Mwaniki & another v Milele Ventures Ltd; Two Zero Six Ruiru Developers Ltd (Interested Party) (Civil Appeal (Application) 139 of 2014) [2024] KECA 438 (KLR) (12 April 2024) (Ruling)

Neutral citation: [2024] KECA 438 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) 139 OF 2014

K M'INOTI, M NGUGI & LA ACHODE, JJA

APRIL 12, 2024

BETWEEN

ALICE WANGUI MWANIKI .... 1ST APPELLANT

AGNES WAMBUI KIRITU .... 2ND APPELLANT

AND

MILELE VENTURES LTD .... RESPONDENT

AND

TWO ZERO SIX RUIRU DEVELOPERS LTD .... INTERESTED PARTY

(Application to review and set aside its order (Omondi, Laibuta and Gachoka, JJ.A) dated 2nd November 2022 and reinstate the application dated 28th September 2018 in CA No. 139 of 2014)

RULING

1. Civil Appeal (Application) No. 139 of 2014 dated 28th September 2018 was listed for hearing on 2nd November 2022 before a bench of this Court comprising Omondi, Laibuta and Gachoka, JJA. At that time the interested party, Two Zero Six Ruiru Developers Ltd, which was the applicant in the said application, was represented by Mr. Jesse Kariuki, Advocate of Jesse Kariuki & Company Advocates. In the application, the interested party was seeking to be joined in the appeal, claiming an interest in the suit property the subject of the appeal.

2. When the application was called out for hearing, Mr. Kariuki appeared for the interested party while Ms. Gikonyo held brief for Mr. Thuita for the respondent. After hearing both counsel, the Court made the following order:

Order of the Court

> "The notice of motion dated 10th September 2018 is listed for hearing before us today. Upon being called out, Mr. Jesse Kariuki, learned counsel for the applicant is present and Miss Gikonyo learned counsel is holding brief for Mr. Thuita for the respondent. The applicant is not present, but has been duly served as confirmed by the hearing notice availed to us. Mr. Kariuki informs us that the application has been overtaken by events and the applicants are no longer interested in pursuing the matter. He wishes to withdraw the application. Miss Gikonyo has no objection. Consequently, the application dated 10th September, 2018 is marked as withdrawn with no orders as to costs. (Emphasis added).
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> Made at Nairobi this 2nd November 2022."

3. On 8th December 2022 the interested party filed a notice of motion seeking two substantive orders, namely, that Messrs. Wachira Gachoka & Company Advocates be allowed to come on record for the interested party, and that the Court be pleased to review, set aside the order dated 2nd November 2022 and reinstate the application which was marked as withdrawn.

4. The grounds on which the application was based were that the said application had not been overtaken by events and that in withdrawing the same, the interested party's previous advocates acted without instructions. In the affidavit in support of the application sworn on 8th December 2022 by Mr. Benson Njuguna, a director of the interested party, it was deponed that the interested party was unable to get from its previous advocates the reason why they withdrew the application; that the application had not been overtaken by events; that in withdrawing the application, the previous advocates acted without instructions; that the information provided to the Court was incorrect; that the error of its previous advocates should not be visited on the interested party; that it was in the interest of justice to review, set aside the order of 2nd November 2022 and reinstate the withdrawn application; and that the respondents would not suffer any prejudice.

5. In its written submissions dated 11th April 2023, the interested party reiterated the above arguments and we therefore do not see the need to rehash the submissions. We must, however, point out that the interested party expended a lot of time and energy expounding on provisions of the *Civil Procedure Act* and Rules and authorities thereon, which have absolutely no relevance in the application before the Court. Among the provisions so belaboured in vain are Order 51 rule 13(2) on the need for a notice on the foot of a motion indicating the consequences of non-attendance; Order 9 rules 9 and 10 on change of advocates; section 80 and Order 45 rule 1 on review; and sections 99 and 100 on amendment of judgments, decrees and orders. Even a casual look at section 2 of the Civil Procedure Act will show that the definition of "court" in that Act is limited to the High Court or a subordinate court acting in exercise of its civil jurisdiction. Appeals and applications like the one before us are regulated, not by the *Civil Procedure Act* or the rules made thereunder, but by the *Court of Appeal Rules*.

6. The 2nd appellant, Agnes Wambui Kiritu, opposed the application vide a replying affidavit sworn on 23rd January 2023. She deposed that the judgment, the subject of the application had been overtaken by events and that she had already been registered as the owner of the suit property.

7. The 2nd appellant also protested that the application by the interested party had been brought under the wrong provisions of the law; did not comply with Order 51 rule 13(2) of the *Civil Procedure Rules* and that the interested party's new advocate was not properly on record. She added that the application for joinder was properly withdrawn by the interested party's previous advocates and that the interested party's remedy was against the advocate, if indeed he had acted without instructions.

8. The 1st appellant and the respondent, Milele Venture Ltd., neither filed replying affidavits, nor submissions. Apart from her replying affidavit, the 2nd appellant also did not file submissions.

9. We have carefully considered the application dated 8th December 2022. The application is purportedly taken out under sections 1, 1A, 3A and 18 of the *Civil Procedure Act* and Orders 40 and 51 rule (1) of the *Civil Procedure Rules*. We need not belabour the fact that those provisions have no application in an application before this Court.

10. The interested party has also relied on the overriding objective in sections 3(3), 3A and 3B of the *Appellate Jurisdiction Act*. We are not persuaded that a party can use the overriding objective as the basis for review and setting aside of a decision or order of the Court. The intendment of the overriding objective is to cure minor procedural lapses, particularly if they have no jurisdictional implications. (See *Lemanken Aramat v. Harun Meitamei Lempaka & 2 Others* [2014] eKLR). In *Mradula Suresh Kantaria v. Suresh Nanalal Kantaria*, CA No. 277 of 2005, this Court expressed itself as follows regarding resort to the overriding objective:

> " The overriding principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained".

11. Also relied upon by the Interested Party is section 3(3) of the *Appellate Jurisdiction Act*, which provides as follows:

> " In the hearing of an appeal in the exercise of the jurisdiction conferred by this Act, the law to be applied shall be the law applicable to the case in the High Court."

12. Contrary to the Interested Party's assumption, that provision does not apply the Civil Procedures Act and Rules to appeals and applications in this Court. All that it does is to allow this Court, in determining an appeal from the High Court, to apply the law that was applicable to the case in the High Court. For example, if the Court is dealing with an appeal arising from exercise of the review jurisdiction of the High Court, the Court will apply and be guided by the principles of review in section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*.

13. Section 3(3) of the *Appellate Jurisdiction Act* therefore cannot be read to mean that an application for review of a judgment or order of this Court is to be regulated by the *Civil Procedure Act* and the rules made thereunder. Except in cases falling under the slip rule in rule 37 of the *Court of Appeal Rules*, namely correction of clerical or arithmetic errors or mistakes arising from accidental slip or omission, the power of this Court to review its decisions is a residual power to be exercised with circumspection, and only in exceptional circumstances. (See *Benjoh Amalgamated & Another v. Kenya Commercial Bank Ltd* [2014] eKLR).

14. The other issue is the limb of the application where the interested party seeks leave for its present advocates to come on record. Under rule 23(1) of the *Court of Appeal Rules*, no leave is necessary where a party to an appeal or application wishes to change his or her advocates. Such a party is simply required to file and serve a notice of change of advocates "as soon as practicable". It is only when an advocate desires to ceases from acting that rule 23(2) requires him to apply for leave to cease acting.

15. The substantive ground upon which the application for review of the order dated 2nd November 2022 is made is that the interested party's previous advocates had no instruction to withdraw the application dated 28th September 2018. It is trite that a duly instructed advocate has an implied general authority to compromise and settle an action and that the client cannot avail himself of any limitation by him

of the implied authority to his advocate unless such limitation was brought to the notice of the other party. (See *Kenya Commercial Bank Ltd v. Specialised Steel Engineering Co. Ltd.* [1982] KLR 485).

16. In *Orbit Chemical Industries Ltd v Attorney General* [2012] eKLR, this Court, held, among other things that:

> "(5) Where an action has been commenced the solicitor retained becomes the agent of the client and has an implied authority to compromise the action and no limitation of such implied authority can be relied upon by the client as against the other side unless such limitation had been brought to the knowledge of the other side before the compromise was arranged. The onus is upon the plaintiff to show that the authority had been limited. There is no room or authority for the client to limit that authority by way of secret instructions.
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> (6) The opposite party transacting with such counsel holding himself out as having ostensible authority to act in the matter need not ask such counsel to prove the extent of his ostensible authority before transacting with him irrespective of the magnitude of the compromise."

17. Accordingly, we are satisfied that in the circumstances of this application, the interested party's previous advocates had implied authority to withdraw the application dated 28th September 2018 and that the interested party has not demonstrated that its previous advocates acted without instructions or that it had limited their authority to withdraw the application.

18. Ultimately, we are satisfied that the notice of motion dated 8th December 2022 has no merit and the same is hereby dismissed with costs to the 2nd appellant. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF APRIL, 2024.

K. M'INOTI

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

K. ACHODE

....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR