IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 171 OF 2012

BETWEEN

PTALLA RUTAKI…….....……..APPELLANT

VERSUS

MICHAEL DEE ROBINSON …….....1ST RESPONDENT

MICHELLE ALICE ROBINSON…….....2ND RESPONDENT

STEPHEN MAIRORI…….....3RD RESPONDENT

ROSELYNE TETEE…….....4TH RESPONDENT

(An appeal from the Ruling and Orders of the High Court of Kenya at Kitale, (J. R. Karanja, J.) dated 5th March, 2012

in

HCCC NO. 125 OF 2009)

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JUDGMENT OF THE COURT

1. This is an appeal from the ruling and orders of the High Court (J. R. Karanja, J.) given on 5th April 2012 ordering the appellant to render an account of Kshs. 7,788,850.00 and to pay any sums found due to the respondents upon taking the account.

2. The background to the appeal is that the 1st and 2nd respondents filed a suit in the High Court at Kitale seeking orders to compel the appellant to render accounts for moneys allegedly withdrawn by him from the bank account of "*Fruited Plains*" held at the Kitale Branch of the Cooperative Bank of Kenya Ltd; an order for the appellant to pay to the 1st and 2nd respondents what is found due on taking the account;and an order to compel the appellant to return furniture allegedly taken by him from the 1st and 2nd respondents' house or payment of the value thereof of Kshs. 212,500.00.

3. In their plaint, the 1st and 2nd respondents pleaded that they are American citizens undertaking missionary work in Kitale; for that purpose they opened a bank account in the name of "*Fruited Plains*" with the Cooperative Bank of Kenya Limited at its Kitale Branch; the appellant and the 3rd respondent were signatories to that account; from time to time between 2007 and 2009 they sent money to the said account for purposes of construction of a residential house,acquisition of land, payment of insurance premium for a vehicle among other things for which they contend the appellant did not fully account to them.

4. In his defence, the appellant denied the claim and contended that the 1st and 2nd respondents, being donors to Fruited Plains, a community based organization, did not have the legal standing to file the suit; that the accounting officers of that organization are the office bearers who maintain the accounting documents of Fruited Plains; that the suit could only be maintainable at the instance of or against that organization; that as secretary of the organization, the appellant discharged his duties as directed by the 1st and 2nd respondents and by the chairman, treasurer and members of the organization; and that all money sent and withdrawn on behalf of the organization was utilized appropriately for the intended purposes and that the appellant "is ready to give full account on the part of his participation. "

5. Soon after filing that suit in December 2009, the 1st and 2nd respondents filed a chamber summons in the suit under the provisions of Order 20 Rules 1 and 2 and Order 21 Rules 16 and 17 seeking orders that:

   "a) The respondent be ordered within such time as this Honourable Court shall order to render an account for the Kshs.7,788,850/= withdrawn by him from A/C No. 01134096517700 and which money had been wired to the said account by the applicants,with specific instructions to the respondent on how the money was to be utilized but for which no account was rendered.

   b) The applicants be allowed to take such objections on the account rendered as they may deem necessary.

   c) The respondent be ordered to pay to the applicants whatever sum is found due to them, upon the taking of the account.

   d) The costs be provided for. "

6. In an affidavit sworn in support of that application, the 1st respondent reiterated the contents of the plaint and exhibited photocopies of bank statements in respect of the bank account of Fruited Plains held at the Cooperative Bank of Kenya, Kitale Branch and deposed that the appellant had not accounted for some of the money withdrawn from that account.

7. In his replying affidavit the appellant maintained that the 1st and 2nd respondents had no basis to demand an account from him "as they are not members nor officials of Fruited Plains "; that under the constitution of that organization it was the duty of the treasurer of the organization to keep financial records and that the treasurer was best placed to render accounts; that he could not single handedly withdraw money from the bank account of the organization. Thereafter, in a bid to further support the application, the 1st respondents filed a detailed supplementary affidavit exhibiting extensive email correspondence exchanged between the 1st and 2nd respondents and the appellant, as well as bank statements and transactional statements.

8. After considering the pleadings, the application, the affidavits and submissions, the learned Judge of the High Court was not impressed by the appellant 's objection to the application. He allowed the application in its entirety.

9. The appellant through learned counsel Mr. A. K. Nyairo complains, inter alia, that the Judge pre-

determined the suit and gave final orders before the parties had an opportunity to adduce evidence in a trial; that there was no proof that the appellant received and misappropriated the amount he was ordered to account for; that the Judge misconstrued the provisions of the rules of Civil Procedure and misapprehended the material before him.

10. Learned counsel for the respondents Miss Mururu on the other hand defended the ruling arguing that it was established that the appellant was, as an agent of the 1st and 2nd respondents under a duty to account.

11. It is necessary to reproduce at some length, the view expressed by the Judge in the impugned ruling:

> *"It is very clear that from the pleadings contained in both the plaint and the defence and from the averments contained in all the affidavits filed herein for and against the application, there is no particular dispute that sums of money were wired into the account operated by the applicants in the name of Fruited Plains organization by the applicants to be withdrawn and used for specific purpose by the respondent and that the respondent actually withdrew the money but could not at all or properly account for how the money was utilized. As it were, the respondent was an agent of the applicants for purposes of receiving the wired money and putting it into specified use on their behalf. They dealt with him in that capacity and would have all the right to require him to account for the money to the last penny. Indeed, he has already expressed his willingness to render account and cannot now be heard to say that the applicants have no "locus-standi" in this matter or that he was not the only party to the withdrawal yet he was the person who received the money and was to use it as instructed. Apart from the utilization of its bank account which was opened by the applicants, Fruited Plains as an organization had nothing to do with the materi al transactions which involved the applicants and the respondent only."*

12. In taking that approach, we think there is merit in the appellant 's complaint that the learned Judge went beyond the inquiry he was required to undertake when dealing with the application that was before him. In our view, the learned Judge made findings and conclusions on contested affidavit evidence that he should not have done before conducting a trial.Rule 1 of Order 20 of the Civil Procedure Rules, provides that:

> *"1. Where a plaint prays for an account, or where the relief sought or the plaint involves the taking of an account, <u>if the defendant either fails to appear or does not after appearance by affidavit or otherwise satisfy the court that there is some preliminary question to be tried</u>, an order for the proper accounts with all necessary inquiries and directions usual in similar cases shall forthwith be made." [Emphasis added].*

13. Under that provision, all the appellant was required to do was to satisfy the court that there is some preliminary question to be tried. It was not the function of the court, at that stage, (to borrow the words of Lord Diplock in **<u>American Cyanamid Co vs. Ethicon [1975] AC 396</u>** uttered in the context of an application for temporary injunctions) "*to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial*."

14. Whilst we do not express any concluded view on the matter, we are persuaded, as urged by Mr. Nyairo, that there were several preliminary questions that required trial. There is for instance the question of the source of funds, and the relationship between the 1st and 2nd respondents with Fruited Plains and the question of agency, to mention just but a few.

15. The application before the Judge was also based on Order 21 Rules 16 and 17 of the Civil Procedure Rules.

Rule 16 provides:

> *"In a suit for an account of pecuniary transactions between a principal and an agent, and in any other suit not hereinbefore provided for, where it is necessary, in order to ascertain the amount of money due to or from any party, that an account should be taken, the court shall, before passing its final decree, pass a preliminary decree directing such accounts to be taken as it thinks fit*

Rule 17 provides:

> *"The court may, either by the decree directing an account to be taken or by any subsequent order, give special directions with regards to the mode in which the account is to be taken or vouched, and in particular may direct that in taking the account the books of account in which the accounts in question have been kept shall be taken as prima facie evidence of the truth of the matter therein contained with liberty to the parties interested to take such objection thereto as they may be advised. "*

16. To the extent that the application was also based on those provisions, we think the learned Judge also fell into error in issuing a preliminary decree at the stage of the proceedings that he did. The issuance of a preliminary decree prior to a hearing was premature. Order 21 of the Civil Procedure Rules deals with and is titled "Judgment and Decree". As the editor of **Mulla on the Code of Civil Procedure**, 14th edition, volume 2 states at page 1325, a preliminary decree in a suit for accounts declares the rights and liabilities of the parties leaving the actual results to be worked out in further proceedings for a final decree. Such a preliminary decree is passed after hearing evidence on issues relating to the merits and all that remains to be done is to take accounts.

17. For those reasons we do not accept, as submitted by Miss Mururu, for the respondents that this was a proper case for the learned Judge to grant the orders that he did at an interlocutory stage.

18. We accordingly allow the appeal and set aside the ruling and orders issued by the High Court on 5th April 2012. We substitute therewith an order dismissing the 1st and 2nd respondent 's application dated 15th February 2011 with costs to the appellant.

19. We direct that the suit be fixed for hearing in the High Court on a priority basis before any judge other than the Hon. Mr. Justice J. R. Karanja, J.

Orders accordingly.

Dated and delivered at Eldoret this 15th day of April, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

……

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

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DEPUTY REGISTRAR