th February, 2004 when he held that another firm, M/s. Njagi Wanjeru & Co. Advocates, had no standing to appear for the 2nd plaintiff as their

client was improperly before the Court.

As already noted in this ruling, these proceedings have certain unusual characteristics which call for a special exercise of the judicial discretion in setting them on a course towards a conclusion. Firstly they have dragged on inordinately, and have in the process run into one of the most voluminous sets of documents in a single case, in this way creating much confusion; secondly this is a file replete with applications many of which cannot , in their purpose, be reconciled and resolved; thirdly, these are proceedings that generate intense sensitivity emanating from family strife; fourthly, these proceedings entail the status of a family company which, owing to family differences, has not functioned like a normal business entity; and fifthly, these proceedings have involved many firms of advocates each taking its own position regarding legal representation and its consequences. It is highly desirable that the emerging issues and claims be set at rest.

As I have indicated earlier, a resolution of the conflicts in these proceedings must begin with the final decision rendered by ***Ombija, J*** on 10th February, 2004. He struck out the suit, and so the suit thereafter had no validity and all decrees thereafter made, were consequential on that decision. It follows that all challenges which have been lodged by various parties through *applications*, are unwarranted; the only recourse must be an appeal in the Court of Appeal.

On the several applications now on file, I will order as follows:

> *1. On the Chamber Summons of 28th October, 2004 filed by M/s. Akoto & Co. Advocates, there is no basis for enjoining as parties at this stage the following persons:* ***Catherine Kabundu; Jane Kabundu; David Kabundu; Steve Kabundu****. If these individuals have any claim related to the parties herein, or any of them, they will need to file separate suits. The application, therefore, is dismissed; and each party to bear own costs in respect of that application.*
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> *2. On the Judgement debtor's application by Chamber Summons dated 7th September, 2004 prayers 1, 2 3 and 4 are granted. Prayer 5 is disallowed. Each party to bear own costs.*
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> *3. On the Notice of Motion application by M/s. Lubulellah & Associates Advocates dated 7th September, 2004 prayers 1, 3 and 5 are granted; prayer 4 is disallowed. Each party to bear own costs.*
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> *4. On the 1st defendant's application by Notice of Motion dated 19th November, 2004 — this is disallowed. Parties to bear own costs.*
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> *5. There shall be no stay of execution of orders or decrees which are the subject of some of the applications herein; but parties shall have leave to apply as necessary, within the framework of appeals such as they have lodged or may lodge.*
>
> *6. Parties shall bear their own costs.*

DATED and DELIVERED at Nairobi this 14th day of October, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the 2nd Plaintiff: Mr. Akoto, instructed by M/s. Akoto & Co. Advocates

For the 2nd, 3rd, 4th Defendants: Mr. Nyaberi, instructed by M/s. Deche, Nandwa & Bryant Advocates

For Interested Party: Mr. Lubulellah, instructed by M/s. Lubulellah & Associates, Advocates

Mr. Kabundu, 1st defendant, in person.