Nyanaro v Kanyankabaria (Civil Appeal E52 of 2022)
[2024] KEHC 2960 (KLR) (7 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2960 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E52 OF 2022

DKN MAGARE, J

MARCH 7, 2024

BETWEEN

AERNEST MWANGO NYANARO ..... APPELLANT

AND

EDNAH KWAMBO KANYANKABARIA ..... RESPONDENT

(This is an appeal from the decision of S.K. Onjoro Principal Magistrate given in MCELEC Case No. 90 of 2021)

JUDGMENT

1. This is an appeal from the decision of S.K. Onjoro Principal Magistrate given in MCELEC Case No. 90 of 2021.

2. Though the issues raised relate to a consent order entered in the case. I need to be satisfied that I have the necessary jurisdiction to hear the Appeal from the primary matter.

3. I am aware, that in every case, there are three types of jurisdiction, that is jurisdiction ratione temporis (time) ratione materiae (subject matter) and personae (over the person). In this case I need to address myself to the jurisdiction ratione materiae.

4. One of the issues the litigators are facing is that the *Marriage Act* 2014, is generally ignored. Despite being 10 years old and with serious consequences, people still proceed with life as usual.

5. The dispute herein started as burial dispute. The deceased had died and was subsequently interred after the consent. That made the jurisdiction, ratione materiae disappear. The consent was recorded by the parties and the subject matter disappeared. Waking up the question of whether any of the parties should have attended a burial is a waste of Judicial time. The order required that succession proceedings commence.

6. All the issues raised cannot be raised in this case. Matters raised in this case are moot. They are not active and their resolution does not change status of the case. In the case of Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others [2016] eKLR, the court J.L .ONGUTO J, stated as doth:-

> " In Coalition for Reform and Democracy (CORD) & 2 Others -v- Republic of Kenya & Another HCCP 628 of 2014 [2015] eKLR, the court cited the case of Patrick Ouma Onyango & 12 Others –v- AG & 2 Others Misc. Appl No. 677 of 2005 wherein the court had endorsed the doctrine of justiciability as stated by Lawrence H. Tribe in his treatise American Constitutional Law, 2nd Ed. Page 92 as follows:
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> 'In order for a claim to be justiciable as an article III matter, it must "present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted." In part, the extent to which there is a 'real and substantial controversy is determined under the doctrine of standing' by an examination of the sufficiency of the stake of the person making the claim, to ensure the litigant has suffered an actual injury which is fairly traceable to challenged action and likely to be redressed by the judicial relief requested. The substantiality of the controversy is also in part a feature of the controversy itself-an aspect of 'the appropriateness of the issues for judicial decision...and the actual hardship of denying litigants the relief sought. Examination of the contours of the controversy is regarded as necessary to ensure that courts do not overstep their constitutional authority by issuing advisory opinions. The ban on advisory opinion is further articulated and reinforced by judicial consideration of two supplementary doctrines: that of 'ripeness' which requires that the factual claims underlying the litigation be concretely presented and not based on speculative future contigencies and of 'mootness' which reflects the complementary concern of ensuring that the passage of time or succession of events has not destroyed the previously live nature of the controversy. Finally, related to the nature of the controversy is the 'political question' doctrine, barring decision of certain disputes best suited to resolution by other governmental actors'.

7. What is the efficacy of setting aside consent judgment or order in a burial dispute. Is it proper use of judicial time to delve into an issue was agreed upon and resulted into burial.

8. On another level, to be able to set aside a consent, requirements that obtain for setting aside a contract must be available. Secondly, when a party alleges knowledge, the test is objective. Could a reasonable person having circumstances, as the applicant be ignorant of the facts alleged?

9. It is not a test for a snob who does not engage himself in affairs they ought to know or deliberately turns a blind eye to this ordinary course of events. The test ignores people who are blissfully ignorant or blatantly stupid. The test must be that of an ordinary person, with sufficient life skills of curiosity and logic. It cannot help a man who is accused of impregnating a woman to be unaware that if birth takes place 4 months or 12 months later, there is a lie somewhere.

10. Sections 59 and 60 of the *Evidence Act* places this test in the kind of matters the court should take judicial notice of. The said section provides as doth: -

> " 59. No fact of which the court shall take judicial notice need be proved.
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> 60.
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> (1) The courts shall take judicial notice of the following facts –

(a) all written laws, and all laws, rules and principles, written or unwritten, having the force of law, whether in force or having such force as aforesaid before, at or after the commencement of this Act, in any part of Kenya;

(b) the general course of proceedings and privileges of Parliament, but not the transactions in their journals;

(c) Articles of War for the Armed Forces;

(e) the public seal of Kenya; the seals of all the courts of Kenya; and all seals which any person is authorized by any written law to use;

(f) the accession to office, names, titles, functions and signatures of public officers, if the fact of their appointment is notified in the Gazette;

(g) the existence, title and national flag of every State and Sovereign recognized by the Government;

(h) natural and artificial divisions of time, and geographical divisions of the world, and public holidays;

(i) the extent of the territories comprised in the Commonwealth;

(j) the commencement, continuance and termination of hostilities between Kenya and any other State or body of persons;

(k) the names of the members and officers of the court and of their deputies, subordinate officers and assistants, and of Evidence Cap 80 all officers acting in execution of its process, and also of all advocates and other persons authorized by law to appear or act before it;

(l) the rule of the road on land or at sea or in the air;

(m) the ordinary course of nature;

(n) the meaning of English words;

(o) all matters of general or local notoriety;

(p) all other matters of which it is directed by any written law to take judicial notice.

(2) In all cases within subsection (1), and also on all matters of public history, literature, science or art, the court may resort for its aid to appropriate books or documents of reference.

(3) If the court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it considers necessary to enable it to do so.

11. The fact whether a co-wife was married or not, is a matter expected to be in the Knowledge of the other co-wife. It is not a matter where a party will forget. The fact that children were not born of him is a matter of the natural course of events.

12. In testing reasonableness in negligence, sir Edward hall Alderson, stated as follows in the case of Blyth v Birmingham Water Works Co {1856}:

> " Negligence is the omission to do something which a reasonable man, grieved upon those considerations which ordinarily regulate the conduct of human affairs, would do or something which a prudent and reasonable man could not do."

13. In cases of recusal, a reasonable man has been described a fair minded person. In the case of Florence Chelangat Langat v Timoi Farms and Estates Limited & another [2015] eKLR, Justice Sila Munyao, stated as doth: -

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> " 14. Ibrahim JSC, in his separate opinion in the case of Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others (2013) eKLR affirmed that the test is the objective test of the reasonable man. The learned judge quoting decisions of other jurisdictions stated as follows: -
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> "Lord Justice Edmund Davis in Metropolitan Properties Co (FGC) Ltd. Vs Lannon (1969) 1 QB 577 stated that disqualification was imperative even in the absence of a real likelihood of bias if a reasonable man would reasonably suspect bias. Acker LJ in R vs Liverpool City Justices ex parte Topping (1983) 1 WLR 119 elaborated on the test applicable. The Court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification would be inevitable."
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> 15. The point was also finely put in the case of Attorney General of Kenya vs Prof. Anyang' Nyong'o & 10 Others EACJ Application No. 5 of 2007 where it was stated as follows: -
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> "We think that the objective test of reasonable apprehension of bias is good law. The law is stated variously, but amount to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable fair-minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially. Needless to say, a litigant who seeks disqualification of a judge comes to court because of his own perception that there is appearance of bias on the part of the judge. The court however has to envisage what would be the perception of a member of the public who is not only reasonable but also fair-minded and informed about all the circumstances of the case."
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> 16. The Constitutional Court of South Africa in the case of President of the Republic of South Africa vs South African Rugby Football Union (1999) (4) S.A 147, 177 also observed that: -
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> "It follows from the foregoing that the correct approach to this application for the recusal of members of this court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their

ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions."

14. It should be remembered that this was an application for setting aside is essentially an application for review. Section 80 of the *Civil Procedure Act* provides as follows:

> " Any person who considers himself aggrieved-
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> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> (b) by a decree or order from which no appeal is allowed by this Act,
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> May apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

15. Further, Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows:

> " 45 Rule 1 (1) Any person considering himself aggrieved-
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> (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay."

16. This then raises three issues for determination.

a. Whether there was discovery of new evidence which was outside the knowledge of the Appellant

b. Whether factors for setting aside the consent order abound.

c. Reliefs due to parties.

17. To set aside a consent order, the courts have set standards to be followed. In the case of Munyiri v Ndunguya [1985] eKLR, Justice Platt Ag JA stated as follows: -

> " There are now revival claims that this consent order does or does not represent the true intention of the parties. In the circumstances of this case, there is no possibility of going behind the record. It would appear that the parties must set aside the consent order either by review or the bringing of a fresh suit; see Brooke Bond Liebig Ltd v Mallya [1975] EA 266: It was there said: -
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> "A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties."

That decision merely followed Hirani v Kassam [1952] 19 EACA 131. The affidavits in this case, ordered by the previous court, illustrate the futility of attempting to arbitrate at this stage between the rival claims.

18. In the case of Hosea Nyandika Mosagwe & 2 others v County Government of Nyamira [2022] eKLR, Mugo Kamau J, stated as doth: -

> " In the case of Evan Bwire V Andrew Aginda Civil Appeal No. 147 of 2006 cited fin the case of Stephen Githua Kimani V Nancy Wanjira Waruingi T/A Providence Auctioneers (2016) eKLR the Court of Appeal held as follows:
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> "An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh. In other words, I find no material before me to demonstrate that the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence."
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> The current Application falls under the above category. The effect of allowing it would amount to re-opening the case afresh. Litigation must come to an end. Parties must present all the facts, documents and evidence in Court at the appropriate time before the Court retires to write its Judgment. Time and time again Courts have advised litigants that they are bound by their pleadings and that you do not prosecute your case piecemeal. What is demonstrated by the Application is a case of poor pleading which is not what was envisaged by Section 80 of the *Civil Procedure Act* nor the Rules under Order 45.

19. In other words, the Appellant should not file a self-serving consent and resile on the same in vain and re-clothe the same as a different matter.

20. The third issue is the pleadings of the parties. The issues raised were never alluded to in the impugned pleadings. The court could not have determined them at the stage even if there was no consent. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, A C Mrima stated as follows: -

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> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
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> ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

12. The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in respect to the essence of pleadings in an election petition: -

"In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....'"

21. The issue of fraud was not pleaded. It cannot be raised at this stage. Order 2 Rule 4 provides as follows: -

" 4. Matters which must be specifically pleaded [Order 2, rule 4.]

(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

22. The same must meet requirements for setting aside a contract. In the decision of Protus Hamisi Wambada & another v Eldoret Hospital [2020] eKLR, Justice M A Odeny stated as doth:

" In the Court of Appeal in the case of Brooke Bond Liebig Ltd V Mallya [1975] EA 266 at 269 Law Ag P said:

"A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties."

23. In Kenya Commercial Bank Ltd V Specialised Engineering Co. Ltd [1982] KLR 485, Harris J correctly held inter alia, that –

1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.

2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.

24. In Hirani V. Kassam [1952] 19 EACA 131 the Court of Appeal held;

> " It is now well settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this court in J. M. Mwakio v Kenya Commercial Bank Limited Civ Apps 28 of 1982 and 69 of 1983. In Purcell v F.C. Trigell Ltd [1970] 3 All ER 671, Winn LJ said at 676:-
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> "It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with the knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract."

25. The questions raised by the Appellant, even if factually true are no enough to upset a consent. The court was right in ignoring rumours hyperbole and conjunctive by the Appellant. There were absolutely no weighty issues. Parties must learn to live by the consequences of their actions. The level of dishonesty and skulduggery that is engineered in this matter is beyond me. The Appellants has no serious issues that would fall under "review".

26. In the circumstances I find no merit in the Appeal and dismiss the same with costs of Kshs. 95,750 to the Respondent.

Determination

27. The upshot of the foregoing is that I make the following determination

    a. The Appeal lacks merit and is accordingly dismissed.

    b. The Respondent shall have costs of Ksh. 95,750/=.

    c. Stay 30 days.

    d. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 7TH DAY OF MARCH, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

Bonuke & Co. Advocates for the Respondent

Maosa & Company Advocates for the Appellant

Court Assistant - Brian