REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 37 OF 2020

SUKARI SUGAR INDUSTRIES LTD .....APPELLANT

versus

OCHOLA PETER ARIYO.....RESPONDENT

JUDGMENT

The appellant, Sukari Industries Ltd filed two appeals CA 37/2020 Sukari Industries Ltd =vs= Ochola Peter Ariyo and Ochola Peter Ariyo =vs= Sukari Industries E00 2 /2020 which were consolidated on 19/10/2020

On 5/8/2020 the appellant (former defendant) filed the Memorandum of Appeal dated 4/8/2020 which appeal arose from the Ruling of Hon. Obiero PM's order given on 4/8/2020 in Migori CMCC 662/2016. The appeal was accompanied by an application which inter alia sought an order of stay of execution in CMCC 662/2016.

On 12/10/2020 the appellant filed another memorandum of appeal dated 6/10/2020 arising from the Order of Hon. Obiero PM given on 29/9/2020 in Migori CMCC 662/2016.

In HCCA 37/2020, the appellant prayed that the court set aside the Ruling and orders of the trial magistrate made on 4/8/2020 in Migori CMCC 662/2016 and in its place allow the application dated 27/7/2020.

By the Notice of Motion dated 27/7/2020, the appellant had sought orders of stay of execution and the setting aside of the judgment and decree issued by the court for reasons that it was obtained fraudulently. The trial court ruled that it had no jurisdiction to grant the orders of stay in the appeal filed on 12/10/2020 arising from the Ruling of the Hon. Obiero PM given on 29/9/2020 in which the application dated 27/7/2020 was dismissed. The appellant sought to have the Ruling and orders set aside and in its place the application dated 27/7/2020 be allowed. In essence, both appeals arose from the trial magistrate's ruling in the application dated 27/7/2020.

In HCCA 37/2020, the appellant relied on the following six (6) grounds:-

a) The learned trial magistrate erred in fact and in law in separating the issues of stay of execution and set aside of judgment on the basis of fraud and generally failing to appreciate the principles applicable on determining the application that was before him.

b) The learned trial magistrate erred in fact and in not appreciating sufficiently or at all that the Appellant facts and/or allegations of fraud against the Respondent and his counsel on record Mr. Brian Mboya as sworn in the supporting affidavit were not rebutted and therefore they remained unchallenged.

c) The learned trial magistrate erred in fact and law in relying on facts stated in a grounds of opposition as a rebuttal to the facts deponed to in the supporting affidavit whereas in the grounds of opposition you can only allude to issues of law and not facts.

d) The learned trial magistrate erred in fact and law by purporting to descend upon the arena of the dispute contrary to the established role of a neutral arbiter by importing the decision the High Court in MIGORI MISC APPLICATION 62 OF 2019 which related to stay of execution pending the hearing and determination of an application for leave and purporting to mean and misinterpreted it, that the High Court had directed the appellant to pay the Respondent in the wake of serious issues of the judgment being obtained by fraud.

e) The learned trial magistrate erred in fact and in law in not appreciating sufficiently or at all the appellant had raised matters of a fundamental nature to warrant the grant of the orders sought in the application.

f) The learned trial magistrate erred in fact and in law in declining to stay execution of the judgment obtained by fraud thereby aiding and abating the fraud.

In Civil Appeal E2/2020 the appellant relied on the following grounds:-

a) The learned trial magistrate erred in fact and in law by raising issues suo moto and proceeded to make a determination on the same by striking out the Appellant's further affidavit without according the parties an opportunity to be heard on the issue the court raised sue moto thereby denying the Appellant a fair hearing.

b) The learned trial magistrate erred in fact and in law in striking out evidence of a court order in form of warrants of arrest issued against the Respondent and arriving at the conclusion that the Respondent has not been charged hence there I no sufficient proof of fraud.

c) The learned trial magistrate erred in fact and law in not appreciating sufficiently or at all that the Appellant facts and or allegations of fraud against the Respondent and his counsel on record Mr. Brian Mboya as sworn in the supporting affidavit were not rebutted and therefore they remained unchallenged.

d) The learned trial magistrate erred in fact and law in relying on facts stated in grounds of opposition as a rebuttal to the facts deponed to in the supporting affidavits whereas in the Grounds of Opposition you can only allude to issues of law and not facts.

e) The learned trial magistrate erred in fact and law by purporting to descend upon the arena of the dispute contrary to the established role of the neutral arbiter by importing issues and rebuttals on behalf of the Respondent when there such evidence tendered by the Respondent especially challenging the authenticity of the forensic report and failure by the police to arrest and charge the Respondent.

f) The learned trial magistrate erred in fact and law by failing to appreciate that the issue of fraud was only discovered after judgment had been issued and therefore the same could not have been pleaded in the defence and further that issues of fraud can be raised at any time even after judgment.

g) The learned trial magistrate erred in fact and law by failing to appreciate that the Plaintiff was on the run and even warrants of arrest had been issued by court of competent jurisdiction as the reason as to why the Respondent could not be charged and if at the Respondent was innocent as he portrays him then the Respondent would have presented himself to the police to answer to those charges and not run away.

h) The learned trial magistrate erred in fact and in law in not appreciating sufficiently or at all that the Appellant had raised matters of a fundamental nature to warrant the grant of the orders sought in the application.

i) The learned trial magistrate erred in fact and in law in failing to appreciate that the Respondent has obtained the judgment by fraud thereby aiding and obtaining the fraud."

The appellant therefore, prays that his appeal be allowed and the court do set aside the ruling and orders appealed against and in their place, allow the application dated 27/7/2020 and costs of the appeal and the application dated 27/7/2020.

A brief background of this matter is that the Respondent (former plaintiff) filed this matter on 15/1/2016 in person but later instructed the firm of Tom Mboya & Co Advocate to act for him on 30/6/2016. The appellant was served and filed a defence dated 13/7/2016. After close of preliminaries, the matter was set down for hearing and Tom Mboya Advocate was present for the Respondent while one Achieng Advocate held brief for counsel for the Appellant. The hearing commenced and was adjourned for defence hearing on 18/11/2019. The matter was reserved for judgment which was delivered on 20/6/2019. It is the appellant's contention that unknown to the court, the judgment /decree were based on fraud and that the evidence of the fraud came to the fore after the judgment was delivered and that is what provoked the filing of the application dated 27/7/2020 to have the judgment and decree set aside but the trial court dismissed it. It is the appellant's further contention that the magistrate descended into the arena of the dispute, raised issues suo moto without giving the parties an opportunity to address him in turn and failed to appreciate the evidence of fraud which was unchallenged.

This being a first appeal, this court has the duty to re-examine the evidence and findings of the trial court, afresh, analyse it and arrive at its own conclusions. This court is guided by the decision of Selle & Another =vs= Associated Motor Boat Co Ltd & others (1968) E.A. 123 where the court said:-

"…..this court is not bound necessarily to accept the judgments of fact by the court below. An appeal to this court therefore is by way of a retrial and the principles upon which this court acts in such an appeal are well settled.

Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

The appellant came up with four issues for determination

1. Whether the striking out of the appellant's further affidavit was done suo moto;

2) Whether the court erred by discarding the court order in the form of a warrant of arrest issued by Migori Law Courts against the Respondent;

3) Whether the court considered the issue of fraud that was raised by the appellant;

4) Whether the court disregarded a forensic report;

On the other hand the Respondent identified the following issues:-

1) Whether the issue of fraud was pleaded in the defence;

2) If the answer to the one (1) above is in the negative, whether there was fraud in the matter;

3) Whether the magistrate erred in dismissing the application;

4) Who is entitled to the costs of the appeal.

Whether fraud was proved:

The appellant's counsel submitted that the jurisdiction of setting aside a judgment procured by fraud is unique and relatively new to Kenya and called for the invocation of the court's inherent jurisdiction; that fraud need not have been pleaded because the discovery of fraud was after judgment had been entered and that the said evidence had not been challenged by the Respondent. On the other hand, the Respondent has submitted that having not pleaded fraud in their defence, the appellant is bound by their pleadings. He relied on the decision in IEBC & Another =vs= Stephen Mutinda Mule & 3 Others CA 219/2013 (2014) eKLR and the persuasive decision of J Majanja in Susan Onyango Ngaji = vs =South Nyanza Sugar Co Ltd CA 112/2018(2019) where the court declined to consider the issue of fraud that had not been pleaded.

I have considered the written submissions on the above issue. Order 2 Rule 4 Civil Procedure Rules lists the matters that need to be specifically pleaded which includes fraud. It is indeed trite that each party to a suit is bound by its own pleadings and courts have repeatedly confirmed that fact. In the Stephen Mutinda case (supra) approval the Supreme Court of Nigeria in Adetoun Oladej Ltd vs Nigeria Breweries PLC 91 of 2002 where Pius Adereji, JSC expressed himself as follows:-

> " *It is now a very trite principle of 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 issues 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."*

In this case, the appellant raises a unique situation because the alleged fraud was allegedly discovered after judgment had been delivered. Fraud was therefore not pleaded in the defence. The allegations of fraud were deponed to by David Okoth in his affidavit dated 27/7/2020. It is noteworthy that the Respondent did not file any replying affidavit to rebut the said allegations. All that the Respondent filed were grounds of opposition. The trial magistrate correctly observed that under Order 51 Rule 14(1) Civil Procedure Rules one can respond to an application by a notice of Preliminary Objection, replying affidavit and or a statement of grounds of opposition. Whereas an affidavit is evidence on Oath, grounds of opposition are mere points of law Averments in an affidavit can only be rebutted by a replying affidavit or oral evidence.

> In CA 95/2016 Mutai and Others =vs= A. G. the court of Appeal observed at paragraph 34" An affidavit is sworn evidence. It occupies a higher pedestal than grounds of opposition that are basically issues of law intended to be argued. Two things flows from this. First, by the mere fact of the affidavits not having been controverted there is an assumption that what was averred in the affidavit as factual evidence is admitted….
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> Paragraph 36 with due respect, the learned Judge failed to appreciate that what is sworn under oath is not a simple matter but a serious issue, for which a deponent can be charged with puffery if it turns out that the deponent has lied under oath. In other words, the consequences are the same as those for a witness who testifies orally and perjures himself by lying on oath.

In our view, affidavit evidence is legally admissible evidence in a court of law. It occupies the same place as any other evidence that is admissible in a court of law.

See also AG & another =vs= Mohamed Balala & 11 others (2014) eKLR.

> "We do not think that the grounds of opposition were sufficient to counter the complaints by the respondents. They were neither a defence nor evidence that the High Court could have relied on to find favour with their arguments. The grounds so to speak were a mere Skelton which required beefing up by way of evidence either through a replying affidavit or other means. Being a mere Skelton, the Judge could not really tell what the appellants case was or what they were upto. The grounds required to be elucidated, elaborated and expounded upon by the appellants so that the High Court could appreciate the issues being ventilated by the appellants in answers to the respondent's allegations. In the absence of such, the High Court was quite right in holding that the petition was undefended. The appellants did not expect the High Court to embark on a fishing expedition of its own to find our exactly what the appellants defence was; put the other way, it was not the duty of the High Court to firm up the grounds of opposition on behalf of the appellants. Further the grounds of opposition could not pass for evidence as they were not deponed or deposed to by any of the appellants."

Guided by the above decisions, it is a fact that the Respondent did not controvert the averments of the appellant in his Supporting Affidavit.

Whether the Court erred in striking out the applicant's further affidavit sworn on 21/8/2020 by David Okoth; The subject application was filed in court on 20/7/2020 and was placed before the court on 4/8/2020. On 25/8/2020, the matter came up for confirming whether submissions had been filed. The further affidavit had been filed on 24/8/2020 together with the submissions. The appellant had not sought leave of the court to file the further affidavit.

The Respondent had been served with the further affidavit and had not objected to the filing of the stated further affidavit.

Since the said further affidavit was on the file, the court should have found out whether or not the Respondent objected to it instead of going ahead to strike it out without being moved by the Respondent. If a party wishes to file further evidence as indeed the applicant had done, unless it was shown that it was prejudicial to the Respondent. The court should have left the said affidavit on record and invited the respondent to object or allow the respondent time to file a response to it. I say so because it is the duty of the court to ensure that justice is done to all the parties and that parties should be allowed to present their case by filing all the necessary evidence. Parties should be allowed to ventilate their issues without undue regard to technicalities for example, where one did not file a document within a given time, the same can be enlarged. I am in agreement with the submissions that the trial court erred in striking out the said affidavit suo motto. In the said affidavit, the applicant purported to annex a warrant of arrest for the respondent issued on 17/8/2020 and a letter from the Assistant Chief in support of their case of alleged fraud against the respondent. However, having found that the other evidence adduced in the supporting affidavit cannot sustain an allegation of fraud, what was annexed to the further Affidavit cannot stand alone to support the allegation of fraud. The statement of the Chief can only be evidence if the chief testified or reduced it to an affidavit. The result is that even though the court may have erred in striking out the appellant's affidavit, I find that the action did not prejudice the appellant's case.

The first question I pose is whether the applicant can raise the issue of fraud after the judgment has already been delivered. Allegations of fraud are very serious. The same must be pleaded and proved. Black's Law Dictionary 10th Edition 2009 page 731 defines fraud as "a knowing misrepresentation or concealment of a material fact made to induce another to act to his or her detriment or a reckless misrepresentation made without justified belief in its truth to induce another person to act."

It was the appellant's submission that the only remedy that the appellant has to pursue is setting aside of the ruling and he relied on the Court of Appeal decision of Richard K. Bunei & 8 others t/a Geo- Estate Development Services =vs= Lorien Ranching Co Ltd & 199 others (2017)eKLR where the court held:-

> *This Court after expressing its opprobrium against fraud when proved to have been used to deceive the court, as an 'insidious disease' that spreads and infects the whole body of the judgment, dismissed the appeal and authoritatively endorsed the holding of the Privy Council in the above-cited HIP GOONG HONG case (supra) quoting with approval the judgment of the committee as delivered by Lord Buck master at p 894;*
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> *"A judgment that is tainted and affected by fraudulent conduct is tainted throughout, and the whole must fail, …. Where a new trial is sought upon the ground of fraud, procedure by motion and affidavit is not the most satisfactory and convenient method of determing the dispute. The fraud must be both alleged and proved; and the better course in such a case is to take independent proceedings to set aside the judgment upon the ground of fraud, when the whole issue can be properly defined, fought out, and determined, though a motion for a new trial is also an available weapon and in some cases may be more convenient.:*
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> *The Court of Appeal further rendered itself thus:*
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> *This Court also referred to and accepted the earlier decision of the Queens Bench Division in COLE vs. LANGFORD [1898]2qb 36 which, after considering the decisions of Jessel M. R. in FLOWER vs. LLOYD 6 Ch.D 297and Lord Justice Baggallay in BAKER vs. WADSWORTH [1898] 67 L.J.Q.B 301held that;*
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> *'Where a judgment has been obtained by fraud, the Court has jurisdiction, in a subsequent action brought for that purpose, to set the judgment aside."*

In Jonesco vs. Beard [1930] AC the Court said:-

> *"It is the settled practice of the Court that the proper method of impeaching a completed judgment on the ground of fraud is by action, in which the particulars of the fraud must be exactly given and the allegation must be established by strict proof. Although there is jurisdiction in special cases to set aside a judgment for fraud on a motion for a new trial, if for any special reason departure from the established practice is permitted; the necessity for stating the particular of fraud and the burden of proof are in no way abated and all the strict rules of evidence apply."*

From a reading of the above decisions, it is clear that where a judgment is obtained by fraud, another suit has to be brought to set aside the said judgment. It is not by way of an application in the same suit as the appellant purported to do.

I have considered the ruling of the trial court dated 29/9/2020 and I do agree with the finding that the applicant did not prove fraud by the deponements and annextures being a statement of the Respondent and the forensic report. The forensic report had not been subjected to any legal process and was a mere annexture. Ordinarily, such a report must be produced by the maker or unless agreed by the parties. On its own, the report could not amount to proof of fraud.

The maker had not sworn any affidavit. As regards the Respondent's statement, it had been part of his cross examination on 3/6/2020 when the case was heard. As held in both the Bunei case and Jonesco Co v Beard (supra) the allegations of fraud can only be dealt with in another fresh action where fraud has to be specifically pleaded and strictly proved during a hearing. Strict proof cannot be done on affidavit evidence. It would have to be a hearing where witnesses will be called and cross examined. That is why I agree with the trial magistrate that

fraud could not be proved in the manner in which the allegations were presented to the court. Even if there was no replying affidavit filed in response to the applicant's affidavit, the applicant has not proved fraud to warrant the setting aside of the impugned ruling. If indeed the incidents of fraud are investigated and established, the same can be the subject of both criminal proceedings and another civil action to recover the decretal sum.

In the end, I find that the appeal is not merited. It is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 9TH DAY OF MARCH, 2021

R. WENDOH

JUDGE

Judgment delivered in the presence of:-

Mr. Olendo for the appellant

Mr. Mboya for the Respondent

Oloo Court Assistant