IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OUKO (P), MAKHANDIA & M'INOTI, JJ.A)

CIVIL APPEAL NO. 2 OF 2018

BETWEEN

JINGO TOURS AND SAFARIS LTD.....APPELLANT

AND

JAMAL SHARIFF SWALEH.....1ST RESPONDENT

THE LAND REGISTRAR MOMBASA.....2ND RESPONDENT

CHIEF LAND REGISTRAR.....3RD RESPONDENT

(Being an Appeal from the Ruling and order of the High Court of Kenya at Mombasa (E. Ogola, J.) dated 5th October, 2017

in

HC Misc. Application No. 11 of 2017)

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JUDGMENT OF THE COURT

The appellant, **Jingo Tours and Safaris Ltd** moved the High Court seeking Judicial Review orders of certiorari to quash the decisions of the 2nd and 3rd respondents to transfer Plot No. 1292/I/MN CR. 11830, (hereinafter the "**suit property")** to the 1st respondent and to issue a Certificate of Title for the suit property to the 1st respondent. The appellant also sought an order of prohibition to stop the 1st respondent from selling, transferring, charging, leasing or in any way dealing with any interest in the suit property or interfering with the appellant's quiet possession of the same and an order of mandamus to compel the 2nd and 3rd respondents to rectify the register and remove or cancel the name of the 1st respondent from the register and substitute therefor the name of the appellant as the lawful owner, within 30 days. The appellant also prayed for costs of the application.

The appellant alleged that at all material times it was the beneficial owner of the suit property, which was illegally, and unlawfully transferred to the 1st respondent who was its director without its knowledge or that of the other co-directors. It averred that the documents used by the 1st respondent namely, the sale agreement, resolution of the appellant to sell the suit property, and the transfer were all illegal and forgeries and that the police confirmed as much, leading to the prosecution and conviction of the 1st respondent for the offences of forgery, obtaining by false pretences and uttering false documents for which he was sentenced to a fine of Kshs. 70,000.00. On account of the foregoing and the fact that the 1st respondent did not appeal against his conviction, the appellant prayed for cancellation of his registration to avoid sale and transfer of the suit property to innocent and unsuspecting members of the public.

It response, the 1st respondent averred that the appellant had abused the court process by filling a multiplicity of suits in relation to the same subject matter, being ***HCCC NO. 41/2011; JR NO. 77/2011, HCCC NO. 218/2011,*** and ***HCCC NO. 484/2011*** all pending before various courts. Although the appellant withdrew HCCC NO. 41/2011 following a ruling by **Ojwang J.** (as he then was) on an interlocutory application, the appellant immediately lodged HCCC NO. 484/2011 seeking similar orders as in the withdrawn suit. Regarding his conviction and sentence the 1st respondent maintained that he had lodged an appeal in the High Court, which was pending hearing and determination. In the circumstances he pleaded that section 47 of the Evidence Act did not apply and prayed for dismissal of the application so as to protect the dignity and process of the court from further abuse by the appellant.

The Attorney General entered appearance for the 2nd and 3rd respondents but did not file any response to the application.

In reply to the 1st respondent's replying affidavit, the appellant filed a further affidavit in which it admitted that prior to filing the suit there were other cases it had initiated as listed in the 1st respondent's affidavit. However, it claimed that those cases were overtaken by events by virtue of the judgment in the criminal case and that prosecuting the same would have been a waste of valuable judicial time. It denied any abuse of court and adverted to its letters to the presiding Judge on 14th and 24th May, 2017 seeking to have all the said previous cases mentioned for prosecution, directions, consolidation or withdrawal. However, it claimed that the files could not be traced but ultimately it withdrew all those pending cases.

The learned Judge considered the arguments by the parties and concluded thus:

> ***"… I find the ex-parte applicant to have been mischievous in its actions; first for not mentioning the existence of the other suits and, second, for only withdrawing the previous suits when the existence of the previous suits was brought to the attention of the court by the 1st respondent. It is my view that the ex-parte applicant through its actions intended to mislead this Court. The above notwithstanding, it is to be noted that although the 1st respondent was convicted in Criminal Case No. 3118 of 2012, he has appealed the said conviction. The ex-parte applicant's case appears to be mainly pegged on that conviction. If that be so, then until the appeal process is exhausted, the ex-parte applicant's application to quash the said title is clearly premature…"***

He then proceeded to dismiss the application with costs to the 1st respondent. Aggrieved by that decision, the appellant filed the present appeal in which it raised 11 grounds of appeal, to wit that the learned Judge erred in law and in fact by failing: to determine the preliminary issues arising from the documents filed by the parties before dealing with the merits of the application; to address himself first to the defence of *sub judice* and its effects on the case before addressing the merits of the application; to find that the defence of abuse of court process had been overtaken by events as the said cases had been formally withdrawn when the notices to withdraw were filed; to appreciate that in *sub judice* the pendency of previous cases called for stay of the application pending the hearing and determination of those cases; to address the legal effect of the withdrawal of the cases during pendency of the application; to appreciate that there were no realistic prospects of the counterclaim succeeding; to hold that the application was not an abuse of the court process because the pending cases had been withdrawn; to find that the reason why the cases were not withdrawn before the filing of the judicial review application was satisfactorily explained and finally, to hold that there was no material non-disclosure because of the appellant's express admission regarding the pending cases.

When the appeal came up for hearing, **Mr. Karina**, learned counsel holding brief for **Mr. Bondi,** learned counsel, appeared for the appellant, **Mr. Mogaka William,** learned counsel, appeared for the 1st respondent and **Mr. Emmanuel Makuto,** learned counsel, represented the 2nd and 3rd respondents. Whereas the appellant, the 2nd and the 3rd respondents opted to rely on their written submissions filed in Court, the 1st respondent relied on the written submissions he had filed in the High Court.

Mr. Karina submitted that the learned Judge did not appreciate the cause of action in judicial review proceedings, which was fraudulent transfer, and registration of the suit property in the name of the 1st respondent by the 2nd and 3rd respondents. He contended that according to the document examiner, the transfer document was not signed by the purported signatories and that the 1st respondent was convicted of forgery which in accordance with section 47 (a) of the Evidence Act was conclusive evidence that he was guilty of the offences. He added that the learned Judge did not appreciate the purport of that conviction and further erred by holding that the application was *sub judice* while the previous cases had been withdrawn and the doctrine was inapplicable in the premises.

Mr. Mogaka on the other hand submitted that the issue raised in the replying affidavit in the trial court was abuse of the court process as there were already in existence several cases regarding the same parties and the same subject matter by the appellant. He contended the appellant had failed to disclose the existence of the said cases in its application for leave as well as in its substantive motion and that it was only after the the 1st respondent raised the issue in his replying affidavit that the appellant filed a further affidavit in which it conceded the existence of those cases and annexed thereto notices of their withdrawal. In the circumstances, it was contended that the withdrawal notices were filed long after the judicial review application and when it was under active prosecution. It was the 1st respondent's further submission that the appellant was therefore guilty of non-disclosure and that the learned Judge was right in dismissing the application. In addition, counsel argued that the appellant also failed to disclose to court that the 1st respondent had preferred an appeal against his conviction, even though that conviction was the basis of the judicial review application. He added that the appeal was allowed by the High Court, but the State lodged a second appeal to this Court, which is still pending. Finally, counsel submitted that there had been no effective withdrawal of the previous suits as claimed by the appellant.

Mr. Makuto, on his part submitted that the application before the High Court was on the basis of the conviction and sentence of the 1st respondent for forgery and other related criminal offences and that the appellant had not demonstrated that the 2nd and 3rd respondents were likely to interfere with the title during the pendency of the criminal appeal. He concluded by submitting that the High Court correctly held that the application was premature and that once a a final determination is made in the criminal matter, then the registrar can be moved as appropriate.

We have considered the record, the written as well as oral submissions by counsel and the law. The issue for our determination is whether the learned Judge erred in dismissing the appellant's judicial review application on account of abuse of court process and non-disclosure of material facts.

It is common ground that the appellant had filed the following cases in the High Court; HCCC NO. 41/2011, HCCC NO. 484/2011, JR NO. 77/2011 and HCCC NO. 218/2011 involving the same parties and on the same subject matter. Although HCCC 41/2011 was subsequently withdrawn, it was immediately replaced with HCCC No. 484/2011. All these cases were pending for hearing by the time the appellant launched the judicial review application that led to this appeal. It is also common ground that the appellant did not disclose this fact to the court when it sought leave to commence the judicial review proceedings and even after leave had been granted, it still did not deem it worthwhile to disclose the same in its substantive notice of motion. It was only driven to do so when in his replying affidavit the 1st respondent alluded to those cases. It was soon after this that the appellant proceeded to file a notice of withdrawal of the cases. In our view this was a belated attempt to pull the rug under the feet of the 1st respondent.

The explanation by the appellant that it would have withdrawn the suits much earlier but for the unavailability of the files is totally unsupported by any credible evidence on record. There is no evidence that the appellant attempted to reconstruct the allegedly missing files or of any serious correspondence between the appellant and the court on the matter. The appellant addressed only two letters to the court, which do not deal with the alleged missing files. Rather, the request therein was for all the files to be placed before the Judge to enable him to acquaint himself with the contents of the files as the appellant was apprehensive that Judge might arrive at a conflicting decision with regard to the Judicial Review application. Towards the end of one of the letters there was a casual and peripheral reference to past unsuccessful attempts to access the file. In any event the letter was dated 14th May 2017 yet the Judicial Review proceedings were initiated on 25th April 2017. The other letter was requesting for certified copies of the proceedings and judgment. It does not require rocket science to see that this was merely a self-serving undertaking. Further the appellant's assertion that the conviction of the 1st respondent for the criminal offences rendered the prosecution of the cases a waste of valuable judicial time has no substance because the appellant was already aware at the time that the the 1st respondent had already instituted an appeal in the High Court against his conviction and sentence, which appeal was ultimately successful.

The fact that the appellant filed notices of withdrawal of the pending cases does not in itself mean that the cases stood withdrawn. In **Beijing Industrial Designing & Research Institute vs. Lagoon Development Ltd (2015) eKLR** this Court dealing with the question of discontinuance and or withdrawal of cases stated:

> ***"The above provision presents three clear scenarios regarding discontinuance of suits or withdrawal of claims. The first scenario arises where the suit has not been set down for hearing. In such an instance, the Plaintiff is at liberty, any time, to discontinue the suit or to withdraw the claim or any part thereof. All that is required of the Plaintiff is to give notice in writing to that effect and serve it upon all the parties. In that scenario, the Plaintiff has an absolute right to withdraw his suit, which we agree cannot be curtailed. The second scenario arises where the suit has been set down for hearing. In such a case the suit may be discontinued or the claim or any part thereof withdrawn by all the parties signing and filling a written consent of all the other parties. The last scenario arises where the suit has been set down for hearing but all the parties have not reached any consent on discontinuance of the suit or withdrawal of the claim or any part thereof. In such eventuality, the Plaintiff must obtain leave of Court to discontinue the suit or withdraw the claim or any part thereof, which is granted upon such terms as are just. In this scenario too, the Plaintiff's right to discontinue his suit is circumscribed by the requirement that he must obtain the leave of the Court. That such leave is granted on terms suggests that it is not a mere formality".***

As it is not possible to tell from the material before us the stage at which the cases had reached in terms of disposal, any of the above scenarios were applicable to the said cases. The burden was on the appellant to show valid withdrawal of the cases, which it failed to demonstrate.

Therefore, the pendency of HCCC NO. 484/2011, JR NO. 77/2011 and HCCC NO. 218/2011 which fact was not disclosed to the court in the initial pleadings of the appellant rendered judicial review application an abuse of the court process as correctly held by the learned Judge.

The Judicial Review proceedings were also heavily pegged on the conviction of the 1st respondent for the offence of forgery. However, the 1st respondent successfully lodged an appeal in the High Court. The State being unhappy with the outcome lodged an appeal to this Court that is still pending. The bottom-line is that the foundation of the appellant's application does not currently exist and it is not our remit to speculate what will ultimately happen in the criminal appeal. And as rightly put by counsel for the 2nd and 3rd respondents, they cannot transfer or issue title with regard to the suit property until the criminal case has been conclusively decided.

In light of the foregoing, we come to the conclusion that the appellant's admission of the existence of other cases and the subsequent belated filing of notices purporting to withdraw those cases was an afterthought and clearly an abuse of court process as correctly held by the learned Judge. We find no fault in the manner in which the learned Judge exercised his discretion. Accordingly, this appeal lacks merit and is hereby dismissed with costs. It is so ordered.

Dated and delivered at Mombasa this 26th day of September, 2019

W. OUKO, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR