Gatabaki v Muga Developers Ltd & 8 others (Civil Appeal 4 of 2018)
[2023] KECA 1360 (KLR) (10 November 2023) (Judgment)

Neutral citation: [2023] KECA 1360 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 4 OF 2018

HA OMONDI, KI LAIBUTA & A ALI-ARONI, JJA

NOVEMBER 10, 2023

BETWEEN

MRS NANCY WANJA GATABAKI ..... APPELLANT

AND

MUGA DEVELOPERS LTD ..... 1ST RESPONDENT

SURAYA PROPERTY GROUP ..... 2ND RESPONDENT

SURAYA INVESTMENT FOURWAYS LTD ..... 3RD RESPONDENT

SURAYA SALES LTD ..... 4TH RESPONDENT

PETER KIARIE MURAYA ..... 5TH RESPONDENT

SUE WACHEKE MURAYA ..... 6TH RESPONDENT

EQUITY BANK LIMITED ..... 7TH RESPONDENT

I&M BANK LTD ..... 8TH RESPONDENT

FRANGIE INVESTMENTS LTD ..... 9TH RESPONDENT

(Being an appeal against the Ruling and Orders of the High Court of Kenya at Nairobi (F. Ochieng, J.) dated 20th September 2017) in Civil Suit No. 352 of 2011)

JUDGMENT

1. The appellant, Nancy Wanja Gatabaki, sued the respondents jointly and severally in Nairobi HCCC No. 352 of 2011 vide her plaint dated 10th August 2011 for a whopping 19 prayers seeking, *inter alia*: injunctive relief restraining the respondents from dealing in LR No. 28223/2 (Original No. 5980) known as Fourways Junction project situate off Kiambu Road (the suit property); damages for breach of contract and fraud; loss of earnings; a declaration that the purported transfer of the suit property

to the 1st respondent was illegal; a declaration that the mortgages and charges between the 1st and 8th respondents were illegal, and orders to set them aside; KShs. 5 Billion being the value of her share in the suit property; an account of the sales and proceeds of the mortgage proceeds; rescission of the development agreements between the parties; freezing orders in respect of certain bank accounts held in the 7th and 8th respondents' banks; a declaration that changes in the shareholding in the 1st respondent were illegal, and orders setting aside those changes; an order directing valuation of the suit property; an order directing the 1st respondent to alienate and transfer half of the suit property to the appellant; costs of the suit and interest.

2. The record as put to us contains only 1 defence dated 8th September 2011 filed by the 7th respondent, Equity Bank Limited, in which the bank denies liability contending, inter alia: that it is a stranger to the appellant's claims, the specific details and responses to which we need not address ourselves in detail; that the 7th respondent approved the 1st respondent's loan application of KShs. 1.5 Billion to finance the 2nd respondent's construction of a housing project on the suit property; that prior to perfection of the security it confirmed that the suit property was owned by the 1st respondent and, therefore, denied that the appellant was the registered proprietor; and that the 7th respondent acquired a legal interest over the suit property without notice of any allegation of fraud averred by the appellant, and that its legal interest therein is indefeasible. They prayed that the appellant's suit be dismissed with costs.

3. When the suit came up for mention on 6th September 2011 before Warsame, J. (as he then was), the parties recorded a consent judgment in terms on which the suit was marked settled. The consent, which was duly executed by the respective learned counsel on record for the parties was in the following terms:

> " That the suit be and is hereby marked as settled on the following terms:
>
> 1. The 2nd defendant shall pay the plaintiff the sum of Kshs. 725,619,000/= in the manner set out below:
>
> a. The sum of Kshs. 140,000,000/= to be paid within 15 days from the date hereof.
>
> b. The sum of Kshs. 262,219,000/= to be paid within 6 months from the date hereof.
>
> c. The balance of Kshs. 323,619/= be paid in the form of houses to be allocated to the plaintiff as follows:
>
> I. 24 Tulip 3 bedroom apartment valued at Kshs. 7,500,000/= each.
>
> II. 6 Daisy 3 bedroom apartment valued at Kshs. 4,900,000/ each.
>
> III. 12 Lilac 3 bedroom villas valued at Kshs. 9,500,000/=
>
> IV. All the above properties to be allocated and transferred to the plaintiff within 24 months from the date hereof without any liabilities and encumbrances at no costs.

2. The 2nd Defendant shall allocate and transfer to the plaintiff land measuring 3.6 acres free from all encumbrances or costs within the next 24 months from the date hereof. The Land to be allocated within the project area.

3. The plaintiff and the 2nd Defendant shall pay the 7th and 8th defendant's costs in the sum of Kshs. 15 million each making a total of Kshs. 30 million within the next 14 days from the date hereof. The said sum to be paid through the firm of Miller & Co. Advocate for onward transmission to the Advocates appearing herein.

4. The plaintiff and the defendant shall pay the firm of Iseme, Kamau & Maema Advocates, the sum of Kshs. 10 million within the next 14 days from the date hereof being the mediation costs.

5. The winding up Cause No. 24 of 2011 be marked as withdrawn with costs of Kshs. 5 Million to be paid to the Petitioner's advocates by the respondent in the cause within 14 days.

6. The plaintiff to resign as a director of the 1st defendant within 14 days from the date hereof. The resignation to be immediately registered with the company registrar.

7. That Sagana Developers Limited shareholding with Muga Holdings Limited shall be 33.3% only.

8. That Sagana Developers Limited shall cease being a shareholder of the 1st defendant and shall transfer its shares for the first defendant to Dr. Samuel Gatabaki absolutely within 14 days from the date hereof.

9. The Interim orders issued on 25th August, 2011 be discharged forthwith.

10. That the plaintiff be discharged and indemnified by the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 9th defendants of all obligations and liability arising from or in connection with the subject development and that she owes no liabilities as a result of the charge of the suit property. In the event that there is a default of the loan outstanding, Equity Bank shall not sell the properties there above allocated to the plaintiff.

11. That in the event of default of the terms set out in clauses No. 1 and 2 as payment to the plaintiff, the directions of the 1st to 6th defendants shall be personally liable.

12. That the charge in favour of Equity bank save for the variations noted above continues to be a valid security and shall not be subject to challenge as a result of the guidelines and terms set out herein above."

4. Subsequently, when the matter came up for mention on 28th September 2011 before Warsame, J. (as he then was), the appellant compromised and withdrew orders 1(a) and (b) of the consent judgment aforesaid leaving the remaining terms in force and binding on the parties. The parties also entered a further consent in terms that a company be incorporated in the name and style of Muga Holdings Limited within fourteen (14) days next following with the involvement of all the parties; that the appellant be bound to tender her resignation from the 1st respondent as director and shareholder within

three (3) days; and that, in default of resignation, the Registrar of Companies do remove her as director and shareholder of the 1st respondent.

5. It is noteworthy that, in view of the paucity of the record before us, we are unable to ascertain with certainty the complete picture of the procedural background against which the further orders aforesaid were recorded. Suffice it to observe that a detailed factual background in that regard is not critical for our determination of the issues raised in the appeal before us.

6. In the meantime, we take to mind the fact that, by a consent order dated 12th August 2013 and recorded in court on 20th April 2015, learned counsel for the appellant and for the 8th respondent, I & M Bank Limited, compromised the appellant's claim against the 8th respondent and caused its name to be struck out of the proceedings and cease to be party thereto.

7. By a Notice of Motion dated 6th September 2013, the 1st to 6th and the 9th respondents applied for extension of time to comply with order No. 1(c) of the consent judgment aforesaid by which they were obligated to deliver to the appellant the housing units therein specified, and in terms of paragraphs (i) to (iv) thereof.

   However, that Motion was abandoned and marked as withdrawn by an order of the court given on 12th February 2014.

8. Subsequently, the appellant filed a Chamber Summons dated 6th May 2014 seeking leave to apply for an order of committal to prison of the 5th and 6th respondents (Peter Kiarie Muraya and Sue Wacheke Muraya), the directors of the 2nd respondent for contempt of the order made on 6th September 2011.

9. By an order given on 15th May 2014, the High Court (Kamau, J.) granted the appellant leave as prayed in her Chamber Summons aforesaid.

10. Having obtained leave as prayed, the appellant filed a Notice of Motion dated 22nd May 2014 praying: that the court be pleased to cite the 5th and 6th respondents for contempt of the court order issued on 6th September 2011; and that the court do order that the said respondents be detained in prison for a period not exceeding six (6) months for disobedience of the consent order 1(c) aforesaid.

11. In addition to the specific consent order in issue, the appellant decried the failure or neglect on the part of the 5th and 6th respondents to allocate and transfer certain houses to together with a piece of land measuring 3.6 Acres within the project area.

12. Likewise, the 5th and 6th respondents filed a Notice of Motion dated 22nd May 2014 praying for orders that the appellant be held in contempt for disobeying the court order issued on 6th September 2011, and that she be committed to civil jail for a period of six (6) months for allegedly refusing or failing to cooperate and facilitate the realisation of consent order No. 7 by which the parties were obligated to incorporate a company known as Muga Holdings Limited, which was to own 9.2 Acres of the suit property jointly with the appellant and one Dr. Gatabaki.

13. In its *ruling and order* given on 20th September 2017, the High Court (Fred Ochieng, J.) dismissed the appellant's Motion with costs to the 5th and 6th respondents. As observed by the learned Judge:

> " 9. .... whilst there was generally a delay in the transfer of the houses and of the parcels of land, both sides confirmed that the defendants did give effect to the orders, albeit late."

14. Upset by the ruling and orders of the learned Judge, the appellant moved to this Court on appeal on a legion of 20 grounds set out on the face of her memorandum of appeal dated 9th January 2018 against the grain of rule 88 of the *Court of Appeal Rules*, 2022 which requires the appellant to

> " set for under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against."

In summary and relevant to the contempt proceedings leading to the impugned ruling, the appellant faults the learned Judge for, *inter alia*: determining a matter not raised before him; showing open bias against the appellant in his assessment of damages, and for making findings and conclusions without considering the evidence as put to him; finding that delay in transferring the houses and parcel of land in issue did not constitute contempt of court; misinterpreting the terms of the consent order by holding that mesne profits should have been mentioned in the consent order; holding that the appellant's costs which include conveyancing costs incurred on transfer of the property was not payable to the appellant's advocates; not finding that the respondents allocated, gave possession and transferred the properties only after the application for contempt was filed; and for awarding costs to the 5th and 6th respondents.

15. In support of the appeal, learned counsel for the appellant, M/s. Gathenji & Company, filed their written submissions dated 11th June 2018 citing 8 judicial authorities on which Mr. Mbuthi Gathenji made oral highlights when the appeal came up for hearing on the GoTo Meeting virtual platform on 10th May 2023, and to which we will shortly return.

16. Opposing the appeal, learned counsel for the 1st to 6th and 9th respondent, M/s. Maina & Onsare Partners, also filed written submissions dated 21st June 2018 citing 10 authorities on which Mr. Bob Otieno made oral highlights, and to all of which we purpose to shortly consider in determination of the appeal.

17. In addition to the foregoing, we take note of Mr. Bob Otieno's indication at the commencement of the hearing that the appellant's claim against the 7th respondent had also been discontinued and its name struck out from the proceedings in the trial court.

18. This being a first appeal, our mandate as set out in rule 31(1) (a) of the *Court of Appeal Rules* is to reappraise the evidence tendered before the trial court and to draw our own conclusions. In *Peters v Sunday Post Limited* [1958] EA 424, the predecessor of this Court, the Court of Appeal for Eastern Africa, stated that:

> " Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide."

19. Put differently, a first appeal is by way of a retrial, and this Court, as the first appellate court, has a duty to re-evaluate, re- analyze and re-consider afresh the appellant's Motion, the affidavit evidence in support and in reply thereto, and draw our own conclusions on it (See *Selle v Associated Motor Boat Co Ltd & Others* [1968] EA 123).

20. We also take to mind this Court's decision in *Makube v Nyamiro* [1983] eKLR where this Court stated thus:

> " A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

21. In determination of the appeal before us, we are also guided by the principle of judicial discretion, its meaning and effect. This principle holds that

> " to whom much is given, much is required".

One of the latitudes given to judges and judicial officers in the course of their work is judicial discretion.

22. The *Black's Law Dictionary* (10th Edition) defines judicial discretion as:

> " The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right."

23. In the same vein, Madan, JA. (as he then was) in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] EA enunciated this principle thus:

> " The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

24. Having considered the record of appeal as put to us, the grounds on which it is anchored, the written and oral submissions of learned counsel for the parties, the cited judicial authorities and the law, we form the view that the appeal stands or falls on our findings on the following five main issues, namely: whether the learned Judge gave due consideration to the evidence as put to him in reaching his decision; whether the belated discharge by the 5th and 6th respondents of the obligations imposed on them under the consent judgment recorded on 6th September 2011 constituted contempt of court; whether the learned Judge showed open bias or otherwise considered matters not raised before him; whether the appellant was entitled to mesne profits and legal fees incurred in the conveyancing of the properties due to her in terms of the consent judgment aforesaid; and whether the learned Judge erred in awarding costs of the appellant's Motion to the 5th and 6th respondents.

25. On the 1st and 2nd issues as to whether the learned Judge gave due consideration to the evidence as put to him in reaching his decision, and whether the belated discharge by the 5th and 6th respondents of the obligations imposed on them under the consent judgment recorded on 6th September 2011 constituted contempt of court, counsel for the appellant submitted that there was evidence on record that the respondents had unequivocally admitted being in contempt of court in their pleadings and orders of the court recorded by various trial Judges; and that the learned Judge erred in concluding, in

the absence of evidence in that regard, that the appellant refused to execute the transfer documents for the properties in issue, and that she refused to cooperate with the respondents to that end.

26. On the authority of *IEBC v Maina Kiai & 5 Others* [2017] eKLR, counsel submitted that the learned Judge did not consider the evidence before him and, in particular, the appellant's affidavit in support, replying affidavits and their extensive submissions. In the afore-cited case, this Court underscored the principle that, where affidavit evidence is adduced, the Judge must consider it, and that this Court will re-evaluate such evidence and reach its own conclusion.

27. In rebuttal, learned counsel for the 1st to 6th and 9th respondents contended that the trial court rightly addressed itself to the matters before it. Counsel submitted that, in arriving at his decision, the learned Judge analysed the pleadings before him and considered the rival arguments advanced by the parties; and that the matter had never gone to full trial to enable the parties to adduce evidence, which would have been analysed to arrive at a final determination.

28. It is instructive that the appellant's claim in the suit against the respondents was compromised and fully settled on express terms of the consent judgment recorded on 6th September 2011; that the learned Judge had due regard to the terms of that consent judgment when addressing himself to the merits of the appellant's Motion seeking to cite the 5th and 6th respondents for contempt of court; and that it would have served no useful purpose for the trial Judge to embark on extensive evaluation of all the evidential materials in support of the competing claims beyond the relevant matters deposed in the appellant's supporting affidavit and the respondents' reply thereto with regard to the contempt proceedings before him.

29. To our mind, the appellant's contention that the respondents admitted that the consent order relating to the construction and delivery of certain houses was not complied with; and that the period agreed for performance in that regard was expiring, constituted contempt of court is to stretch matters beyond sound reason. Neither can the alleged contempt be presumed from the fact that the 5th and 6th respondents discharged their obligations under the consent judgment around the same time when the appellant moved the court to cite them for contempt.

30. That said, it is also noteworthy that the delay in the incorporation by the parties of Sagana Developers Limited; the appellant's resignation as director and shareholder of the 1st respondent; and of the intended transfer of the appellant's shares in the 1st respondent company to Dr. Samuel Gatabaki, were equally contributory to the delay in the 5th and 6th respondents' performance of their obligations under the consent judgment.

31. In view of the foregoing, we find nothing to fault the learned Judge for reaching the conclusion, as we hereby do, that the delay complained of was mutual, and not by any means in contempt of court by the 5th and 6th respondents. As the learned Judge correctly observed:

> "25. As things stand currently, the defendants admit that there were delays, but blames the delays upon the plaintiff.
>
> 26. I find that the plaintiff has not provided proof to show that she had done everything which was required of her, and which would then have enabled the defendants to perform their role.
>
> 27. Therefore, it cannot be said that the delay in transferring the houses and the 2 parcels of land, to the plaintiff constituted contempt of court."

32. We also take to mind the fact that the respective obligations of the parties under the consent judgment aforesaid were to run in tandem, and that delay in performance by any of them of any of the agreed terms cannot be construed as contempt of court. We so conclude in appreciation of the nature of building contracts and transfer of land, not to mention the slow pace at which the parties may have moved in the process of incorporation of Sagana Developers Limited, the agreed resignation of the appellant from the 1st respondent, and the process of transfer to Dr. Daniel Gatabaki of the appellant's shares in the 1st respondent company. That settles the 1st and 2nd issues before us.

33. Turning to the 3rd issue as to whether the learned Judge showed open bias or otherwise considered matters not raised before him, counsel for the appellant submitted that the application before the trial Judge was dated 22nd May 2014, and that he erred in law and in fact in ruling on a matter not before him. Counsel pointed out that, in paragraph 48 of the ruling, the learned Judge stated that he found no merit in "the application dated 6th September 2011".

34. On the allegation of "open bias," learned counsel contended that the learned Judge treated the serious issue of disobedience of the court order casually, thereby displaying an open bias against the appellant. According to counsel, the Judge

> " ... overlooked her suffering for over 24 months while she waited for justice after having agreed to allow the respondents to proceed with the development".

In addition to the foregoing, counsel submitted that the appellant was deprived of her rental income for a further period of 16 months for no reason, and was condemned to pay "advocates' costs".

35. In response, learned counsel for the 1st to 6th and 9th respondents submitted that the appellant ought to have moved the trial court for review in the face of the Judge's inadvertent error in citing the date of the appellant's Motion as 6th September 2011, which was the date of the afore-mentioned consent judgment, instead of 22nd May 2014; that the impugned ruling details the intent of the appellant's Motion for orders to cite the 5th and 6th respondents for contempt of court; and that the appellant did not have any other application for similar orders.

36. On the authority of *Nguruman Limited v Shompole Group Ranch & Another* [2014] eKLR, learned counsel submitted that rule 35(1) and (2) of the *Court of Appeal Rules* empowers the Court to correct clerical or arithmetic errors or any error arising from an accidental slip or omission.

37. As to whether the learned Judge showed "open bias" against the appellant, learned counsel termed the allegation serious and detrimental to just and fair dispensation of justice. According to counsel, the aspersions cast on the conduct of the trial Judge are serious, especially considering the weight of the allegation of outright favouritism and bias.

38. We agree with counsel for the respondents that the Judge's clerical error in citing the date of the application as that of the consent judgment is in the nature of a slip that can be easily corrected as contemplated in rule 35(1) and (2) of the *Rules of this Court*. We find nothing on the record as put to us to suggest that the trial Judge ruled on an application other than the appellant's Motion in contempt proceedings against the 5th and 6th respondents. To our mind, such a clerical error or slip is not sufficient to warrant this Court's interference with the impugned ruling.

39. As to whether the learned Judge was biased against the appellant, we think not. The fact that the learned Judge did not pronounce himself on the appellant's claim for mesne profits ought to be viewed in light of the terms of the consent judgment recorded on 6th September 2011 on express terms that did not

contain any award in that regard. Her claim in the plaint for "loss of earnings/income" was not subject to determination in the contempt proceedings against the 5th and 6th respondents.

Accordingly, we fail to see how bias can be imputed on the learned Judge whose remit did not go beyond those proceedings. In any event, the appellant's suit had been compromised on the express terms of the consent judgment beyond which the trial Judge could not make any additional award in her favour. As counsel for the respondents correctly submits, the appellant's claim for "loss of earnings/income" could only be determined on full trial and not in the contempt proceedings culminating in the impugned ruling.

40. Turning to the 4th issue as to whether the appellant was entitled to mesne profits and legal fees incurred in the conveyancing of the properties due to her in terms of the consent judgment aforesaid, the appellant faults the learned Judge for holding that, for mesne profits to be ordered, a specific default remedy ought to have been included in the consent judgment dated 6th September 2011. No such remedy was agreed.

41. Having carefully considered the record as put to us, we take note of the following facts: that the appellant indeed claimed "loss of earnings/income" vide her plaint dated 10th August 2011; that, apart from the 7th respondent's defence dated 8th September 2011, the record does not contain any statements of defence by the other respondents; that the appellant's suit was compromised and determined by the consent judgment recorded on 6th September 2011; that the express terms of that consent judgment do not include any default clause or an award of mesne profits or "loss of earnings/income" as against any of the respondents; that the claim for "mesne profits" on account of which the learned Judge is now faulted for failing to award does not feature in the orders sought in the appellant's Motion or in the affidavit in support thereof; that the, appellant's suit having been partially settled by the consent judgment dated 6th September 2011, her claim for mesne profits and conveyancing costs are among the outstanding issues that are yet to be determined; and that paragraph B of the appellant's status report dated 22nd March 2017, and paragraph B of the 1st to 6th and 9th respondents' status report dated 20th April 2017, list mesne profits among three "unresolved issues for determination by the court".

42. In our view, the parties are on the same page as to the issues that remain unresolved, and which are subject to determination by the trial court on their merits. These are: mesne profits; transfer/registration of leases; and costs. In view of the foregoing, we fail to see how the learned Judge erred in failing to order payment of mesne profits to the appellant in his ruling on the contempt proceedings. Those issues are yet to be determined on their merits if and when the parties move the trial court in that regard. Suffice it to observe that we need not say more on those issues lest we influence or embarrass the court that will ultimately determine them.

43. Finally, the appellant faults the learned Judge for awarding the 5th and 6th respondents costs of the contempt proceedings. We need not over emphasise the principle that costs follow the event. The event is that the appellant's Motion dated 22nd May 2014 fails. Accordingly, we find no reason to interfere with the learned Judge's decision to award those costs.

44. Having carefully considered the record of appeal, the grounds on which it was anchored, the written and oral submissions of learned counsel for the appellant and for the 1st to 6th and 9th respondents, the cited judicial authorities and the law, we reach the inescapable conclusion that this appeal has no merit and is hereby dismissed with costs to the 1st to 6th and 9th respondents. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF NOVEMBER, 2023.

H. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR