



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, NAMBUYE & MUSINGA, J.J.A.)

CIVIL APPEAL NO. 174 OF 2013

BETWEEN

PRAFUL SHAH.....APPELLANT

VERSUS

DEPOSIT PROTECTION FUND BOARD

AS LIQUIDATOR OF TRUST BANK LTD

(In liquidation).....1ST RESPONDENT

AJAY SHAH.....2ND RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (E.K. Ogola, J.) dated 30th May, 2013,

in

H.C. Misc. Application No. 294 of 2010)

RULING OF THE COURT

1. There are two appeals that arose from the Ruling of Ogola, J. in High Court Miscellaneous Civil Application No. 294 of 2010 that was delivered on 30th May, 2013. The appeals are **No. 158 of 2013, Ajay Shah v Deposit**

Protection Fund Board (as Liquidator of Trust Bank Limited) and Praful Shah, and the other one is **No. 174 of 2013, Praful Shah v Deposit Protection Fund (as Liquidator of Trust Bank Limited) and Ajay Shah**.

2. In the High Court matter that gave rise to the two appeals, Deposit Protection Fund Board (**DPFB**) had filed an application against Ajay Shah and Praful Shah seeking the following orders:

“(1) A declaration that the Respondents Ajay Shah and Praful Shah who acted as Executive Directors of Trust Bank Limited (In Liquidation) were knowingly parties to the carrying on of business of Trust Bank Ltd (In Liquidation) with intent to defraud creditors of the company and for a fraudulent purpose.

(2) A declaration that Respondents Ajay Shah and Praful Shah who acted as Executive Directors of Trust Bank Limited (In Liquidation) were guilty of misfeasance and breach of trust in relation to the said company.

(3) A declaration that the Respondents Ajay Shah and Praful Shah who acted as Executive Directors and employees of Trust Bank Limited (In Liquidation) in breach of their fiduciary duties to Trust Bank Limited allowed and/or caused Trust Capital Services Limited, in which they had a personal interest, to overdraw its accounts without proper security and thereby caused the Bank to loose (sic) Kshs.241,442,376.80 cts as at 16th September 1998.

(4) An Order that the Respondents Ajay Shah and Praful Shah jointly and severally are liable to make good and pay the Applicant, Deposit Protection Fund Board as Liquidator of Trust Bank Limited (In Liquidation) the sum of Kshs.1,549,591,424.41cts being the amount due in the account of Trust Capital Services Limited as at 28th February 2010 together with interest thereon at prevailing Bank rates from 1st March 2010 to the date of payment in full.

(5) An order that the Respondents Ajay Shah and Praful Shah are liable and do pay the costs of this action.”

3. Ogola, J. granted the orders as sought in the aforesaid application; thus triggering the two appeals to this Court. Each of the appellants were represented by different firms of advocates.

4. When Appeal No. 158 of 2013 came up for hearing before this Court, the 1st respondent herein proposed that the two appeals be consolidated and heard together; or alternatively, that parties enter into a consent order to the effect that the decision in that appeal be binding on this appeal, No. 174 of 2013. The appellant rejected that proposal, with the result that Civil Appeal No. 153 of 2013 was heard as scheduled.

5. In a judgment delivered on 17th June, 2016, this Court set aside the ruling and order of the trial court and all its consequential orders and awarded costs of the appeal to the appellant and the 2nd respondent therein.

6. On 25th November, 2016 Praful Shah, the appellant herein, filed an application seeking the following orders:

“(a) That the Judgment and Order of this Appellate Court made and/or issued on 17th June 2016 in the related Appeal being Court of Appeal No. 158 of 2013 – Ajay Shah –vs- Deposit Protection Fund Board and Praful Shah be adopted as the Judgment and Order of this Appeal on such terms as to costs of the Appeal as this Court may deem fit, proper and just in the circumstances;

(b) That costs of this Application be provided for.”

7. The application was premised on grounds, *inter alia*, that the two appeals arose from the same ruling of the High Court; and now that the High Court decision that was the basis of the appeals had been set aside by this Court in its judgment in Civil Appeal No. 158 of 2013, the present appeal was unsustainable.

8. The appellant’s application was supported by the 2nd respondent but was strenuously opposed by the 1st respondent. In his replying affidavit, **Micah Lekeuwan Nabori**, the Liquidation Agent of Trust Bank Limited for and on behalf of the 1st respondent, stated, *inter alia*, that prior to the hearing of the said appeal the 1st respondent persistently requested the appellant for a period of approximately one month to make an election between treating Appeal No. 158 of 2013 as separate, or agree to consolidate the hearing of the two appeals so that the decision made in the said appeal would be binding on both appeals but the appellant flatly refused the above suggestion and maintained that the two appeals be heard separately. He wondered why the appellant was now taking a completely different position from the earlier one.

9. More importantly, the 1st respondent, being aggrieved by the decision of this Court in Civil Appeal No. 158 of 2013, had filed an appeal in the Supreme Court, Petition No. 13 of 2016, a copy whereof was annexed to the 1st respondent’s replying affidavit, Mr. Nabori stated. From the aforesaid petition, which was filed pursuant to **rules 8 and 32 of Supreme Court Rules 2010**, the 1st respondent believes that the decision of this Court in Civil Appeal No. 158 of 2013 was wrongly decided.

10. In his submissions in support of the application, **Mr. Kimani**, learned counsel for the appellant, told the Court that considering that the two appeals arose from the same ruling of the High Court and that this Court had already set aside the entire ruling, it would be a waste of scarce judicial time and resources to constitute a bench to hear the pending appeal on a matter this very Court has substantively determined.

11. On the other hand, **Mr. Oyatsi**, learned counsel for the respondent, submitted that the Court is not bound by its earlier decision; it has power and jurisdiction to depart from its findings in Civil Appeal No. 158 of 2013 if during the hearing of the pending appeal it is persuaded that the earlier decision was erroneously made.

12. Further, Mr. Oyatsi submitted that the appellant, having adamantly rejected consolidation of the two appeals or to have the decision in Civil Appeal No. 158 of 2013 apply to the pending, the appellant is estopped from going back on his election. He cited this Court’s decision in **KENYA CHEMICAL AND ALLIED WORKERS UNION v BAMBURI CEMENT LTD [2017] eKLR** where the Court held:

“A party who has made a conscientious election that has led the other party to believe that he intends to adopt a particular position going forward is estopped from going back on his election. The doctrine of election as enunciated in the famous case of Scarf v Jardine (1882) 7 App Cas 345, has found relevance in our jurisdiction and has been applied in Rogers Mwema Nzioka v The Attorney General & 8 Others H.C. Pet. No. 613 of 2006, Gimalu Estates Ltd & 4 Others v International Finance Corporation & Another, H.C. Civil Suit 606 of 2003, among a series of other cases.”

13. As regards the power or jurisdiction of this Court to depart from its own decisions, Mr. Oyatsi cited **TRUST BANK LTD v EROS CHEMISTS LIMITED & ANOTHER [2000] eKLR**, where the Court held:

“.....as a matter of judicial policy this Court, as the final Court of Appeal for Kenya, while it will normally regard a previous decision of its own as binding, should be free in both civil and criminal cases to depart from such a previous decision when it appears right to do so.....

.....*The final consideration on the first issue is whether, having come to the conclusion that this Court is free to depart from its own decision and that the Court's decision in the Russel case was wrong, should this Court now give a decision contrary to that given by this Court earlier. We have found this matter of the greatest difficulty. The earlier decision, with respect is erroneous and surely this Court is not bound to perpetuate an error.*"

Of course the Court of Appeal is no longer the final Court in Kenya, we now have the Supreme Court of Kenya.

14. We have carefully considered the application, the oral and written submissions by counsel and the cited decisions. It is common ground that the two appeals arose from the same decision of the High Court. It was also not denied by Mr. Kamau that when Civil Appeal No. 158 of 2013 was before this Court for hearing, the appellant flatly rejected the 1st respondent's reasonable proposal to consolidate the two appeals or to have the judgment in that appeal apply to this one; the very argument that the appellant is now urging before this Court.

15. Mr. Kamau did not tell the Court the reason for the appellant's change of mind. In the circumstances, we would agree with Mr. Oyatsi that a party who has made a conscientious election that has led the other party to believe that he intends to adopt a particular position going forward is estopped from going back on his election. See **KENYA CHEMICAL AND ALLIED WORKERS UNION v BAMBURI CEMENT LTD** (*supra*).

In the absence of any reason for the appellant's belated change of positions, we find and hold that the appellant is estopped from reneging on his earlier stand as stated hereinabove.

16. As regards the merits or otherwise of this Court's judgment in Civil Appeal No. 158 of 2013, there is an appeal (petition) that has been filed against it in the Supreme Court by the 1st respondent. It is not clear whether the appeal has a hearing date. The Supreme Court decision can go either way.

17. In the circumstances, even if the doctrine of estoppel was not to operate against the appellant, it would still be imprudent to order that the judgment in Civil Appeal No. 158 of 2013 be adopted as the judgment of the Court in the pending appeal. This is simply because such decision would be of no value in the event that the Supreme Court allows the 1st

respondent's appeal pending before it. The Court would have acted in vain. On the same breath, it may be improper to proceed with the hearing of this appeal before the Supreme Court renders its decision in Petition No. 13 of 2016.

18. For the aforesaid reasons, we hereby dismiss the appellant's application with costs to the 1st respondent.

Dated and delivered at Nairobi this 22nd day of February, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR