REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCOMMA NO. E182 OF 2023

EDWARD MUKUNDI KARANJA &

VERONICA WANJIRU KARANJA

(Sued as the Administrators to the Estate

of the Late Joseph John Karanja).....……..…….……APPELLANTS

-VERSUS-

PINNACLE PROJECTS LIMITED……..……1ST RESPONDENT

DAVID KABUBII KURIA……2ND RESPONDENT

(*Being an Appeal from the Ruling and order of the Chief Magistrate's Court at Nairobi Hon. W.K. Micheni, Chief Magistrate, delivered on 19th July 2023 in Milimani CMCC No. E1256 of 2021*).

JUDGMENT

1. The plaintiffs (respondents) filed a suit against the defendants (appellants) in the lower Court vide a plaint dated 9th September 2021, seeking special damages in the sum of Kshs.15,776,000/= for unpaid professional fees, interest on the said amount at Court rates from 16th December 2020 until full payment, general damages and costs of the suit.

2. The respondents' case was that the 1st respondent was duly instructed by the appellants to render professional services to the estate of the late Joseph John Karanja and to the appellants by extension. That the respondents diligently executed their mandate including acting as a distribution agent for the estate, providing project management consultancy and preparing a comprehensive Settlement Agreement dated 8th July 2009, which was signed by all beneficiaries, including the

appellants. The respondents stated that their services involved convening and chairing numerous meetings, maintaining communication among the beneficiaries, preparing asset schedules, valuing properties, establishing debts, and formulating distribution plans.

3. The respondents asserted that they also oversaw and implemented various projects such as property sales, valuations, allocations of estate assets, securing Deed Plans and resolving claims against the estate. They averred that in order to achieve the said tasks, they engaged and coordinated consultants. It was stated by the respondents that the 2nd respondent in addition to the foregoing mediated disputes among beneficiaries and the appellants and other beneficiaries of the estate of the late Joseph John Karanja, and that they expressly acknowledged and accepted the respondents' services via email correspondence and various meetings. They asserted that despite repeated demands, the appellants failed to settle the debt of Kshs.15,776,000/= for professional fees, necessitating the suit before the lower Court.

4. In opposition to the respondents' suit, the appellants filed a statement of defence dated 16th November 2021 and denied all the averments contained in the respondents' plaint. The appellants alleged that the respondents' claim is time-barred under Section 4(1) of the Limitation of Actions Act since any cause of action arising from the 2009 Settlement Agreement lapsed by 2015, yet the respondent's suit was filed in 2021. They further averred that the Trial Court had no jurisdiction to determine the dispute between the parties herein as any alleged unpaid fees ought to have been pursued in **Nairobi Succession Cause No. 1115 of 1993** as a creditor's claim against the deceased's estate. They denied any privity of contract with the respondents asserting that no Agreement existed for the alleged professional fees.

5. The appellants maintained that the respondents were merely mediators/negotiators, not distribution agents, and that they were fully paid Kshs.1,400,000/= for the services they offered. They accused the respondents of intermeddling with the estate of the late Joseph John Karanja by unlawfully retaining Title documents and Deed Plans, frustrating property sales and only releasing the said documents after being compelled by a Court Order issued on 26th October 2020. The appellants averred that the respondents never claimed a lien or filed a claim as creditors in the Succession Cause, hence they are estopped from raising fresh claims. They further averred that preparation of lists of assets, valuation of properties and formulating distribution plans was work done by qualified third parties, directly engaged and paid by the deceased's estate.

6. Subsequently, the appellants filed a Notice of Motion application dated 17th February 2022 in the lower Court under the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act, Order 2 Rule 15 & Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law seeking an order for the respondents' suit against the appellants to be struck out with costs. The application was premised on the grounds on the face of the Motion, and it was supported by an affidavit sworn on the same day by Mr. Edward Mukundi Karanja, one of the appellants and an Administrator of the estate of the late Joseph John Karanja.

7. Mr. Mukundi averred that the alleged claim of Kshs.15,776,000/= constitutes special damages not specifically pleaded or proved, amounts to unjust enrichment, and is barred by Section 4(1) of the Limitation of Actions Act, since any contractual claim based on the 2009 Settlement Agreement lapsed by July 2015. He contended that any claim for unpaid

fees ought to have been lodged in the Succession Cause as a creditor's claim.

8. In opposition to the said application, the respondents filed a replying affidavit sworn on 8th April 2022 by Mr. David Kabubii Kuria, the 2nd respondent herein, and the Managing Director of the 1st respondent. Mr. Kabubii averred that the appellant's application was an abuse of the Court process as it failed to meet the threshold under Order 2 Rule 15 of the Civil Procedure Rules, 2010. He argued that striking out the suit would contravene Article 50 of the Constitution by denying the respondents a fair trial. He contended that a cause of action arises when one party commits an act compelling the other to seek legal action, not at the time of executing a contract.

9. Mr. Kabubii asserted that the cause of action arose when the 2nd respondent surrendered Deed Plans and Title documents on 26th October 2020 and matured upon the appellants refusal to pay. He stated that the appellants were are misusing Section 4(1) of the Limitation of Actions Act to evade liability. He further stated that the suit is independent of **Nairobi Succession Cause No. 115 of 1993,** and properly instituted against Administrators of the estate for unpaid dues. Mr. Kabubii contended that the respondents' claim is for multiple unpaid professional services beyond negotiations and stated that payment of one service cannot extinguish liability for all. He averred that a demand letter was issued on 16th December 2020, not 2021 as claimed in the appellants' supporting affidavit.

10. The Trial Court in a Ruling delivered on 19th July 2023 held that the issues raised in the appellant's application could only be determined at the trial stage upon evaluation of evidence and sworn testimonies. The Court further held that the respondents' suit did not constitute an abuse of

the Court process and found that the appellants' application was without merits, and proceeded to dismiss it.

11. Being dissatisfied with the said decision, the appellants filed a Memorandum of Appeal dated 11th August 2023 raising the following Grounds of Appeal-

i) The Learned Magistrate erred in law and fact in failing to find that the Respondents as alleged unpaid Creditor, ought to have filed a claim as a Creditor of the Estate in **Nairobi Succession Cause No.1115 of 1993** - In the Matter of the Estate of the Late Joseph John Karanja, to which they participated;

ii) The Learned Magistrate erred in law and fact in failing to find that the Respondents are estopped from raising new claims against the Estate as they admitted to having a lien over the properties of the Estate but failed to raise the issue of the alleged unpaid professional fees in **Nairobi Succession Cause No.1115 of 1993** - In the Matter of the Estate of the Late Joseph John Karanja;

iii) The Learned Magistrate erred in law and fact in finding that the cause of action arose on 16th December 2020 when the Respondents issued a demand letter yet the cause of action arose on 18th June 2014 when the Appellants sought for the release of documents held as a lien by the Respondents;

iv) The Learned Magistrate erred in law and fact in failing to find that the cause of action arose on or about 18th June 2014 and became statute barred on or about 17th June 2020;

v) The Learned Magistrate erred in law and fact in failing to find that as the claim by the Respondents is for professional fees for

distribution of the estate, the same ought to have been determined by the Family Court;

vi) The Learned Magistrate erred in law and fact in failing to find that there was no privity of contract between the Appellants and the Respondents;

vii) The Learned Magistrate erred in law and in fact in failing to find that there was no order making the Respondents the distribution agents of the Appellants as distribution of a deceased's estate is solely the responsibility of the Court and the Administrators;

viii) The Learned Magistrate erred in law and fact in finding that there was a distribution Agreement through emails when no such Agreement exists;

ix) The Learned Magistrate erred in law in failing to find that an estate can only be distributed by a legally appointed Administrator;

x) The Learned Magistrate erred in law and fact in failing to determine that that the Respondent had admitted to having been fully paid for their services rendered as per the Written Submissions in **Nairobi Succession Cause No.1115 of 1993** - In the Matter of the Estate if the Late Joseph John Karanja;

xi) The Learned Magistrate erred in law and fact in failing to find that the Respondents cannot approbate and probate at the same time as they had admitted in **Nairobi Succession Cause No.1115 of 1993-** In the Matter of the Estate if the Late Joseph John Karanja that the Appellants sought for different professional services paid for them, and therefore, it would amount to unjust enrichment for the Respondents to be paid for services offered by different professionals;

xii) The Court erred in law and in fact in finding that the Appellant's case did not meet the test for striking out a plaint;

xiii) The Learned Magistrate erred in law and fact in that she disregarded the written submissions submitted by the Appellant thus resulting to a miscarriage of justice; and

xiv) The Learned Magistrate erred in law and fact by failing to evaluate the entire affidavit evidence thus arriving at an erroneous finding.

12. The appellants' prayer is for this Appeal to be allowed with costs, for the Ruling of the Trial Court delivered on 19th July 2023 by Hon. W.K. Micheni, Chief Magistrate (as she was then was), in dismissing their application dated 17th February 2022 to be set aside and substituted with an order allowing the said application.

13. The instant Appeal was canvassed by way of written submissions. The appellants' submissions were filed on 9th December 2024 by the law firm of Wamae & Allen LLP, while the respondents' submissions were filed by the law firm of Amolo & Gacoka Advocates on 14th February 2025.

14. Mr. Kigata, learned Counsel for the appellants relied on the case of **In re Estate of Prisca Ong'ayo Nande (Deceased)** (Succession Cause 836 of 2013) [2020] KEHC 6553 (KLR), and submitted that the Succession Act requires creditors to lodge their claims before the Succession Court for consideration during distribution of a deceased's estate. He contended that the respondents ought to have presented their claim in **Nairobi Succession Cause No. 1115 of 1993** and if their claim was to be disputed, seek stay of confirmation of grant as they proved their liability to the estate in Civil Court. He cited the case of **Republic v Lucas M. Maitha Chairman, Betting Control and Licensing Board & 6 others** [2015] KEHC 624 (KLR), and argued that since the respondents did not

claim a lien over the properties in the Succession Cause, the right to claim fees on lien was extinguished when Hon. Justice Dulu ordered them to release the documents they had unlawfully retained, an Order they complied with.

15. Mr. Kigata submitted that all engagements between the parties herein were concluded by July 2009 under a Settlement Agreement, meaning that any contractual claim became time-barred by July 2015 pursuant to the provisions of Section 4(1) of the Limitation of Actions Act. He contended that even if further services were rendered, there is no evidence beyond 31st March 2012, making the present claim stale and time-barred.

16. Counsel contended that the cause of action between the parties herein may have also arisen when the respondents were formally asked to release the estate documents vide a letter dated 18th June 2014, since at that point, they could have claimed a lien over the demanded documents. He argued that if that was the case, the respondent's claim is still time barred as they were required to file any claim they had against the appellants on or before 17th June 2020.

17. Mr. Kigata cited the Court of Appeal case of **Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another** [2015] KECA 784 (KLR), and submitted that no contract existed between the parties herein, and since no services were rendered, the respondents cannot lawfully demand payment. Counsel further submitted that under Section 108 of the Evidence Act, the burden of proving privity of contract lies with the respondents, which burden they failed to discharge.

18. He relied on the Court of Appeal case of **748 Air Services Limited v Theuri Munyi** [2017] KECA 419 (KLR), and argued that since the

respondents actively participated in the succession proceedings without raising their alleged fee claims, they are estopped from doing so now, having waived that right by conduct.

19. Mr. Chege, learned Counsel for the respondents referred to the provisions of Order 2 Rule 15 of the Civil Procedure Rules, 2010, and the Court of Appeal case of **Kivanga Estates Limited v National Bank of Kenya Limited** [2017] KECA 591 (KLR), and submitted that the appellants' application to strike out the respondents' plaint did not meet the established grounds under the Civil Procedure Rules, 2010, thus the Trial Court correctly dismissed it. He further submitted that since the Civil Procedure Rules uphold the principle of natural justice by ensuring no party is condemned unheard, striking out of pleadings should only be applied in clear and obvious cases, which was not the case herein. Counsel stated that the respondents' pleadings disclose a reasonable cause of action, raising key issues on whether professional services were rendered, and whether the Administrators are liable to pay Kshs.15,776,000/= and costs.

20. Mr. Chege stated that since the said issues require determination at trial, the respondents' case is not plain or obvious for striking out. He asserted that the Trial Court's Ruling should be upheld to safeguard the respondents' right to be heard, in line with the principles of natural justice.

21. Counsel argued that the cause of action did not arise in 2009 or 2014 as alleged, but in October 2020 when the 2nd respondent handed over the Deed Plans pursuant to a Court Ruling, and that the cause of action matured in December 2020 upon the appellants' failure to honour a demand letter. He maintained that the respondents' suit was filed within the statutory 6-year period provided for in Section 4(1) of the Limitation

of Actions Act. Counsel relied on the case of **In re Estate of Mukhobi Namonya (Deceased)** [2020] KEHC 9045 (KLR), and stated that the claim in this suit is distinct from the Succession Cause and may be pursued independently against the Administrators of the deceased's estate.

22. Counsel submitted that a valid contract existed between the respondents and the estate of the late John Joseph Karanja for professional services rendered as evidenced by undisputed correspondence including a letter of 8th August 2018, which implied an Agreement. He cited the case of **Caleb Onyango Adongo v Bernard Ouma Ogur** [2020] KEHC 5305 (KLR), and contended that Courts adopt an objective approach to determine the existence of contracts, requiring proof of offer, acceptance, and consideration. He further referred to the Court of Appeal case of **Abdulkadir Shariff Abdirahim v Awo Sharriff Mohammed t/a A.S. Mohammed Investments** [2014] eKLR, and submitted that the law does not demand that all Agreements be in writing save for contracts of guarantee or surety under Section 3(1) of the Law of Contract Act.

ANALYSIS AND DETERMINATION.

23. This being the 1st appellate Court, I have the duty to analyze and re-evaluate the evidence adduced before the lower Court and reach my own independent conclusion. See **Williamsons Diamonds Ltd v Brown** [1970] EA 1 **and Ramji Ratna and Company Limited v Wood Products (Kenya) Limited**, Civil Appeal No. 117 of 2001.

24. I have re-examined the Record of Appeal and given due consideration to the written submissions by the parties' respective Counsel. The issue that arises for determination is whether the instant Appeal is merited.

25. The Ruling that forms the subject of the instant Appeal is in respect to the appellants' application filed under the provisions of Order 2 Rule 15 of the Civil Procedure Rules, 2010, seeking to have the respondents' suit struck out. Order 2 Rule 15 of the Civil Procedure Rules, 2010, provides that –

> ***1) At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that –***
>
> ***a) it discloses no reasonable cause of action or defence in law; or***
>
> ***b) it is scandalous, frivolous or vexatious; or***
>
> ***c) it may prejudice, embarrass or delay the fair trial of the action; or***
>
> ***d) it is otherwise an abuse of the process of the Court,***
>
> ***and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.***
>
> ***2) No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.***
>
> ***3) So far as applicable this rule shall apply to an originating summons and a petition.***

26. It is a well established principle that striking out of a suit or pleading is a drastic and draconian act, to be invoked sparingly, with great caution, and only as a measure of last resort. Courts will only invoke the said procedure where the pleadings are incapable of being cured through amendment. In the oft cited case of **Yaya Towers Limited v Trade Bank Limited (In Liquidation)** (Civil Appeal No. 35 of 2000), the Court of Appeal stated as follows –

> ***A plaintiff (defendant) is entitled to pursue a claim in our Courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.***

27. The Court of Appeal in **Crescent Construction Limited vs Kenya Commercial Bank Limited** [2019] eKLR, held as follows on striking out of pleadings–

> ***However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the Court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honored legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.***

28. As correctly held by the Hon. Trial Magistrate, it is trite that pursuant to the provisions of Order 2 Rule 15(2) of the Civil Procedure Rules, 2010, no evidence is admissible on an application under Order 2 Rule 15(1)(a), of the Civil Procedure Rules, 2010. Therefore, in considering whether the Trial Court was correct in dismissing the appellants' Notice of Motion

application dated 17th February 2022, this Court shall consider whether the application was scandalous, frivolous or vexatious, and if it may prejudice, embarrass or delay the fair trial of the action and/or is otherwise an abuse of the Court Process.

29. In the lower Court, the appellants sought to have the respondents' suit struck out on the ground that their claim is time barred pursuant to the provisions of Section 4(1)(a) of the Limitation of Actions Act, which states that-

> ***1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued -***
>
> ***a) actions founded on contract;***
>
> ***b) …***

30. The appellants' contention is that the respondents' claim is time barred since it is founded on the Settlement Agreement dated 8th July 2009. Their argument is to the effect that pursuant to the provisions of 4(1)(a) of the Limitation of Actions Act, the respondents ought to have filed their suit on or before 7th July 2015. They further averred that even if it is assumed that the respondents cause of action arose when the respondents were formally asked to release the documents for the deceased's estate, vide a letter dated 18th June 2014, the respondent's claim would still be time barred as they would have been required to file any claim they had against the appellants on or before 17th June 2020.

31. The respondents on the other hand asserted that their cause of action did not arise in 2009 or 2014 as alleged, but arose in October 2020 when the 2nd respondent handed over the Deed Plans pursuant to a Court Ruling, and that the cause of action matured in December 2020 upon the appellants' failure to honour a demand letter. The defendants asserted that

their suit having been filed in 2021 was filed within the statutory 6-year period provided for in Section 4(1) of the Limitation of Actions Act.

32. In the case of **South Nyanza Sugar Co. Ltd v Dickson Aoro Owuor** [2017] KEHC 7669 (KLR), cited by the Hon. Trial Magistrate in her Ruling, the Court held thus-

> ***What is for determination is when exactly the cause of action accrued since from that time the limitation period of 6 years starts running. I do not find that issue difficult to decide on. I say so because when a party enters into a contract for a specific period of time, it does so in the understanding and belief that each of the parties to the contract will observe its part thereof until full execution of the contract. <u>It is only when one of the parties happens to be in breach of the contract that a possible cause of action arises as at that date of the alleged breach and not at the end of the contract period.</u>*** Emphasis added.

33. This Court agrees with the Trial Court that a cause of action on breach of contract arises at the time of breach and not at the time of entering into the contract. Upon perusal of the Settlement Agreement dated 8th July 2009, it is evident that none of the respondents were a party to that Agreement, thus it cannot be said that the respondents' cause of action arose at the point of execution of the Settlement Agreement.

34. It is not in dispute that the respondents offered professional services to the appellants. Therefore, in the absence of a written contract for professional services between the parties herein, it is my finding that the cause of action between the parties herein arose when the respondents demanded for payment, for professional services rendered and the appellants failed to honour the demand by paying the amount so

demanded. From the record, it is clear that the said demand was made vide a letter dated 16th December 2020. Since the respondents' suit before the Trial Court was filed in 2021, this Court finds that the suit was filed within the statutory 6-year period provided for under Section 4(1) of the Limitation of Actions Act.

35. The appellants also contended that the respondents ought to have pursued their claim in **Nairobi Succession Cause No. 1115 of 1993**, as creditors of the estate of the late John Joseph Karanja. It is not in contest that the services rendered by the respondents were to the estate of the late John Joseph Karanja. I therefore concur with the Court's finding in the case of **In re Estate of Mukhobi Namonya (Deceased)** (supra), that the respondents cannot be deemed to be *"creditors"* of the said estate in the real sense of the word. It is however noteworthy that under the provisions of Sections 83(c) of the Law of Succession Act, the Administrators of a deceased's estate have a duty to pay out of the estate of the deceased, all expenses of obtaining their grant of representation and all other reasonable expenses of administration (including estate duty, if any).

36. Accordingly, this Court finds that the respondents are indeed well within their rights to pursue the legal representatives of the estate of the late John Joseph Karanja for services rendered. The question that therefore follows is at what point the claims could be raised and to which Court the respondents should have filed their claim. To this end, I am inclined to agree with the Trial Court that the respondents' claim is incidental to the administration, thus it could not have been properly raised during the pendency of **Nairobi Succession Cause No. 1115 of 1993**. Further, as already stated above, the respondents' claim is not a debt incurred by the deceased during his lifetime, but one incurred by the Administrators of his estate during distribution of the deceased's assets.

37. Additionally, pursuant to Section 48 of the Law of Succession Act, Hon. Magistrates have jurisdiction over succession matters depending on the limit of their pecuniary jurisdiction. Therefore, since the respondents' claim against the appellants is for Kshs.15,776,000/=, it was properly filed and placed before a Chief Magistrate who has a pecuniary jurisdiction limit of Kshs.20,000,000/=.

38. In the premise, I do not find anything barring the respondents from filing their claim in the Trial Court as they have done.

39. On the issue of privity of contract, I find it is contradictory that on one hand the appellants claim that the respondents' suit is for breach of contract thus it is barred under Section 4(1)(a) of the Limitation of Actions Act and on the other hand contend that there was no privity of contract between them and the respondents. The above notwithstanding, having found that the the estate of the late John Joseph Karanja engaged the respondents in whatever capacity for their services during the administration of the estate of the deceased, the issue of whether or not there was privity of contract between the parties herein and whether or not the respondents have been fully paid for the services rendered ought to be determined at the hearing of the dispute between the parties herein, where all the parties shall adduce evidence and testify in support of their respective cases and not at an interlocutory application.

40. In the end, I am not persuaded that the appellants have made out a case under the provisions of Order 2 Rule 15(1)(b),(c) & (d) to warrant this Court's interference with the decision of the Trial Court rendered in a Ruling delivered on 19th July 2023.

41. The upshot is that this Court finds that the Appeal herein is without of merits. It is hereby dismissed with costs to the respondents. The lower

Court case is remitted to the Chief Magistrate's Court for hearing and determination.

It is so ordered.

DELIVERED, DATED and **SIGNED** at **NAIROBI** on this **31st day** of **October 2025. Judgment delivered through Microsoft Teams Online Platform.**

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Mutugi for the appellants/applicants

Mr. Waweru for the respondents

Ms B. Wokabi – Court Assistant.