IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 132 OF 2014

BETWEEN

KENYA POWER & LIGHTING COMPANY LIMITED……..APPELLANT

AND

BENZENE HOLDINGS LIMITED t/a WYCO PAINTS…….RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Alnasir Visram, J.) dated 5th June 2008

in

H.C.C.C. No. 2139 of 1999)

CONSOLIDATED WITH

CIVIL APPEAL NO. 133 OF 2014

KENYA POWER & LIGHTING COMPANY LIMITED …… APPELLANT

AND

BENZENE HOLDINGS LIMITED t/a WYCO PAINTS ……..RESPONDENT

(Being an appeal from the Order and Ruling of the High Court of Kenya at Nairobi (Ali-Aroni, J.) dated 7th June, 2010

in

H.C.C.C. No. 2139 of 1999)

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JUDGMENT OF THE COURT

On 15th November, 1996 fire broke out and burnt down the respondent's premises in Industrial Area, Nairobi County where it was engaged in the business of manufacturing paint. The fire was blamed on the negligence of the appellant, the Kenya Power and Lighting Company Limited, who were subsequently sued for damages in the sum of Kshs.6,013,226. On its part the respondent denied the particulars of negligence and instead attributed the fire outbreak to the respondent's failure to adhere to safety precautions in view of the nature of its business.

At the trial before **Visram, J**., as he then was, both sides called expert witnesses on the probable cause of the fire, at the conclusion of which the learned Judge accepted the respondent's evidence that the fire was caused by an electric power surge, resulting in the emission of sparks before igniting the fire. On the other hand he dismissed the contention by the appellant that the chemical substance used in the manufacture of paint was responsible for the fire outbreak. In the end he entered judgment in favour of the respondent and awarded it damages in the sum of Kshs.6,028,226, costs and interest. Aggrieved by this decision the appellant filed Civil Appeal No.132 of 2014 to challenge it in this Court.

In the meantime, within seven days of the impugned decision, the appellant took out a motion pursuant to section 3A of the Civil Procedure Act for orders that the proceedings and the aforesaid judgment be set aside; that the respondent's suit be struck out because the appellant had discovered that the matter proceeded when the respondent had in fact been dissolved and struck off the register of companies; that, on that score it had no capacity to participate in the proceedings; and that the judgment was rendered in complete disregard to this fact.

The application was argued before **Ali-Aroni J.**, who in a terse ruling faulted the appellant for invoking the court's inherent powers under section 3A aforesaid when the application was in fact one for review under **order 44** of the revoked Civil Procedure Rules. In dismissing the application she concluded that;

"An applicant cannot, where there is a specific Order and Rule apply this general Rule as to do so will be throwing the Rules of procedure out of the window. Rules of procedure should as much as possible be adhered to."

Once again the appellant was aggrieved and lodged Civil Appeal No 133 of 2014. The two appeals were listed before us on the same day and by consent the appeals were consolidated. Whereas the first appeal challenges the substantive finding on the cause of the fire, the second one challenges the exercise by the learned Judge of judicial discretion.

It is our view that should the appeal challenging the dismissal of the appellant's application to set aside the judgment succeed, the latter appeal would be rendered moot. In other words, should we find that the learned Judge ought to have set aside the proceedings and judgment and to have struck out the suit then no purpose would be served in considering the substantive appeal. For this reason we start with the appeal challenging the decision of **Ali-Aroni, J**.

The appeal has been brought on the grounds that the learned Judge erred in insisting that the appellant ought to have applied for review and not to have invoked **Section 3A** of the Civil Procedure

Act for orders of setting aside; that she erred in finding that the aforesaid section 3A had no application; and that she failed to appreciate that the judgment disregarded the fact that the respondent was not in existence at the time of the proceedings.

The appeal was canvassed through written submissions which were highlighted before us. According to the appellant, after the respondent brought the action against it, the latter voluntarily applied to the Registrar of Companies to be dissolved, and by a gazette notice of 24th October, 2003 it was dissolved upon expiration of 3 months from that date; that the respondent was definitely aware of this fact but did not disclose it, neither did it apply for its reinstatement; and that cognizant of this need the respondent petitioned the High Court in H.C.C.C NO.768 of 2008 for reinstatement.

The appellant relied on the cases of **Housing Finance Company of Kenya Ltd V Embakasi Youth Development Project**, **H.C.C.C. No. 1068 of 2001**, **Banque Internationale De Commerce De Petrograd V Goukassow (3) (1923) 2KB 682** and **Elijah Sikano and Another V Mara Conservancy & 5 Others H.C.C.C. No. 37 of 2013** in which the Courts restated the law to the effect that only a juristic person can sue and be sued; that a non-existent entity or person cannot maintain a court action; that once this fact is brought to the attention of the court, it cannot allow the action to proceed but must strike it out; and that it amounts to an abuse of the court process for a non-existent entity to consume judicial time and resources by purporting to participate in proceedings before it.

On the procedure, the appellant submitted that there being no express provision in the rules for an application to set aside a final judgment, it properly invoked the inherent jurisdiction of the court; that it was in error for the learned Judge to insist that the application was for review but camouflaged as one for the setting aside to circumvent the stringent conditions for the grant of the former.

For its part the respondent asked the question; if the respondent was non-existent then against who has the appeal been brought" It argued that the respondent was a holding company of WYCO Paints, an entity with sufficient legal capacity to sue; that, in actual fact the suit was brought by Jubilee Insurance Company Limited in the respondent’s name in exercise of its right of subrogation after settling the appellant's claim in respect of loss and damage to its premises by fire; that the appellant ought to have had notice of the fact of the dissolution of the respondent, having been gazetted on three separate occasions; that the appellant could not claim that this fact was not available at the time the action was brought or judgment entered. The respondent further contended that it was irregular for the appellant to anchor the application on the court's inherent power when in fact what it was seeking was covered by express provisions of the rules. For all these arguments and in support thereof the respondent cited **Mayers & Another V Akira Ranch Ltd (No. 2 (1972) EA 347, Jadva Karsan V Harnam Singh Bhogal (1953) 20 EACA 74** and **Meshallum Waweru Wanguku V Kamau Kania (1982 -88) 1 KAR 780.** We have considered these submissions and authorities. It is common ground

that by a gazette notice No 6818 of 12th August, 2004 the Registrar of Companies struck off the respondent from the register of companies with the result that it ceased to exist. It is equally not in dispute that it was the respondent itself that applied to be dissolved. That being so the issue before us is narrowed to whether the learned Judge improperly exercised her discretion in rejecting the appellant's application to set aside the judgment and to strike out the suit on account of the respondent’s lack of

capacity. It is today firmly settled that a judge's exercise of discretion can only be interfered with by an appellate court if the exercise of the discretion is clearly wrong on account of a misdirection or for acting on irrelevant matters as a result of which the court arrived at a wrong conclusion. See **Mbogo & Another V Shah** (1968) EA 93.

We must as a matter of necessity start with the question of the procedure. Apart from the provisions of order 10 rule 11, order 12 rule 7 and order 36 rule 10 of the Civil Procedure Rules, dealing with the setting aside of default judgments, the Civil Procedure Rules does not have a provision for the setting aside of the final judgment. A party aggrieved by a final judgment can either move the court under order 45 for a review of the resultant decree or by lodging an appeal in terms of order 42. To qualify for a review there are stringent requirements to be met. For instance the applicant must demonstrate that as a matter of right he can appeal but has not exercised that option; that no appeal lies from the decree with which he is dissatisfied; or that he has discovered a new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced when the order was made; or that there is a mistake or error apparent on the face of the record; or that there are sufficient reasons to warrant the review. It is also a requirement that the application for review must be brought without unreasonable delay. The appellant was categorical that the decision not to invoke this order was conscientious and deliberate, just as it was purposive to resort to the inherent powers of the court because all the appellant wanted was the setting aside the judgment on a specific ground that was not covered under the former order 44, namely the respondent's lack of capacity to maintain an action.

Section 3A of the Civil Procedure Act appears to have been introduced to augment the provisions of section 3, vesting in the courts inherent power to make any orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Of course this power has now been broadened by the introduction in 2009 of overriding objective in **sections 1A & 1B** and in 2010 by **Article 159** of the Constitution.

The extent of inherent powers of the court was eloquently explained by the authors of the **Halsbury's Laws of England, 4th Edn. Vol. 37 Para. 14** as follows;

"The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process … In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties

and to secure a fair trial between them." See also **Meshallum Waweru Wanguku** (supra)

This inherent jurisdiction is a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice.

It is situations like the one before us that call for the exercise of the inherent powers of the court. The respondent came to court to enforce an interest against the appellant and in the middle of such pursuit voluntarily applied to the Registrar of Companies to be dissolved. Its counsel did not disclose this fact throughout the trial. To draw an analogy, like deceased human being, the respondent continued pursuing the case from the spiritual world and even got a judgment over four years after its demise. By the time the trial commenced in September 2005 the respondent had ceased to exist one year prior to this date. The respondent was obliterated by the formal striking off of its name from the companies register. It did not take long for the respondent to realize the folly of its action to voluntarily dissolve when it had a pending claim in court. On 24th December, 2008, a few months after the judgment was given in its favour and an award of over Kshs.6 million made to it, the respondent petitioned the High Court pursuant to the provisions of section 339(6) of the Companies Act for restoration, specifically pleading that it did so on account of the judgment and that the appellant was intent on avoiding to satisfy the judgment on the ground that the respondent was dissolved and struck off the register.

It has been held consistently by the courts over the years that a company that has been dissolved cannot maintain an action and conversely that no action can be brought against it simply because it does not exist in the eyes of the law. This principle was emphasized as long ago as 1923 by Bankes L.J in **Banque Internationale De Commerce** (supra), which was subsequently in 1959 cited with approval by **Templeton, J** of then Supreme Court of Kenya in **Fort Hall Bakery Supply Co. V Fredrick Muigai Wangoe (1959) EA 474**, who said:

"The party seeking to maintain the action is in the eye of our law no party at all but a mere name only, with no legal existence…….. A

non-existent person cannot sue, and once the court is made aware that the plaintiff is non-existent, and therefore incapable of maintaining the action, it cannot allow the action to proceed……

Since a non- existent plaintiff can neither pay nor receive costs there can be no order as to costs".

That being the settled position of the law we cannot see the relevance of the arguments that the respondent was a holding company of WYCO Paints, when it is indicated only in the heading of the suit that it traded as WYCO Paints, without evidence whether WYCO Paints itself existed and in what form. The issue of subrogation was equally of no moment as the action was brought and prosecuted by the respondent itself.

In the circumstances we find merit in the appeal challenging the exercise of discretion by **Ali-Aroni, J** who clearly improperly exercised that discretion by considering irrelevant issues, insisting that the

application ought to have been brought under order 45 instead of section 3A. In the process she failed to consider the merit of the application and came to the wrong conclusion.

Accordingly this appeal succeeds and is allowed with no orders as to costs, as the respondent has no existence and can therefore neither pay nor receive costs. We substitute the order dismissing the application dated 12th August, 2008 with one allowing it with the effect that the respondent's suit stands struck out and proceedings as well as judgment are set aside. With that determination no purpose will be served to consider the grounds in relation to Civil Appeal No. 132 of 2014.

Dated and delivered at Nairobi this 25th day of November, 2016

ASIKE – MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR