



IN THE COURT OF APPEAL

AT ELDORET

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

CIVIL APPEAL NO. 140 OF 2012

BETWEEN

DR. EVANS KIDERO APPELLANT

AND

ANDREW OMTATAH OKOITI & OYUGI NETO AGOSTINHO

**SUING AS REGISTERED Trustees of KENYA FOR JUSTICE DEVELOPMENT (KEJUDE)
TRUST & 29 OTHERS RESPONDENTS**

(Being an appeal from the Ruling and Order of the High Court of Kenya at Bungoma (A. O.

Muchelule, J) dated and delivered on 4th June, 2012 in

BUNGOMA H.C.C.P. NO. 1 OF 2012)

JUDGMENT OF THE COURT

1. By a constitutional petition dated 26th January 2012 Andrew Omtatah Okoiti and Oyugi Neto Agostinho as registered Trustees of Kenyans For Justice and Development (Kejude) Trust and 29 other persons petitioned the High Court of Kenya at Bungoma for numerous reliefs against the respondents including declarations that the Commissioner of Lands is required to safeguard public land; the property known as L. R. No. Bukhayo/Nasewa/1500 is public land and that dealings in it by Busia Sugar Company Limited, Mumias Sugar Company Limited or Kaplong Limited are irregular, null and void; the respondents, including the appellant who was named as the 9th respondent in the petition, have no legal or constitutional right to that property; an injunction to restrain the respondents from dealing with the property; and an order should issue directed at the Director of Public Prosecutions to investigate some of the respondents and also the appellant to determine whether they are criminally liable.

2. The petitioners, who are the respondents in this appeal averred that the Government of Kenya compulsorily acquired several parcels of land from members of the Busia community who were not adequately compensated with the intention of establishing Busia Sugar Factory; the parcels of land acquired from the community were consolidated into the property known as L. R. No. Bukhayo/Nasewa/1500 (the property); the property was wrongfully transferred to Busia Sugar Company Limited; the community was deceived that that Company was a state

corporation when in fact it was a private company; that through a host of dubious transactions in which Mumias Sugar Company Limited is implicated and over which the appellant presided, the property was charged to Mumias Sugar Company Limited for non-existent liabilities and ultimately sold in purported exercise of a chargee's statutory power of sale to Kaplong Limited. Specifically against the appellant, the petitioners averred that despite the fact that Busia Sugar Company Limited was not indebted to Mumias Sugar Company Limited, the appellant falsely represented that it was indebted to the extent of over Kshs. 119 million.

3. The petitioners contended that the respondent's actions and omissions violated numerous constitutional provisions and breached the respondent's fundamental rights.

4. In answer to the petition, Mumias Sugar Company Limited filed a replying affidavit on 13th February 2012 that was sworn on 10th February 2012 by the appellant as its managing director. In that affidavit, the appellant explained the genesis and nature of the relationship between Mumias Sugar Company Limited and Busia Sugar Company Limited. The appellant deposed that on account of acute liquidity problems Busia Sugar Company Limited was experiencing, it sought the assistance of Mumias Sugar Company Limited, which agreed to fund and manage cane development in Busia Sugar Company Limited; that at the request of Kenya Sugar Board, Mumias Sugar Company Limited incurred liabilities on behalf of Busia Sugar Company Limited which were secured by a charge over the property; Busia Sugar Company Limited was placed under receivership by Kenya Sugar Board pursuant to a debenture over the former's indebtedness relating to sugar development fund/loans extended by Kenya Sugar Board to Busia Sugar Company Limited; the receivership was later nullified by the court; when it became apparent that the recoverability of debt due to Mumias Sugar Company Limited from Busia Sugar Company Limited was in doubt, Mumias Sugar Company Limited resolved to sell the property in exercise of its power of sale under the charge; having obtained a valuation report as regards the current value of the property, Mumias Sugar Company Limited entered into an agreement for sale to sell the property to Kaplong Limited on 7th July 2011; the sale of the property by private treaty to Kaplong Limited was sanctioned by the court; that the court order sanctioning the sale is the subject of a civil suit in Bungoma High Court; and that all dealings between Busia Sugar Company Limited and Mumias Sugar Company Limited were open and above board. With the appellant on behalf of Mumias Sugar Company Limited prayed for the dismissal of the petition.

5. The appellant took the view that he was wrongly joined in the petition as no cause of action was disclosed in the petition against him. On 6th February 2012 the appellant presented a notice of motion to the High Court and sought an order for his name to be expunged from the proceedings and for the petitioners to be condemned to pay his costs for wrongly dragging him to court. In the grounds set out on the face of that application and supported by his affidavit, the appellant contended that the petitioners have not in the petition demonstrated any wrongs committed by the appellant in his private capacity; in his capacity as managing director of Mumias Sugar Company Limited, he cannot be liable for wrongs allegedly committed by the company which is a separate and distinct legal entity; there is no basis for his inclusion as a respondent in the matter; and that his inclusion in the matter was actuated by extreme malice on the part of the petitioners.

6. To further support and demonstrate that his inclusion in the petition as a respondent was actuated by malice, the appellant filed a further affidavit on 13th February 2012 in which he deposed that one of the petitioners, Andrew Omtatah Okoiti, had prior to filing the petition threatened "*to bring out the Nasewa land issue personally against*" him unless his request for intervention in the settlement of his claim that was pending in court arising from an accident involving his tractor and a vehicle belonging to Mumias Sugar Company Limited was settled on his terms.

7. In response, Andrew Omtatah Okoiti swore two replying affidavits on 16th March 2012 and 31st March 2012 respectively in which he deposed that the appellant is a necessary party in the petition; that some of the allegations and prayers in the petition are against the appellant personally; apart from the appellant being the managing director of Mumias Sugar Company Limited, the petitioners "*reasonably suspected that he abused his office and engaged in criminal activities which were meant for personal gain*" and that the court ought to hear the petition for its "*full, effective and final determination.*"

8. Regarding the claim that the petition was actuated by malice, Andrew Omtatah Okoiti set out in detail his dealings with the appellant after which he denied any malice in joining appellant in the petition.

9. After hearing the parties, the learned judge of the High Court dismissed the appellant's motion. It is against the background that the appellant complains that the learned judge of the High Court erred in dismissing his application and hence the appeal to this Court.

The appeal and submissions by counsel

10. The grounds on which the appellant has challenged the decision of the High Court as set out in the memorandum of appeal are that the judge based his decision on his own construction of the case instead of basing his decision on the evidence and the material placed before him through the appellant's responses to the petition; the judge did not appreciate the nature of the petition and the reliefs that were sought by the petitioners; the judge failed to distinguish between Mumias Sugar Company Limited and the appellant and erred in holding that the appellant was a necessary party to the petition; and that the learned judge erred in refusing to strike out the name of the appellant from the proceedings.

11. At the hearing of the application before us Professor T. Ojienda senior counsel appearing for the appellant submitted that the learned judge did not address the complaints raised in the application and submissions and in particular the consideration that Mumias Sugar Company Limited is a separate and distinct legal person from the appellant; complaints relating on the appellant touch on him qua managing director of the company and that he was joined in the petition without any basis; no basis was also laid in the petition for the reliefs or prayers directed at the appellant; the learned judge avoided dealing with the issues taken up by the appellant including the fact that the appellant, as a director, is in law separate from the company as stressed in **Bachoo Patel vs. Stanley George Wamutura [2010] eKLR** that followed the age old principle articulated in **Salomon vs. Salomon [1897] AC 78** where the House of Lords categorically stated that the company is in law a different person from its members.

12. Counsel for the appellant also referred us to the decision of this Court in **Victor Mabachi & Anor vs. Nurturn Bates Ltd [2013] eKLR** where this Court held that it is a breach of the principle of common law that where the principal is disclosed, the agent is not to be sued; in the present case, the principal Mumias Sugar Company Limited was disclosed and that its agent the appellant, its managing director could not therefore be sued; the prayer in the petition for the appellant to be investigated, being the only prayer that touches on the appellant, cannot be a basis for joining the appellant in the petition as nothing is shown to have been done by the appellant in any capacity other than that of the managing director of Mumias Sugar Company Limited.

Counsel concluded his arguments by referring us to numerous decisions of this Court that stand for the proposition that the allegations in the petition pertaining to alleged infringement of constitutional rights and breaches of human rights must not be generalized and must express with precision, the nature, manner and extent of the alleged violations.

13. Learned counsel Mr. Simiyu Makhoha stated that the 10th respondent is not affected.

14. Mr. C. Kanjama for the 1st to 30th respondents (excluding the 10th respondent) submitted that a person who commits a crime cannot purport to have done so on behalf of another person; the petitioners in this case are alleging that the appellant is involved in perjury and fraud in relation to the property; the appellant cannot in those circumstances claim agency as he acted in excess of his authority; specific complaints are made in the petition against the appellant in paragraphs 35,38,39,48 thereof and that prayers E, F and I touch on the appellant directly; the petitioners allege that perjury and other offences were committed by the appellant; this being a constitutional matter coming on appeal, this Court should adopt a liberal approach in light of Articles 22 and 23 of the Constitution; if the appellant's name is struck out from proceedings, some of the prayers sought by the petitioners will no longer be sustainable. It is therefore necessary that the appellant should remain a party in the petition.

15. According to Mr. Kanjama, the authorities cited are distinguishable; the authorities on the question of separate entity in particular do not apply to proceedings of a constitutional nature where each person is personally liable; the petition is specific on the complaints made and the prayers sought; and that the appellant should not be allowed to use a collateral attack to avoid ventilation of grave matters affecting many farmers. With that Mr. Kanjama asked us to dismiss the appeal.

Determination

16. We have considered this appeal and the submissions by learned counsel for the parties. The

order of the High Court appealed from was made in exercise of the court's discretion. For this Court to interfere with the exercise of that discretion, the appellant must satisfy us that the learned judge misdirected himself in some matter and as a result arrived at a wrong decision or it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice. In **Mbogo and Another v Shah [1968] EA 93**, Sir Clement De Lestang, V. -P of the predecessor of this Court had this to say on any challenge of the court's exercise of discretion:

"I think it is well settled that this Court will not interfere with the exercise of... discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

17. Has the appellant satisfied us that the learned judge was wrong in his approach? Although the appellant set out ten grounds of appeal, the substance of the complaints is that the learned judge failed to take into account that Mumias Sugar Company Limited that was named as the 6th respondent in the petition and the appellant who was the managing director of that company who was named as the 9th respondent in the petition are separate legal personalities. Related to that is the complaint hinged on decisions of this Court in **Anarita Karimi Njeru vs. R [1976-80] 1 KLR**

1272 as followed in **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** that the no specific allegations have been made against the appellant in the petition and that the requirement that constitutional petitions are to be pleaded with reasonable precision was breached.

18. The proposition put forward by counsel for the appellant that a company is a separate legal entity from its directors and shareholders is undoubtedly correct. There are many judicial pronouncements to that effect going back to **Salomon vs. Salomon & Co Ltd** (supra). In a recent decision of this Court in the case of **Victor Mabachi & Another vs. Nurtorn Bates Limited** (supra) this Court re-affirmed that principle when allowing an appeal from a decision of the High Court refusing to strike out the name of the appellant therein who was an agent of a disclosed principal.

19. We are not satisfied that the decision of the High Court goes against that established legal principle. In our view, the learned judge did not in his ruling say that the appellant is personally responsible for the actions or omissions of the Mumias Sugar Company Limited. What we understand the judge to have said when he ruled that "*the 9th Respondent is in my view a necessary party to the petition who has to account for the alleged violations, if at all....*" is that on the face of the petition a cause of action against the appellant was disclosed and that whether the allegations made against each of the respondents in the petition are sustainable is a matter for determination during the hearing of the petition. In that regard, this is what the learned judge said:

"Regarding the 9th Respondent, I get the petitioners to be saying that he was the main mover of the events that eventually led to the sale of the suit premises to the 8th Respondent, that he did this when he was privy to the information that the 6th Respondent was not owed any money by the 7th Respondent. Petitioners regard him to be the mover of the illegal consent that led to the sale of the suit premises.

All these allegations by the Petitioners against each Respondent, or all of them, will be subjected to inquiry during trial and will have to be proved. The 9th Respondent is arguing that whatever he did was on behalf of the 6th Respondent for whom he was working as the managing director, and he did nothing in his personal capacity. I consider this to be his defence which he will pursue during the main hearing. It is during that hearing that he will argue that whatever violations that may be proved against the

6th Respondent cannot attach to him as the two are separate and distinct legal

entities.”

20. We therefore reject the complaints that the learned judge of the High Court failed to make a distinction between the appellant and the 6th Respondent in the petition or that no specific allegations have been made against the appellant in the petition.

21. The complaint that the remedies sought against the appellant in the petition are untenable is founded on the premise that there is no demonstration that the violations or wrongs allegedly done by the appellant were done in his private capacity. Having regard to the conclusion that we have reached that the appellant has not satisfied us that the learned judge of the High Court

wrongly exercised his discretion in refusing to strike out the name of the appellant, the question of whether the remedies sought are tenable or not will be a matter for determination by the High Court after hearing the petition.

22. The upshot is that the appellant has not demonstrated to us that the learned judge of the High Court misdirected himself with the result that he arrived at a wrong decision. It is also not manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion.

23. The result is that we dismiss this appeal with cost.

Dated and delivered at Eldoret this 10th day of October, 2014.

R. N. NAMBUYE

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JUDGE OF APPEAL

D. K. MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR