



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 86 OF 2018

MARGARET GACIGI GECAGA

(Suing on her own behalf and as a next friend of

DR. BETHUEL MAREKA GECAGA).....PLAINTIFF

-VERSUS-

GATEWAY INSURANCE CO. LTD.....1ST DEFENDANT

UDI MAREKA GECAGA.....2ND DEFENDANT

QUINVEST LTD.....3RD DEFENDANT

RULING

1. Margaret Gacigi Gecaga (Margaret) filed this case on her own behalf and on behalf, as next friend, for Dr. Bethuel Mareka Gecaga (Dr. Gecaga). It is not disputed that Dr. Gecaga was the husband of Margaret. I say 'was' because, although no proof was produced before me, parties in this matter state that Dr. Gecaga died in the year 2016.
2. Margaret alleged in this claim that Udi Mareka Gecaga (Udi), the 2nd Defendant fraudulently transferred Dr. Gecaga's shares in Gateway Insurance Co. Ltd. (Gateway) into the 3rd Defendant, Quinvest Ltd. Margaret's final prayers in the Plaintiff relate to that allegation, whereby she seeks amongst other Orders injunctive Orders restraining Gateway from releasing to Udi the value of the aforesaid shares.
3. Margaret's claim is defended by the Defendants and in particular Udi and the 3rd Defendant pleaded in their defence that Margaret's claim disclosed no cause of action against them.
4. Udi and the 3rd Defendant filed a Notice of Motion dated 20th January 2015 seeking an Order of striking out this suit. That application was heard by Justice Fred A. Ochieng and by that Learned Judge's Ruling of 16th April 2018 this suit was struck out.
5. It is important to state that Margaret filed a Notice of Motion dated 6th May 2015 where she sought for an Order that Kshs. 57,658,165 representing the shares in contention herein be deposited in an interest earning account in the joint names of the law firms: J. M. Njenga & Co. Advocates and Hamilton Harrison & Matthews.
6. On 4th June 2015, the Court adopted the parties consent as follows:

"IT IS HEREBY ORDERED BY CONSENT:

THAT the sum of Kshs. 55,987,559.66 held by Hamilton Harrison & Matthews and Kshs. 200,788.26 held by Muthaura, Mugambi, Ayugi and Njonjo Advocates be placed an interest earning account held at Kenya commercial bank limited in the joint names of J. M. Njenga and Company Advocates and Hamilton Harrison & Matthews until the hearing and determination of this suit or until further Orders of the Court.

7. There are two notices of motion for consideration in this ruling whose prayers re directed at the above stated consent Order.

8. The first in time is the Notice of Motion dated 30th April 2018 filed by Margaret. Margaret seeks an Order of injunction pending her appeal to the Court of Appeal to stop the release of the amount of money held in the joint account of the law firms.

9. The second Notice of Motion was filed by Udi and the 3rd Defendant. It is dated 3rd July 2018. By that application, an Order is sought for the funds held in the joint account of the law firms to be released to Hamilton Harrison & Matthews, the Advocates for Udi and the 3rd Defendant.

10. The first Notice of Motion is based on the grounds that on the suit being struck out, by the ruling of 16th April 2018, Margaret filed a Notice of Appeal, against that ruling. That the substratum of this suit is the funds held in the joint account. That if those funds are released the substratum of the suit will be lost, the intended appeal will be rendered nugatory and the appellant will suffer irreparable loss.

11. In support of the 2nd Notice of Motion it was stated that the funds were held in the joint account pending the hearing and determination of this suit. That the Court by its ruling dated 16th April 2018, this suit was struck out thereby determining the matter. That accordingly, the funds in the joint account should be released to the 3rd Defendant.

ANALYSIS AND DETERMINATION

12. I have read and considered grounds of opposition, affidavit evidence and parties' submissions. Having considered those documents, I wish to only discuss some of the issues raised by the parties. Before considering those issues, I wish to state that this Court cannot consider the merit of the pending appeal before the Court of Appeal. I will therefore not discuss submissions made in that regard.

13. Can an injunction be issued pending appeal? Under Order 42 Rule 6(6) of the Civil Procedure Rules (the Rules), the High Court, in the exercise of its appellant jurisdiction, is empowered to grant temporary injunction provided the procedure of institution of an appeal has been complied with.

14. Further under Order 40 Rule 1(a) the Court is empowered to grant injunctive Orders where property is wrongfully being sold in execution of a decree.

15. The above Rules are the extent which I could find relating to injunction Orders pending appeal. The Court can however invoke section 3 and 3A of the Civil Procedure Act, Cap 21, in my view to grant an injunction pending appeal.

16. The Defendants were of the view that Margaret having entitled her application under Order 42 Rule 6 (6) of the Rules she could not obtain injunctive Order but that she had to satisfy the three grounds set out in Order 42 Rule 6 (1) of the Rules; that is she had to show she would suffer substantial loss, that the application was made without delay and that she would provide such security the Court would Order for due performance of the decree.

17. The one answer I will give to that submission by the Defendants is that an application is not defeated because it is brought under the wrong Order or Rule, so long as the prayer sought is clear and would not cause prejudice to the other party.

18. In my considered view however, the applications before me will be determined on the appreciation of what the parties consented to on the 4th June 2015.

19. That consent reproduced above provided that the funds would be held in the joint accounts '*until the hearing and determination of this suit or until further Orders of the Court.*'

20. From that consent, I see tow distinct positions that will determine whether the funds will be released from the joint account. The first is when this matter is heard and determined. The second is when the Court makes further Orders.

21. By the second limb of that consent it would seem that the parties reserved discretion to the Court on whether or not the funds should be released.

22. I will, for the purpose of what is before me, concentrate on the first limb.

23. Has this case been heard and determined? Indeed, by the ruling of 16th April 2018, this case was determined. However, on Margaret filing her Notice of Appeal, against that ruling, on 17th April 2018 it can be said that this case was reactivated. This would seem to be the import of Order 42 Rule 6(4) of the Rules which provides:

“For the purpose of this Rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court Notice of Appeal has been given.”

24. The moment Margaret filed a Notice of Appeal, this case was reactivated. The issues that were before the High Court, before the suit was struck out, are now before the Court of Appeal. The suit therefore has not been determined because the Court of Appeal will reconsider the issues and pronounce itself.

25. The above is the essence of the parties consent and having consented that the funds be held until the determination of the suit parties are bound by their consent. This indeed is what the Courts have often held. In the Court of Appeal in the case **SAMUEL MBUGUA IKUMBU V BARCLAYS BANK OF KENYA LIMITED [2015] eKLR** the Court on this stated:

“Hancox JA (as he then was) in the case of Flora Wasike v. Destimo Wamboko (1982-1988) 1 KAR 625, said in his judgment at page 626 –

“It is now 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 the fulfilled, which are not carried out.” See the decision of this Court in J. M. Mwakio v. Kenya Commercial Bank Ltd. Civ. Apps 28 of 1982 and 69 of 1983,

This Court in the case of Brooke Bond Liebig v. Mallya 1975 E.A. 266 held:-

“A consent judgment may only be set aside for fraud collusion, or for any reason which would enable the Court to set aside an agreement.”

26. It follows that the consent continues to subsist until the case is determined. That being the finding of the Court the Notices of Motion dated 30th April and 3rd July 2018 both fail.

27. The Orders that commend themselves to me are as follows:

- a) The Notices of Motion dated 30th April 2018 and dated 3rd July 2018 are hereby dismissed with no Orders as to costs.
- b) For the avoidance of doubt, the parties consent adopted by this Court as an Order of the Court on 4th June 2015 continues to subsist on the terms stated therein, that is until the determination of the pending appeal.

DATED, SIGNED and DELIVERED at NAIROBI this 8TH day of MAY, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie.....COURT ASSISTANT

.....FOR THE PLAINTIFF

.....FOR THE 1ST DEFENDANT

.....FOR THE 2ND DEFENDANT

.....FOR THE 3RD DEFENDANT