



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, WARSAME & MURGOR, JJ.A)

CIVIL APPEAL NO. 139 OF 2011

SIDHI INVESTMENTS LIMITED.....APPELLANT

VERSUS

UCHUMI SUPERMARKETS LIMITED.....1ST RESPONDENT

KASARANI MALL LIMITED.....2ND RESPONDENT

(Being an Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Mwera, J.) delivered on the 28th day of June, 2010

in

HC Civil Case No. 311 of 2005)

JUDGMENT OF THE COURT

In an application dated 17th June 2009, the Appellant herein sought to amend its Amended Plaintiff dated 12th April 2005. The primary purpose was to plead the issue of constructive trust in conformity with Justice Osiemo's ruling in Civil Case No. 311 of 2005 delivered on 19th October 2007. The said Application was heard by the Deputy Registrar, who allowed the prayers sought on the finding that no prejudice would result to the Respondent.

Being aggrieved, the Respondent filed an appeal in the High Court by way of a chamber summons dated 20th November 2009 under Order 48 rule (5)3 of the Civil Procedure Rules (repealed). The appeal was heard by Mwera J. (as he then was), who set aside the decision of the Deputy Registrar in order to 'put each side on equal footing'. The trial Judge directed that "*the parties should await the decision of the Court of Appeal in the pending appeal or other court orders before proceeding further on the aspect in question*". That appeal is Civil Appeal No. 192 of 2008 which was heard at the same time with this appeal. It is this decision that triggered the current appeal to this Court.

The Appellant filed its Memorandum of Appeal dated 1st July 2009 against the High Court's decision, listing twelve (12) grounds of appeal.

We are cognizant that the Deputy Registrar dealt with the application dated 17th June 2009 in exercise of the powers under **Order 48 rule 5 (1) C of the Civil Procedure Rules** (repealed). The said rule gave the Registrar powers to hear and determine *inter alia*, an application made under Order 6 A on amendments of pleadings.

The matter went on appeal against the said decision to the High Court, Mwera J. (as he was then) who dealt with the Application and found that the orders sought by the Appellant to re-amend the Plaintiff were meant to answer the decision made by Osiemo J in the appeal before us in **Civil Appeal No. 192 of 2008**; that there existed a constructive trust between the parties.

In essence, the Appellant was making an attempt to incorporate the disputed findings of the Ruling in its pleadings which was meant to sidestep the decision, which was subject to Civil Appeal No. 192 of 2008.

We agree with Mwera J, that the attempt was intended to steal a march in a dispute pending in the Court of Appeal. In the premises, we find no basis to interfere with the decision of the High Court and accordingly we dismiss this appeal with costs to the Respondents.

Orders accordingly.

Dated and Delivered at Nairobi this 22nd day of March, 2019.

P. N. WAKI

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR