



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL CASE NO. 464 OF 2014**

**MARGARET WANJIRU NDUNGU.....APPELLANT**

**-VERSUS-**

**SAMMY WAGURA KARANJA.....RESPONDENT**

**RULING**

By a notice of motion dated 14<sup>th</sup> January 2015 and filed in court on 27<sup>th</sup> January 2015, the appellant /applicant Margaret Wanjiru Ndung'u seeks from this court orders:

1. Spent

2. That pending the hearing and determination of this appeal an order of injunction do issue to restrain the respondent from selling or transferring the interests or business shop on LR No. Block 76/32, restaurant on LR Block 75/1054 namely the Docs Pub and Club, Bar and Restaurant on LR Block 75/1004 and 1004 and 1005 namely Our Times Bar and Restaurant and a car wash business on plot No. 93/1248.

3. That pending the hearing and determination of the appeal a mandatory injunction order do issue directed to the respondent to allow the appellant to access the business that they own jointly namely business shops on LR No. Block 76/32, restaurant on LR Block 75/1054 namely the Docs Bar and Restaurant on LR Block 75/1004 and 1005 namely Our Times Bar and Restaurant and a car wash business on plot No. 93/1248.

4. That pending the hearing and determination of the appeal accounts be taken by an independent accounting firm as from August 2013 to determine the income from the joint business in business shops on LR NO. Block 76/32, restaurant on LR Block 75/1054 namely the Docs Pub, bar and restaurant on LR Block 75/1004 and 1005 namely Our Times Bar and Restaurant and a car wash business on Plot No. 93/1248 and the respondent be ordered to deposit in court 50% of the profits and or income.

5. That costs of this application be provided for.

The application is predicated on the grounds that:

a. The defendant has intimated his intention to change the state or status of the joint business by incorporating third parties.

- b. Unless the order of injunction is issued the appellant shall be occasion substantial loss.
- c. The appeal herein may be rendered nugatory if the application is not granted.
- d. From August 2013 the respondent has not earned any income from joint businesses.
- e. As a result of the decision from the subordinate court, the appellant is unable to access the joint business despite her being a joint owner.

The application is also supported by the affidavit sworn by the applicant appellant Margaret Wanjiru Ndung'u on 27<sup>th</sup> January 2015. The appellant/applicant deposes that the lower court issued orders barring the parties hereto from having any contact with one another or communicating with one another directly except through their respective counsels.

According to her, at the time of filing her application in the lower court for injunction she had misplaced all her documentation file relating to the various businesses that she had had and upon getting them she managed to identify the various joint business on the LR Block 76/32, 75/1054, LR Block 75/1004 and 1005 and plot 93/1248 and that since August the respondent had been running the businesses without her involvement as a result of his violence against her.

Further, that she therefore sought orders for review of the orders made by the lower court on 3<sup>rd</sup> December 2013 and also for an order to be allowed to access the joint businesses but the court dismissed the said application on 10<sup>th</sup> April 2014 prompting her to file this appeal and hence this application seeking the orders herein. The applicant also filed a supplementary affidavit on 17<sup>th</sup> March 2015 annexing pleadings in the lower court to wit plaint, Notice of Motion, amended notice of motion and ruling of the subordinate court dismissing her applications for review and deposing that the respondent had not filed any defence in the lower court.

The respondent opposed the application and filed grounds of objection dated 15<sup>th</sup> May 2014 and replying affidavit sworn of 15<sup>th</sup> May 2015 contending that the application is misconceived, bad in law; frivolous and vexatious and has no merit; it is an afterthought and in bad faith, and there is inordinate unexplained delay. It is further contended that the dismissed application was for review whereas the one before this court is one for an injunction; The orders sought have absolutely no bearing with the prayers in the main suit pending in the lower court CMCC 2978/2013 which is for general damages and special damages arising out of an alleged assault of the appellant by the respondent in January 2009 and January 2013; That order 42 Rule 6 of the court limits the jurisdiction of this appellate court for giving stay of execution but the application herein is not one for stay; and that the application herein is not supported by cogent facts and evidence.

In the respondent's sworn affidavit, he provides a detailed historical background of the suit in the lower court culminating into the consent order given on 3<sup>rd</sup> December 2013 in the presence of both parties ably represented by their respective advocates. The respondent further deposes that a consent order cannot be set aside except by another consent or where there is proof of fraud, undue influence or misrepresentation.

Further, the respondent deposes that this application is misconceived since the orders sought are totally different from the main cause of action pending in the lower court; and that there is a delay in filing this application hence, an afterthought and reiterates the grounds that the appellate court can only grant stay of execution under Order 42 Rule 6 and not an injunction which was never sought for in the first instance. He prayed for dismissal of the application with costs.

The parties agreed to dispose of the application way of written submissions with the applicant filing hers on 17<sup>th</sup> March 2015 and the respondent filing his on 18<sup>th</sup> May 2015 and this court is now called upon to determine this application based on those submissions.

The applicant's submissions dated 17<sup>th</sup> March 2015 mirror the averments in the application, grounds in support thereof, the supporting and supplementary affidavits which I have reproduced in this ruling above.

On the other hand, the respondent's submissions mirror the grounds of objection and replying affidavit whose contents I have replicated above.

None of the parties relied on any decided cases.

I have carefully considered the application as presented, the responses thereto and the parties' respective rival submissions.

Basically, the applicant's application seeks for injunctive orders against the respondent: whereas the gist of the respondent's opposition is that this court has no jurisdiction to grant injunctive orders which were never sought in the lower court and that it can only stay execution of the orders of the lower court pending appeal and no more. Further, that the application has been made with unexplained undue delay, is misconceived and lacks merit, further, that the order appealed from was from a review application wherein the trial magistrate refused to set aside consent order and that the court has no jurisdiction to set aside consent judgment in the absence of evidence of fraud or misrepresentation.

According to the respondent, the applicant's application dated 16<sup>th</sup> September 2013 and amended on 24<sup>th</sup> September 2013 never sought orders regarding joint business ventures with her husband, the respondent herein and neither did she seek an order for accounts to be taken of those joint businesses hence this application seeks to expand the original claim as pleaded in the plaint through the back door without following the right procedures for amendment of pleadings.

From the two rival positions advanced by both parties, the main issues for determination are:

1. Whether the applicant/appellant is entitled to the orders sought.
2. What orders should the court make.
3. Who is entitled to costs of this application?

On the first issue, it is clear that the applicant seeks for injunctive reliefs as well as an order for accounts against the respondent pending hearing and determination of this appeal. The reliefs relate to the running of joint business ventures, as opposed to the prayers sought in the plaint and the application dated 23<sup>rd</sup> May 2013 in the lower court wherein the applicant sought orders restraining the respondent herein by himself, his servants and or agents from calling, visiting and or coming anywhere near the plaintiff's house, property or person, pending inter parties hearing.

Subsequently on 16<sup>th</sup> September 2013 the applicant filed another application seeking orders for

*“ That an order do issue restraining the respondent himself, his servants and or agents from calling the plaintiff on or sending the plaintiff short text messages (SMS) to her telephone, or visiting and or coming anywhere nearer than 50 meters from the plaintiff's houses, business premises, property or person pending the interpartes hearing and determination of this application.”*

On 27<sup>th</sup> September 2013, the parties recorded a consent order which was adopted as an order of the court to the effect that:

*“The respondent do and is hereby restrained by himself, his servants and/or agents from calling the plaintiff on or sending short text messages(sms) to her telephone, or visiting and or coming anywhere nearer than 50 meters from the plaintiff's house, business premises, property*

*or person pending inter partes hearing and determination of this application”*

In addition, the lower court on 3<sup>rd</sup> December 2013 did make an order that:

*1. That the plaintiff and the respondent to keep away from each other including SMS and telephone calls and any other form of contact including coming near each other's residence and the plaintiff not to visit their joint business premises.*

*That all communication henceforth be through their respective counsels. It is the above order of 3<sup>rd</sup> December 2013 which the applicant sought by her application dated 14<sup>th</sup> March 2014 to be reviewed to the effect that, inter alia .*

*2. The status quo of the joint businesses be maintained pending the hearing and determination of the application and or suit.*

*3. That the plaintiff be allowed access to the joint business premises.*

*4. That accounts be undertaken by an independent accounting firm as from August 2013 to determine the income from the joint business and the plaintiff be compensated and or paid 50% of the profit being her interest and share in the business.”*

The trial court dismissed the application for review vides a ruling dated 10<sup>th</sup> October 2014 thereby prompting this appeal and this application for injunction.

In the Memorandum of Appeal filed on 21<sup>st</sup> October 2014, the appellant complains among others, that the learned magistrate disregarded her interests in the properties in question; failed to consider that the effect of his decision was to take away the appellant's property and at the same time gift it to the respondent.

In my humble view, and upon consideration of the above matters, I find no nexus between the prayers for review and the application for injunction herein.

In my view, the appellant is seeking to establish a completely new cause of action on appeal through an application for prohibitive and mandatory injunctions. These prayers were never part of the application before the lower court and neither are they based on the substantive prayers sought in the plaint.

If the appellant found her pleadings in the lower court inadequate to found a proper claim, she had the liberty to seek for amendments thereof and not to seek for an amendment through an appeal process.

No substantive claim for an order for accounts or even a prayer relating to the joint business enterprises was ever pleaded or made before the trial court. It would therefore be an abuse of this court's process to make such substantive orders at this appellate stage which orders are not grounded on any pleadings before the trial court.

In my view, the orders of prohibitory and mandatory injunction and a prayer for accounts asked for are extraneous to the primary cause of action. In addition, the trial court dismissed the application for review and did not make any orders for the doing or restraining the doing of any act and this court would not have any jurisdiction to entertain an application for injunction which was not made before the trial court. In other words the orders sought do not relate to what the lower court heard or decided hence this court has no jurisdiction to establish a new cause of action between the parties.

This court takes cognizance of the first principles that pleadings are designed to facilitate the setting out of the parties' claim with sufficient particularity to enable the adverse party to respond. Accordingly, a party may not be permitted to raise a ground which is not pleaded because the respondent

will not have an opportunity to rebut it. It is clearly a matter of justice of the case to see that a party against whom the new point is sought to be taken is not prejudiced by being taken by surprise at the new point on appeal without an opportunity to respond to the issue and have the facts investigated by the trial court. See **Wachira V Ndanjeru [1987] KLR 252** per Platt JA.

In my view, it is not in the interest of justice to consider a new cause of action that was never pleaded as that would not give the respondent a fair trial.

In **Girdhan Lal Vid yarthi V Ram Lakha [1957] EA 527 CA**, the Court of Appeal held that the appellant could not be heard to allege an express trust when he had only pleaded a resulting trust before the trial court.

In this case, the orders in the lower court were confined to restraining the respondent from contacting, including coming near each other's residence or calling the appellant or visiting their joint business or her house. The pleadings related to the above consent order. She also prayed for special and general damages arising out of an alleged assault incident.

At most, the applicant would have sought for stay of execution of orders of the subordinate court. She has not done so, and instead sought for injunctions that set out completely new causes of action from those sought both in the plaint and in the application for review before the subordinate court. That is completely unacceptable, and such prayers are unavailable to the applicant, besides the application being fatally incompetent. (See **Mohammed Yakub & Another vs Mrs Badur Nasa Civil Application No. 285/99 Nairobi and HC Miscellaneous Civil 51/2013[2014] eKLR. R V Commission for Investigations & Enforcement Exparte Wananchi Group Kenya Limited**.)

Furthermore, albeit the application is brought under Order 42 Rule 6 of the Civil Procedure Rule and Section 3A of the Civil Procedure Act, there is not a single prayer for stay of execution or enforcement of the orders of 3<sup>rd</sup> December 2014, which this court would have in the circumstances of this case considered based on the grounds upon which it is sought to be granted, and the conditions espoused in Order 42 Rule 6 (2) of the Civil Procedure Rules.

In the instant case, there being no such application, it would be an exercise in futility to consider whether the grounds under Order 42 Rule 6 of the Civil Procedure Rules for grant of stay pending appeal have been fulfilled.

Albeit this court has jurisdiction under Order 42 Rule 6 (6) of the Civil Procedure Rules to grant an injunction pending an appeal from a subordinate court, in the exercise of its appellate jurisdiction, such injunction can only be granted for purposes of preserving status quo and to prevent the appeal, if successful, from being rendered nugatory as was held in **Madhupper International Ltd V Ker [1985] 1 KLR 840** and in **Charter House Bank Ltd V Central Bank of Kenya & Another Civil Application No. 200 of 2006**. Further, the principles that apply for granting of injunctions on appeal are that the applicant must show that he or she has an arguable appeal that is not frivolous and secondly that if the order of injunction sought is not granted, the intended appeal will be rendered nugatory, if it eventually succeeds See **R V Kenya Anti Corruption Commission & 2 Others ,[2009] KLR 31**.

On whether this appeal is arguable, and without delving into the merits thereof, I have already pointed out what some of the grounds of appeal are. Nonetheless the fact remains that the appellant herein never sought any prayers for mandatory injunction or even for an accounts to be taken relating to their joint business ventures with the respondent. It is therefore not clear how she expected the trial court to review its orders of 10<sup>th</sup> October 2014 to reflect a position that was never substantively sought in the prayers contained in the plaint and in the interlocutory application before the trial court. If the effect of the order of 10<sup>th</sup> October 2014 was to take away her property or rights in the property jointly owned by the applicant and respondent, then that fact was never part of the issues raised or determined in the application before the trial court.

The appellant was granted her prayer which sought to injunct the respondent from calling; visiting and or coming anywhere near her house, property or person. How that position changed to the issue of selling of transferring the interests or business shops, restaurant , bar and car wash business and or accessing the said business premises and or prayers for accounts to be undertaken of the income from the joint business is not clear.

I am, for that reason in agreement with the decision of the Court of Appeal in **Provincial Insurance Company of EA Ltd Vs Mordecai Mwangi Nandwa CA 179/95** that where the issue was not pleaded at the trial stage, the court in the exercise of its appellate jurisdiction cannot be asked to make any order respecting the said issue.

Furthermore, this court notes that the order which the applicant appellant herein sought for review was made by consent of both parties. To review, set aside or vary such an order, there must be either consent of both parties or evidence of fraud, misrepresentation or mistake. Such a consent order binds the parties to it the same way a contract binds parties to it. Circumstances under which a consent judgment or order may be interfered with were clearly set out in the case of **Brooke Bond Liebig (7) Ltd v Maliya [1975] EA 266** that prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court or if the consent was given without sufficient material facts or in misapprehension or ignorance of material facts or in general for a reason which would enable the court to set aside an agreement.

I have perused the Notice of Motion and record before the trial magistrate. It does not disclose facts that prove any of the grounds for setting aside a consent judgment or order. In the instant appeal and application, the applicant /appellant has not alleged fraud, collusion or any of the reasons that can justify the setting aside of the consent order made between the parties, that she sought for review. As was held by the Court of Appeal in **Samuel Wambugu Mwangi V Othaya Boys High School Nyeri CA 7 /2014 Per Visram, Koome and Otieno Odek JJA** that :

***“A consent order has a contractual effect upon the parties....”***

For the foregoing reasons, without necessarily delving into the merits and demerits of the main appeal, it is my most considered view that the applicant has not demonstrated to the satisfaction of this court that her appeal as filed is arguable or that it stands to be rendered nugatory if successful and the orders sought are denied at this stage.

In the end, I decline to grant the orders sought in the application dated 14<sup>th</sup> January, 2014 and proceed to dismiss it with costs to the Respondent.

**Dated, signed and delivered in open court at Nairobi this 14<sup>th</sup> day of October, 2015.**

**R.E.ABURILI**

**JUDGE**