



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, WARSAME & J. MOHAMMED, JJ.A

CIVIL APPEAL NO. 98 OF 2009

BETWEEN

NANCY WANGUI NJUGUNA.....1ST APPELLANT

JAMES NJUGUNA KAGWIMA.....2ND APPELLANT

AND

NANCY NJERI GITAU.....1ST RESPONDENT

JAMES MUTA GITAHI.....2ND RESPONDENT

(An appeal from the Ruling/Orders of the High Court of Kenya at Nairobi (Ang'awa, J)

delivered on 10th July 2007

in

HCCC NO. 766 OF 2006)

JUDGMENT OF THE COURT

Nancy Wangui Njuguna and **James Njuguna Kagwima** (1st and 2nd appellants respectively) on the one hand, and **Nancy Njeri Gitau** and **James Muta Gitahi** (1st and 2nd respondents respectively) are married couples.

They entered into an agreement/memorandum of understanding dated 18th May 2002, by which they formed a partnership on how to run Glorious Primary School. One of the clauses in the said agreement/memorandum of understanding, provided that any disputes arising in the course of running the said school would be resolved through arbitration.

A dispute did arise prompting the 1st appellant to move the Chief Magistrate's Court Nairobi vide Milimani Civil Suit No. 13299/2004, in which the 1st respondent herein was named as the defendant. Pursuant to **Section 6 of the Arbitration Act, 1995**, the 1st respondent filed a notice of motion on 3rd December, 2004 seeking orders to stay the proceedings pending the hearing and determination of the

arbitration. The parties thereafter entered into a consent, whereby they agreed to have the said case stayed, in order to pave way for the arbitral process. The dispute was consequently referred to the arbitrator.

While the arbitral proceedings were still pending, the 1st appellant moved to the subordinate court and applied to withdraw her suit, an application which was allowed and the suit was consequently withdrawn. The appellants then went to the High Court and filed Nairobi HCC No. 766 of 2006 against the respondents herein. The respondents in opposition to that course of action moved the High Court under **Section 4 and 6 of the Arbitration Act [1995]**, and other relevant provisions of the law urging the Court to stay the proceedings therein or strike out the suit.

After hearing that application, the learned judge (An'gawa J) found in favour of the applicants, and made a finding to the effect that the procedure followed by the respondents was irregular, as the arbitral proceedings were still live when the suit was filed; and further, that the trial magistrate had no jurisdiction to discontinue CMCC No. 13299 of 2004, as the matter was still pending before the arbitrator. Consequently, the learned judge set aside the orders of the trial magistrate discontinuing CMCC NO. 13299 Of 2004.

She also gave the arbitrator 150 days to commence the arbitration proceedings. The suit before the High Court was also stayed to await the outcome of the arbitral proceedings.

Aggrieved by the said orders, the appellants moved to this Court on appeal. Through the firm of Rumba Kinuthia & Co. Advocates, they filed the memorandum of appeal dated 11th May, 2009 which has seven grounds of appeal. It is important for us to replicate those grounds here for reasons that will become apparent later on in this ruling. The grounds are as hereunder:-

- 1. The Hon. Judge grossly erred and misdirected herself by failing to note the fraud committed by the respondents in manipulating the alleged memorandum of understanding to defraud the appellants.***
- 2. The Hon. Judge grossly erred and misdirected herself by failing to note that the respondents' non-disclosure of material facts in essence does not permit them to rely on the said memorandum of understanding.***
- 3. The Hon. Judge erred in law and in fact by ignoring the fact that the defendants did not substantiate their allegations and/or tender any tangible evidence or at all to support their case.***
- 4. The Hon. Judge grossly erred and misdirected herself in referring the matter to the lower court despite the suit at the lower court having been withdrawn by the appellants.***
- 6. The Hon. Judge grossly erred and misdirected herself by failing to rely on the evidence brought forth by the appellants and instead rely solely on the contents of the memorandum of understanding which had been breached by the respondent and thus could not be relied upon.***
- 7. The Hon. Judge grossly erred and misdirected herself by failing to consider the collaboration between the defendants to defraud the appellants. The Hon Judge also failed to take note of the ample evidence on record by the appellants which proved on a balance of probabilities that the respondents breached the memorandum of understanding.***

It is clear from the contents of the memorandum of appeal that grounds 1, 2, 3 and 7 relate to the substantive issues that were meant to be heard and determined before the tribunal. There is no ground 5 in the memorandum of appeal and the only relevant grounds in our view are grounds 4 and to some extent ground 6.

The only issue for determination in this appeal is whether the appellants could singularly move the subordinate court to withdraw CMCC No. 13299 of 2004, which had been stayed by consent of both

parties pending the conclusion of the arbitral process. The learned judge found that the appellants could not do so.

We note that the staying of court proceedings in a matter that has been referred to arbitration is provided for under **Section 6 of the Arbitration Act 1995**. The purpose of that section is to ensure that the parties who have subjected themselves to the arbitral process are not exposed to another suit simultaneously.

Arbitration is a mode of dispute resolution, to which parties voluntarily submit them. Once they do so, then unless the arbitral process is determined, or terminated, the parties cannot fall back on the Court process.

Section 6(2) is explicit on this point. It provides as follows:-

6(2) “Proceedings before the court shall not be continued after an application under sub section (1) has been made and the matter remains undetermined.” (Emphasis supplied)

In this case, the matter before the tribunal had not been determined one way or another.

Secondly, as the application to stay the proceedings before the subordinate court was by consent of both parties, then one party could not purport to move to court and withdraw the suit, when the dispute remained unresolved.

We note further, that the referral itself of the dispute to the tribunal was made through a consent order. In our view one party cannot side step a consent which it was a party to, and thus bound by its terms, on a whim. If a party felt that he/she needed to opt out of the consent agreement, a proper application for setting aside the said consent ought to have been made before the court which recorded and endorsed the consent order. To the extent that that was not done, then we find that the route employed by the appellant was inappropriate and unprocedural.

We also note that the suit before the High Court was filed when the arbitral process was still pending, and after the proceedings before the subordinate court had been irregularly withdrawn. Indeed, the appellant’s suit before the High Court was incompetent, as rightly declared by the learned judge. We agree with the learned judge that once the court refers the matter to arbitration, and an arbitrator is appointed, then the arbitrator becomes an interested party in the suit and it cannot be withdrawn without his knowledge.

If on the other hand, the parties had lost faith in the arbitral process and wanted to proceed with the matter in court, then they needed to terminate the arbitral proceedings first in compliance with **Section 33 of the Arbitration Act**. Both learned Counsel Mr. Muchoki and Mr. Isindu for the appellants and respondents respectively, acknowledged that the arbitral process has never been terminated. The law enjoins the parties herein to either proceed with the arbitral process, or to terminate the arbitral process in accordance with the law before they can proceed with the dispute in court.

We are in agreement with the learned judge that the purported discontinuance of the suit before the subordinate court when the arbitral process was still pending was irregular and not sanctioned by law. Further, that the filing of HCC Civil Case No. 766 of 2006 was tantamount to an abuse of the court process.

We reiterate for the benefit of the appellants, that the learned judge could not pronounce herself on the issues of fraud or other matters raised in the memorandum of appeal, as those issues could only be determined either before the arbitration tribunal or during the substantive hearing of the dispute by the court once the arbitral process was terminated.

We are satisfied that the learned judge interpreted, and applied the law correctly. No basis has been laid for us to interfere with her findings.

Consequently, we find this appeal devoid of merit and the same is hereby dismissed with costs to the

respondents.

Dated and delivered at Nairobi this 29th day of April 2016.

W. KARANJA

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR