Aryan Limited v Kibe & another (practicing as Wanja & Kibe Advocates) (Commercial Miscellaneous Application E038 of 2023) [2024] KEHC 16948 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEHC 16948 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

COMMERCIAL MISCELLANEOUS APPLICATION E038 OF 2023

F WANGARI, J

APRIL 11, 2024

BETWEEN

ARYAN LIMITED .... APPLICANT

AND

MICHAEL M KIBE .... 1ST RESPONDENT

EUNICE W NJERI .... 2ND RESPONDENT

PRACTICING AS WANJA & KIBE ADVOCATES

RULING

1. The application subject of this ruling is dated 24th October, 2023. It is brought under the provisions of sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 40 Rules 1 and 2 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. It seeks the following orders: -

   a. That this application be certified urgent and service thereof in the first instance;

   b. That pending the hearing and determination of this application, the Applicant be allowed to issue a performance bond/guarantee to the Respondent from any bank in Kenya of the Respondent's choice as alternative security for their bills in exchange for the liquid cash of Kshs. 36,555,163/= being withheld;

   c. That pending the hearing and determination of the Originating Summons, the Applicant be allowed to issue a performance bond/guarantee to the Respondent from any bank in Kenya of the Respondent's choice as alternative security for their bills in exchange for the liquid cash of Kshs. 36,555,163/= being withheld by them;

   d. That costs be provided for.

2. The grounds in support of the application are among that the Respondents are holding funds to the tune of 36,555,163/= belonging to the Applicant which came about as payment of decretal sum in Mombasa HCCC No. 212 (Consolidated with HCCC No. 130 of 2012) Mahendkumar C. Shah & Another v Fidelity Commercial Bank, Aryan Limited & Another and the same could not be released on account of a dispute regarding outstanding legal fees which could not be taxed.

3. It is a term of the decree that the said sum would attract interest from the date of filing suit to the point it is released to the Applicant thus the continued withholding denies the Applicant the enjoyment of interest contrary to the objective of the judgement. It is contended that so far the Applicant has lost two (2) months interest since 4/08/2023 when the sum was released to the Respondents for onward transmission to the Applicant. The application is further supported by an affidavit sworn by one Aasheet S. Shah. The Applicant thus prayed that its application be allowed.

4. The application is opposed. The Respondents have filed grounds of opposition dated 13/11/2023 and a notice of preliminary objection dated 20/11/2023. The contents of the two (2) responses appear to mirror each. In summary, the Respondents contend that the jurisdiction of the Honourable Court under section 47 of the *Advocates Act* is limited to orders for the delivery of advocates' bills of costs and any deeds, documents or papers in his possession, custody or power.

5. The court has no jurisdiction under that section to determine the form of security for advocate fees or compel advocates to relinquish their liens in exchange for alternative security. All liens are dependent on possession. Should the application be allowed, the Respondents will lose their lien. The court cannot take away the advocates lien as any such order would amount to deprivation of property in violation of Article 40 of the *Constitution* of Kenya. A dispute on lien for unpaid fees is not a dispute that can be determined by way of interlocutory application.

6. It was further contended that the jurisdiction of the court under Order 40 Rule 1 of the Civil Procedure Rules is limited to temporary injunction to restrain a party in a suit from wasting, damaging, alienating, selling, removing or disposing off any property until the suit is heard. The Respondents are not coming any of the acts mentioned but simply holding on to their lien. They are therefore not subject to orders of injunction as sought by the Applicant.

7. They are equally not committing any breach of contract or other injury of any kind and thus not subject to orders of injunctions Order 40 Rule 2 of the Civil Procedure Rules. Under Order 52 of the Civil Procedure Rules, the court has no jurisdiction to determine interlocutory applications. The Respondents thus sought for the dismissal of the application.

8. Directions were taken to have both the notice of preliminary objection and the application be disposed of simultaneously. Parties were directed to file their respective submissions and both parties duly complied. The Applicant's submissions are dated 30/1/2024 while those of the Respondents are dated 6/3/2024. The court commends both parties for their industry in taking their time to prepare the detailed submissions they have filed. They go a long way in helping the court arrive at a suitable ruling either way.

Analysis and Determination

9. I have carefully considered the application, the notice of preliminary objection, the submissions for and against, the authorities cited as well as the law and I discern the following issues for determination: -

    a. Whether the notice of preliminary objection is merited;

b. If the answer to (a) above is negative, whether the prayers sought in the application dated 24/10/2023 are for granting; and

c. What is the order as to costs.

10. I propose to deal with the notice of preliminary objection first since if the same is sustained, it shall dispose of the notice of motion application. The parameters of consideration of a Preliminary Objection are now well settled. A Preliminary Objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696. At page 700, Law, JA stated: -

> " A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

At page 701, Sir Charles Newbold, P added: -

> " A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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…"

11. For a Preliminary Objection to succeed the following tests ought to be satisfied; Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid Preliminary Objection should, if successful, dispose of the suit or application.

12. I have reviewed the fifteen (15) paragraphs set out in the preliminary objection dated 20/11/2023 and the closest a point of law is raised is invocation of section 47 of the *Advocates Act*, Order 40 Rules 1 and 2 and Order 52. The Respondents posit that under section 47 of the *Advocates Act*, the court's jurisdiction in terms of the orders it can issue therein are limited and excludes power to determine the form of security for advocate fees or compel advocates to relinquish their liens for alternative security.

13. Section 47 (1) which forms the basis of the objection provides as follows: -

> " The jurisdiction of the Court to make orders for the delivery by an advocate of a bill of costs, and for the delivery up of or otherwise in relation to, any deeds, documents or papers in his possession, custody or power, is hereby declared to extend to cases in which no business has been done by him in the Court."

14. My understanding of the above provision does not limit the powers of court to make orders including the ones sought in the present application. Doing so would be tantamount to giving the provision a restrictive interpretation. If Parliament intended to limit courts' powers in the said provision, nothing would have been harder than to state so. I thus do not agree with the Respondents' submissions on this aspect. The powers of the court are wide as seen under sections 3A and 63 (e) of the *Civil Procedure*

Act. My view finds succor in the Court of Appeal decision of Waruhiu K'owade & Ng'ang'a Advocates v Mutune Investment Limited [2016] eKLR where it was held as follows: -

> "…It was an inherent jurisdiction which the Court had over advocates who were officials of the Court, not for the purposes of enforcing legal rights, but for purposes of enforcing honourable conduct on the part of the Court's own officials…"

15. The second contention by the Respondents is that courts have no jurisdiction under Order 52 of the Civil Procedure Rules to hear and determine interlocutory applications. Having considered Order 52 of the Civil Procedure Rules, I note that it has ten (10) rules. The Respondents' position that courts have no jurisdiction to hear interlocutory applications under the said Order is not supported by the law. A review of rule 4 clearly bespeaks otherwise. I find no merit in this argument.

16. The other paragraphs in the preliminary objection are factual and thus fall foul of the hallowed principles set out in the Mukisa Biscuit case (above). It is against this background that I find no merit in the preliminary objection and I proceed to dismiss the same with no orders as to costs.

17. I now proceed to consider the second issue. Prayers 1 and 2 of the notice of motion application though not granted initially are deemed to have been overtaken by events when the application was set down for hearing. This being the case, I find that the only prayer left for determination is prayer 3.

18. The Applicant is seeking to be allowed to issue a performance bond/guarantee in favour of the Respondents from any bank in Kenya of the Respondents' choice. In exchange, the Respondents to release the sum Kshs. 36,555,163/= which they are holding to the Applicants. There is no contention that indeed the Respondents are holding the sum sought. The only contention is that they are holding the amount as a lien.

19. The Respondents have not denied they have been paid a sum of Kshs. 3,000,000/ as taxed costs in relation to the suit they represented the Applicant and/or its directors or shareholders. The act of the Respondents in applying the funds they are holding on other matters they represent the Applicant and which are not yet concluded is conduct the Court of Appeal in Waruhiu K'owade & Ng'ang'a Advocates v Mutune Investment Limited (above) decried. In the said case, the court held as follows: -

> "…In our understanding, any money or documents given and received on the strength of a professional undertaking cannot be utilized for any other purpose other than what they are intended for. It is outside the mandate of an advocate to purport to use it or convert an undertaking for an event other than what it was intended for and agreed between the parties. To allow advocates to retain client funds for no reason at all would be a travesty of justice and would be an abuse of the fiduciary trust given and by extension would amount to conversion and criminal activity. It would amount to deceit and unjust enrichment and ultimately, would erode public confidence in the administration of justice…" (Emphasis added)

20. Are the Respondents left without a remedy? The Applicant is ready and willing to provide performance bond/guarantee from any bank of the Respondents' choice. Oxford English Dictionary, 18th Edition defines a performance bond as a financial guarantee to one party in a contract against the failure of the other party to meet its obligations. It is normally issued by banks or insurance companies.

21. On the other hand, Cambridge Dictionary defines performance guarantee as a written agreement to pay back a loan if someone else does not.[1] It is issued by a third party and mostly banks and insurance

[1] https://dictionary.cambridge.org/dictionary/english/performance-guarantee accessed on 9th April, 2024 at 2212hrs.

companies. On both occasions, these are as good as money. I thus return finding that the Respondents are not left exposed.

22. It is common knowledge that the money while with the Respondents is not earning any interest and equally, money depreciates in value. As such, keeping it tied is not prudent. The Applicant has provided enough assurance that in the event it does not succeed, the Respondents can simply call up the performance bond/guarantee at the then prevailing rates. The same cannot be said of the Applicant as it would have lost the value as well as the interest.

23. Can the Respondents hold on to the money on account of lien? The answer lies in decision of Waruhiu K'owade & Ng'ang'a Advocates v Mutune Investment Limited (above) where the court observed as follows: -

> " ...We are unable to understand the appellant's argument that it could claim a right of lien over the sum of money for the sole reason that Isaac Samson Githuthu, who it is claimed is a director and principal shareholder of the respondent, owed the applicant outstanding legal fees... The law being what it is, it is manifestly clear to us that the appellant cannot claim a right of lien over the money entrusted to it after it gave an irrevocable and unconditional professional undertaking. Such a contention of a right of lien is legally unsustainable and unsupportable in law..."

24. I am bound by the above decision and I thus find that the contention of lien as postulated by the Respondents cannot be sustained. In any event, the performance bond/guarantee is enough lien and not prejudicial to any party.

25. Lastly, on this issue, the procedure of moving the court is clearly provided under Order 52 Rule 4 of the Civil Procedure Rules. The application is by originating summons supported by affidavit. Does it preclude interlocutory applications? I do not think so. Order 52 Rule 4 (3) covers the Respondents and the court reserves the power to make any orders it deems fit including on interlocutory applications such as the present one. I think I have said enough to demonstrate that the application dated 24/10/2023 is merited.

26. On costs, it is settled that the same follows the event. However, the court retains discretion whether to grant them or not. Furthermore, this discretion must be exercised judiciously and courts should not deprive a plaintiff/defendant of his or her costs unless it can be shown that they acted unreasonably. The Halsbury's Laws of England, 4th Edition (Re-issue), [2010], Vol.10. para 16, notes as follows: -

> " The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice"

27. Any departure from this trite position can only be for good reasons which the Supreme Court in Jasbir Singh Rai & Others vs Tarlochan Rai & Others [2014] eKLR noted includes public interest litigation since in such a case, the litigant is pursuing public interest as opposed to personal gain. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion,

courts must not only look at the outcome of the suit but also the circumstances of each case. In Morgan Air Cargo Limited v Everest Enterprises Limited [2014] eKLR the court noted as follows: -

> "The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that ''Costs follow the event" was driven by the fact that there could be no ''one-size-fit-all" situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case."

28. Being an interlocutory application, the costs shall abide the outcome of the main suit.

29. Having found as above, the following orders flow therefrom: -

    a. The application dated 24th October, 2023 has merits and the same is allowed in terms of prayer (3);

    b. The notice of preliminary objection dated 20th November, 2023 lacks merit and the same is dismissed with no order as to costs;

    c. The Performance Bond/Guarantee be deposited in court within the next thirty (30) days;

    d. In default of (c), either party is at liberty to move the court accordingly;

    e. Costs to abide the outcome of the originating summons.

    Orders accordingly.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 11TH DAY OF APRIL, 2024.

....

F. WANGARI

JUDGE

In the presence of:

Mr. Anangwe Advocate for the Applicant

Mr. Kinyua Advocate for the Respondent

Mr. Barille, Court Assistant