Murungi & 2 others (All practising as Kamau Kuria & Kiraitu Advocates) v Ndung'u Njoroge & Kwach Advocates & another (Civil Appeal 293 of 2017) [2022] KECA 804 (KLR) (24 June 2022) (Judgment)

Neutral citation: [2022] KECA 804 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 293 OF 2017

MA WARSAME, MSA MAKHANDIA & HA OMONDI, JJA

JUNE 24, 2022

BETWEEN

KIRAITU MURUNGI ..... 1ST APPELLANT

GIBSON KAMAU KURIA ..... 2ND APPELLANT

KATHURIMA M'INOTI ..... 3RD APPELLANT

ALL PRACTISING AS KAMAU KURIA & KIRAITU ADVOCATES

AND

PAUL N NDUNG'U, ELIUD N NJOROGE, RAPHAEL K NGETHE, P KIHARA KARIUKI (ALL PRACTISING AS NDUNG'U NJOROGE & KWACH ADVOCATES) ..... 1ST RESPONDENT

MUMWE INVESTMENTS LTD ..... 2ND RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (J.K Sergon, J.) dated 19th August 2016 in Nairobi HC Misc. Civil Appl. No. 42 of 1997 (OS))

JUDGMENT

1. This is an appeal from the ruling of the High Court (Sergon, J.) dismissing the appellants' chamber summons dated 2nd April 2014 seeking interalia to strike out Miscellaneous Civil Application No. 42 of 1997 with costs.

2. The salient background of this matter is that the 2nd respondent Mumwe Investments Limited secured loans from Kenya Capital Corporation Limited (KENYAC) and the Industrial Development Bank Limited (IDB) by charging various properties owned by its directors. The said parties developed a scheme where some of its properties would be converted into residential properties and subdivided into

plots to be sold to members of the public. The 2nd respondent subsequently entered into agreements with its financiers, whereby the money loaned would be repaid with proceeds from the sale of the plots.

3. The appellants, who represented the 2nd respondent, would obtain the title documents and partial discharges from the financiers after giving a professional undertaking to pay to the 1st respondents either the entire purchase price or, 10% deposit of the purchase price or the balance of the purchase price in a given number of days after registration of the respective transfers. They would subsequently forward the documents to the purchasers advocates after receiving an undertaking from them that they would register the title and remit the proceeds of sale to the them.

4. A dispute arose between the 2nd respondent and its financiers over the extent of the debt owed (if any) and the firm of Kamau Kuria & Kiraitu Advocates filed Civil Case No. 5254 of 1992 under the instruction of the 2nd respondent.

5. In 1997, the firm of Ndung'u Njoroge & Kwach Advocates, the 1st respondent, also filed Miscellaneous Civil Application No. 42 of 1997 seeking to compel the appellants to comply with their professional undertakings to pay the purchase price and/or deposit in respect of various properties owned by their client.

6. In the course of the proceedings in Civil Case No. 5254 of 1992, the 2nd Respondent changed representation and a Notice of Change was filed by Messrs. Wanjama & Co. Advocates on 30th November 2000 and the 2nd respondent and its financiers proceeded to compromise the suit through an out of court settlement Agreement dated 27th November 2000.

7. Aggrieved, the appellants maintained that Messrs. Wanjama & Co. Advocates were not properly on record and could therefore not purport to enter into a settlement agreement with the respondents and the financiers while it was still on record for the 1st respondent. It was their view that the consent of 27th November 2000 was incompetent and illegal.

8. The appellants consequently filed an application dated 14th March 2001 challenging the appointment of Messrs. Wanjama & Co. Advocates and the settlement agreement filed. This application was dismissed by the court a decade later for want of prosecution.

9. Undeterred, the appellants filed an appeal against that decision which is the subject of another appeal before this court and also filed an application dated 2nd April 2014, the subject of this appeal seeking the following orders:

    a. That it be declared that further prosecution of this suit after filing on 21st February, 2001 of a purported consent order in HCCC No. 5254 of 1992: Mumwe Investments, Mr. E Kimani and Mrs. Mary Kanyi Kariuki v Kenya National Capital Corporation and 2 Others, is an abuse of the process of the court.

    b. That as an alternative to 1, it be declared that the further prosecution of this suit after filing on 21st February, 2001 of a purported consent order in HCCC No. 5254 of 1992:Mumwe Investments, Mr. E Kimani and Mrs. Mary Kanyi Kariuki v Kenya National Capital Corporation and 2 Others, offends the conscience of this Honourable Court.

    c. That this suit be struck out with costs.

10. In a ruling delivered on 19th August 2016, Sergon, J. held that entering into a consent did not waive the respondents' rights to enforce the undertaking. The court observed that by seeking to determine the illegality and morality of the consent order, the appellants were attempting to have a second chance of

challenging the decision of the court and that the orders sought were declaratory in nature and could only be ventilated at trial and not in an interlocutory application as the one filed.

11. The appellants are of course aggrieved with that order, and have brought this appeal. The memorandum of appeal which raises 23 grounds of appeal which are mostly repetitive and argumentative and contrary to the provisions of Rule 86(1) of the *Court of Appeal Rules*, seeks to set aside the orders of the court made on 19th August 2016.

12. In its grounds of appeal, the appellant essentially faults the decision of the learned judge on three main fronts: the first is that the learned judge failed to consider that the consent order was illegal, void, fraudulent, extortionist, unenforceable and entered behind their backs, the second is that the learned judge erred in holding that declaratory orders could not be granted, third is that the court erred in failing to find that the prosecution of HCC No 42 of 1997 was an abuse of the process of the court since the 1st respondent had waived its rights to enforce the undertakings.

13. At the plenary hearing, the appellants were represented by learned counsel Mr. Ng'anga while the respondents were represented by Mr. Bundotich Mwange who both reiterated their written submissions.

14. The thrust of Mr. Ng'anga's submission was that the consent order entered in Civil Case No. 5254 of 1992 was entered for an immoral and illegal purpose as it sought to compromise and prejudice the appellant by ensuring that it was saddled with liability in HCCC No. 42 of 1997 and was not able to recover its fees by exercising their lien.

15. It was further submitted that the purported consent order which was negotiated behind its back by its estranged clients, the firm of Wanjama & Co. Advocates, the financiers and their advocates in Civil Case No. 5254 of 1992, purposed to settle that case and Miscellaneous Civil Application No. 42 of 1997. However, the consent imposed obligations on them even though they were not involved in its formulation and altered the terms of the professional undertaking. For instance, it would have to pay the purchase price to the financiers and not the 1st respondent upon instruction from the 2nd respondent and it would have to submit the entire proceeds of sale without making deductions such as its legal fees.

16. Citing the case of *Joram Mwendwa Guanatai v The Chief Magistrate Nairobi*, Civil Appeal 228 of 2003 the appellant argued that the trial court has an inherent power and a duty to secure fair treatment for all persons who are brought before the court and to prevent an abuse of the process of the court if it is oppressive and vexatious. In its view, the 1st respondent had not only breached its obligations to its fellow advocates, but had acted illegally and was perpetuating its misconduct by prosecuting the suit.

17. Opposing the appeal, Mr. Bundotich submitted that the appellants could not allege that the consent order was invalid on one hand, and also use the same consent order to attempt to strike out the originating Summons at the same time. In his view, the issues regarding the effect of the consent order filed in HCCC 5254 of 1992 could only be determined upon full interrogation of the Originating summons at a full hearing. He emphasized that the Learned Judge had exercised his discretion correctly and urged the court to dismiss the appeal.

18. We have anxiously considered the record of appeal, the law and submissions canvassed before us. It cannot be doubted that the court has inherent jurisdiction to dismiss an action which is an abuse of the process of the court. However, this jurisdiction must only be exercised in the clearest of cases.

19. We also take cognizance of the guidance set out by this Court, in *Mbogo & Another v Shah* [1968] EA 96 stated as follows: -

> " I think it is well settled that this court will not interfere with the exercise of 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 failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion..."

20. Having said that, we discern that the central issue for determination is the question of whether the learned judge rightly exercised his discretion in declining to strike out the 1st respondent's suit and permanently staying the proceedings therein for the reason that it was an abuse of the court process.

21. It is clear that the appellants' submissions before this court revolved around the consent order of 27th November 2000; the incongruity of its terms in the circumstance, the illegality of its purpose, its attempts to vary the terms of the original terms of the professional undertaking, its illegality, its intention to deny the appellants of their rightful legal costs, the misconduct of the advocates involved and the glaring injustice of the entire affair.

22. In essence, we are being asked to scrutinize and probe the consent order filed in HCCC No. 5254 of 1992 and analyze the different facts of the case in order to determine whether the 1st respondents' cause of action can be maintained. An invitation that we must certainly decline.

23. First, it is evident that the validity of the consent order was the subject of an application in HCCC No. 5254 of 1992 which was dismissed for want of prosecution and as such the issue has not been ventilated before that court, second, the facts and contestations set out in the appellants' application clearly indicates that the dispute between the parties was far from being one that was plain and clear cut as to warrant the suit being struck out summarily or being permanently stayed. The questions include whether or not the appellants were in breach of the undertaking, the import of the consent in the circumstances and whether the debt (if any) of the 2nd respondents had been settled.

24. In view of the above, we are persuaded that the learned judge did not err in his finding that:

> " ... the Applicants/Respondents by entering the consent have not in any waived their right to seek for the enforcement of the undertaking.
>
> The second issue which also arose is whether or not the consent order is immoral and illegal. I have already pointed out that the Respondents/Applicants filed an application to challenge the consent order which application was dismissed for want of prosecution. The Respondents/Applicants have filed an appeal against the dismissal order. The appeal is pending before the Court of Appeal. It would appear the Respondents/Applicants are attempting to use this application to have a second chance to challenge the decision before this court. It is not permissible in law.
>
> A cursory look at the orders sought vide the chamber summons dated 2nd April 2014 will reveal that the Respondents/Applicants are seeking for declaratory orders which can only be ventilated in a trial and not through an interlocutory application".

25. Just like the trial Court, we cannot allow the appellants' attempts to revive its original application contesting the validity of the consent filed in the corresponding suit. To do so would be to allow the appellants a second bite of the cherry, albeit through the back door. Furthermore, to do so would usurp

the position of the trial judge, and attempt to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination. (See the sentiments of *Danckwerts L.J. in Wenlock v Moloney*, [1965] 2 All E.R 871 at page 874).

26. In any event the trial court will have the benefit of examining the evidence presented to it and satisfying itself whether or not in the circumstance, it is just for the professional undertaking rendered to be enforced.

27. We have said enough to demonstrate that the appeal is devoid of merit. Consequently, the appeal is dismissed. The appellants shall pay the costs of the appeal

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2022.

.....

M. WARSAME

JUDGE OF APPEAL

.....

ASIKE-MAKHANDIA

JUDGE OF APPEAL

.....

H. OMONDI

JUDGE OF APPEAL

DEPUTY REGISTRAR

I certify that this is a true copy of the original

Signed