Dande & 4 others v British-American Asset Managers Limited & 11 others (Civil Appeal 277 of 2017) [2022] KECA 469 (KLR) (18 March 2022) (Judgment)

Neutral citation: [2022] KECA 469 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 277 OF 2017

MSA MAKHANDIA, M NGUGI & P NYAMWEYA, JJA

MARCH 18, 2022

BETWEEN

EDWIN HAROLD DAYAN DANDE ..... 1ST APPELLANT

ELIZABETH MAILENTAI NKUKUU ..... 2ND APPELLANT

PATRICIA NJERU WANJAMA ..... 3RD APPELLANT

SHIV ANOOP ARORA ..... 4TH APPELLANT

CYTONN INVESTMENTS MANAGEMENT LIMITED ..... 5TH APPELLANT

AND

BRITISH-AMERICAN ASSET MANAGERS LIMITED ..... 1ST RESPONDENT

BAAM ADVISORY LLP ..... 2ND RESPONDENT

ACORN PROPERTIES LIMITED ..... 3RD RESPONDENT

ACORN INVESTMENTS LIMITED ..... 4TH RESPONDENT

EDENVALE DEVELOPMENT LLP ..... 5TH RESPONDENT

STARLING PARK PROEPRTIES LLP ..... 6TH RESPONDENT

CRIMSON COURT DEVELOPMENT LLP ..... 7TH RESPONDENT

SINOPIA PROPERTIES ..... 8TH RESPONDENT

MIKADO PROPERTIES LLP ..... 9TH RESPONDENT

ACORN GROUP LIMITED ..... 10TH RESPONDENT

CRESCENT PROPERTIES LLP ..... 11TH RESPONDENT

SPRING GREEN PROPERTIES LLP ..... 12TH RESPONDENT

(Being an appeal from the Ruling of the High Court of Kenya at Nairobi (Mbogholi Msagha, J.) dated 15th December, 2016 in Civil Case No. 353 of 2016)

JUDGMENT

]ARGUMENTS

1. This judgment relates to the issue of costs between the appellants and the 1st and 2nd respondents following the withdrawal of suits filed by the 1st and 2nd respondents against the appellants and the 3rd to 12th respondents. In his ruling dated 15th December 2016, the trial Judge, Mbogholi Msagha J. (as he then was), declined to make an order of costs in favour of the appellants against the 1st and 2nd respondents and directed that each party bears its own costs. This is the same order that had been made in a consent entered into between the respondents.

2. In their Memorandum of Appeal dated 4th August 2017, the appellants contend that the trial court erred in declining to enter judgment on costs in their favour as provided under the mandatory provisions of Order 25 Rule 3 of the *Civil Procedure Rules 2010*; failing to consider Order 25 Rule 3 under which the appellants' request for judgment was made; failing to consider the appellants' submissions but instead accepting the 1st and 2nd respondents' submissions; failing to find that section 27 of the *Civil Procedure Act* has no application in circumstances where a suit has been withdrawn; making an adverse finding of fact against the appellants on contested matters of fact as though a trial had been held before him; failing to follow the law and displaying bias against the appellants. The appellants ask the court to allow their appeal and make an order of costs in their favour as against the 1st and 2nd respondents.

3. The 1st and 2nd respondents filed a cross-appeal in which they raised three grounds of appeal. These are that the trial court erred in law and fact in, first, not appreciating sufficiently or at all that the consent order recorded between the 1st and 2nd respondents and the 3rd to 12th respondents that each party bears its own costs was not binding as between them and the appellants; in not directing that the costs of the suits be awarded to the 1st and 2nd respondents despite having found that the 1st and 2nd respondents were entitled to the costs; thirdly, that the trial court erred in law and fact in not holding that in the circumstances of the case and the rival arguments made by the parties, the costs of the suit should have been awarded to the 1st and 2nd respondents against the appellants.

4. Learned Counsel, Mr. Mbaluto, highlighted the appellants' submissions dated 30th March 2017. He submitted that Order 25 Rule 3 of the Civil Procedure Rules, the applicable provision in these proceedings, contains mandatory provisions. Learned Counsel submitted that in this case, there was a compromise of the matter which did not involve the appellants but which led to a withdrawal of the suits as against them. The issue that required determination, upon the withdrawal, was whether the costs of the withdrawn suits should be awarded to the appellants.

5. Learned Counsel cited the decision of the Supreme Court in *John Otanda vs Telkom Kenya* SC APP. No. 25 of 2014 in which it was held that whereas a party was at liberty to withdraw any proceedings which it might have instituted, such withdrawal was subject to the issue of costs which can be claimed by the respondents. Mr. Mbaluto submitted that the trial Judge did not consider the arguments that were placed before him on behalf of the appellants. That he instead relied on section 27 of the *Civil Procedure Act*.

However, according to Learned Counsel, section 27 provides that it is subject to such conditions and limitations as may be prescribed. One of those conditions is the one under Order 25 Rule 3 which provides for costs upon withdrawal, and which therefore limited the discretion of the High Court. Since the trial Judge did not apply the applicable law, being Order 25 Rule 3, this Court was called upon to interfere with the learned Judge's exercise of discretion. Reliance was placed on the case of *Kiska Limited vs. Vittorio De Angelis* Civil Appeal No. 9 of 1968 in support of the submissions with respect to the circumstances under which this Court could interfere with the exercise of discretion by the trial court.

6. The appellants further submitted that notwithstanding that what was before the trial court was an application for costs consequent upon a withdrawal of suits, the trial Judge went ahead and made an adverse finding of fact against them. That this was done when the trial Court observed that the 1st and 2nd respondents would not have instituted the suits but for the actions of the appellants, and that the return of funds by the 3rd to 12th respondents to the 1st and 2nd respondents was a confirmation that the transfer of those funds by the appellants was spiced with fraud. Since the withdrawal of the suits had taken place before the trial of the matter, it was not open to the trial Judge to make such a final and conclusive finding without having heard the other side.

7. Accordingly, it was open to this Court, on the basis of the principles set out in *Mbogo vs Shah* (1968) EA 93, to intervene and set aside the decision of the High Court and substitute it with one entering judgment on costs in favour of the appellants.

8. In response to the cross-appeal, Learned Counsel submitted that because the suit was withdrawn as against the appellants, it is they who are entitled to the costs. A party could not withdraw proceedings, having caused a party to incur costs, and then say that it was the one entitled to costs. Accordingly, the cross-appeal was without basis and should be dismissed.

9. In his submissions in response on behalf of the 1st and 2nd respondents, Mr. Ngatia, Senior Counsel, noted that five cases were filed in the High Court against the five appellants together with the companies which were the beneficiaries of the 1st and 2nd respondents' funds. Interim orders had been obtained against the appellants, which subsisted until the final consent orders were recorded. The consent orders included one signed by all the parties to the suits, including the appellants, which stated that the funds the subject of the suits belonged to the 1st and 2nd respondents and would be re-transferred to them. The question of the costs between the 1st and 2nd respondents on the one hand and the appellants on the other was to be subjected to arguments and determination.

10. Mr. Ngatia submitted that the 1st and 2nd respondents' funds did not fly like birds but were transferred to third parties by human agencies. They were also re-transferred by human agency. Further, that there had been properties that were bought by those funds, and the properties were to be re-conveyed to the 1st and 2nd respondents. According to Mr. Ngatia, the question of the agencies who had effected the transfers which were re-transferred to the 1st and 2nd respondents was a focal point at the hearing of the issue of costs. The companies had agreed to re-transfer the funds and properties upon being confronted by the 1st and 2nd respondent with information that they were beneficiaries of funds that the 1st and 2nd respondents had not authorized to be remitted to them. In returning the funds, the companies were making a confession and an avoidance, indicating that they did not know that the funds had been illegally obtained from the 1st and 2nd respondents, and that they were willing to return the funds to them. Confronted with that situation, the trial Judge could not, in the 1st and 2nd respondents' view, reward the persons who were wrong doers by giving them costs of the suit when they were also parties to the consent. In the 1st and 2nd respondents' view, the trial Judge was quite correct in his decision.

11. Mr. Ngatia submitted that the 1st and 2nd respondents had a valid cause of action against the appellants as over Kenya Shillings five billion had been taken away from their accounts and it was willingly brought back. It was necessary to enjoin all these parties, including the appellants, since, without the persons who caused the transfer, a material participant in the activity would have been missing. Mr. Ngatia relied on the case of *Super Marine Handling Services v Kenya Revenue Authority* [2010] eKLR in which this Court, citing the case of *Devram Dattan v Dawda* [1949] EACA 53, held that when it is demonstrated that a High Court Judge, on an issue of costs, has some grounds to support his decision, the Court of Appeal will not interfere with the exercise of his discretion.

12. Mr. Ngatia submitted that the trial court was quite correct in arriving at the decision that he would not reward the appellants with costs. If anything, it is the appellants who should have been ordered to bear the 1st and 2nd respondents' costs. Had the appellants wanted a trial with respect to their wrongdoing, they would not have participated in the consent recorded before the High Court. Mr. Ngatia asked this Court to dismiss the appeal and reconsider ordering the appellants to pay the 1st and 2nd respondents' costs in the High Court and in this appeal.

13. In his submissions in reply, Mr. Mbaluto observed that counsel for the respondents had not at any point addressed the provisions of Order 25 Rule 3. He submitted that the reason for this was that the said Rule causes the 1st and 2nd respondents' cross-appeal to fall by the wayside and also calls for the appeal to be allowed. He reiterated that in the context of an application or consideration of costs, a court does not have either the jurisdiction nor the power nor the ability not to award the costs as there were defences filed by each of the appellants which were never interrogated fully by way of a trial. It was only through a trial that one can come to a factual finding. Further, that nowhere in the consent was the issue of fraud conceded by the appellants. Whereas in an ordinary trial and a full hearing and a determination of costs arises the trial court has discretion in the award of costs, where there is a withdrawal, Order 25 Rule 3 takes away the discretion in light of its mandatory terms.

14. As this is a first appeal from the decision of the High Court, we reiterate this Court's role as expressed in *Selle & Another vs Associated Motor Boat Co. Ltd. & others* (1968) EA 123 where it was stated that an appeal to this Court from a trial by the High Court is by way of retrial, and this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. We shall therefore proceed to consider the issues raised in the appeal and cross appeal by re-evaluating the evidence adduced in the High Court and arrive at our own conclusions of fact and law. In this regard, we will only depart from the findings by the High Court if they are not based on the evidence on record; or where the said court is shown to have acted on wrong principles of law as held in *Jabane vs Olenja* [1986] KLR 661; or if its discretion was exercised injudiciously as held in *Mbogo & Another vs Shah (supra)*.

15. We have considered the submissions of the parties and the record of the trial court. The appellants hinge their appeal on the provisions of Order 25 Rule 3 of the Civil Procedure Code which they assert is applicable in this matter and on the basis of which they submit the trial court should have entered judgment on costs in their favour. They rely on the decisions in *John Ochanda v Telkom Kenya Ltd (supra)* and *Project Kenya International v Peter Wanjohi Kamau* [2013] eKLR to submit that it is trite that once a party is subjected to a suit that is then withdrawn, such a party is entitled to costs as of right. Notwithstanding, then, the several grounds raised in their Memorandum of Appeal, the crux

of the appellants' case is that they are entitled to costs as of right under Order 25 Rule 3 of the Civil Procedure Rules, which provides that:

> Upon request in writing by any defendant the registrar shall sign judgment for the costs of a suit which has been wholly discontinued, and any defendant may apply at the hearing for the costs of any part of the claim against him which has been withdrawn.

16. The question that we need to address ourselves to is whether the facts and circumstances of this case lend themselves to an application of this Rule, and whether the trial Judge was correct in his finding that they do not. These facts, as they appear from the pleadings and submissions of the parties, are not in contention. Funds belonging to the 1st and 2nd respondents had been transferred, through the 1st to 4th appellants, to third parties, the 3rd to 12th respondents. The 1st and 2nd respondents had filed five suits against the appellants and the 3rd to 12th respondents for the recovery of the said funds. In order to preserve the said funds, preservation orders had been applied for and obtained without a demand being made to the appellants and the 3rd to 12th respondents. Thereafter, a settlement had been reached between the 1st and 2nd respondents and the 3rd to 12th respondents for the re-transfer of the funds to the 1st and 2nd respondents. A consent was thereafter filed in the trial court.

17. It is asserted by the 1st and 2nd respondents and not disputed by the appellants that the appellants were parties to the said consent for the re-transfer of the funds and properties. It is further not disputed that the appellants were the 2nd respondent's employees, holding senior positions, and that it is though their actions as such employees that the funds had been transferred to the 3rd to 12th respondents without the consent of the 1st and 2nd respondents.

18. There was thus a proper basis for the filing of the suits against the appellants and their co-defendants. We agree with the view expressed by the Supreme Court in *Jasbir Singh Rai vTarlochan Singh Rai & 4 others* [2014] eKLR that at the time the suits were filed in the High Court, the 1st and 2nd respondent had valid causes of action against the appellants and their co-defendants in the matters. No blame could attach to them for filing the suits to recover the funds and such properties as had been purchased with the funds that had been transferred to the 3rd -12th respondents without their consent.

19. For the same reasons, no blame could attach to the 1st and 2nd respondents for withdrawing the suits once settlements were reached with the parties holding their funds, and consents for the re-transfer of the funds had been entered into. In the circumstances of this case, the trial Judge, in our view, properly applied the provisions of section 27 of the *Civil Procedure Act*. This section provides that:

> (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:
>
> > Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

20. The withdrawal of the suits between the parties in this matter was not the kind of withdrawal contemplated by the provisions of Order 25 Rule 3 of the Civil Procedure Code. The 1st and 2nd respondents had withdrawn the suits because the 3rd to 12th respondents had conceded that there was

some wrongdoing in the transfer of the funds and properties belonging to the 1st and 2nd respondents. They had reached a settlement to restore the funds and properties to the rightful owners. A consent had been entered into, and the suits withdrawn, not because there had been no basis for the suits, but because there was no longer any basis for the suits to continue since the subject matter had been restored to its rightful owners. The Court observed as follows regarding the filing of the suits and the appellants' demand for costs following the withdrawal of the suits:

> " When all factors are considered in these cases, the plaintiffs would not have instituted these suits had it not been for the actions of the 1st to the 5th defendants. The return of the funds by the 6th to 15th defendants to the plaintiffs is a confirmation that the transfer of those funds by the 1st to 5th defendants was in itself spiced with fraud. It is ironic therefore that the 1st to 5th defendants claim to be entitled to costs in this case.

21. Indeed, it takes a certain amount of chutzpah for parties in the position of the appellants to demand costs in respect of the suits filed, because of actions that they had initiated that had led to potential loss of funds by their hitherto employer. While they take issue with the use of the term 'fraud' by the trial court, we are not satisfied that this in itself in any way detracts from the finding of the trial court that the appellants were not entitled to the costs of the withdrawn suits. We take the view that the trial Judge properly exercised his discretion in finding that the appellants were not entitled to costs in the circumstances of the case.

22. Regarding the cross-appeal, we note that the 1st and 2nd respondents ask this Court to find that the trial court erred in not awarding them the costs even after finding that they were entitled to them. In reaching the decision not to award costs to any of the parties, the trial Judge observed as follows:

> " The award of costs is a matter of the discretion of the court, and should not be considered as a matter of course. ...
>
> In the instant case it may well be argued, and rightly so, that the plaintiffs succeeded in all these suits. I say so because all the monies alleged to have been transferred at the instance of the 1st to 5th defendants, to the rest of the defendants have been recovered and suit compromised.
>
> For those reasons I find, if anything, it is the plaintiffs who are entitled to costs. However, considering the order recorded between the plaintiffs and the 6th to 15th defendants that each party shall bear their own costs. I adopt the said order with regard to the 1st to 5th defendants and hold that they are not entitled to any costs from the plaintiffs. This matter shall therefore be put to rest on those terms. (Emphasis added)

23. Section 27 of the *Civil Procedure Act*, which we have found is applicable in the present case, leaves the award of costs to the discretion of the court. As was observed by this Court in Mbogo v Shah (supra) at page 94:

> " I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

24. We are satisfied that the trial Judge properly exercised his discretion in the circumstances of this case. The issue before the court was the appellants' claim for costs following the withdrawal of the suits by the 1st and 2nd respondents, not a determination of who, between the appellants and the 1st and 2nd respondents, was entitled to costs. We are therefore satisfied that there was no error on the part of the trial court in not making an award of costs to the 1st and 2nd respondents and in determining that each party should bear its own costs, the same order that the respondents had entered into in the consent filed in court. Accordingly, we find no basis for interfering with the trial Judge's decision regarding costs in the High Court, and both the appeal and cross-appeal must fail, and are hereby dismissed.

25. As both parties are unsuccessful in their respective appeals, each party shall bear its own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MARCH, 2022.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

PAULINE NYAMWEYA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR