



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, GATEMBU & M’INOTI, JJ.A)

CIVIL APPEAL NO. 175 OF 2013

BETWEEN

DREAM CAMP KENYA LIMITED APPELLANT

AND

MOHAMED ELTAFF 1ST RESPONDENT

SAGA SAFARIS LIMITED 2ND RESPONDENT

SAGA TRAVEL AND SAFARIS A. B. 3RD RESPONDENT

TOUR AFRICA SAFARIS LIMITED 4TH RESPONDENT

*(Being an Appeal from the Ruling and Order of the High Court of Kenya at
the High Court Commercial & Tax Division, Milimani Courts, Nairobi*

(Mabeya, J) made on 11th November, 2011

in

MILIMANI COMMERCIAL COURTS, NAIROBI

H. C. C. S. NO. 450 OF 1999)

JUDGMENT OF THE COURT

1. In a shareholder dispute between the parties, the High Court (Kasanga Mulwa, J) in a judgment delivered on 28th January 2000 determined that **“the best way out of the existing situation...is that the 1st [respondent] sells his shareholding of 10% to the other existing shareholders of the company at a fair market value to be determined by an arbitrator to be agreed by the parties and if not to be appointed by the court.”**

2. Subsequently, in a ruling the subject of this appeal delivered on 11th November 2011, the High Court

(Mabeya, J) determined that the effective date, for purposes of the valuation of the 1st respondent's shareholding in the appellant is the date of valuation. Aggrieved, the appellant lodged this appeal.

Background

3. In a suit commenced before the High Court at Nairobi by a plaint dated 19th April 1999, being HCCC No. 450 of 1999, the respondents averred that under an agreement for sale of business dated 19th December 1997, the 2nd respondent sold its business known as Big Simba Camp together with the remainder of lease over title number CIS Mara/Talek/154 to the appellant; that under that agreement, the 2nd respondent was to retain 10% proprietary interest in the said business; that subsequently, the appellant purported to compel the 1st respondent to resign as a director of the appellant company. Accordingly, the respondents sought numerous reliefs against the appellant including a declaration that the 1st respondent is entitled to participate fully in the management of the business of Big Simba Camp.

4. The appellant defended the suit and at the same time counterclaimed seeking an order, among other reliefs, that the 1st respondent be compelled to surrender his shareholding in the appellant.

5. After hearing the parties, the court (Kasanga Mulwa, J) delivered judgment in that suit on 28th July 2000 and held, as already stated, that **“the 1st respondent should sell his 10% shareholding to the existing shareholders at a fair market value determined by an arbitrator agreed upon by the parties or in default, appointed by the court.”**

6. The respondents unsuccessfully appealed against that judgment to this Court in Civil Appeal No. 318 of 2000. That appeal was dismissed in a judgement delivered by this Court on 14 October 2005.

7. Subsequently, in an application dated 14th July 2008, the appellant moved the High Court in HCCC No. 450 of 1999 to review its judgement of 28th July 2000 so as to provide that the court, as opposed to an arbitrator (as had been ordered in the judgement of 28th July 2000), should determine the fair market value of the first respondent's 10% shareholding in the appellant.

8. After hearing the parties on that application, the court (L. Kimaru, J) in a ruling dated 12th June 2009 ordered that:

“To resolve the dispute as to which auditor shall determine the fair market value of the shares of the company, I direct the plaintiffs (sic) and the defendant to each nominate an auditor of their/its choice. The two auditors shall constitute the panel of arbitrators that shall determine the fair market value of the 10% shareholding that was the subject matter of the suit. Each party shall pay the appointed auditor. In the event of disagreement between the two auditors, the plaintiffs and the defendant shall propose the name of an umpire who shall be appointed by the court to determine the points of disagreement.”

9. The court also gave timelines within which that exercise was to be undertaken. One would have thought that that order would have enabled the parties to move with dispatch to have the exercise of carrying out the valuation of the shareholding in question determined without further ado. But that was not to be.

10. On 27th September 2011, the appellant presented yet another review motion before the High Court seeking further directions in relation to the orders given on 12th June 2009 that, *“the effective date of the valuation of the 1st [respondent's] 10% shareholding in the [appellant] company is the date of judgment in this suit...”*

11. The appellant argued that the effective date for the share valuation *“can only be the date of the judgment of the High Court”* while the respondents, though maintaining that the application was

incompetent, urged that as the 1st respondent was yet to sell his shares, “*the effective date for the valuation of the shares can only be at the time of transfer.*”

12. That application was heard by Mabeya, J who delivered the impugned ruling on 11th November 2011. While rejecting the application for review on the basis that an application for review of an order made on an application for review was not maintainable, the Judge observed that the judgment did not fix the effective date of the valuation. He invoked the inherent powers of the court and held that “**the effective date to fix the fair market value is the date of valuation.**” As already indicated, that holding is the subject of this appeal.

The appeal and submissions by counsel

13. In his memorandum of appeal, the appellant complains that the order given on 11th November 2011 was made in error and not based on law; that the court failed to consider the interests of justice and the dilatory conduct of the 1st respondent; that the Judge wrongly exercised his discretion in making the order; and that in making that order, the Judge purported to sit on appeal over the decision of the court given on 28th July 2000.

14. In support of the appeal, learned counsel for the appellant Mr. S. Amin relied on written submissions which he highlighted. He cited a passage from **Halsbury’s Laws of England**, 3rd edition, volume 22 at paragraph 1658, for the proposition that a judgment or order takes effect from the date it is made and submitted that the Judge erred in holding that the date of the valuation, as opposed to the date of judgment, is the effective date.

15. Relying on the case of **E. Muriu Kamau & another vs. National Bank of Kenya Limited [2009] eKLR** counsel argued that the court has an overriding duty to act justly in every situation and the 1st respondent should not, as it were, be permitted to reap where he has not sown. In counsel’s view, the majority shareholders of the appellant have invested heavily in the appellant since judgment was pronounced on 28th January 2000 and the 1st respondent has not at all contributed or been part of that growth.

16. Counsel concluded by saying that the impugned orders involved a wrong exercise of discretion in that the Judge failed to take into account that the respondents have unjustly prevented the appellant from enjoyment the benefit of the judgment since 28th July 2000.

17. Opposing the appeal, learned counsel Mr. Obel holding brief for Mr. Katiku for the respondents also relied on written submissions which he highlighted. He argued that the Judge correctly held that the effective date is the date of the valuation as the 1st respondent remains a shareholder. According to counsel, as the judgment given on 28th January 2000 was silent on the effective date of valuation, it is incumbent upon the arbitrator who was given the duty to undertake the valuation to determine the value of the shares “*as at the time he/she conducts the valuation.*”

18. Counsel argued that the 1st respondent did not cease to be a shareholder on pronouncement of the judgment on 28th July 2000 but remains a shareholder until such time when he transfers his shares; that the Judge correctly held, when invoking the overriding objectives under Section 1A and 3B of the Civil Procedure Act, that the effective date of the valuation of the shares to be the date of the valuation; and that the Judge properly exercised his discretion in making the orders that he did and this Court has no basis for interfering with the manner in which he exercised that discretion.

Determination

19. We have considered the appeal and the submissions by learned counsel. The impugned order, made in exercise of the inherent powers of the court, was an exercise of judicial discretion by the lower court. The sole question in this appeal is whether the order that “*the effective date to fix the fair market value of the*

1st respondent's shareholding in the [appellant] is the date of valuation" constituted a wrong exercise of judicial discretion.

20. The circumstances in which this Court can interfere with the exercise of discretion by the lower court are limited. As Sir Clement De Lestang, V.P. stated in **Mbogo vs. Shah [1968] EA 93** at page 94:

"..... I think it is well settled that this Court will not interfere with the exercise of its 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."

21. In the same case, Sir Charles Newbold P. at page 96: had this to say:

"... a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

22. In holding, as he did on 11th November 2011, that *"the effective date to fix the fair market value is the date of valuation"* the learned Judge was, as it were, „perfecting? the judgment delivered on 28th July 2000. As he noted, *"that judgment did not fix the effective date of the valuation."* He therefore sought to cure or correct that omission. Having stated that *"a judgment of the court becomes effective the moment it is pronounced"* it is not clear what informed his decision later in his ruling that, *"in my view, the fair market value would be the one prevailing at the time of execution of the decree i.e valuation, and not at the time of judgment"* and that *"the judgment having left open the issue of appointment of arbitrators or transfer of shares, then the effective date in my view should be the date of valuation."*

23. The effect of the judgment of the court delivered on 28th July 2000 was, as correctly pointed out by the judge in the impugned ruling, to order the 1st respondent to relinquish his shareholding and transfer his 10% shareholding to the remaining shareholders. That order took effect on pronouncement of the judgment. It follows, in our view, that the value of the 10% shareholding that was to be relinquished should be ascertained with reference to the date on which relinquishment was ordered and not at a later date. We doubt that the 1st respondent would have supported the impugned decision had the performance of the business of the appellant, and consequently the value in the company, declined after 28th July 2000.

24. Although the Judge declined to grant the appellant's motion for review, invoking instead the inherent powers of the court in order to correct the omission by the trial judge to "fix the effective date of the valuation", it was not open to the Judge to vary the judgment so as to postpone the effective date of the judgment. By doing that, we think the Judge fell into error.

25. We are, in the circumstances, entitled to interfere with the exercise of discretion by the lower court and accordingly allow the appeal to the extent that we set aside that part of the ruling of the court delivered on 11th November 2011 declaring that

"the effective date to fix the fair market value is the date of valuation." We substitute therefore an order that the effective date to fix the fair market value is the date of judgment, namely, 28th July 2000.

26. Each party shall bear its own costs of the appeal.

Orders accordingly.

Dated and delivered at Nairobi this 19th day of January, 2018.

P. N. WAKI

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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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