Spire Properties (K) Limited v Gikandi Ngibuini t/a Gikandi & Co Advocates & 12 others (Civil Application E058 of 2022) [2023] KECA 464 (KLR) (28 April 2023) (Ruling)

Neutral citation: [2023] KECA 464 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION E058 OF 2022

SG KAIRU, JW LESSIT & GV ODUNGA, JJA

APRIL 28, 2023

BETWEEN

SPIRE PROPERTIES (K) LIMITED ..... APPLICANT

AND

GIKANDI NGIBUINI T/A GIKANDI & CO ADVOCATES ..... 1ST RESPONDENT

MAYFAIR BANK LIMITED ..... 2ND RESPONDENT

EDWARD OONGE T/A WERE & OONGE ADVOCATES ..... 3RD RESPONDENT

MARIAM SAIDI MWAMBORA ..... 4TH RESPONDENT

BENSON KITETO ..... 5TH RESPONDENT

ROSEBUD STELLA MUBIRU ..... 6TH RESPONDENT

KOON CHOO & CHRISTINE LYN JOGSCHAT ..... 7TH RESPONDENT

ANTHONY BWIRE AKUKHA ..... 8TH RESPONDENT

JOSEPH ONGÚTI ..... 9TH RESPONDENT

STEPHEN K. NDEGWA ..... 10TH RESPONDENT

SAMUEL G. MOMANYI ..... 11TH RESPONDENT

DANIELL O. OMUYA ..... 12TH RESPONDENT

OBADIAH G. MBUGUA ..... 13TH RESPONDENT

(Being an application for release of money held in the joint account of Gikandi & Co Advocates together with Were & Oonge Advocates consequent upon the judgement of this court dated 29th July 2022 in Civil Appeal No 135 of 2018)

RULING

1. By a notice of motion dated August 31, 2022, the applicant herein, Spire Properties (K) Limited, seeks an order compelling the 2nd respondent to release the principal sum of Kshs 7,601,112.50 plus interests thereon, held in the joint bank account number 03******** in Mayfair Bank, Nyali Branch in the joint names of the 1st and 3rd Respondents, to the Applicant within three days of the making of this order, by transferring the same to the applicant's Advocate's bank Kenya Commercial Bank A/C No. 11********** Hurlingham Branch.

2. According to the applicant, it lodged an appeal before this Court, being Civil Appeal No. 135 of 2018: Spire Properties (K) Limited versus Miriam Saidi Mwambora and Others against the judgment of the Employment and Labour Relations Court (ELRC) (Rika J.) delivered on 8th September 2017 in Cause No. 79 of 2013 (the Trial Court). It was averred that the applicant applied for an order of stay of execution of the Trial Court's judgment, which application was allowed and the orders issued on condition that the 1st Respondent and 3rd Respondent herein open a joint bank account number 03******** in Mayfair Bank, Nyali Branch (the 2nd respondent) and the applicant deposits therein the sum of Kshs. 7,601,112.50 and this was done. This order was adopted on 11th July 2019 by this court upon granting stay pending the hearing and determination of the substantive appeal or until further orders.

3. At the time of the making of that order, the parties were represented by the firm of Were & Oonge Advocates (the 3rd Respondent herein) for the appellant/applicant and the firm of Gikandi & Company Advocates (the 1st Respondent herein) for some of the respondents. Subsequently, the Applicant instructed the firm of Munyao Muthama and Kashindi Advocates to take over and represent them in the matter in place of the firm of Were & Oonge Advocates (the 3rd Respondent herein) while some of the 1st Respondent's clients subsequently instructed the firm of Musa, Boaz and Thomas Advocates to represent them in place of the firm of Gikandi and Company Advocates (the 1st Respondent herein). In the meantime, the sum deposited in the joint interest-earning account continued to be held in the names of the 1st and 3rd Respondents herein who were previously on record for the parties as mentioned above.

4. It was contended that by an application dated 5th July 2022, the Applicant sought orders for its Advocates on record, the firm of Munyao Muthama and Kashindi Advocates to be granted access to the joint bank account number A/C No. 03********at Mayfair Bank Limited Nyali branch and a consent order was made to that effect.

5. Subsequently, this court delivered the judgment on the substantive appeal; Civil Appeal No. 135 of 2018 - on 29th July 2022 allowing the same and setting aside the judgement of the ELRC. The only order that remained in favour of the Respondents in the appeal who were represented by the firm of Gikandi & Company Advocates, was the six months gross salary due and payable by the 1st Respondent (Transnational Bank) in Civil Appeal No. 135 of 2018. However, at the time this court delivered the judgment on 29th July 2022, the Applicant's Advocates had not been made a signatory to or granted access to the joint account and have since not been granted access.

6. According to the applicant, by dint of the judgment delivered on July 29, 2022 allowing the appeal, the condition for the stay granted on July 11, 2019 lapsed. Consequently, the Applicant's Advocate served the court order issued on July 25, 2022 upon the 2nd Respondent and requested it to supply the applicant with the list of documents and/or information needed to change the signing mandate

of A/C No. 03********. Despite the request from the Applicant's Advocate, the 2nd Respondent has refused and/or neglected to facilitate the change of the signing mandate of the said joint bank account as stipulated in the court order issued on July 25, 2022 and declined to respond to the request to grant access to the applicant's advocates.

7. Similarly, the 1st respondent has refused to consent to the release of the said deposited sum plus interest accrued thereon in the joint account to the applicant. Instead, by a letter dated August 3, 2022 the 1st respondent asserted that the funds cannot be released because its client intends to appeal against this Court's judgment delivered on July 29, 2022 to the supreme court.

8. The applicant asserted that the funds were deposited in the joint account as security for execution of the trial court's judgment which has now been set aside. Since, no order of stay of execution has been granted either by this court or the Supreme Court to suspend the decision, the 1st respondent and his clients lack any lawful basis to hold on to the funds in the joint account.

   By refusing to consent to the release of the funds and to facilitate access to the joint account the 1st and 2nd Respondents, the Applicant's the right to enjoy the fruits of its litigation and the judgment delivered on July 29, 2022 have been denied.

9. Given the conduct of the 1st and 2nd respondents, it was urged that they should be ordered to pay the costs of this application on a full indemnity basis.

10. In response to the application, the 1st respondent, Gikandi Ngibuini, swore an affidavit on October 19, 2022. The gist of that affidavit was that all the exhibits attached to the supporting affidavit were neither marked nor sealed with the Commissioner for Oath's stamp and were, as such, incompetent and in valid and ought to be expunged from the record. That incompetency also renders both the affidavit and the application incompetent for lack of supporting affidavit. A further ground of incompetency of the application was, according to the 2nd respondent, failure to cite all the parties interested in the joint interest account. Specifically, it was pointed that the firm of Musa Boaz & Thomas advocates for the 1st to the 10th Respondents in Civil Appeal No. 135 of 2018 were left out.

11. According to the deponent, aggrieved by the decision of this court allowing the appeal, the 1st Respondent's clients have appealed against the said judgement to the Supreme Court which, according to the 1st respondent may either uphold or set aside the said judgement. It was therefore the 1st respondent's view that the court has inherent jurisdiction to issue an order for stay of release of the said funds pending the hearing and determination of the said appeal so as to preserve the subject matter of the appeal. He disclosed that he had since received instructions to apply for stay of such orders. In his view, the applicant stands to suffer no prejudice as the money shall continue earning interest if continue to be held in the joint account. On the other hand, should the money be released as sought by the Applicant and 1st respondent's clients succeed on the appeal, the said clients would not be guaranteed recovery of the decretal sum as the applicant's financial capability is unknown hence the success of the appeal will be a pyrrhic victory.

12. It was urged that in the interest of justice the application ought to be declined.

13. At the virtual hearing before us, Ms Irene Kashindi appeared for the applicant, Mr Gikandi Ngibuini appeared for the 1st Respondent, while Mr Kogere appeared for the 4th to 13th respondents.

14. On behalf of the applicant, reliance was placed on its written submissions filed on 26th September, 202 which were highlighted by its Learned Counsel Ms Kashindi. In those submissions, Learned Counsel cited the case of *Kim Jong Kyu v Housing Finance Company Ltd & 2 others* [2015] eKLR and *Mercy Wamboi Njoroge v Francis Babu Mwangi & another* [2019] eKLR.

15. According to the applicant, the conditions of the stay order lapsed upon determination of the appeal and this condition having been fulfilled, there is no lawful basis whatsoever for the 1st respondent to object to the release of the money to the applicant. Therefore, the refusal to facilitate the release of the money is unlawful and unjustified. Reliance was placed on the case of *Eastland Hotel Limited v Wafula Simiyu & Co Advocates* [2015] eKLR.

16. The applicant further relied on the overriding objective of this court under section 3A and 3B of the *Appellate Jurisdiction Act* and the inherent power of the court and urged that in order to do justice, it is vital that the funds be released immediately so as to meet the ends of justice. To the applicant, the 1st respondent's client's appeal to the Supreme Court is not a valid ground to object to the release of the money since there is no order that has been made for funds to continue being held as the condition for stay lapsed when the judgment was delivered.

17. While conceding that the annextures to the supporting affidavit were inadvertently not marked or sealed by the Commissioner for Oaths, Ms Kashindi submitted that the omission was cured when the supplementary affidavit was filed. It was however her position that all the documents annexed were part of the record.

18. Given the conduct of the 1st and the 2nd respondents, the court was urged to direct the said respondents to bear the costs of this application on a full indemnity basis.

19. On behalf of the 1st respondent, reliance was placed on the written submissions dated October 17, 2022 as highlighted by learned counsel Mr Gikandi. The said submissions regurgitated the contents of the replying affidavit and cited rule 9 of the *Oaths and Statutory Declarations Rules*, *Abraham Mtyangi v S O Omboo & others* [2003] eKLR and *Fredrick Mwangi Nganga v Garam Investments & another* [2013] eKLR and *Solomon Omwega Omache & another v Zachary O Ayieko & 2 others* [2016] eKLR.

20. It was urged that in keeping true to the inherent power of the court to do justice to the parties, it is appropriate in the circumstances of the present case, for the court to decline to order the release of the money held in the joint account so that if the 1st respondent's clients ultimately succeed on appeal in the Supreme Court, the appeal is not rendered nugatory. This submission was based on *Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints* [2016] eKLR.

21. According to Mr Gikandi, as long as a party has filed an appeal, the Court still has the jurisdiction to preserve the substratum of the dispute. Mr Gikandi also took issue with the filing of this application against the advocates and submitted that that application ought not to have been filed against him as he was acting on behalf of his clients.

22. It was therefore argued that for the reasons we given, the notice of motion dated 3August 1, 2022 is bereft of merit and is not for granting.

23. Mr Kogere, who appeared for the 4th to 13th respondents addressed us orally in this matter. He associated himself with Mr Gikandi's submissions and submitted that the application was incompetent since the order for deposit was made in the proceedings where Mr Gikandi, Mayfair Bank and Mr Oonge were not parties. In his view, this application ought to have been made in the file in which the order was made. As a result of commencing new litigation, he submitted, new parties and new issues have been introduced while some parties have been omitted. It was his position that once the court delivers itself on a matter in a final judgement, it lacks jurisdiction to entertain any subsequent application since the application would be spent. In his view, while there is jurisdiction to entertain an ancillary application, no such jurisdiction exists in respect of a separate application. It was further

submitted that that since the order for stay was made by the ELRC and confirmed by this court, it is the ELRC that ought to have decided whether or not the order should be discharged.

24. In this case we were urged to balance the rights of a party exercising his right of appeal as against the successful party. Since there is a possibility that the Supreme Court may reverse this court's decision, it was urged that the same considerations that dictated the grant of the order ought to guide this court since no prejudice is likely to be suffered by the applicant.

Analysis and Determination

25. We have considered the issues raised in this application. The substantive issue for our determination is whether the sum of Kshs 7,601,112.50 plus interests thereon, held in the joint bank account number 03******** in Mayfair Bank, Nyali branch in the joint names of the 1st and 3rd respondents, ought to be released to the applicant. However, the respondents have raised some legal issues that we need to deal with first.

26. It is contended that the application ought to be struck out as the annextures to the supporting affidavit were neither marked nor sealed by the Commissioner for Oaths contrary to Rule 9 of the *Oaths and Statutory Declarations Rules*. It is conceded that the supporting affidavit did not comply with the said rule. However, that omission was cured by the filing of a supplementary affidavit to which the same documents were annexed duly marked and sealed. A look at most of the documents annexed reveals that they were court decisions. In our view, even without annexing the said documents, being court decisions, this court may refer to them even on its own motion once the court's attention is drawn to them. In any case, the incompetency would have only gone to the annextures and not to the application and the court would still have been at liberty to decide the application based on the grounds of the application without reference to the affidavit. As was appreciated by Akiwumi, JA in *Sarah Hersi Ali v Kenya Commercial Bank Ltd. Civil Application* No. Nai. 165 of 1999, failure to securely seal all the exhibits annexed to an affidavit in accordance with section 6 of the *Oaths and Statutory Declarations Act* is not fatal as to insist on the same would be too technical especially if the affidavit itself without the annextures shows the merits of the application and the allegations therein are not challenged.

27. All in all, we find that the application was not incompetent on that score.

28. On the issue of failure to join some of the parties, that defect, if defect it was, was cured when we allowed the 4th to 13th respondents to be joined to these proceedings.

29. The respondents are of the view that this application ought to have been made in the matters in which the order for deposit was made. Ordinarily, where the court reverses a decision of the lower court, Section 91 of the *Civil Procedure Act* comes into play. That section provides that:

    1. Where and in so far as a decree is varied or reversed, the court of first instance shall, on the application of the party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position they would have occupied but for such decree or such part thereof as has been varied or reversed; and for this purpose the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

    2. No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under subsection (1).

30. In this case however, the order for deposit was made by the ELRC and was confirmed by this court. Accordingly, there were two orders made by different courts. Since the ELRC cannot make an order

in respect of a matter dealt with by this court, it is our view that it was only proper for the applicant to move this court for the orders sought. As to whether it was proper to open a new matter for the purposes of seeking the orders sought, we agree that the ideal situation ought to have been that the application should have been made in the appeal file, this being an application for consequential relief.

31. We however understand the applicant's predicament since the deposit was made in the names of the counsel for the parties hence the need to have an order directed at that particular account. In our view, since the lifespan of the order for deposit was tied to that of the appeal, what is being sought before us is just a consequential order which the court could have granted even on own motion upon the determination of the appeal. Accordingly, we find no prejudice occasioned by the filing of the fresh application.

32. As to whether it was proper to join the advocates for the parties to these proceedings, while we agree that ordinarily advocates ought not to be joined to proceedings in which they appear only as counsel, in the circumstances of this case, that procedural misstep does not go to the root of the matter. We adopt the view that rules of procedure are meant to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and should not be elevated to a fetish and that the rules are the handmaidens of the Court and should not become too harsh mistresses. See *Ndegwa Wachira v Ricarinda Wanjiju Ndanjeru* Civil Appeal No 44 of 1984 [1987] KLR 252; [1986-1989] EA 577.

33. As we have stated hereinabove what is being sought in this application are consequential orders. These are orders which flow from the decision of this court upon the determination of the appeal. Unless a stay of execution of the said order is sought and granted, this court would have no justification in declining to grant the orders sought herein, the existence of an appeal to the Supreme Court notwithstanding. The submissions made before us by the respondents would have been relevant if what was before us was an application for stay of execution. We associate ourselves with the decision in *Eastland Hotel Limited v Wafula Simiyu & Co Advocates* [2015] eKLR where this court held that:

> "When an appeal is heard and determined, the effect of the judgment is to lapse any interlocutory orders that were made prior to the delivery of the final judgment. The conditional stay of execution and the order directing the deposit of Kshs. 5,000,000/= in a joint account lapsed with the delivery of the judgment of this court on October 24, 2014; a conditional deposit is discharged and becomes due and repayable upon fulfilment of the condition."

34. Consequently, we find merit in the notice of motion dated August 31, 2022. We direct the 2nd Respondent to release the principal sum of Kshs 7,601,112.50 plus interests thereon, held in the joint bank account number 03******** in Mayfair Bank, Nyali Branch in the joint names of the 1st and 3rd respondents, to the applicant by transferring the same to the applicant's advocate's bank Kenya Commercial Bank A/C No. 11******** Hurlingham branch.

35. We are of the view that this application would have been wholly unnecessary had the parties herein sought and obtained legal advice from their counsel. In light of our finding that the advocates ought not to have been made parties to this application, we make no order as to costs.

36. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF APRIL 2023.

S. GATEMBU KAIRU (FCI Arb.)

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR