Asige Keverenge & Anyanzwa Advocates v Leisure Lodges Limited (Appeal 111 of 2019) [2022] KECA 901 (KLR) (13 May 2022) (Judgment)

Neutral citation: [2022] KECA 901 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

APPEAL 111 OF 2019

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

MAY 13, 2022

BETWEEN

ASIGE KEVERENGE & ANYANZWA ADVOCATES ..... APPELLANT

AND

LEISURE LODGES LIMITED ..... RESPONDENT

(An appeal against the Judgment, Decree and Order of the High Court of Kenya at Mombasa (P.J.O. Otieno, J.) delivered on 23rd June 2017 in High Court Civil Case No. 279 of 2004 (O.S.))

JUDGMENT

1. In this appeal, the appellants, Japheth S. Asige and S.O. Anyanzwa t/a Asige Keverenge & Anyanzwa Advocates (the Advocates), have challenged the judgement of the High Court at Mombasa, (P.J.O. Otieno, J.) delivered on 23rd June 2017. In that judgment, the High Court ordered the Advocates to render an account to the respondent, Leisure Lodges Limited, of money deposited and paid to them on February 15, 2001 by interim liquidators of the respondent.

2. The background, in brief, is that by an order of the court made on the October 16, 1996 in Nairobi Winding Up Cause No. 28 of 1996, the High Court appointed Hezekiah Wangombe Gichohi and Geoffrey Kimeu as interim liquidators of the Respondent with their powers restricted to those set out in Section 241 of the since repealed *Companies Act*, (Cap 486), except Section 241(2) of that Act.

3. By a letter dated February 15, 2001 (a day before their mandate as interim liquidators of the respondent was terminated by an order of the Court of Appeal given in a reserved judgment on February 16, 2001 in Nairobi Civil Appeal No. 83 of 2000), the interim liquidators transmitted to the Advocates an amount of Kshs. 5,000,000, which the interim liquidators indicated to be "part of our outstanding fees".

4. By the same letter, the interim liquidators instructed the Advocates to apply the said amount, "in accordance with our instructions to you on matters directly relating to both" of them, to be placed

under their joint names. The Advocates were further directed, in the same letter, to place the money "into an interest earning account pending instructions on various legal matters that you are handling on our behalf."

5. All appears to have been quiet for a considerable period thereafter. Just over four years after the interim liquidators had placed the funds with the Advocates, the respondent, through a letter by its advocates dated August 2, 2004, demanded a refund of the same together with all interest earned and accrued. Flabbergasted by that demand, in a response described by the learned trial Judge as "short and terse" dated 20th August 2004, the Advocates, stated: "...sorry, we do not owe your client a single cent. You have completely got the facts wrong. Please ascertain and verify your instructions and leave us alone."

6. With the door slammed in its face, and without prospect of further engagement with the Advocates over the matter, the respondent filed suit before the High Court at Mombasa by way of an Originating Summons (O.S) dated 24th December 2004, in which the respondent sought determination by the court of the following questions: whether it is entitled to receive a full account of the money deposited with the Advocates; whether it is entitled to information; whether the Advocates complied with the instructions given to them by the interim liquidators; and whether in the circumstances the funds in question belong to the respondent, and if so, whether the respondent was entitled to the funds together with interests accrued.

7. The O.S was based on the grounds that subsequent to the lifting of the liquidation over the respondent by order of the Court of Appeal, the respondent discovered the payment made to the Advocates; that based on the instructions given by the interim liquidators, the Advocates were under a duty to place the funds in an interest earning account; and that the money had been drawn from the respondent's account.

8. In opposition to the O.S, the Advocates, while acknowledging that the amount in question was paid to them, asserted that the amount was "payment of interim liquidators fees and not otherwise"; that their duty was to apply the funds as instructed by the interim liquidators "for payment of their fees" who were entitled to professional fees for managing the business of the respondent; that the Advocates had no obligation "legal or otherwise to account for anything" to the respondent; and that it was false to claim that the money paid to them by the interim liquidators was held or dealt with in trust for the respondent.

9. The respondent's suit was at some stage dismissed for want of prosecution whereupon the respondent applied for its reinstatement. While ordering the reinstatement of the suit, the trial court on December 10, 2015 ordered that "the only issue for determination is whether or not the payment of Kshs. 5,000,000 was for fee to the interim liquidator". At the same time, the court made an order, "that Mr. Asige is hereby directed to file a further affidavit or accounts detailing and evidencing disbursement to the liquidator."

10. In his affidavit sworn on August 12, 2016, Mr. Japheth Asige deposed that the Advocates discharged their obligations in accordance with the instructions received from the interim liquidators; and that the Advocates were strangers to the allegation that the interim liquidators were acting for the respondent in their instructions to deposit and apply the money.

11. After considering the O.S and the submissions made before him, the learned trial Judge, in the impugned judgement, concluded that the respondent "is entitled to cash accounts and for payment of any sum that such accounts shall reveal to be due to the client [read respondent] from the advocate." The court found that the amount of Kshs. 5,000,000 was deposited with the Advocates in their capacity as advocates for the respondent; and that the Advocates were therefore bound in law to render

an account to the respondent on how the money had been applied or employed from the date of the deposit. The court ordered the Advocates to render accounts within 30 days.

12. It is against that judgment that the Advocates lodged the present appeal. It is however noteworthy that subsequent to delivery of that judgment on July 23, 2017, the respondent moved the trial court for an order to compel the Advocates to pay to the respondent the amount of Kshs. 5,000,000 together with interest. That application was allowed in a ruling delivered on October 12, 2018 and although the Advocates filed a notice of appeal in relation to that ruling, it is not the subject of the present appeal. We will get back to this later.

13. Returning to the present appeal, the Advocates have challenged the judgment of June 23, 2017 on the grounds that the learned Judge rendered a preliminary judgement pending the final judgement; that the Judge erred in holding that there was a client-advocate relationship between the Advocates and the respondent; that the finding by the Judge that the Advocates were acting for the respondent, as opposed to acting for the interim liquidators was erroneous; that the reliefs granted by learned Judge went beyond the prayers in the O.S; and that the Judge wrongly ordered the Advocates to pay to the respondent the amount of Kshs. 5,000,000 which was already accounted for.

14. During the hearing of the appeal before us, learned counsel Mr. Japheth Asige appeared in person. Learned counsel Mr. James Ochieng Oduol and Ms. Eunice Kibe appeared for the respondent.

15. Relying on his written submissions which he orally highlighted, Mr. Asige submitted that the letter of February 15, 2001 from the interim liquidators instructing his firm on how and for what the funds were to be applied is critical; that the instructions given by the interim liquidators to his firm were clear and unambiguous on what his firm was to do with the cheque for Kshs. 5,000,000; that it is undisputable that those instructions emanated from the interim liquidators who were therefore the clients of the Advocates; and that the Advocates were not acting for the respondent. It was submitted that the Advocates duly complied with the instructions given by the interim liquidators.

16. Counsel submitted that when the Court of Appeal discharged the liquidation, the interim liquidators were ordered to file and supply the respondent with audited accounts with liberty to the respondent to apply if there were queries regarding those accounts; that on discovering that the liquidators had paid out the Kshs. 5,000,000, the respondent should have raised queries with the interim liquidators as the Court of Appeal had directed; that instead of doing so, the respondent, in bad faith, wrongly chose to institute the O.S against the Advocates; that at the very least, the interim liquidators should have been made parties to the O.S. Counsel maintained that there was no advocate-client relationship between the Advocates and the respondent.

17. Counsel submitted further that after rendering the judgment on June 23, 2017, the trial Court embarked on yet another trial resulting in another judgment in October 2018; that in doing so the trial Court was acting as though it was prosecuting the matter on behalf of the respondent. With that, counsel urged this Court to allow the appeal with costs and set aside the judgment of the High Court.

18. Mr. Ochieng Oduol in opposing the appeal relied on written submissions which he orally highlighted. Counsel began by pointing out that grounds 2, 3, 4, 7, and 8 in the memorandum of appeal relate to the decision of the High Court given on 12th October 2018 which is not the subject of the present appeal and that those grounds do not lie in this appeal.

19. As regards the letter of February 15, 2001, counsel submitted that that letter is undoubtedly on the notepaper or letterhead of the respondent; that the interim liquidators, having been appointed as such over the respondent, a limited liability company, did not have a separate existence from the company; that there appointment displaced the board of directors and thence acted in place of the board; that

the powers of the interim liquidators were circumscribed under Section 241 of the *Companies Act* exercisable with the sanction of the court; that placement of funds in interest earning account entailed moving funds, a matter under Section 241(2) of the *Companies Act*, which would have required the sanction of the court; that the source of the funds was undoubtedly the respondent; that in giving the instructions in the letter of 15th February 2001, the interim liquidators were acting for the respondent and not in their personal capacity. Moreover, counsel submitted, the subject reference in the letter to "various legal matters" could only relate to the respondent.

20. It was submitted that the letter was written on the eve of the Court of Appeal decision discharging the liquidation; that the Advocates did not file any affidavit to show where the funds were or what happened to the funds despite the opportunity given by the trial court for the Advocates to do so; that in his affidavit of August 12, 2016, Mr. Asige made no mention of where the funds were banked.

21. It was submitted that upon discharge of the interim liquidators on February 16, 2001 their mandate ceased and they could not thereafter give instruction regarding the funds and the Advocates therefore held the same to the order of the respondent. It was submitted that the relationship of advocate client as between the Advocates and the respondent was established and the trial court correctly held that the funds should be accounted. In that regard, reference was made to decisions in of *Kim Jong Kyu v Housing Finance Co Lld & 2 Others* (2015) eKLR; *Mohamed Faki Khatib Practising as Khatib & Co Advocates v Farid Ahmed Swaleh & Another* (2021) eKLR. With that, counsel urged the Court to dismiss the appeal with costs.

22. We have considered the appeal, the submissions and the authorities cited. Although the Advocates have raised 12 grounds of appeal in their memorandum of appeal, the main issue for determination in this appeal is whether the learned Judge of the High Court was right in concluding that the money in question was deposited with the appellants in their capacity as advocates for the respondent and if so, whether the Judge was right in ordering the appellants to render an account.

23. Both parties agree that the answer to these questions lie in the

interpretation of the all-important letter of 15th February 2001 which was in the following terms:

> " February 15, 2001
>
> Asige Kiberenge(sic)and Anyanzwa, Adv
>
> Wakianda House
>
> 2nd Floor
>
> Meru Road
>
> Mombasa.
>
> Dear Sirs,
>
> RE: Deposit For Various Legal Matters, ETC.
>
> We have instructed the company, Leisure Lodges Ltd (In Interim Liquidation) to pay directly to you a sum of Kshs. 5,000,000.00 which is part of our outstanding fees. It is in essence payment of our fees on account.
>
> In accordance with our discussions with you this amount will be applied in accordance with our instructions to you on matters directly relating to both of us and it should be placed under our joint names viz. H.W. Gichohi and G.M. Kimeu. Please place the same

into an interest earning account pending our instructions on various legal matters that you are handling on our behalf. [Emphasis added]

Yours faithfully

H.W. Gichohi G.m. Kimeu."

24. There is no dispute that the authors of that letter, H.W. Gichohi and G.M. Kimeu, were interim liquidators of the respondent having been appointed by the High Court. Their mandate was however terminated by an order of the Court of Appeal given on February 16, 2001. By the time they wrote that letter, they did so in their capacity as such interim liquidators. It is plain to see, from the wording in the letter, viz, "We have instructed the company, Leisure Lodges Ltd (In Interim Liquidation) to pay directly to you a sum of Kshs. 5,000,000.00," that the source of the funds that were to be paid to Advocates, were the respondent's funds.

Although the interim liquidators designated the funds as representing "part of" their "outstanding fees", the Advocates were directed to hold those funds pending further instructions and were to place them in a joint account.

25. It is somewhat puzzling, a bizarre coincidence, that the instructions to the Advocates by the interim liquidators were given to the Advocates a day before the Court of Appeal was scheduled to deliver its judgment on the fate of the liquidation on February 16, 2001. As it turned out, the interim liquidators mandate was terminated by that judgment on February 16, 2001. The respondent, whose funds had been transmitted by the interim liquidators to the Advocates were entitled to an account of those funds from the Advocates. Those funds were not sent by the H.W. Gichohi and G. M. Kimeu to the Advocates in their individual or personal capacities, for had that been the case the instructions would not have been carried on the respondent's letterhead.

26. We are therefore in agreement with the learned trial Judge when he concluded that the money was given to the Advocates

> " in their capacity as advocates" for the respondent and that in the absence of an explanation by the Advocates how they dealt with the funds, the court could only conclude that "no disbursement was ever made" by the Advocates and "it is therefore both a legal and professional duty upon the advocate to avail the details of how such sum was ever used or treated if the provisions of Rule 13 of the Advocate Accounts Rules were to be complied with by them".

27. The Judge was right in our view in stating that having found that the money belonged to the respondent as a client of the Advocates, "then it follows that when the said client therefore asks for accounts, such accounts are due and must be rendered." In *Mohamed Faki Khatib Practising as Khatib & Co Advocates vs. Farid Ahmed Swaleh & Another* [2021] eKLR this Court, in reference fiduciary duties of an advocate stated:

> " The appellant having a fiduciary duty to account for the monies received by him, he had the duty to satisfactorily discharge this obligation by properly accounting for the monies which were entrusted to him. The appellant should not have had difficulties giving account of the monies received, because the appellant ought to have had a proper paper trail of the transactions undertaken, and the monies paid out. From the contradictory accounts that the appellant gave, it is evident that the appellant did not have a proper paper trail of the monies received and paid out."

28. Similarly in the present case, we are unable to fathom the difficulty the Advocates have in giving an account of the respondent's funds deposited with them in the course of the interim liquidation. See also *Kim Jong Kyu v Housing Finance Company Ltd & 2 others* [2015] eKLR. We have no basis for interfering with the judgment of the trial court given on 23rd June 2017.

29. Lastly, and as already stated, the record of appeal shows that subsequent to the judgment delivered on June 23, 2017, the respondent applied, by motion dated April 12, 2018 for an order to compel the appellants to pay the amount of Kshs. 5,000,000. In a ruling delivered on October 12, 2018, that application was allowed. On 19th October 2018, the appellants lodged a notice of appeal intimating their intention to appeal that ruling. That appeal is not before us and to the extent that grounds 2, 3, 4, 7 and 8 in the memorandum of appeal herein relate to the ruling of 12th October 2018, it is not a matter for us to address in the present appeal.

30. In conclusion, this appeal has no merits. It is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT MOMBASA THIS 13TH DAY OF MAY 2022.

S. GATEMBU KAIRU, (FCIArb)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR