



Governors Balloon Safaris v Skyship Company Limited & another (Civil Appeal (Application) 261 of 2014) [2023] KECA 1026 (KLR) (4 August 2023) (Ruling)

Neutral citation: [2023] KECA 1026 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 261 OF 2014
DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA
AUGUST 4, 2023**

BETWEEN

GOVERNORS BALLOON SAFARIS APPLICANT

AND

SKYSHIP COMPANY LIMITED 1ST RESPONDENT

NAROK COUNTY GOVERNMENT 2ND RESPONDENT

(Being an application seeking to have the appeal herein marked as wholly compromised and/or settled by conduct of the parties, which appeal is against the Ruling and Orders of the High Court of Kenya at Nairobi (Mabeya, J.) delivered on 22nd November 2013 in HCCC No. 461 of 2008)

RULING

1. Before this Court is a Notice of Motion dated November 29, 2018 brought by Narok County Government pursuant to the provisions of sections 3, 3A and 3B of the *Appellate Jurisdiction Act*, Order 25 rule 5 of the *Civil Procedure Rules* as well as the inherent jurisdiction of the court. The applicant prays for two orders, namely that: the main appeal herein (Civil Appeal No. 261 of 2014) be marked as wholly compromised and/or settled by conduct of the parties; and that costs of the appeal be borne by the appellant, Governors Balloon Safaris (hereafter referred to as ‘Governors Balloon’).
2. Before delving into the crux of the application, it is imperative that we set out the background to the application. Governors Balloon, vide a plaint dated August 14, 2008 and subsequently amended on September 17, 2008, instituted suit, to wit, Nairobi HCCC No. 461 of 2008, against the 1st respondent, Skyship Company Limited (hereafter referred to as ‘Skyship’) and the County Council of Transmara (the predecessor of the Narok County Government). Governors Balloon contended that, on August 1, 2000, the County Council of Transmara entered into a contract with an entity known as Mara Balloon Safaris Limited whereby the County Council of Transmara, in consideration of the payments stated in the contract, granted Mara Balloon Safaris Limited exclusive right to carry on the



business of Air Services for passengers using hot air balloons within a particular area located within the Maasai Mara (the exclusive zone).

3. Governors Balloon contended that, under Clause 5.3 of the contract, the County Council of Transmara had covenanted as follows:

“Not to permit the establishment of any additional hot air ballooning base within a 15km radius of Little Governors Camp such that the only two bases within that limit are the two already established and situated at Little Governors Camp (operated By MBS or its successor) and at Mara Serena Lodge (operated by Transworld Safaris Ltd).”

4. According to Governors Balloon, under Clause 7 of the contract, the said hot air balloon operations were to remain in force for a period of 33 years from the date of the agreement, and was thereafter to be extended and/or renewed for a similar period upon terms and conditions to be agreed upon by the parties.
5. Governors Balloon contended that, on March 26, 2001, the County Council of Transmara agreed and/or consented to the assignment of the said contract to it (Governors Balloon). Accordingly, the said assignment granted Governors Balloon all rights and obligations under the contract which were previously accruing to Mara Balloon Safaris Limited. It was further contended that, based on the contract and the subsequent assignment of rights, Governors Balloon went ahead to apply for a licence from the Civil Aviation Authority to operate hot air balloons within the exclusive zone. It also applied for a bank facility in order to raise the necessary capital to run the business, which facility it hoped to repay using the revenue to be generated from the business.
6. According to Governors Balloon, the fortunes would change for worse as Skyship, with full knowledge of the contract between Governors Balloon and the County Council of Transmara, maliciously, wrongfully and with intent to injure Governors Balloon, procured and induced the County Council of Transmara to breach the terms of the said contract. Several particulars of breach of contract and fraud were pleaded against Skyship and the County Council of Transmara.
7. Governors Balloon contended that, owing to the breach of contract, it stood to lose the benefits of the said contract and profits which it would have made. The estimated loss of profit for the remainder of the contract period was placed at Kshs.700 million while the loss of profit for the renewal period was estimated to be over Kshs. 800 million.
8. The orders sought by Governors Balloon in the plaint were: an injunction restraining the Skyship from interfering with, or, causing the County Council of Transmara to breach the agreement dated August 1, 2000; an injunction restraining the County Council of Transmara from licensing Skyship to operate a hot air balloon business in the exclusive zone; mandatory injunction compelling the County Council of Transmara to perform its obligation under clause 5.3 of the agreement dated August 1, 2000; a declaration that the contract between the Skyship and the County Council of Transmara dated March 1, 2007 was null and void; damages and costs.
9. Vide a statement of defence dated September 16, 2008 and subsequently amended on October 31, 2008, Skyship contended, inter alia, that the suit by Governors Balloon did not disclose any cause of action against it; that the suit was an abuse of court process as the matters raised therein had been unsuccessfully raised by Governors Balloon before KCAA; that the powers or legal authority to licence or regulate the business of hot air balloons were exclusively vested upon Kenya Civil Aviation Authority; that, to the extent that the contract between Governors Balloon and the County Council of Transmara purported to restrict hot air ballooning operations within Masai Mara, it was in violation



of the express terms of regulation 68 of the *Civil Aviation (Licensing of Air Services) Regulations, 2007* and thus null and void.

10. On its part, the County Council of Transmara, vide a defence and counterclaim dated September 18, 2008 and subsequently amended on October 6, 2008, acknowledged having entered into a contract with Mara Balloon Safaris Limited on August 1, 2008. It denied having consented to the assignment of the said contract to Governors Balloon. Therefore, Governors Balloon, not being a party to the contract, could not derive any rights and/or benefits under the said contract. The County Council of Transmara denied all the particulars of fraud pleaded against it.
11. In its counterclaim, the County Council of Transmara contended that Governors Balloon was unlawfully occupying its land on terms that had not been agreed upon between the parties. It also stated that, on August 14, 2008, whilst knowing that the County Council of Transmara was not liable to it, Governors Balloon unlawfully and wrongfully obtained ex parte orders against it, whose effect was to deny it revenue in the sum of USD 400 per day from August 14, 2008. It sought a declaration that the Governors Balloon was not a party to the contract dated August 1, 2000; a declaration that Governors Balloon was not entitled to conduct hot air balloon safaris within the exclusive zone under the terms of the contract dated August 1, 2008; a permanent injunction barring Governors Balloon from conducting hot air balloon safaris within the exclusive zone pursuant to the contract dated August 1, 2000; an inquiry as to the revenue generated by Governors Balloon from the hot air balloon business within the exclusive zone; mesne profits; an order directing Governors Balloon to pay it such sums as may be found due after taking of the accounts; costs and interest.
12. During the pendency of the suit before the High Court, Skyship, vide an application dated March 31, 2010, prayed for dismissal of the suit by Governors Balloon for want of prosecution. It was contended that Governors Balloon had not taken any steps to prosecute its case since April 28, 2009. The delay was inordinate and inexcusable and amounted to an abuse of the court process, Skyship argued.
13. Vide a ruling delivered on November 22, 2013, the court (Mabeya, J.) agreed with Skyship and dismissed the suit for want of prosecution with costs to Skyship and the County Council of Transmara.
14. Governors Balloon thereafter filed an application dated August 25, 2014 seeking to have the counterclaim by the County Council of Transmara dismissed for want of prosecution. The grounds in support of the application were, inter alia, that the County Council of Transmara had not prosecuted its counterclaim for a period of more than 6 years preceding the instant application; that the ruling delivered by Mabeya, J. on November 22, 2013 dismissing the primary suit by Governors Balloon for want of prosecution did not affect the counterclaim that was still in the record of the court. Governors Balloon and the County Council of Transmara entered into a consent before Ochieng, J. (as he then was) on August 25, 2014 whereby the counter claim was marked as withdrawn with costs to Governors Balloon and the latter proceeded to tax its costs pursuant to the said consent Order.
15. It is important to point out that the appeal pending hearing and determination before this court and upon which the instant application is premised is against the ruling and orders by Mabeya, J. dismissing the primary suit by Governors Balloon for want of prosecution. The grounds in support of the said appeal are, inter alia, that the learned judge erred in law and fact when he exercised his discretion to dismiss the suit on account that Governors Balloon had failed to take any action in the case for a period of more than 1 year; in his computation of the period of 1 year; in his application and appreciation of the law when he held that the delay between April 28, 2009 and April 16, 2010 was inordinate and inexcusable when it was evident that Governors Balloon was prosecuting certain applications within the main suit; when he dismissed the suit for want of prosecution and, at the same time, acknowledged that Skyship had not proved any prejudice owing to the delay in prosecuting the case; and for dismissing



the case for want of prosecution against Narok County Government in the absence of an application by the 2nd respondent.

16. It is the above noted appeal which the Narok County Government seeks, through this application, to be marked as wholly compromised and/or settled by conduct of the parties. It is contended in the application and in the affidavit in support sworn by Elizabeth Sanangoi Olochoki, the County Secretary of the Narok County Government, that the matters prompting the filing of the appeal herein were compromised by a consent order recorded before Ochieng, J. (as he then was) on August 25, 2014 by which Governors Balloon gave effect to the decision it seeks to appeal against, and proceeded to have a counter claim filed against it by the Narok County Government dismissed with costs for want of prosecution, and that the order dismissing the counterclaim has since been given effect, the party and part costs payable to Governors Balloon having been taxed. It is contended further that Governors Balloon is by conduct estopped from urging the appeal herein, having derived a benefit from the dismissal order of the counterclaim.
17. At the hearing of this application, learned counsel, Ms. Moraa appeared for the Narok County Government while Skyship was represented by learned counsel, Mr. Amoko. Learned counsel, Mr. Oyatsi was present on behalf of Governors Balloon. Highlighting the written submissions by Narok County Government dated October 31, 2022, counsel reiterated that the matters prompting the present appeal have been wholly compromised by a consent order recorded before Ochieng, J. on August 25, 2014 by which the Governors Balloon gave effect to the decision it seeks to appeal against and proceeded to have the counterclaim filed against it by the Narok County Government dismissed with costs for want of prosecution. It was further contended that Governors Balloon had since given effect to the consent order by filing a bill of costs against the Narok County Government. Counsel submitted that the present appeal was an abuse of the court process and a collateral attack on the application by Governors Balloon dated August 25, 2014 as well as the consent order recorded in the High Court.
18. On his part, learned counsel, Mr. Amoko, while supporting the application by Narok County Government, submitted that, Governors Balloon having obtained a benefit out of the consent order dated August 25, 2014, forfeited its right to pursue the instant appeal. Counsel argued that estoppel by representation applies to the circumstances of this case and placed reliance for this proposition on the case of *Pil Kenya Limited vs. Joseph Oppong* [2009] eKLR. Counsel contended that the appeal before this court was an abuse of the court process and urged us to mark it as wholly compromised.
19. Learned counsel, Mr. Oyatsi on his part, while opposing the application, submitted that whether or not the appeal has been compromised is a question of fact. He submitted that the notice of appeal giving rise to the appeal was lodged on December 6, 2013, while the consent order which is alleged to have compromised the appeal was recorded on August 25, 2014, about 8 months after the filing of the notice of appeal. Counsel contended that, if the parties intended to have the notice of appeal withdrawn at the time of recording the consent, they needed to have brought themselves within the ambit of the provisions of rules 81 and 84 of the *Rules of this Court*. Counsel contended that the consent order related only to the withdrawal of the counterclaim, while the appeal is against the decision of the High Court dismissing the main suit. Counsel contended that the counterclaim and the main suit are two separate suits and that, although the counterclaim was determined through the consent order, litigation in respect of the main suit continues until it is determined by or in the present appeal.
20. We have considered the application, the grounds in support and/or in opposition, the submissions made by counsel as well as the law. The singular issue we are called upon to determine in this application is whether the appeal was wholly compromised by dint of the consent order recorded before Ochieng, J. on August 25, 2014 through which the counterclaim filed by Narok County Government was



withdrawn with costs to Governors Balloon. In determining this issue, we deem it necessary to consider what a counterclaim is. The *Halsbury's Laws of England*, Fourth Edition, vol. 42, defines a counterclaim as follows:

“When A has a claim of any kind against B and brings an action to enforce that claim, and B has a cross-claim of any kind against A which by law he is entitled to raise and have disposed of in the action brought by A, then B is said to have a right of counterclaim.”

21. A counterclaim is a separate suit from the primary suit. Under the provisions of section 35 of the *Limitation of Actions Act*, the survival of a counterclaim is not pegged on the pendency of the primary suit. It provides as follows:

“35. Set-off and counterclaim.

For the purposes of this Act and any other written law relating to the limitation of actions, any claim by way of set-off or counterclaim is taken to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded.” [Emphasis added]

22. The withdrawal of a primary suit, as was the case herein, does not by itself extinguish a counterclaim. The counterclaim survives and remains on the record of the court as a separate action. The germane argument by Narok County Government and Skyship in this application is that Governors Balloon has already given effect to the consent order recorded on August 25, 2014 and that, having obtained a benefit out of the said consent order, it forfeited its right to pursue the appeal. The terms of the consent as stated by parties were that the counterclaim filed by Narok County Government be marked as withdrawn with costs to Governors Balloon. The consent having been adopted as an order of the court meant that the counterclaim was spent; it no longer had a life of its own. The consent order did not make any reference to the primary suit or to the intended appeal by Governors Balloon, which was evident through the notice of appeal already lodged by Governors Balloon on December 6, 2013. Nothing stopped the parties at the time of recording the consent from extending the terms of the consent to the primary suit and/or the intended appeal if they so wished.

23. We do not agree with the views expressed by Narok County Government and Skyship that the withdrawal of the counterclaim impacted on the appeal. The intention of the parties was to have the counterclaim withdrawn with costs. The withdrawal of the counterclaim, in our view, did not have any effect on the primary suit, which had already been dismissed for want of prosecution. Any arguments to the contrary are farfetched and without any factual basis.

24. In sum therefore, there is nothing to stop Governors Balloon from proceeding with the appeal, which is against the ruling and order dismissing its primary suit for want of prosecution. The appeal is properly before this court and ought to proceed for hearing and determination on merit.

25. In the upshot, the application to have the appeal marked as wholly compromised and/or settled by conduct of parties is without any merit and is accordingly dismissed with costs. We direct that the appeal be set down for hearing and determination.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY AUGUST, 2023

D. K. MUSINGA (P.)

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JUDGE OF APPEAL



DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

