



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, OKWENGU & G. B. M. KARIUKI, J.J.A.

CIVIL APPEAL NO. 36 OF 2012

BETWEEN

JOSEPH NDIRANGU WAWERU

T/A MOORELAND MERCANTILE CO.1ST APPELLANT

HILLWORKS FURNITURE LTD.....2ND APPELLANT

AND

CITY COUNCIL OF NAIROBI.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi

(Mugo, J) dated 29th January, 2007

in

HCCC NO. 1323 OF 1993)

JUDGMENT OF THE COURT

The suit giving rise to this appeal was initiated before the High Court of Kenya at Nairobi by way of the plaint dated 19th March 1993. In the plaint, the plaintiffs who are the appellants in this appeal, claimed as against the respondent herein general damages; Ksh 29,064,011 as special damages; interest on both and costs of the suit.

The respondent denied the claim, and thereafter, the appellants filed the application dated 19th September, 1995 under the then **Order VI Rule 3(6)** requesting for further and better particulars from the respondent, after several letters requesting for particulars fell on deaf ears. The application was heard by Aganyanya J (as he then was), who, on 14th February 1996 ordered the respondent to serve the appellants with the said particulars within 45 days of service of the said order.

There was no compliance with the order and so the appellants moved to court again this time by way of chamber summons dated 25th April 1996. In the application, the appellants entreated the court to strike

out the defence, and enter judgment in their favour, the respondent having failed to comply with the court order to supply the particulars to the appellant.

The application was heard by Mbogholi J, who in his ruling rendered on 18th March 1997 found in favour of the appellants, struck out the respondent's defence, and also entered judgment for the appellants "as prayed in the plaint".

Following the ruling, the Court issued the preliminary decree dated 18th April 2005, which in part provided for payment of:-

1. Principal amount of Ksh 29,064.011.00
2. Interest thereon at the rate of 12% pa from 19th March 1993 to 18th March 1997 Ksh. 13,950,725.30 (totaling Ksh. 43,014,736.30)
3. Costs of the suit to be taxed by the taxing office.

The deputy Registrar of the Court then set down the matter for formal proof in respect of the claim for general damages.

In the meantime, the respondent proceeded to settle the amount as drawn in the preliminary decree, to the tune of Ksh. 55,000,000.00. Counsel for the respondent filed a notice of preliminary objection in limine to the formal proof, which preliminary objection was heard and dismissed by Ojwang, J (as he then was) on 3rd February, 2006. The learned Judge ordered the deputy Registrar to fix the formal proof for hearing on priority basis before a Judge in the Civil Division of the High Court.

The formal proof hearing proceeded before Mugo, J after an application by Mr. Njagi seeking recusal of the Judge from the matter was dismissed. After hearing the parties and considering the written submissions filed by their respective counsel, the learned Judge rendered the judgment dated 29th January 2007 which is now the subject of this appeal.

In her judgment, the learned Judge made the following finding inter alia:-

"I am of the view that the execution of the decree by payment of Ksh. 55,000,000.00/= and above was premature and illegal since the issue of whether the plaintiffs were entitled to payment could not be determined prior to the conclusion of the formal proof....."

.... This being the case, I am of the view that the execution of the decree by payment of Ksh. 55,000,000.00/= and above was premature and illegal."

The learned Judge invoking what she said was the Courts inherent power and jurisdiction under **Section 3A of the Civil Procedure Act** dismissed the appellants' suit with costs and further set aside the judgment entered on 18th March 1997 along with the resultant preliminary decree. She further ordered the appellants to refund the Ksh. 55,000,000/= paid to them by the respondent.

Those were the orders that triggered this appeal in which the appellants have proffered seven grounds as hereunder:-

- (1) *The learned Judge erred on a matter of law and fact in that she granted a judgment that was neither pleaded nor canvassed by the respondent or the parties.*
- (2) *The learned Judge erred on a matter of law by sitting on appeal or setting aside a judgment by a court that had equal powers/jurisdiction.*
- (3) *The Judge erred in failing to grant the damages sought when the same were actually proved by*

way of evidence.

(4) *The Judge erred in fact and law in concluding that a preliminary judgment could be set aside after it had been executed and erred in concluding that execution or satisfaction of the decree was illegal and that the same was subject to proof when the same was for specific amount.*

(5) *The learned Judge lacked the jurisdiction and legal authority to order refund of Kshs. 55 million to the respondent on the assumption of underhand dealings or corruption at the respondent's offices.*

(6) *The learned Judge erred on a matter of law and fact in assuming she had a constitutional or public duty to canvas for and reward the respondent a sum neither sought by the respondent not shown to be due to the respondent from either pleadis evidence or equitably.*

(7) *The judgment of the learned Judge is against the law and evidence before the court.*

The appellants have now moved this Court for the following prayers:-

a. *The appeal be allowed.*

b. *Judgment and Order aforesaid be set aside.*

c. *Judgment be substituted with an order setting aside the said judgment and/or retrial for assessment of damages.*

d. *Costs of this appeal and the court below.*

When the appeal came up for hearing before us, learned counsel Mr. Kibathi held brief for Mr Muthaura Kiome for the appellant, while Mr. Njagi Wanjeru represented the respondent. Mr. Kibathi urged the grounds of appeal together. We can compartmentalise his arguments into two.

First was the question as to whether a Judge can set aside a valid judgment of another Judge of concurrent jurisdiction; or whether a Judge can sit on appeal on a judgment of a Judge of concurrent jurisdiction.

Second, whether the learned Judge was in order to *suo muto* give orders for the refund of the decretal amount which had already been paid, even in the absence of any complaint from the respondent.

On the first issue, he called in aid this Court's decision in **Civil Appeal No. 90 of 2005, Stephen Mwaura Njuguna vs Douglas Kamau Ngotho** consolidated with **Civil Appeal No. 247 of 2007**, where the Court held,

“the learned Judge had no jurisdiction to determine a matter that was decided by a fellow Judge of concurrent jurisdiction. He could not for instance set aside a judgment of Muga Apondi J, a Judge who has the same jurisdiction as himself. Such setting aside could only be by an appellate court but not by a Judge of the High Court as the appellant sought.”

Learned counsel therefore, urged us to allow the appeal as the impugned decision was made without jurisdiction. He also reiterated the other prayers as espoused in the memorandum of appeal.

Opposing the appeal, Mr. Wanjeru submitted that *“the Judge did not set aside the preliminary decree”*, but only found that the preliminary decree had not been proved.

We do not however agree with Mr. Wanjeru on that point given the very vivid and unambiguous language used by the learned Judge in her judgment on this issue. She said;

“accordingly, the judgment entered on 18th March, 1997 and the Preliminary Decree are hereby

set aside.”

She then went further and gave an order for a refund of the money already paid to the appellants. Mr. Wanjeru’s argument was that the learned Judge did in fact have jurisdiction to interfere with the preliminary decree. He relied on this Court’s decision in **Civil Appeal No. 52 of 2005, Highway Furniture Mart Ltd vs The Permanent Secretary Office of The President & Attorney General**.

In the above case, Okwengu, J (*as she then was*) had set aside a decree which had been drawn by the Registrar of the Court, but which decree was not in conformity with the judgment of Juma, J.

The court in that case concluded that:-

“The superior court had a duty to see that the appellant only recovered what it was entitled to under the judgment and had jurisdiction to set aside the decree which was a nullity ex debito justitiae...”

We have come to the conclusion that the superior court has inherent jurisdiction to set aside a decree which was a nullity.”

We have considered the record before us and the proceedings before the superior Court as analysed above. The gravamen of this appeal is really whether Mugo, J had the jurisdiction to set aside the judgment of Mbogholi, J, and the resultant preliminary decree. The answer to this lies in the two decisions of this Court relied on by the parties. If we can start with the Highway Furniture Mart Case, (*supra*) it is clear that the Court was dealing with a totally different situation.

Okwengu J did not in any way interfere with the judgment of her brother Judge. All she did was to correct a situation where the decree failed to accord with the judgment in clear contravention of the then **Order XX Rule 6(I)**.

The court pronounced itself very succinctly on this issue when it stated:-

“It is not correct to say that the learned Judge sat on appeal against the judgment of Juma J, for Okwengu, J did not find any error in the judgment and left in intact.”

The Court went further to state:-

“A decree which is not in conformity with the judgment is liable to be reversed and set aside for a party to the suit cannot suffer because of the errors committed by the court. The court would however, be functus officio if the decree conforms with the judgment...” (Emphasis supplied)

In our view, this pronouncement does not aid the respondent’s case at all. The judgment of Mbogholi, J had not been challenged; a compliant decree had been drawn and had been complied with. The respondent had not complained at all. Nor had it appealed against the judgment of Mbogholi J, which gave rise to the said decree. The learned Judge in our view, a position that is bolstered by the two authorities relied on by the parties herein, had no jurisdiction whatsoever to set aside the judgment of Mbogholi J, which was a proper, regular judgment rendered by a court of competent jurisdiction.

The preliminary decree emanating from the said judgment was compliant with the judgment, and the same had not been impugned by either party. The learned Judge had in our view no jurisdiction whatsoever to interfere with either the judgment of Mbogholi, J or the preliminary decree.

We reiterate this Court’s findings in the Stephen Mwaura Njuguna case (*supra*) that a Judge has no jurisdiction to re-hear and interfere with a decision in a matter that was decided by a fellow Judge of concurrent jurisdiction. If the respondent was aggrieved by the ruling and preliminary decree, its recourse was in appealing against the same. We also observe that indeed, the issue of the preliminary decree was in fact not before the honourable Judge, nor was the issue of the claim for special damages. Special damages

as pleaded amounted to a liquidated claim and was not therefore subject to reagitation and proof along with the general damages. The matter before Mugo J was to hear and determine if the claim for general damages could be proved.

Formal proof was strictly in respect of the claim for general damages and not for the entire claim, the claim for special damages having been disposed off at the preliminary stage. The learned Judge was in error in assuming jurisdiction where she had none and setting aside a proper, regular judgment of a judge of concurrent jurisdiction where such jurisdiction was non-existent.

We need not say more. It is clear from the foregoing that this appeal has merit. We allow it with orders that the judgment of Mugo J is hereby set aside in its entirety. We also order that the appellants be at liberty to pursue their claim on general damages by way of formal proof before any other Judge of the High Court, other than Mugo J. We also award costs both in this Court and in the High Court to the appellants.

Dated and delivered at Nairobi this 11th day of December, 2015

W. KARANJA

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR