



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, J. MOHAMMED & KANTAI, JJ.A.)

CIVIL APPEAL NO. 314 OF 2014

BETWEEN

SHEILA NKATHA MUTHEE APPELLANT

VERSUS

ALPHONCE MWANGEMI MUNGA & OTHERS 1ST RESPONDENT

FRANK HELGE NEUGEBAUER 2ND RESPONDENT

(Appeal from the Ruling of the High Court at Nairobi (Nduma, J) dated 11th July, 2014

in

HCCC No. 133 of 2008)

JUDGMENT OF THE COURT

This is a first appeal from the ruling of the Industrial Court at Nairobi (Nduma, J.) delivered on 11th July, 2014. That ruling was as a result of an application where that court was asked to review and/or set aside some orders that had been made on 11th December, 2013. The learned judge considered the application and dismissed it.

As a first appellate court it is our duty to reconsider the evidence, reevaluate it and make our own conclusions. A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it was based on no evidence or it was based on a misapprehension of the evidence or it is shown that the judge acted on wrong principles in reaching the finding that

he did -see **Sumaria and Another v Allied Industries Limited [2007] 2KLR 1** or **Mwanasokoni vs. Kenya Bus Service Limited [1985] KLR 931 Civil Appeal No. 35 of 1985 Mombasa (unreported)** for an enunciation of these principles.

What is the background of this matter?

On 15th October, 2008 the 1st respondent **Alphonse Mwangemi Munga & 9 others** filed a representative suit on behalf of 367 former employees of **African Safari Club Limited**. That case was **Industrial**

Cause no. 133 (N) of 2008. The claimants in the suit prayed for a finding that the dismissal of the employees from employment was wrongful, malicious, unfair, null and void; that the claimants be issued with certificates of service and be paid terminal dues for leave accrued; that they be paid salary arrears as at the time of termination of their employment; that they be paid accrued house allowance, gratuity and they be paid for termination in lieu of notice and other claims. That claim was heard by the Industrial Court which delivered an award on 28th April, 2011 in favour of the claimants as follows:

“(1) Kshs.50,506,075/= being their salary arrears and terminal benefits, six (6) months compensation each, under powers vested in, or conferred upon the Court by Section 15(c) of the Labour Institutions Act, No. 12 of 2007, based on their individual wages or salaries at the date of their unfair and wrongful summary dismissal.

2. Certificate of Service, costs of the claim and interests on all the sums at the prevailing Court rates.”

The 1st respondent and his colleagues were not able to execute that award and on 8th September, 2011 they applied at the Industrial Court that the directors of Africa Safari Club Limited namely, **Karl J Ruedin** (now deceased) and **Frank H. Neugebauer** (the 2nd respondent) be summoned to court for examination on the identity and location of the assets of the said African Safari Club Limited and to produce its books of account. It was also prayed that in default of attendance to court the directors be made personally liable to the decree holders for the satisfaction of the decree and their assets be attached and sold to recover the decretal sum that then stood at Shs.137,400,025/=. That application was in court on 11th December, 2013 where Karl J. Ruedin (who had since died) was not represented. An advocate appeared for the 1st respondent and his colleagues and the 2nd respondent was also represented by an advocate. The advocates present informed the court that they had discussed the matter and reached a consent. That consent was adopted by the court to the following effect:

“THIS MATTER coming up for mention on the 11th day of December, 2013 before Hon. Justice J. Nduma Nderi in the absence of the parties.

AND by consent recorded by advocates for the claimant and advocates for the named director and adopted by this court as an order of the court;

IT IS HEREBY ORDERED BY CONSENT:

1. THAT by consent pursuant to the search dated 27th November, 2013 and filed in court on 28th November, 2013 a prohibitory order do issue for sale by way of public auction of plot No. MN/1/1515 CR. NO. 13371.

2. THAT the court Registrar do issue notification of sale and execute all necessary documents to facilitate the sale.

GIVEN UNDER my hand and seal of the Court at Nairobi this 11th of December, 2013. ISSUED at Nairobi this 16th day of December, 2013.

DEPUTY REGISTRAR

INDUSTRIAL COURT”

Meanwhile before that consent Karl Jacob Ruedin had died on 19th March, 2013.

Aggrieved by those orders that were entered by consent set out herein the appellant **Sheila Nkatha Muthee** filed **Succession Cause No. 305 of 2013** where on 24th January, 2014 she obtained grant of letters of administration, ad colligenda bona which was limited to only taking legal steps to preserve

parcel of land No. **M.N./1/515** grant no. **CR 13371**. The appellant also filed a suit being **Petition No. 24 of 2014** at the High Court where on 2nd of May, 2014 she obtained an injunction to restrain the respondents from selling or purporting to effect the sale of the said parcel of land and barred the **Registrar of Lands Mombasa** from registering any transfer, lease, vesting order or any other transaction purporting to dispose of the subject property pending the hearing and determination of the application.

Before obtaining the said orders the appellant had filed an application in the Industrial Court dated 30th January, 2014 to review or set aside the said consent issued on 11th December, 2013. That was the application whose ruling is the subject of this appeal. On considering the application and the objections raised in the Industrial Court found that there was material non disclosure of the status of the matter pending at the Industrial Court to the High Court at Mombasa which had issued orders of injunction to preserve the subject matter pending hearing. The Industrial Court also considered and held that the appellant lacked locus standi to institute the suit. The court found that the appellant was conflicted in acting as the administratrix of the estate of the late Karl J. Ruedin and also acting as the advocate of the estate. Those are the findings that have led to this appeal which is premised on the memorandum of appeal which sets out 13 grounds of appeal. Those grounds can be summarised thus; that the trial court erred in hearing and making substantive orders when the matter was listed for mention and not a hearing; that by doing so the appellant was denied a right to be heard; that the learned judge suppressed evidence adduced by the appellant; that there was a breach of the appellant's natural justice rights; that the learned judge erred in ordering the private property of the deceased to be attached to settle company debts; that the learned judge erred in disregarding the principle of company law as regards separate legal personality of a company from its directors; that the learned judge erred in holding that prohibitory orders issued by other courts relating to the deceased's property were irregular; that the learned judge erred in holding that the appellant lacked locus standi in proceedings and was conflicted; that the learned judge erred in considering matters that were not raised in the pleadings and finally that the learned judge erred in coming to the conclusions that he did and in giving judgments to the claimants and the 2nd respondent which validated an irregular and illegal consent order contrary to evidence tendered in court.

Written submissions were filed on behalf of all parties and when the appeal came for hearing before us on 14th of January, 2016 there was a highlight of those submissions. **Pheroze Nowrojee**, Senior Counsel appeared for the appellant while learned counsel **Mr. Henry Kurauka** appeared for the 1st respondent and learned counsel **Mr. Henry Kabiru** appeared for the 2nd respondent. Mr. Nowrojee submitted that it was wrong for the Industrial Court to entertain a consent when the appellant was not represented. That, according to learned counsel, was not a consent and could not bind the deceased or his estate. In the event, according to counsel an order was made without an affected party being heard. Counsel further submitted that a public auction has taken place where the said property was sold which auction took place despite existence of court orders preserving the same. In addition learned counsel criticized the learned judge for finding a conflict of interest when according to counsel there was nothing wrong or irregular in the appellant acting as administratrix of the estate and also its advocate. For all this counsel asked for prayers set out in the memorandum of appeal – that the appeal be allowed; that the ruling of the trial court be discharged and/or set aside and that the irregular and illegal consent entered on the 11th of December, 2013 for the sale of the deceased private property by way of public auction to settle the company's debt and/or other subsequent consents entered into for and/or on behalf of the respondents be vacated, set aside and/or discharged in their entirety.

Mr. Kurauka in response submitted that judgment had been entered for the former employees of African Safari Club Limited in 2013; that an appeal was filed against that judgment which appeal was dismissed in 2015 and that the original decree had therefore not been challenged. He further submitted that execution process followed; that the judge of the Industrial Court summoned directors of the company and that the subsequent sale of the land was done by the court. Learned counsel thought the appeal had no merits and should be dismissed.

Mr. Kabiru submitted that no appeal had been filed against orders made on 11th December, 2013 when consent order was recorded. According to counsel that consent order was regularly entered because the deceased's director of African Safari Club Limited had been served but failed to attend court. According

to counsel the court lifted the corporate veil and that is why the 1st respondent and his colleagues were able to attach the property of the director of the company. Counsel continued that the deceased's director or the appellant could not claim breach of rights to be heard when the deceased had been summoned to attend court but he ignored those summons and failed to attend court. In any event according to Mr. Kabiru no substantive orders were made on 11th December, 2013 but had been made earlier and no appeal had been lodged.

Mr. Nowrojee in response submitted that the subject property had never been registered in the name of the debtor company and submitted further that a consent order could be made at a mention but that all involved must be present.

We have carefully considered the record of appeal, the submissions both written and oral and the relevant law.

It would appear from the record and as we have set out in this judgment that various suits and applications were filed in various courts by the parties to this appeal. But we confine ourselves to the ruling delivered on 11th July, 2014 which was a ruling relating to an application dated 30th January, 2014.

We have perused that application. It prayed in the main that the court be pleased to order a review of the order made on the 11th December, 2013 and/or setting aside of the same pending the hearing and determination of that application. The same also prayed for orders of review of those orders pending determination of the suit. The appellant swore an affidavit in support of that application whose contents are set out substantially in the ruling appealed from. It was stated *inter alia*, that the appellant had obtained grant of letters of administration ad colligenda bona, limited to enable her take steps to preserve a stated property. It was also stated that the High Court sitting at Mombasa had on 30th December, 2013 issued preservative orders to protect and preserve the estate of the deceased from the sale by public auction of the deceased's plot no. M.N./1/515 pending inter partes hearing on 20th January, 2014 by **Maureen Odero, J.** The judge in the ruling subject of this appeal (Nduma, J) observed that the orders given on 30th December, 2013 were given oblivious or in disregard to orders issued by the Industrial Court on 11th December, 2013 for allowing tracing of properties of African Safari Club Limited a company whose principal shareholder and Managing Director the court had found to be Karl Jacobs Rudein (deceased). The court also found that the deceased died before satisfying the award of the court given on 28th April, 2011 in respect of terminal benefits due and owing to 368 former employees of African Safari Club in the sum of Shs.137,400,025/=. The court also found that having examined the surviving directors of African Safari Club Limited a consent was entered "on 15th December, 2013". On the issue of material non disclosure to the High Court and the appellant being conflicted the court held:

"16. It is trite that the Industrial Court as constituted pursuant to Article 162(2) (a) of the Kenya Constitution 2010 as read with Section 4(1) of the Industrial Court Act 2011 has an equal status to the High Court and one Court cannot be a forum of staying orders of another Court of concurrent jurisdiction in a different cause of action.

17. This Court is convinced that there was material non-disclosure of the status of the matter pending before the Industrial Court to the High Court in order to obtain the orders granted by the High Court aforesaid.

18. This has the effect of making the Court of concurrent jurisdiction act at cross purposes with respect of the same subject matter. It is clear that the whole purpose of obtaining the grant ad colligenda bona is to avoid debts owed to hundreds of employees of the Respondent in this suit and to protect unjustly, the assets of the deceased in order to frustrate orders of this Court. It is in this spirit that letters of administration have not been sought yet the deceased died more than a year ago.

19. In the case of Kahawa Sukari Limited (2004) [EA 93] the Court held; "a grant of letters of Administration intestate is not sufficient to constitute the petitioner a member of the company

under Section 211 of the Companies Act. A person who obtains grant ad colligenda bona is not a representative of the deceased until he obtains a full grant. Even a person with full grant cannot be treated as a member of a company until he is entered in the register of members.”

20. In this regard, the Applicant herein cannot move the Court to set aside orders made by this Court against the respondent company and therefore Sheila Nkatha Muthee lacks Locus Standi in these proceedings and this application for this reason and others cited earlier, especially the conflict of interest by the Applicant in purporting to Act (sic) both as an administrator of the estate and at the same time as the Advocate of the same (see Rule 9 Advocates Practice Rules) is dismissed with costs.”

It is instructive to set out in full the notice of appeal that was filed after that ruling:

“TAKE NOTICE that SHEILA NKATHA MUTHEE, (the Administrator of the Estate of Karl Jacob Ruedin) being dissatisfied with the decision of the Honourable Principal Judge Mathews N. Nduma given at Nairobi on the 11th day of July, 2014 intends to appeal to the Industrial Court against the whole of the said decision.”

On the face of it it would appear that there is an irregularity in the notice of appeal as the said notice specified that it was intended to appeal to the Industrial Court against that court’s decision. This issue was not addressed by any of the parties and on that ground alone and by using the overriding objectives of the **Appellate Jurisdiction Act** where we are to facilitate the just, expeditious, proportionate and affordable resolution of appeals we shall say no more on that aspect of the matter. But it is important to note that the notice appeals the decision of the Industrial Court given on 11th July, 2014. We say so because and as properly submitted by the respondents there was no appeal against the orders made on 11th

December, 2013. The competence of an appeal is based on its compliance with the law. **Rule 75** of our **Rules** provides for the manner appeals are to be filed.

In **Nairobi City Council v Resley [2002] 2 E.A 487** this Court stated:

“Rule 5 (2) (b) as read with rule 74(3) of the Court of Appeal Rules leave no doubt that any decision sought to be appealed against must be based on a notice of appeal filed against such a decision.”

In the more recent case of **Nguruman Limited v Shompole Group Ranch & Anor [2014] eKLR** quoting the case of **Samuel Kamau Macharia & Anor v Kenya Commercial Bank Limited & 2 Others [2008] KLR 61** this Court stated:

“A Court’s jurisdiction flows from either the constitution or legislation or both. Thus a Court can only exercise jurisdiction or legislation as conferred by the constitution or other written Law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law.... the issue as to whether a Court of Law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings.

There is no provision of allowing a notice of appeal lodged in a later decision to be used in an application for stay of an earlier decision.”

The position here is that the appellant strongly attacks events that led to substantive orders being given apparently at a mention. We have no material before us evidence that the deceased director of African Safari Club Limited had been served for the hearing or mention for 11th December, 2013 but no appeal was filed against the orders that were made. The application that was before court and from which this appeal has been preferred was against the orders made on the application for review or setting aside of the orders. That application by Motion was said to be brought under **Order L (50) rule 1 and 2** of the **Civil**

Procedure Rules (this order provides that “month means calendar month” and excludes Sundays and public holidays in computation of time); **Sections 1A, 1B, 3, 3A and 63** (these generally define the duty of the court which is enjoined to apply the overriding objective of the Civil Procedure Act and to make orders for the ends of justice to be met and to prevent abuse of the court process); the Law of Succession Act; **Article 169** of the **Constitution of Kenya, 2010** (the applicant probably wished to invoke **Article 159** of the **Constitution** which provides for judicial authority which is derived from the people and vested in the courts). So the relevant provisions on an application for review or setting aside of orders were not cited but no matter. It is obvious from the prayers made that the trial court was being asked to review or set aside the orders that had been made by consent and adopted by the court on 11th December, 2013. The relevant provision of the Civil Procedure Code on review or setting aside is **Order 45**. It gives to a person who considers himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred, or to a person who is aggrieved by a decree or order from which no appeal is allowed the right to apply for review of that order. It gives important conditions. Such a person must show that he has discovered new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be procured by him at the time

when the decree was passed or the order made. Another factor that would give such a person a right to apply for review is that there is an error apparent on the face of the record. Other sufficient reason may also give such a right and all this to be done to the court that passed the decree or made the order without unreasonable delay.

Did the appellant satisfy these conditions when she made the application for review or setting aside? The learned judge did not think so. He held in the main that the High Court had been misled when relevant matter being that the Industrial Court had issued the orders it did on 11th December, 2013 had not been placed before the High Court or brought to its attention. In the event the court held that there had been material non-disclosure of the status of the matter at the Industrial Court when the High Court was moved for orders of injunction on 30th December, 2013.

On our own consideration we cannot find any error in the way the learned judge dealt with that aspect of the application. The learned judge was being asked to set aside or review orders made on 11th December, 2013 – the request was being made by a party who was aware of those orders but who crossed the road to another court and obtained orders of injunction which were in effect a contradiction of the orders granted by the Industrial Court. That party – the appellant – did not inform the High Court that there was on record orders issued by the Industrial Court on the same issue and that the High Court would, in effect be overturning orders of the Industrial Court. The appellant was certainly not entitled to exercise of the discretion created by the Civil Procedure Act or any other law particularly **Order 45 Civil Procedure Rules** on factors to be satisfied by a party seeking review of a decree or order.

The appellant raises many grounds relating to substantive orders being made at a mention and being denied right to be heard which would be a breach of natural justice rights. The appellant also complains that orders of attachment of property belonging to the deceased on a debt owed by a company were made. None of these issues were before the learned judge who delivered the ruling appealed from. The notice of appeal before us is against that ruling of 11th July, 2014 and not against orders made on 11th December, 2013 to which no appeal had been filed at all.

The other aspect of the ruling appealed from was whether the appellant had the necessary *locus standi* to file the application. The learned judge found that the appellant lacked such locus.

Upon the death on 19th March, 2013, of Karl Jacobs Ruedin, the registered proprietor of Plot No. MN/1/1515 CR. 13371, Shanzu in Mombasa County, the appellant moved the High Court in Succession Cause No. 305 of

2013 and obtained letters of administration ad colligenda bona “..... limited only to enable her take legal steps to preserve the Shanzu Plot No. MN/1/515 CR. 13371....” That grant was not confirmed at all. The learned judge of the Industrial Court held that:

“.....the Applicant herein cannot move the Court to set aside orders made by this Court against the respondent company and therefore Sheila Nkatha Muthee lacks Locus Standi in these proceedings....”

The issuance and purpose of a grant of letters of administration ad colligenda bona (emphasis by underline) is provided under **Section 67** of the **Law of Succession Act Cap 160 Laws of Kenya** and procedure thereof is under **Rule 36** of the **Probate and Administration Rules**. The Rules expressly state that the purpose of such a limited grant is to enable the applicant to collect, give entry, receive the estate and do such acts as may be necessary for the preservation of the estate of the deceased until the grant is made. Set out in full **Rule 36** provides:

“(1) Where, owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant of administration ad colligenda bona defunct of the estate of the deceased.

2. Every such grant shall be in Form 47 and be expressly limited for the purpose only of collecting and getting in and receiving the estate and doing such acts as may be necessary for the preservation of the estate and until a further grant is made.”

The limited grant ad colligenda bona does not give authority to the holder to file an action in court on behalf of a deceased and more so where the grant does not bear an endorsement to the effect that it is limited to the purpose of instituting a suit. In **Otieno v Ougo & Anor [1986-1989] EALR 468** this Court rendered itself thus:

“....an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.”

In **Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama [2014] eKLR** this Court has remained consistent on the issue by stating as follows:

“That may well be the case, but in our view the position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession.”

This Court has also authoritatively delivered itself on the issue in **Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & Another (1982-99) 1 KAR, Morjaria v Abdalla [1984] KLR 490** and in **Trouistik Union International & Another v Jane Mbeyu & Another Civil Appeal No. 145 of 1990**. The appellant therefore had no capacity to file the application before the Industrial Court.

Locus standi is a primary point of law almost similar to that of jurisdiction since the lack of capacity to sue renders the suit incompetent. In **Alfred Njau & Others v City Council of Nairobi [1982-88] 1 KAR 229** this Court gave meaning to the term locus-standi by stating:

“.....to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.”

The learned judge of the Industrial Court was right to find that the appellant who had failed to obtain a grant to represent the estate of the deceased lacked the necessary locus to take the application.

We find no merit in this appeal which we hereby dismiss with costs.

Dated and delivered at Nairobi this 19th day of May, 2016.

G.B.M. KARIUKI

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR