



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 436 OF 2014

MARGRET WANJIKU KAMAU PLAINTIFF

-VERSUS-

JOPA VILLAS LLC (IN RECEIVERSHIP).....1ST DEFENDANT

JOPA VILLAS LLC2ND DEFENDANT

RULING

1. By a ruling of this court delivered on 26th February 2016 the court in order (e) thereof stated thus:

“The parties shall submit themselves to the Deputy Registrar for the purposes of taking accounts with respect to order number (h) of the Ruling dated 4th December 2015. This matter shall be mentioned before the said Deputy Registrar on 15th March 2016 for directions on the said accounts”.

2. The 1st Defendant, not being satisfied with that ruling including order (e) above appealed to the court of Appeal. The matter is pending in the court of appeal but there is no stay of proceedings in this court.

3. However, the parties have now appeared before the said Deputy Registrar as directed by this court. While there, the 1st Defendant has filed the Notice of Motion dated and filed herein on 11th May 2016, seeking as the main order the cessation of the said taking of accounts on the ground that the said Deputy Registrar has no jurisdiction to take accounts in respect of this matter.

4. Faced with that dilemma the Deputy Registrar has referred this matter back to this court for directions regarding the said Notice of Motion dated 11th May 2016.

5. M/s Opio, counsel for the 1st Defendant submitted that pursuant to the said orders of 26th February 2016, it is apparent that the taking of accounts in this matter is an integral part of the dispute between the parties and would amount to the disposal of the main suit. Counsel submitted that law provides that the Honourable Deputy Registrar’s jurisdiction is limited to the consideration and determination of procedural and administrative matters. The Hon. Deputy Registrar has no jurisdiction to hear and determine a high court matter substantively. Counsel submitted that none of the parties herein have sought orders for the taking of accounts in their pleadings and/or in any application, and that in any event

the amount in dispute is Ksh.193,842,237.80/=. The Deputy Registrar lacks jurisdiction to handle a dispute for such an amount especially where the sums are disputed. Counsel further submitted that there has been no case management in the matter pursuant to Gazette Notice 5179 of 28th July 2014 and the taking of accounts, which amounts to the disposal of the suit, is therefore premature. Counsel submitted that the Applicant's right to a fair hearing will be greatly prejudiced should the Deputy Registrar proceed to take accounts in the matter as it will not have had an opportunity to call witnesses.

6. On their part messrs Nyachoti, and Ongegu for the Plaintiff and the 2nd Defendant respectively submitted that the said application by the 1st Defendant is an abuse of the court process. Counsel submitted that by the orders of this court on 26th February 2016, the Deputy Registrar was directed to take accounts. The 1st Defendant was not pleased by the order, and they appealed. However, their appeal is still pending but there is no stay of proceedings in this court. Counsel submitted that the application by the 1st Defendant dated 11th May 2016 is meant not only to delay the finalization of the matter but is also a clever way to appeal, in this very court, against the orders of this court of 26th February 2016, a thing which cannot happen. Counsel submitted that the 1st Defendant is making that application simply because their attempts at appeal in the court of Appeal, and to stay these proceedings have born no fruit in the court of appeal and that the current application is a desperate attempt to stall the process of taking the accounts as directed by this court.

7. Counsel further submitted that the issue of account should be determined forthwith because there are third party claims in the amount held jointly under the advocates' name. One such claim is for Shs.18,660,067/= demanded by the Kenya Revenue Authority, and as long as it remains unpaid a loss will be occasioned in terms of accruing interests and penalties.

8. I have carefully considered these submissions, and the directions I am required to provide in relation to the said application dated 11th May 2016. To do that I raise the following issues for determination;

(i) Whether there is a valid court order directing the taking of accounts by the Deputy Registrar.

(ii) Whether the issues before the court cannot be concluded at interlocutory stage.

(iii) Whether the said application is an abuse of the court process.

(v) Which directions can issue to the Deputy Registrar.

9. To address the first issue I will refer to the ruling delivered on 26th February 2016 at order number (e) thereof where this court directed that the accounts be taken by the Deputy Registrar. That ruling stands, and it has not been set aside by any order of a Superior Court. To purport to ignore that ruling, and to bring an application whose impact is to appeal against the said ruling, is not only an abuse of the process of this court, but also an act in bad faith by the 1st Defendant. So my answer to issue number one is that there is a valid order of this court directing the Deputy Registrar to take accounts.

10. The second issue is whether or not this suit can be concluded at the interlocutory stage. This issue has been raised by M/s Opio counsel for the 1st Defendant. Counsel submitted that the issue of jurisdiction had never been raised in earlier proceedings, and that the order directing the Deputy Registrar to take accounts was not made with reference to the parties. Counsel now says that parties need to comply with pre-trial directions, file their Bundle of documents and prepare the suit for the determination of disputed sums.

11. My view is that the jurisdiction of the Deputy Registrar to take accounts cannot be in doubt. It is not the duty of the High Court judge to do calculations and arithmetics. The Deputy Registrar has not been directed to determine any substantive issue in dispute between the parties. The suit property has already been sold, and the 1st Defendant's debt paid in full. What is outstanding are issues relating to fees payable to various services providers including advocates and Receiver Managers. These service

providers had no claims before the court. Their claims arise as soon as the issues before the court are determined. Indeed M/s Opio counsel for the 1st Defendant was content to have this suit ended if she were to have her way and secure the third party service providers' fees in the terms she had suggested. These figures are in the court record. See the Supplementary Affidavit of **Harveen Gadhoka** dated and filed in court on 14th October 2015. **Annexure H. G 1** shows the entire claim by the 1st Defendant. Among the claim are the disputed sums as follows;

- OPIC disbursements USD 187,937
- Legal fees for sale of property USD 108,518
- Legal fees to Caplan & Stratton Advocates USD 397,586.06
- Receivership costs USD 152,263.47
- Receivers fees USD 447,282.50
- Receivership disbursements USD 3,389.73

12. The above sums of money, allegedly due to Third Party service providers were included in the said affidavit so that the court could award the 1st Defendant the said sums, and if allowed, that would have finalized this matter. M/s Opio was then content to have this matter concluded at the alleged interim stage. Mr. Nyachoti and Mr. Makori objected to those sums, alleging that they were bloated. This is why the court directed the taking of accounts. M/s Opio was content, if her prayer were to be allowed, and the above sums granted to his client, to conclude this matter at interlocutory stage. Now that those figures have been objected to by the other parties, and the court has referred the matter to the Deputy Registrar to take accounts, M/s Opio raises the issue of jurisdiction and also alleges that this matter cannot be concluded at this stage. Counsel referred the court to the case management directions of this Division, and submitted that parties deserved to file Bundles of Documents, Witness Statements and other documents to enable them prove their cases. The issue which now arises is whether the said third party service providers are parties to this suit so that they can comply with case management directions and prove their claim. In my view, those service providers are not parties to this suit. The natural practice of law is that the cost associated with legal proceedings follows the event or as may be provided by court. A service provider is at liberty to demand any amount of money for his fees. However, if that demand is disputed such fees may be taxed, and documents verified, and accounts taken as may be necessary. The said third party providers cannot purport to enter into the arena of the suit as parties, to prove their claim. Their claim is proved by submission to the Deputy Registrar under the relevant remuneration criteria. To open this suit for the purposes of service providers filing Bundles of Documents to prove their claim is an abuse of the process. Those Bundles and Statements can be filed before the Deputy Registrar as is necessary and as the Deputy Registrar directs, and solely for the purposes of taking accounts.

13. I cannot leave this part without commenting on M/s Opio's submissions that a case cannot end at an interlocutory stage. That submission is not only incorrect but also misinforms justice. The suggestion that a matter must drag on in court years on end pending main hearing is a legal fallacy, and an unsound jurisprudence. It abrogates the overriding objective of **S 1 A and 1 B** of the Civil Procedure Rules which require justice to be done in the shortest time possible and at the least cost to all the parties. To proceed to hearing for the sake of it is a gross abuse of the court process and gross insensitivity to parties. There are ample authority to show that a court can conclude a matter summarily even during case management if there is need to do so. It has been severally held that a Defendant need not be dragged to full hearing and suffer costs and time, by a suit which can be dismissed at an interlocutory stage, and the reverse reasons apply for the Plaintiff in a case where there is no arguable defence. A few examples of such case law will suffice. In the case of *Pepin V. Taylor 2001 EVCA Civ. 1522* the court stated that;

“... The rules allows a judge ... if the judge thinks there is no real prospect of a claim succeeding, he ought, when exercising his case management powers, to dismiss it summarily ...”

14. Similarly, in the case of *Swain v Hillmah (2001) I ALL ER 91*, the court observed that where a judge thinks that there is not prospect of a case succeeding he should dismiss it even at the Case Management stage. In the case of *Murri v Murii (1992) E A 212* the court stated that the Defendants should not be troubled by a case that is bound to fail having regard for the documents before the court. The court observed as follows;

“Before leaving this part of the appeal I would add that the object of the summary procedure of striking out is to ensure that Defendants should not be troubled by claims against them which are bound to fail having regard to the uncontested facts. In principle if there is any room for escape from the law, well and good; it can be shown. But in the absence of that, it is difficult to see why a Defendant should be called on to pay a large sum of money and a Plaintiff permitted to waste large sums of his own or somebody else’s money in an attempt to pursue a cause of action which must fail. It seems to me that when that situation arises the comments of Lord Blackburn in Metropolitan Bank v Pooley (1885) 10 AC 210 at 221, are applicable. He said that “a stay or even dismissal of proceedings may often be required by the very essence of justice to be done”. The object is to prevent parties being harassed and put to expense by frivolous, vexatious or hopeless litigation. It would be contrary to the public interest that justice should be shackled by rules of procedure when the shackle will fall to the ground the moment the uncontested facts appear; and that is just this case. It is, I think, convenient now to turn briefly to consider if this is so.”

15. From the above cases it is clear that a suit does not need to proceed to full hearing, and can in fact be concluded at an interlocutory stage if the justice of the matter demands.

16. As for issue number three, I have already found that the application by the 1st Defendant dated 11th May 2016 is an abuse of the process of this court. I will not add anything to that finding.

17. The last issue I raised was on the kind of directions this court can issue to the Deputy Registrar. It is clear from the forgoing paragraphs of this ruling that the court affirms the orders and directions of this court issued on 26th February 2016. I therefore, pursuant to the said orders, further direct the Deputy Registrar as follows;

(a) The Deputy Registrar has the jurisdiction to take the accounts and any matters related thereto, even in the nature of taxation as directed by this court, on 26th February 2016, and by this ruling and order.

(b) In complying with order (a) above the Deputy Registrar may in her discretion make appropriate allowances for the filing of any documents, and may hear witnesses, it necessary, only for the purposes only of settling the accounts.

(c) This matter is urgent, and there are third party payments to be made which attract interests and penalties until payment shall be made. In that regard the Deputy Registrar shall ensure that the said accounts are taken as soon as is practically possible.

(d) This matter is herewith referred back to the Deputy Registrar to proceed as directed above on 16th May 2016.

Orders accordingly.

READ, DELIVERED AND DATED, AT NAIROBI THIS 13th DAY OF MAY 2016.

E. K. O. OGOLA

JUDGE

Ruling Read in open court in the presence of:

Mr Nyachoti for Plaintiff

M/s Opiro for the 1st Defendant

Mr. Ongegu hb Makori Defendant

Teresia – Court Clerk