IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)

CIVIL APPEAL NO.28 OF 2014

BETWEEN

MOHAMMED SALIM BALALA.....1ST APPELLANT

ABED OMAR ABED T/A BALALA & ABED ADVOCATES...2ND APPELLANT

AND

TOR ALLAN SAFARIS LIMITED.....RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Malindi (Meoli, J. dated 13th June, 2014

in

Malindi H.C.C.S. No.86 of 2012)

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JUDGMENT OF THE COURT

Mohammed Salim Balala and **Abed Omar Abed** are partners in a law firm known as Messrs Balala & Abed Advocates *(the Appellants)*. As such advocates, they were retained to act for one, **Omar Mshamu Ismaili** (*the vendor)* in an intended conveyance between vendor and Tor Allan Safaris Limited (*the Respondent*). A sale agreement dated 20th August, 2010 was subsequently executed; wherein the vendor agreed to sell to the respondent all that piece or parcel of land described as Ngomeni/squatter sett. Scheme/139 together with the developments thereon *(the suit property)* at a consideration of Kshs30,492,000/-. It was a term of the agreement that prior to the execution of the agreement, 10% of the purchase price would be paid to the Appellants who would hold the same as stakeholders under a professional undertaking, pending the completion of the transaction. A sum of Kshs.3,049,200/- being the deposit and further sum of Kshs.200,000/- on account of the purchase price was duly paid by the respondent as a foresaid.

Alongside the condition on deposit, the agreement also stipulated that the completion date for the transaction was to be within 90 days' of execution, with both sides having a myriad of duties to be performed towards that end. However, in the course of time, the parties failed to agree on the demarcation of the suit property. Efforts to have the land surveyed proved fruitless and this hampered the completion of the transaction, culminating in the issuance of a 14 day completion notice by the Respondent. The notice was vide a letter dated 12th April, 2011; and required the vendor to either sort out the issue of

demarcation and complete the sale or refund the deposit and all other fees incurred by the respondent in pursuit of the sale then totaling Kshs.3,365,530/-. The vendor neither completed the sale nor refunded the monies. Instead, through the appellants the vendor also issued a 21 day completion notice of his own, dated 13th April, 2011.

When the vendor refused to comply with the terms of the respondent's notice, the respondent deemed it fit to file **Malindi H.C.C.C No. 86 of 2012** against the vendor, claiming refund of Kshs.3,249,200/-, costs and interest. The vendor duly entered appearance and filed his defence in which he denied all the allegations blaming him for the non-completion of the transaction. Indeed he accused the respondent for sabotaging the transaction since it lacked funds to go through with the transaction. Before the suit could be set down for hearing the respondent filed an application dated 16th April, 2013; seeking to enjoin the appellants in the suit, on the basis that the it wished to pray for the furnishing of accounts, which remedy could only be enforced against the appellants. This application was heard by **Meoli J.** and a Ruling thereof delivered on 13th June, 2014, allowing the appellants to be so enjoined as defendants in the suit.

The appellants, unhappy with this outcome, preferred the present appeal. The same is expressed to be based on eighteen grounds which can be summarized as follows: That the learned judged erred in failing to appreciate that the prayer for accounts had already been raised in the initial Plaint and answered in the third party's defence; that in any event, rendering of accounts would not suffice as a remedy as the monies had already been forfeited; that the judge should have recognized that the appellants were not bound as stakeholders as the respondent had not complied with the contract; that the learned Judge erred in inferring that the appellants owed the respondent a duty of care, when the respondent had advocates of its own; that the appellants were not privy to the contract between the parties and as a result, there lay no valid claim against them by the respondent; that the learned judge appears to have incorrectly shifted the burden of proof onto the appellants to show why they could not be enjoined in the suit.

The appeal proceeded by way of oral submissions; with **Mr. Buti** learned counsel for the appellants stating that the core issue in the case was whether the contract was rescinded and deposit forfeited. It was his assertion that since the appellants were not privy to the contract, their liability to the respondent did not arise. In addition, that the contract was subject to the Law Society of Kenya conditions of sale; which allowed for forfeiture of deposit as was the case herein and that this forfeiture had been provoked by the respondents' failure to complete the sale. Further, that in any event, even if they were held to be subject to liability under the contract, the appellants had already shown that there had been forfeiture of the deposit in question and the rendering of accounts was thus superfluous. The appellant further faulted the grant of the prayer for enjoinment as it had been sought under the wrong provisions of law. It was Mr. Buti's argument that the amendment was not judiciously done as **Order 1 Rule 4** does not envision the substitution or addition of parties, yet this is the provision invoked by the Respondent. In conclusion, Counsel urged this court to hold that the relationship between the vendor and the appellants was protected by advocate- client privilege and enjoining the appellants was thus a violation of this privilege.

In opposition of the appeal, **Mr Karega,** learned counsel for the respondent submitted that the duty of a stakeholder is to hold on the stake until the conditions of the contract have been met and fulfilled. He also contended that this being a decision based on discretion of the High Court, the same can only be interfered with if it is shown that the lower court had misdirected itself, which was not the case herein. All that was needed was for the establishment of a *prima facie* case, which in this case according to Counsel, was whether or not there existed a right that had been infringed. He reiterated that such a right existed. Accordingly, the respondent defended the High Court's decision saying that the learned judge had rightly acknowledged the rival claims over the deposit as sufficient evidence of a *prima facie* case and that there were competing completion notices to support this. He summed up by saying that the issues raised in this appeal are issues that can only be ventilated and determined at trial and therefore urged for the dismissal of the appeal.

It is without doubt that furnishing of accounts was an order not sought in the initial plaint. Amendment of Plaint was thus necessary to enable the respondent include this prayer. Question is whether the appellants were correctly enjoined in the suit. One of the grounds upon which the appellant has attacked the ruling of the High Court is that it allowed an application premised on the wrong provisions of law; that since the

provisions invoked were not in tandem with the relief sought the High Court ought not have granted the orders.

Though the application was expressed to have been brought under Order 1 Rules 4 & 14 and Order 8 Rules 3 & 5 of the Civil Procedure Rules; the prayers sought were:

- *"That the plaintiff be granted leave to add Balala Mohammed Salim and Abed Abed Omar practicing as Balala & Abed Advocates as the 2nd and 3rd Defendants in this suit;*
- *That the Plaintiff be granted leave to amend the Plaint filed herein be amended (sic) in terms of the draft amended Plaint annexed to the Affidavit of Jan Matthew Alan which has been filed herewith in support of this application.*
- *That the costs of this application be provided for*."

While **Order 1 Rules 4** & **14** and **Order 8 Rules 3** & **5** have a place in the application, the respondent failed to cite **Order 1 Rule 10(2)** as well, which is the provision that specifically provides for joinder of parties. The Rule provides *interalia*:

> 2. **The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, be added.**

However, failure to cite the proper order and rule or vice versa under which the application is made is in our view a non-fatal omission. From a plain reading of the application, there is no doubt as to the nature of the relief sought. When the court is able to discern the provision of law invoked from a reading of the application, then it can proceed to pronounce its Ruling on merit, notwithstanding the omission **see. Mohammed Aden Abdi v Abdi Nuru Omar & 2 others, Civil Appeal No. 190 of 2006 Court of appeal at Nairobi [2007] eKLR** in which this Court, differently constituted faced with a similar scenario, stated as follows:

> *"We have looked at the application and in an appropriate case, this not being one, the Court may strike out an application in which appropriate provisions are not cited. In the instant application however, the prayers in the motion and the Affidavit in support leave no doubt, that the applicant is seeking an order pursuant to Rule 80 of the Court Rules …."*

In addition, under **Order 51 Rule 10** of the Civil Procedure Rules, while the provisions invoked should ideally be stated, the failure to invoke a provision relied upon does not render an application invalid. This provision states as follows;

> 1. **Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of failure to comply with this rule.**
>
> 2. **No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.**

The second question is whether the appellants had a place in this suit? It is common ground that the deposit was made to the Appellants as stakeholders. According to ***Black's Law dictionary 9th Edn;*** A stakeholder is defined as:

> *"A disinterested third party who holds money or property the right to which is disputed between two or more other parties"*

It can therefore be safely said that as a stakeholder in this land transaction, the Appellants therefore acted as escrow agents. The same dictionary describes escrow as:

1. A legal document or property delivered by a promisor to a third party to be held by the third party for a given amount of time or until the occurrence of a condition, at which time the third party is to hand over the document or property to the promise

2. …..

3. …..

4. The general arrangement under which a legal document or property is delivered to a third person until the occurrence of a condition.

Their position as escrow agents and/or stakeholders is also defined by clause 3.1 of the agreement which provided that:

> *"The purchaser shall on or before the date of this agreement pay the Deposit to the vendor's advocates who shall hold the deposit on their professional undertaking pending completion of the fixing of the boundary wall of the property, rectification of the RIM plan and rectified title deed by the vendor at his costs. Thereafter the vendor's advocates shall hold the deposit as stakeholder pending registration of the transfer in favour of the purchaser or his nominee."*

As such stakeholders, did the appellants owe the respondent any duty of care? It was hotly contended by the appellants that no such duty existed, whereas the respondents held contrary view. Yes the Law Society of Kenya conditions of sale may have set out the obligations of each party to the transaction and the penalties for failure. These were issues best left into the realm of trial. Who then would be best placed to answer the questions arising therefrom? We cannot think of any other person(s) other than the appellants, hence the need to have them enjoined in the suit.

Of course there is contestation as to whether the release of the funds was as per agreement or not. On the respondent's part, the funds should still be with the appellant, since the respondent had not failed to complete the contract. Indeed, from the pleadings, the respondent seeks the refund of the said monies as well as an account of how much interest it has accrued so far. Secondly, there is the issue of whether the relationship between the Appellant and the vendor is protected by advocate client privilege. It is without a doubt that allegations of forfeiture of deposit, blame for non-completion of contract and presence or absence of advocate-client relationship are issues in dispute that can only be determined at trial. These contentions do not dislodge the presence of a *prima facie* case against the appellants by the respondent as to warrant their non-joinder. If anything, they established it.

Of particular importance is that the advocate client privilege is only there for the sake of the client not the advocate. It is for the client to choose whether or not to lift the privilege. All that the advocate can do is plead privilege if sued. **(see. Halsbury's Laws of England 4th edition vol 44 at page 52).** This does not mean that an Advocate cannot be sued on the basis of his relationship with his client. It only means that he cannot be compelled to disclose information thus obtained unless his client chooses to lift or pierce the privilege. Again this can only be resolved at trial.

Lastly, on the allegation that the learned judge had erroneously shifted the burden of proof upon the appellants; at the heart of the impugned Ruling, the learned judge expressed herself as follows:

> *"It is evident from the admitted facts of the case that the Plaintiff's claim against the Defendant and intended Defendant arise from the same transaction and similar questions of fact will arise; namely, whether the deposit was duly forfeited or not. Secondly, the legal question of liability on either Defendant will have to be determined. As has been correctly argued by the intended Defendants, they were not parties to the sale agreement between the Plaintiff and the present Defendant. However, they no doubt stood in a special capacity as advocates of the Plaintiff who held the deposit as stakeholder pending the completion of the agreement or other eventuality."*

We do not see any instance of the shifting of the burden as alleged by the Appellant. If anything, the

learned judge seems to have addressed the reasons why the joinder of the appellants to the suit was absolutely necessary. In considering an application for enjoinder, the following are paramount:-

- It will not cause injustice to the other parties.
- It does not seek to substitute or introduce an entirely new cause of action.
- It will not bring in distinct causes of action against different defendants over distinct transaction(s)

(see. Mulla: the code of Civil Procedure 18th Edition, 2011, vol 22 at pages 1485-86.

In the case of **Eastern Bakery vs. Castelino [1958] 1 EA 461 (CA)** this Court stated:-

> "*The court will not refuse to allow an amendment, simply because it introduced a new case … But there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit … The court will refuse to amend where the amendment would change the action into one of a substantially different character … or where the amendment, would prejudice the rights of the opposite party existing at the date of the proposed amendment."*

As a parting shot we note that even the statement in the defence that there existed no professional undertaking between himself and the Appellant was sufficient to create doubt as from whom redress on the issue of furnishing of accounts should be sought.

In view of the above, we are satisfied that the enjoinder was proper and on that score this appeal fails and is accordingly dismissed with costs.

Dated and delivered at Mombasa this 23rd day of April, 2015.

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR