IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 65 OF 2014

ANWAR MAHENDRA PANDYA.....APPELLANT

AND

BUSINESS FORMS & SYSTEMS LTD.....1ST RESPONDENT

ALOWIYA MAHENDRA PANDYA.....2ND RESPONDENT

AMAR MAHENDRA PANDYA.....3RD RESPONDENT

SAGE REGISTRARS.....4TH RESPONDENT

(Appeal from the ruling and order of the High Court at Nairobi, (Havelock, J.) dated 10th December 2013

in

HCCC NO. 717 OF 2009)

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JUDGMENT OF THE COURT

By a ruling dated 10th December 2013 and the subject of this appeal, the High Court (Havelock, J.) dismissed with costs an application by the appellant, ***Anwar Mahendra Pandya,*** seeking to substitute the 2nd respondent, ***Aloiwiya Mahendra Pandya*** (deceased) with the administrators of her estate and for leave to amend the plaint. The learned judge found that the suit in which the application was made had already been compromised before the death of the deceased and that the amendments proposed by the appellant would fundamentally change the character of the dispute to the prejudice and detriment of the respondents. Those are the findings that the appellant is challenging in this appeal, contending that the learned judge misapprehended the principles for substitution of parties and amendment of pleadings.

The appeal arises from a dispute in a family business in ***High Court Civil Suit No. 717,*** which the appellant filed on 29th September 2009 against the 1st respondent, ***Business Forms and Systems Ltd*** (the company), the deceased, who is his step-mother, his brother ***Amar Mahendra Pandya*** (the 3rd respondent), and the 4th respondent, ***Sage Registrars***. The appellant, the deceased and the 3rd respondent were at all material times the sole shareholders and directors of the company while the 4th respondent, a

firm of certified public secretaries was its the secretary. In his suit, the appellant averred that his co-directors had unlawfully and illegally appointed the 4th respondent as the company secretary and that they had mismanaged the family business and defrauded him by among others, using the company's funds to purchase properties in their own names; wrongfully selling, disposing or encumbering the company's assets, paying themselves huge and undeserved salaries and bonuses and excluding him from the affairs and management of the company, thus denying him his due share and entitlement.

Contending that his co-directors intended to remove him as a director of the company unlawfully and *ultra vires* the memorandum and articles of association of the company, the appellant prayed for, among others, declarations, prohibitory and mandatory injunctions, an order compelling the respondents to render to him complete and accurate accounts of the company and an order for appointment of a competent inspector to investigate and report on the affairs of the company.

In their rather lengthy 33-paragraph defence dated 6th October 2009, the 1st to the 3rd respondents averred that the appellant's suit was barred in law because he had filed a similar suit, being ***HCCC No. 94 of 2008***, which was dismissed by the High Court. Otherwise those respondents denied all the appellant's averments, and in particular the alleged fraud and mismanagement of the company, and contended that the appellant was guilty of dereliction of duty as a director and that he had made it difficult for the other directors to work with him. For its part the 4th respondent denied that its appointment was unlawful or illegal and contended that the suit did not disclose a cause of action against it.

Contemporaneously with the suit, the appellant filed a motion on notice in which he prayed for several interlocutory reliefs pending the hearing and determination of the suit. After hearing the application *inter partes*, on 11th February 2011 ***Khaminwa, J***. issued injunctions among others restraining the respondents from removing the appellant as a director of the company or denying him access to his office and compelling them to render to him accounts. Clause 6 of the order read as follows:

> ***"6. That a competent inspector be appointed to investigate the affairs of the 1st defendant (the company) and to report thereon."***

Aggrieved by that order the deceased and the 3rd respondent filed a notice of appeal against the order of the High Court. They contend that later they abandoned the appeal because of the events that took place subsequently, which we shall advert to shortly.

On 26th April 2011, the deceased and the 3rd respondent filed ***Winding-Up Cause No. 6 of 2011*** seeking to wind up the company on the basis that it would be just and equitable to do so. In the alternative they prayed for an order requiring the appellant to purchase their shares on terms that the court may deem fit and just and the appointment of an interim liquidator pending the hearing and determination of the winding up petition.

Before the suit and the petition could be heard, on 25th May 2012 the appellant, the deceased and the 3rd respondent entered into an agreement by which the appellant agreed to purchase the other co-directors' shares in the company for Kshs 60 million. The purchase price was to be paid in agreed instalments, the first of which the appellant paid upon the signing of the agreement. Other pertinent terms of the agreement were that upon execution of the agreement, the deceased and the 3rd respondent would deliver to the appellant's advocates duly executed share transfer forms, written letters of resignation of the deceased as a director of the company, written letter of resignation of the company secretary, and express acknowledgement by the deceased, the 3rd respondent and the secretary that they had no further claims against the company. The 3rd respondent was to continue as a director of the company on agreed monthly salary until payment of the balance of the purchase price. The deceased and the 3rd respondent also agreed to call a meeting of the directors of the company to pass the necessary resolutions to give effect to the agreement.

Clause 3.n. of the agreement stipulated as follows:

"The vendors shall deliver to the purchaser's advocates consent letters duly signed by the parties' advocates withdrawing HCCC No. 717 of 2009, Anwar Mahendra Pandya v Business Forms & Systems Ltd & 4 Others and Winding Up Cause No. 6 of 2011, In the Matter of Business Forms & Systems Ltd, with no orders as to costs and copies of such consents duly stamped by the courts shall be handed over to the vendors for retention."

By clause 5.5.1 the parties agreed that Kshs 8 million would be retained out of the balance of the purchase price for two years to cater for any loss, damage or expense that the appellant may suffer arising, among others from claims against the company. Lastly clause 9 was in these terms:

"9. Entire Agreement

9.1. This agreement (together with any documents referred to in it) constitute the whole agreement between the parties relating to the sale and purchase of the shares and no party has relied on any representation made by any other party which is not a term of this agreement.

9.2. No future variation of this agreement shall be effective unless made in writing and signed by each of the parties hereto."

Three days after the agreement, on 28th May 2012, the deceased passed on and the 3rd respondent and ***Zarqa Nadeem Ahamed (Ahamed)***, the executors of her will were duly appointed administrators of her estate by the High Court on 21st January 2013. On or about 20th

July 2012 the appellant and the 3rd respondent entered into a variation agreement in which they varied some of the terms of the initial agreement so that one of the properties of the company was transferred to the appellant and the time within which he was to pay the purchase price was extended. Otherwise both parties reiterated their commitment to the full implementation of the agreement.

Shortly thereafter the appellant threw matters into a spin when, purporting to act pursuant to the order of the High Court that authorized appointment of an inspector to investigate the affairs of the company and to report thereon, he commissioned a firm of auditors, ***Messrs. Ngwili & Company,*** to conduct a forensic audit of the company from 2007 to 2012. According to their report stamped 3rd May 2013 the auditors claimed that the deceased and the 3rd respondent had misappropriated Kshs 176,303,060/= from the company.

That is the background to the application that led to this appeal. On 13th May 2013 the appellant filed a motion on notice in the High Court seeking to substitute the deceased with the 3rd respondent and

Ahamed as the administrators of her estate. In addition, he applied for leave to amend the plaint. The grounds upon which the application was based was that the deceased had passed on and the executors of her will had been duly appointed administrators of her estate; that it was necessary to join the administrators in the suit in lieu of the deceased; that such joinder was necessary to full implementation of the share purchase agreement; that forensic audit had unearthed misappropriation of the funds of the company by the deceased and the 3rd respondent which the appellant wished to pursue and that for all the foregoing reasons, it was necessary for the appellant to amend the plaint.

The 3rd respondent and Ahmed vigorously opposed the application on the basis of their affidavits sworn respectively on 10th and 25th June 2013. They contended that HCCC. No. 717 of 2009 and Winding Up Cause No. 6 of 2011 had effectively been settled and compromised and that all that remained was only formal step to record the compromise in court; that in view of the global settlement of the dispute the appellant had no basis to unilaterally purport to appoint a forensic auditor for the company; and that after the death of the deceased the appellant had reiterated his commitment to the full implementation of the agreement. In their view, the application was not brought in good faith and appellant was backpedalling on the agreement. They contended that having obtained advantages under the agreement he was hell-bent

on ensuring that he did not pay the balance of the purchase price. They further contended that the appellant had obtained the shares at a discounted price; had only paid part of the purchase price; already held the majority shares in the company after the 3rd respondent transferred his shares to him; and had a property of the company transferred to him.

By the ruling that is impugned in this appeal, the learned judge dismissed the application, holding as regards the prayer for substitution, that the parties had compromised the suit, and as regards the prayer for amendment of the plaint, that the intended amendments would substantially change the character of the suit and prejudice the existing rights of the respondents. By consent of the parties, we directed that the appeal be heard and determined through written submissions. Although the appeal was premised on 6 grounds of appeal, the appellant compressed all the grounds into two issues, namely substitution of the deceased and amendment of the plaint.

On substitution, the appellant submitted that it was necessary because as of the date of the death of the deceased on 28th May 2012, the agreement had not been performed. To the extent that the agreement had not been performed, it was submitted, the suit was not settled or compromised. Relying on ***Order 25, rule 5(1)*** of the Civil Procedure Rules, the appellant submitted that there was no compromise of the suit as contemplated by that rule. Accordingly, the appellant urged the outstanding issues in the agreement could not be performed or the suit compromised without substitution of the deceased. In the appellant's view, under ***Order 24 rules 4(1)*** and ***(20)*** of the Civil Procedure Rules, substitution is a matter of course. He relied on the judgment of this Court in **Morjaria v. Abdalla**, ***CA. No. 1 of 1982*** to support the view that the court has broad powers to substitute a party.

As regards amendment of the plaint, the appellant submitted that amendment was a direct consequence of substitution of the deceased. It was also necessary, the appellant contended, to plead misrepresentation against the 3rd respondent for misleading him that he was the sole beneficiary of the deceased and also to bring forth his full claim against the deceased and the 3rd respondent based on matters that had been unearthed by the forensic audit. The judgment of this Court in ***Central Kenya Ltd v Trust Bank Ltd & 4 Others***, ***CA. No. 222 of 1998*** was cited to support the proposition that amendments should be freely allowed and that they should not be denied where any prejudice occasioned can be compensated by award of costs. Lastly, on the authority of ***Elijah Kipng'eno Arap Bii v Kenya Commercial Bank Ltd*** and ***Permanent Secretary, Ministry of Roads & Another v. Fleur Investments Ltd***, ***CA. No. NAI. 115 of 2014***, it was contended that amendments could be allowed even where they change the original cause of action or introduce a new one.

The respondents opposed the appeal arguing that the learned judge did neither misdirect himself nor exercised his discretion injudiciously. They agreed with the judge that factually there was nothing left to the suit because it was compromised. Relying on ***Green v Rozen & Others*** ***(1955) 2 ALL ER 797*** and ***Lochab Transporters v Kenya Arab Orient Insurance Ltd***, ***HCCC No 3586 of 1985***, the respondents submitted that the agreement had superseded both HCCC. No. 717 of 2009 and Winding-up Cause No. 6 of 2011 so that there was nothing left to be achieved by the application for substitution and amendment. The remedy for an aggrieved party, it was contended, lay in enforcement of the agreement rather than in purporting to revive the compromised suits. On Order 25 rule 5, the respondents urged that it was only a procedural device for enforcing a compromise and did not have the effect of reviving a compromised suit.

On amendment of the plaint, the respondents contended that the High Court having found that it had no jurisdiction over the matter after the compromise, it followed naturally that there was no jurisdiction too to permit amendment of the compromised suit. If we understood the respondent's correctly, their further contention was that even if the learned judge had jurisdiction to entertain the application after the compromise, which they denied, he had properly found on the facts of this case that the amendment would introduce fresh matters, which would change the tenor of the suit to the respondents' disadvantage.

Accordingly the respondents urged us to dismiss the appeal with costs.

We have carefully considered the record, the ruling by the learned judge, the grounds of appeal, the

submissions by learned counsel, the authorities they cited and the law. In our estimation, this appeal turns on the effect in law of the agreement between the parties, dated 25th May 2012. The appellant contends that it had no effect on the suit because the deceased died before the agreement was fully implemented. The respondents on the other hand contend that the parties had reached full agreement and signed the agreement before the death of the deceased. What were left were mere formalities and as a result of the compromise manifest in the agreement, the suit and the winding up cause were superseded and ceased to exist, thus depriving the High Court jurisdiction to continue hearing them.

The starting point is the agreement of 25th May 2012, which we have perused. That the agreement was preceded by contentious litigation between the parties pertaining to the company is hardly in dispute. There was HCCC No 717 of 2009 filed by the appellant against the respondents in which he was seeking various declaratory and injunctive reliefs in regard to the running and management of the company. There was an order in favour of the appellant for inspection of the accounts of the company. There was an intended appeal by the respondents against that order. There was the Winding-up Cause No. 6 of 2011 in which the respondents were seeking to wind-up the company because of irreconcilable differences with the appellant or in the alternative to be bought off by the appellant. We appreciate that in interpreting the agreement before us, we must confine ourselves to its terms. However, the background we have adverted to is relevant in appreciating how the agreement came to be.

There is no doubt in our minds that the purpose of the agreement of 25th May 2012 was to settle once and for all the intricate and internecine disputes between the parties so that they could move on with their lives. If the purpose of the agreement was only to sell and transfer shares from the deceased and the 3rd respondent to the appellant, and to keep the disputes in court festering as before, nothing would have been easier to do than fashion a narrow agreement or expressly provide that the agreement for the sale of shares was without prejudice to the pending litigation. But what did the parties do? They crafted an agreement that went beyond the sale and transfer of shares, extending to settlement of all the suits that were pending in court at the time of the agreement. By clause 3.n. of the agreement, which we have already reproduced earlier in this judgment, the parties agreed to withdraw both HCCC No. 717 of 2009 and Winding-up Cause No. 6 of 2011 with no orders on cost. The deceased and the 3rd respondent were merely required thereafter to give to the appellant's advocates consent letters to that effect and it was for those advocates to attend to any required formalities.

All the parties to the agreement executed it before the death of the deceased. In view of the terms of the agreement, can the learned judge be faulted for holding that the parties had compromised the suit and accordingly, it would serve no purpose to substitute parties and purport to amend the plaint? In arriving at that conclusion, the learned judge considered the judgment in ***Green v Rozen & Others (supra)*** in which

Slade J. stated:

> ***"...having considered such authorities as I have been able to find, I arrive at the conclusion that in those circumstances the new agreement between the parties to the action superseded the original cause of action altogether, that the court has no further jurisdiction in respect of the original cause of action which has been superseded by the new agreement, and that, if the terms of the new agreement are not complied with, then the injured party must seek his remedy on the new agreement."***

That view of the law was approved and followed by Shields. J. in ***Lochab Transporters v Kenya Arab Orient Insurance Ltd .(supra)***

For our part, we are in agreement with that statement of the law and the respondents' view that there was a global settlement of the disputes between the parties including compromise of HCCC No. 717 of 2009. The agreement was duly signed by all the parties, part-payment of the purchase price has been effected, the 3rd respondent has transferred his shares in the company to the appellant or his nominee, as a result the appellant has become the majority shareholder in the company, and both the appellant and the 3rd respondent have reiterated in the variation agreement their commitment to the full implementation of the

agreement.

But what does the appellant seek to do in the dismissed application? He seeks to reopen the dispute while keeping to himself all the benefits that he has so far reaped from the agreement. In particular he wishes to proceed in a manner that will make it unnecessary for him to pay the balance of the purchase price of the shares to the deceased and the 3rd respondent. He justifies his approach on the grounds that the agreement is not fully implemented and that the administrators of the estate of the deceased must be brought into the suit for that purpose. If that were the only reason for seeking to amend the plaint, the appellant would be entitled to the benefit of the doubt. But what do the intended amendments seek to achieve? It is to literally trash the agreement or particularly part of it that places obligations on the appellant and make totally new and far-reaching demands against the estate of the deceased and the 3rd appellant, without any regard to the settlement reached by the parties.

We agree with the learned judge that whatever is outstanding towards the full implementation of the agreement is a matter of formality for the advocates of the parties, who had in any event already signified commitment to the agreement and its terms by signing the agreement. The court should not allow a party to misuse the right of substitution of parties or amendment of pleadings to oppress other parties or to perpetuate law suits that lack *bona fides*. Satisfied as we are that the parties in this appeal effectively compromised the suit on 25th May 2012, there is no basis to fault the learned judge for finding that substitution and amendment of the suit would serve no purpose. This appeal stands dismissed with costs to the respondents. It is so ordered.

Dated and delivered at *Nairobi* this *12th day of May, 2017*

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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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