



FNH v Housing Finance Company of Kenya Limited & another (Petition 46 of 2019) [2020] KESC 21 (KLR) (4 September 2020) (Ruling)

FNH v Housing Finance Company of Kenya Limited & another [2020] eKLR

Neutral citation: [2020] KESC 21 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

PETITION 46 OF 2019

**DK MARAGA, CJ & P, PM MWILU, DCJ & V-P, MK
IBRAHIM, SC WANJALA & NS NDUNGU, SCJJ**

SEPTEMBER 4, 2020

BETWEEN

FNH APPLICANT

AND

HOUSING FINANCE COMPANY OF KENYA LIMITED 1ST RESPONDENT

WATTS ENTERPRISES LIMITED 2ND RESPONDENT

(Being an application on the Representation of the Applicant pending Civil Appeal No. 31 of 2016 as consolidated with Civil Appeal No. 32 of 2016 (Koome, Okwengu and Kantai JJA))

Supreme Court lacks the jurisdiction to determine novel issues introduced via an appeal

The applicant sought determination of the status of representation by counsel in a cause pending before the Supreme Court. The Supreme Court held that it lacked the jurisdiction to determine novel issues introduced via an appeal.

Reported by Ribia John

Civil practice and Procedure – appeals – appeals to the Supreme Court – appeal to the Supreme Court as of right in a case involving the interpretation of the constitution – Supreme Court’s jurisdiction where a novel issue was introduced - whether the Supreme Court had the jurisdiction to determine a novel issue on appeal where the said issue had not progressed through the normal appellate mechanisms – Constitution of Kenya, 2010 article 163(4)(a).

Brief facts

The applicant sought determination of the status of representation by counsel in a cause pending before the Supreme Court. The appellant had donated a power of attorney to an advocate who represented the appellant in the High Court and in the Court of Appeal.

While the matter was pending in the Supreme Court the respondents approached the appellant directly with a settlement offer. Having being troubled with the protracted litigation process, the appellant sought the



services of a new advocate and later signed the deed of settlement and on the same day she wrote to her previous advocate and terminated the power of attorney and the advocate's services. The donee of the power of attorney filed the instant application seeking to continue litigating the matter in the Supreme Court on grounds that the revocation of the power of attorney was null and void.

Issues

- i. Whether the Supreme Court had the jurisdiction to determine a novel issue on appeal where the said issue had not progressed through the normal appellate mechanisms.

Held

1. An appeal to the Supreme Court had to originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. An appellant had to be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party had to be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it could not support a further appeal to the Supreme Court under the provisions of article 163(4)(a).
2. The gravamen of the instant matter was a dispute on representation. Neither the High Court nor the Court of Appeal delved into the issues of representation. It was a novel issue that was coming before the instant court for the very first time and was yet to progress through the normal appellate mechanism, so as to reach the Supreme Court in proper form. The Supreme Court lacked the requisite jurisdiction to entertain the instant application.

Application dismissed; applicant bore the costs.

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

1. This is a Notice of Motion Application dated 23rd December 2019, and filed on the 23rd of January 2020, where the Applicant, the firm of Taib A. Taib seeks determination of the status of representation by counsel in a cause pending before this court. The proceedings at this stage, therefore, only concern the preliminary question of representation.
2. The Applicant herein, FNH, was the registered proprietor of 'the suit property' L.R. No ***** - a residential house situated within Runda Estate Nairobi.
3. On 23rd February 2003, the Applicant drafted and executed a Power of Attorney appointing Sharok Kher Mohamed Ali Hirji as his legal representative. in relation to the suit property, which power of attorney was filed with the Register of Powers of Attorney on the 17th of March 2003 as No. P/A 37723/1.
4. It is by virtue of the said Power of Attorney that Sharok Kher Mohamed Ali Hirji had the authority to act for and on behalf of the Applicant and Original Respondent in High Court Civil Case No. 226 of 2003 and in Civil Appeal No. 31 of 2016 as consolidated with Civil Appeal No. 32 of 2016.



5. The Application is opposed by Sharok Kher Mohammed Ali Hirji, (the donee of the said power of Attorney) who filed a Replying Affidavit, drawn and filed by her Advocate Eric Mutua, and dated 27th of February 2020.
6. It is her evidence that she was married to the Applicant from 17th April 1978 to 28th December 1999, when a divorce was granted by the Kadhis Court in Divorce Cause No. 31 of 1994, and that during the said marriage, they jointly acquired several properties including the suit property.
7. She states that in as far as the Power of Attorney creates an agency relationship, she has exercised her donated power and discretion in good faith and in the best interest of both F and herself.
8. She further avers that when the Petitioners herein had filed an appeal before this Court, she came to the realization that it was time to bring this long-winded litigation to an end and made a decision to directly engage the Appellants with a view to resolving the dispute out of court. She adds that she did not involve her advocate at the time, as he was opposed to the idea.
9. It is her evidence that when presented with a tentative agreement to settle the matter, she retained the services of Eric Mutua, an advocate to assist her in the proper interpretation of the document, and subsequently signed the Deed of Settlement dated 11th December 2019. Further, that on the same day, she formerly wrote to Mr. Taib Ali Taib terminating his services and informing him that she had resolved the matter with the Appellants.
10. She deposes that on 13th December 2019 her Advocate on record, Eric Mutua wrote to Taib A. Taib Advocates communicating to him the fact that a Petition and an urgent application for stay had been filed before this court. He sought to know whether her previous advocates had objection to their dealing with the mater at the Supreme Court. By a letter dated 16th December 2019 Mr. Taib Ali Taib responded to her, intimating that she had no capacity to instruct any Advocate in the matter. She avers that she was then informed that there was a revocation of the power of attorney that had been given to her to act in these proceedings.
11. She states that the purported Notice of Revocation of a Power of Attorney dated 16th December 2019 is an afterthought and of no consequence in view of the fact that the Deed of Settlement was executed on the 11th December 2019. Further that the said Notice of Revocation of a Power of Attorney is not registered under the Registration of Documents Act.
12. It is her evidence that that in view of her interest in the suit property, the Special Power of Attorney herein constitutes an irrevocable Power of Attorney in that respect; that in the premises, the purported revocation of the Power of Attorney is therefore null and void.

Applicant's Submissions.

13. On the other hand, the Applicant, in his submissions, states that on or about the month of December 2019, he got wind of the fact that his representative and donee of his power of attorney, Sharok Kher Mohamed Ali Hirji, had without consulting him attempted to negotiate and compromise the judgment and decretal amount obtained in High Court in HCCC No. 226 of 2003 and confirmed in Civil Appeal No. 31 of. 2016 as consolidated with Civil Appeal No. 32 of 2016, which amount, after adjusting for accumulated interest and cost, was in excess of Kshs. 2 Billion. He was duly informed by his advocate on record that the donee's actions were causing gross prejudice to the interest of the Applicant/Original Respondent and that he did not approve of the same.



14. He submits that it is the refusal to heed the instructions of the Principal and the Donor of the Power of Representation that led to the revocation of the power of Attorney and that the same was communicated to the Donee.
15. It is his case that in spite of the revocation, Sharok Kher Mohamed Ali Hirji continued to act as the Respondent in the above matter, appointed her own advocate and entered into negotiations with the Petitioners.
16. It is the Applicants case that vide a letter dated 11th December 2019 parties were informed that the Respondent was not party to the purported compromise or arrangement and that he did not consent to the same and nor did Sharok Kher Mohamed Ali Hirji have any authority to transact in the matter on behalf of the respondent in the manner contemplated or at all.
17. Citing Renom Agency Limited v Muthoga Gaturu & Company Advocates & 3 others [2016] eKLR, it is his case that a representative cannot take over and supersede the Principal Litigant and exclude him from proceedings as Sharok Kher Mohamed Ali Hirji purports to do. The representative acts only on behalf and in the name of the donor of the Power of Attorney and by his authority.
18. He submits that the Power of Attorney is not irrevocable, that it clearly provided for its termination and revocation at Clause 5, where it stated that the Power of Attorney "may be revoked in any time by notice in writing served by me upon the said Attorney appointed...", He urged that the Power of Attorney as drawn up had no valuable consideration nor was it coupled with any interest, therefore, the same cannot be argued to be an instrument conveying interest in the property and subject matter of the suit to the Donee.
19. It is his submission that even where Sharok Kher Mohamed Ali Hirji derived her authority, power and or agency to act in this matter from the Power of Attorney No. PIA 37723/1, she has no interest whatsoever in the property known as L.R. No. NBI/7785 310Runda- 10 Grove, Runda Estate and was not the registered proprietor of the said property. Therefore, following the revocation of the Power of Attorney she ceased to have any authority, power and or agency to act in this matter.

1st and 2nd Respondents Case

20. The 1st and 2nd Respondent filed grounds of opposition and written submissions on 5th of March 2020.
21. It is their case that such a dispute has nothing to with the substantive appeal at all, neither can it be termed as interlocutory as provided under rule 23 of the Supreme Court Rules.
22. They submit that pursuant to the power of attorney given to Sharok, the Applicant cannot now try to undo what had already been done with the power before its purported revocation. Further, that even if Sharok were to be substituted, there is nothing to take over as the matter has been resolved by the deed of settlement, before the purported revocation.
23. It is their submission that should F have an issue with the settlement, he ought to sue Sharok in separate proceedings in which Housing Finance Kenya ought not to be party to. This, they state, is because the power of attorney has to be considered as part of a wider concept of the law relating to principal – agent relationships, as well as the limits of those relationships. It therefore will be a matter of fact and not law to determine what authority the agent in this case has to bind the principal.
24. They submit that until the Applicant is substituted as the Respondent following an application for that purpose, and there is none is before this court, he remains a stranger both to these proceedings, and those in the High Court and Court of Appeal.



Analysis

25. From a reading of the case above, it is apparent that the gravamen of the matter is a dispute on representation.
26. But before we can delve into the issue, at the very onset, it is important to ascertain if this court has the requisite jurisdiction to determine the question as to the legal representation and validity of the power of attorney of the parties before the court.
27. The appellate jurisdiction of this Court is rightly captured in Article 163(4) of the Constitution of Kenya which states as follows:
- “(4) Appeals shall lie from the Court of Appeal to the Supreme Court –
- i. As of right in any case involving the interpretation or application of this Constitution; and
- ii. In any other case in which the Supreme Court, or Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)
- (5) A certification by the Court of Appeal under clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned.”
28. Apart from the foregoing constitutional and legal provisions, this Court has ceaselessly stipulated the boundaries of its jurisdiction under Article 163(4)(a) of the Constitution in several decisions, which decisions are still applicable. In the Lawrence Nduttu case, a two-Judge Bench of this Court (Tunoi and Wanjala SCJJ) set the guiding principles as follows:
- 28: “The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4) (a).”
29. Further, in the Hassan Joho Case this Court observed as follows:
- 37: “In light of the foregoing, the test that remains, to evaluate the jurisdictional standing of this Court in handling this appeal, is whether the appeal raises a question of constitutional interpretation or application, and whether the same has been canvassed in the Superior Courts and has progressed through the normal appellate mechanism so as to reach this Court by way of an appeal, as contemplated under
- Article 163(4)(a) of the Constitution...” [emphasis added].
30. In this matter, a perusal of the record reveals that neither the High Court nor the Court of Appeal delved into the issues of representation. It is a novel issue that is coming before this court for the very



first time and is yet to progress through the normal appellate mechanism, so as to reach this Court in proper form. In light of this and of the principles cited in the case law above, this court lacks the requisite jurisdiction to entertain this application.

Orders

1. The application dated 23rd December 2019 is hereby dismissed;
2. The Applicants shall bear the costs of this application.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF SEPTEMBER, 2020

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D. MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

Registrar, Supreme Court of Kenya

