



IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO.19 OF 2015

BETWEEN

KIM JONG KYU APPELLANT

AND

HOUSING FINANCE COMPANY LTD 1ST RESPONDENT

KANYI J & CO.ADVOCATES2ND RESPONDENT

KAMOTI & CO.ADVOCATES 3RD RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Mombasa (Kasango, J.) dated 28th August, 2014,

In

MISC.APPLIC.NO.178 of 2014(OS)

JUDGMENT OF THE COURT

The factual background of this appeal is fairly straight forward. The uncontroverted facts are that the law firm of Kanyi, J & Company Advocates (the 2nd respondent) represented the appellant in Mombasa H.CCC No.335 of 2001, **E.N.Austine & others v Kim Jong Kyu & another.** The outcome of this suit was not in favour of the appellant, who moved to the Court of Appeal through the same firm to challenge it.

In the meantime he took out an application in the **High Court** under order 42 **rule** 6(2) of the Civil Procedure Rules for orders to stay execution of the decree. The respondents were represented by Kamoti & Co. Advocates (the 3rd respondent). The application for stay of execution was granted on terms that the decretal sum of Kshs.6,000,000/= be deposited in an interest-earning account in the joint names of the advocates representing the parties. It is common ground that pursuant to that order an account was opened with Housing Finance Company Ltd (1st respondent) and a cheque for the decretal sum deposited

on 7th July 2010. The funds remained in the account until the appeal was decided in favour of the appellant. Between 7th July, 2010 when the funds were deposited and 5th January, 2014, when the appellant contended that he became aware of the returns on the investment only Ksh.1,017,724.30, approximately 1% interest rate, had been credited in the account.

According to the appellant he had been assured by his advocates that they would negotiate an interest rate not lower than 17%. Disappointed by the turn of events, the appellant instituted an originating summons initially against Housing Finance Company Limited. The summons was subsequently amended to include the two firms of advocates, Kanyi, J & Co. Advocates and Kamoti, & Co Advocates for their role as explained earlier. The amended originating summons sought answers to the following five questions.

“1. Whether Kanyi J & Co. and Kamoti & Co. Advocates, the 2nd and 3rd defendants hold the money in A/C NO TD 300-0011294 opened with the 1st Respondent bank in trust for the applicant. If yes,

2. Whether the applicant is entitled to disclosure of information on how the interest allegedly earned by the money deposited therein was arrived at

3. Whether the 1st respondent is legally obligated to provide the applicant with information regarding the interest it paid its fixed deposit account-holders for the period from 1st January, 2010 to 13th February, 2014

4. Whether the applicant is entitled to 17% interest p.a. in the amount held in A/C NO TD 300-0011294 in the name of the 2nd and 3rd defendants.

5. Who to pay the cost of the originating summons”

The appellant deponed in support of the summons that the 2nd respondent was his “*legal representative and/or agent for the purpose of defending ...*” the High Court suit alluded to earlier; that he engaged it specifically to negotiate a good rate with whichever bank the funds would be invested; and that the 2nd respondent promised that the rate would not be less than 17%. It therefore came as a surprise him when he learnt that the rate applied during the entire period was a mere 1%. He further averred that both 2nd and 3rd respondents in opening and depositing the funds in their joint names acted as his trustees and therefore owed him an explanation as to the basis of 1% interest rate; that the 2nd respondent, specifically had a legal duty to safeguard the appellant’s interest; that the 1st respondent failed to supply details of and justification for the rate of 1% despite several requests by the appellant thereby violating his rights under **Article 35** of the Constitution; that in order to ascertain consistency in the rates for similar accounts, the 1st respondent ought also to have supplied to the appellant the applicable rate for other existing fixed deposit account holders.

All the three respondents denied any wrong doing with the 1st respondent arguing that the application was incompetent, frivolous, vexatious and an abuse of the process of the court; that in the absence of a deed or instrument creating a trust in terms of **Order 37 rule 1** of the Civil Procedure Rules, the appellant’s claim against the 1st respondent was without any legal basis; that the appellant lacked *locus standi* to bring the action based on a transaction in which he was not a party; and that there was no indication in the account opening forms that the account was for the appellant’s benefit. The 1st respondent further argued that, to comply with the appellant’s demand for information regarding the details of the joint accounts of other customers would violate **section 31(2)** of the Banking Act and Guideline 3.2.11 of the Central Bank of Kenya Prudential Guidelines 2013 which demand the protection of account holders’ personal information; that **Article 35(1)** of the Constitution did not avail the appellant any rights or fundamental freedoms. Finally the 1st respondent contended that at the time the appellant brought the originating summons he already had the information regarding the interest rate applied, hence the application amounts to an abuse of the court process.

The 2nd respondent through Joseph Karanja Kanyi, advocate, denied making any promise to negotiate any rate of interest as he had no capacity to guarantee that, and maintained that the appellant had the full knowledge of the account details and even gave his consent. The 3rd respondent through Vincent Omollo denied any role in choosing the 1st respondent as the vehicle in which to invest the funds.

Directions under **Order 37 Rule 16** of the Civil Procedure Rules were taken that the summons be argued through affidavit evidence. After hearing arguments, the learned Judge (**Kasango, J**) found that the account in question was subject to account opening contract, which involved only the 2nd and 3rd respondents on the one part and the 1st respondent on the other. She further found that nowhere in that contract was there mention that the account was for the benefit or was to be held in trust for him. Relying on the **High Court** decision in **Africa Edge Sari v Supinder Singh Soin** H.C.Civil Case No.766 of 2012 the learned Judge concluded that since there was no privity of contract between the appellant and the respondents, the originating summons was for dismissal and proceeded to do so. The conclusion and the reasoning aggrieved the appellant who brings this appeal challenging it on the grounds that the finding on the non-existence of a trust was erroneous, the doctrines of privity of contract and *locus standi* were misapplied, and that it was an error to hold that **Section 31 (2)** of the Banking Act prohibited disclosure of information even pursuant to a court order yet **Article 35 (1)** of the Constitution entitled the appellant to get the information he sought from the 1st respondent.

In the written submissions the appellant maintains that even though he was not a party to the contract between the respondents *inter se*, he was nonetheless entitled to information held by the respondents in terms of **Articles 35 (1) (6) & 46 (1) (b)** of the Constitution. According to the appellant the question before the learned Judge was whether there was a trust created between the appellant and the 2nd and 3rd respondents and not whether there was a contractual relationship. In terms of **section 2** of the Trustees Act and on the authority of a Uganda case of **Semakula & Co. Advocates v Uganda Revenue Authority** (2012) UG COMNC 48, learned counsel for the appellant submitted that an advocate in the position of the 2nd and 3rd respondents have a fiduciary duty towards a client; any money held by an advocate on behalf of a client is held in trust. Funds held in a client's account constitute a trust, and therefore, pursuant to **section 57** of the Trustee Act the appellant was entitled to obtain an order for any of the things stipulated in that section. For these reasons, learned counsel submitted that the learned Judge erred by holding that no trust relationship existed and that the appellant had no *locus standi* to bring and prosecute the originating summons. Instead the learned Judge proceeded to determine the application as if the claim was based on the law of contract.

Regarding the appellant's right to information it was submitted that although **section 31(2)** of the Banking Act prohibits the disclosure to third parties of information in respect of an account, there is no such prohibition if the disclosure is pursuant to an order of the court. In any case such disclosure is a constitutional right.

In response the 1st respondent through written submissions, which were adopted by the 2nd respondent, argued that the appellant's claim was based on the law of contract since the joint bank account was created through a contract between the bank and the 2nd and 3rd respondents. To this arrangement the appellant was not a party and could not claim under it. The doctrines of privity of contract and *locus standi* were properly applied, they maintained. In support of this argument counsel urged the Court to apply the holdings in **William Muthee Muthami v Bank of Baroda** Civil Appeal No.21 of 2006 and **Aineah Liluyani Njirah v Aga Khan Health Services** Civil Application No.194 of 2009, both of which considered the application of the doctrine of privity of contract and its exceptions. They concluded that the appellant failed to bring himself within any of the exceptions, even after the 1st respondent's account opening form gave the appellant and the 2nd and 3rd respondents a chance to indicate the "*reason for opening*" the account, and nothing would have been easier than to state in that form that the account was for the appellant's benefit. It was further contended that a trust cannot be legitimately imported into a contract when parties have not expressed such as their intention. Instead the reason proffered in the form was "*direct marketing.*"

It was argued finally that the 2nd and 3rd respondents having denied undertaking to negotiate a rate on behalf of the appellant there was no basis of the claim, and that having worked out the rate of interest (1%) based on the statement of the joint account it was unnecessary to urge the court to furnish that very information; that with over 10,000 joint account holders, the prayer to supply to the appellant rates applicable to all of them was not in good faith.

The appeal relates to an advocate/client relationship created by an order directing decretal sum to be invested in an interest-earning account in the names of the advocates for the parties. Advocates in addition to being professionals, are officers of the court and play a vital role in the administration of justice. In our legal system, the advocate/client relationship has long been recognized as fiduciary relationship in which the client places his or her confidence, faith, reliance and trust in the advocate, whose aid, advice, opinion or protection is sought from time to time. The client gives the advocate significant amount of control over the matter in which the brief relates. With this relationship comes certain duties and responsibilities on the advocate. These duties and responsibilities are provided for in the statute and the rules of conduct as we demonstrate below. The sets of **rules** that govern the advocates' professional conduct arise out of the duty that they owe to the court, their clients, and fellow advocates. **Section 80** of the Advocates Act stresses the advocate's duty to a client;

“80. Betrayal of trust

Any person who, being an advocate, is entrusted in his professional capacity with any money, valuable security or other property to retain it in safe custody with instructions to pay or apply it for any purpose in connection with his duty as an advocate fails to pay, apply or account for the same after due completion of the purpose for which it was given, shall be guilty of an offence:”

In addition, the **Advocates (Accounts) Rules and the Advocates (Deposit Interest) Rules** draw the permissible limits of dealings with funds received on behalf of and for the benefit of a client. The foregoing emphasises that an advocate must at all times act in the best interest of his client; that where he is required to invest he must do so prudently and avoid obvious risks and; that failure to account for funds held by an advocate on behalf of a client is in fact a criminal offence.

The appellant took out originating summons pursuant to **Article 35(1) (B)** of the Constitution and **Order 37 rule I** of the Civil Procedure Rules. In view of what has been said by courts regarding the procedure and purpose of originating summons, we think the invocation of **Article 35** was not properly informed by those decisions, that originating summons procedure is designed for summary, and *ad hoc* determination of simple points of law or for the obtaining specific directions of the court. See **Kibutiri v Kibutiri** (1983) KLR1. As regards enforcement of constitutional rights and freedoms, Article 22(3) of the Constitution requires the Chief Justice to make rules regulating the enforcement procedure. Pursuant to that power the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 have been made. Those rules prescribe an enforcement procedure informed by the special need for particularity and focus necessary in litigating violation of constitutional rights and freedoms. The summary procedure of originating summons is singularly unsuited for that purpose.

Apart from the list of who and in what situation originating summons may be taken out, **Order 52 rule 4** of the Civil Procedure Rules also allows a client to take out originating summons for such orders as to the delivery by an advocate of a clients' cash account, money or securities which an advocate may have in his possession or control on behalf of a client.

In the originating summons the appellant sought answers to specific questions as already set out earlier. To paraphrase, he sought, first, to know whether the 2nd and 3rd respondents held the joint account in trust for him. When a court grants a conditional stay under **Order 42 rule 6(2) (b)** of the Civil Procedure Rules and directs that funds be invested in an interest-earning joint account, such a deposit simply constitutes security for the due performance of the decree or order as may ultimately be binding on the party who has applied for stay. Security is required to obviate any form of loss to either side of the dispute. As a security the funds are not at the disposal or in possession of any of the parties or their

counsel who may be the signatories and any dealings with such funds can only be by an order of the court. Depending on the outcome of the appeal the funds may be paid out to either party. In contrast with conditional orders of stay directing decretal sums to be paid into court, deposits in a bank earn interest, so that should the applicant succeed there will be some returns on his money. Likewise the returns on investment will augment any interest that may be awarded.

There are two aspects to the investment of the Kshs.6,000,000/= into an interest-earning account in the joint names of both counsel. By directing both counsel to be the only signatories to the account the court was not creating a trust but merely providing a safeguard for the funds. Secondly, by signing the account opening form, the two advocates bound themselves, in a contractual sense to the terms of the account. For instance, pursuant to the order of the court, counsel bound themselves to open an interest-earning fixed deposit account, with a mandate that any transaction in relation to the account could only be by the two account holders signing. There were, in addition a raft of general terms and conditions governing banking with the 1st respondent, which were annexed to the form. So that, even if the question was whether there was a trust, that question could not be determined in isolation of the terms of the contract between the 2nd and 3rd respondents and the 1st respondent. The learned Judge did not, therefore misdirect herself in considering and finding that there was no privity of contract between the 1st respondent and the appellant. Even though the learned Judge completely omitted to consider the issue of trust, on our own evaluation of the pleadings and evidence, we find, in the circumstances of this case, that no trust was created by the order directing the 2nd and 3rd respondents to open an interest-earning account in their joint names. Their duty was to the court and not the parties. That is why when the appellant failed to deposit the funds within the time ordered, an application had to be made to the court to enlarge time for doing so. These funds are distinguishable from client's funds in the hands of an advocate governed by the Advocates Act and to which **Orders 37 and 52** aforesaid relate.

On the face of it, the account opening form, related only to the 2nd and 3rd respondents. A third party looking at it could not tell that it was opened pursuant to an order of the court or even that it was meant to safe guard the interest of the parties to a dispute. The reason or purpose for opening the account was simply indicated in the form as “*direct marketing.*”

Having found, like the learned Judge, that there was no privity of contract and that the appellant had failed to bring himself within the exceptions to the rule on privity of contract, we turn to consider the second issue, whether the appellant was entitled to 17% interest per annum. On this question we are only concerned with the role of the 2nd respondent. The appellant averred in the affidavit in support of the originating summons that upon the granting by the High Court of a conditional order of stay he engaged the 2nd respondent;

“6...to negotiate with whatever bank they intended to deposit the decretal sum at a good interest rate...”

7...I transferred all the monies....to the account opened with the 1st respondent on the 1st respondent's representation that I would get a good interest.

8...the 1st respondent had promised me that the interest would not be less than 17%”

The alleged assurance over the rate of 17% by either the 1st or the 2nd respondents has been denied. As we understand it, the rate of interest is usually negotiated between the bank and the client, depending on such condition as the amount to be deposited and the duration of the deposit, so that a client who deposits 1 million for a month may not get the same interest as one who deposits 100 million for 6 months. As far as liability of the bank is concerned **section 82** of the Advocates Act, in our view, provides the answer. It states:

“82. Relief to banks

(1) Subject to this section, no bank shall, in connection with any transaction on any

amount of any advocate kept with it or with any other bank (other than an account kept by an advocate as trustee for a specified beneficiary) incur any liability or be under any obligation to make an inquiry, or be deemed to have any knowledge of any right of any person to any money paid or credited to any such account which it would not incur or be

under or be deemed to have in the case of an account: kept by a person entitled absolutely to all the money paid or credited to it.

Provided that nothing in this subsection shall relieve a bank from any liability or obligation to which it would be subject apart from this Act”

Without the knowledge that the deposit was for the benefit of any party the 1st respondent cannot be liable to any of the parties claiming interest in the funds.

This partially takes care of the next questions in the originating summons seeking a disclosure on how the interest rate of 1% was arrived at, and the demand for details of other similar accounts. The question is based on the provisions of **Articles 35** of the Constitution.

A part from what we have already said regarding raising such a contentious and complex question in an originating summons, we do not see how this Article is relevant to the type of information sought from the 1st respondent but more significantly the 1st respondent is protected, indeed prohibited by **section 31(2)** of the Banking Act from disclosing or publishing any information in its possession except as provided by the Act. With respect, it appears to us that the appellant was on a fishing expedition when he invoked **Articles 35** of the Constitution to get information relating to other clients of the 1st respondent on the interest rates that they had secured for themselves. The applicant had no legitimate interest in being availed other clients’ information held by the 1st respondent. In appropriate cases, however by an order of the court, relevant information may be disclosed. In this case the omnibus information regarding details of accounts of strangers was not only unreasonable but also unrealistic and the learned Judge properly dismissed the prayer.

This appeal, for all these reasons lacks merit and is accordingly dismissed with cost to the respondents.

Dated and delivered at Malindi this 30th day of October, 2015

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M’INOTI

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR