REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL. NO.40 OF 2015

MICHAEL NDONGA MACUA T/A.....APPELANT

DONMACK PETROLEUM PRODUCTS

VERSUS

SHUSHILA A. KOHLI.....1ST RESPONDENT

NISHA KOHLI.....2ND RESPONDENT

(An appeal from the ruling of Hon. L. Komingoi Chief Magistrate dated 9th April 2015 in the Chief magistrate's court at Nakuru Civil Case no 690 of 2008)

JUDGMENT

1. This appeal is against the trial Magistrates Ruling dated 9th April 2015 in CMCC No 690 of 2008.

Proceedings for the day appear on page 150 the Record of Appeal.

I have considered the court record. The subject ruling did not arise from a mention, hearing or taking of directions for the day. It is a stand alone order, without support by either of the above.

No parties are stated to have been present to prompt the court to prepare the ruling. The applications dated 12th March 2015 and 30th July 2014 were not serialized for mention, directions or hearing although the extracted order indicates so. Proceedings before the court for the day did not touch on the two applications, subject of the impugned ruling.

2. The appellant was dissatisfied with the ruling leading to filing of this appeal.

The grounds for the appeal may be summarised to as herebelow

(1). Whether the parties were given a chance by the court, to be heard before the ruling dated 9th April 2015 was made and issue

(2). Whether the court acted within the law while dismissing the two applications when not conversed before her on the 9th April 2015 or on any other date.

3. The two applications, as I can discern from the court record were not fixed for hearing on the material date.

The application dated 30th July 2014 was filed by the appellant seeking an order for setting aside exparte orders of the court dated 11th April 2012, while the application dated 25th March 2015 sought orders for recusal of the trial magistrate from the matter.

Parties filed written submissions which they also highlighted.

4**. Issues that rise for determination in my view are**

(1). Whether the trial court acted within the law by dismissing the two applications without according the parties an opportunity to be heard.

(2). Whether the trial magistrate had the requisite pecuniary jurisdiction to entertain the matter before her.

5. On the 9th April 2015, all parties were represented by their advocates.

The matter for hearing was on issuance of prohibitory order. There being no objection from the respondents, the court rendered

"The prohibition order issued on the 9th July 2013 against any sale or dealings with Nakuru Municipality Block 8/63 is hereby discharged."

6. On the face, it appears to be a proper and lawful ruling.

However, it is stated to be in respect of the plaintiff's application dated 12th March 2015, and another dated 30th July 2014.

However, looking at the extracted order – page 138 Record of Appeal, it is evident, as stated that the matter came up for **mention**, to take hearing date for the application dated 12th March 2015 and for taking **directions** on the application dated 30th July 2014. The court, in the above circumstances, and in the absence of parties, rendered that

*"…. The court having reserved the matter so as to give directions while in the **absence of parties**, **it is hereby ordered…"***

7**. I need not proceed further**. I find and hold that

1. The ruling was delivered in the absence of parties,

2. The two applications were not listed for hearing, but for mention, and taking directions.

3. Without being heard, the trial court made a substantive finding and ruling that the two applications were frivolous and intended to cause annoyance.

4. Application dated 25th March 2015 seeking recusal of the magistrate from the matter is misplaced.

5. The applications were dismissed.

8. The appellant's complaints are clear and plain. They were not accorded a fair hearing, but condemned in absentia. The record speaks for itself.

The respondent in its submissions steered away from the issues.

Article 50 of the constitution gives all parties a right to fair trial, which in the circumstances of this appeal include, a right to present one's case before the court before the party is condemned.

9. In the **case FCS Ltd –s- Odhiambo & 9 Others (1987) KLR 182-188**, the court rendered, interalia:

"The rules of procedure carry into effect two objectives: first to translate into practice the rules of natural justice so that there are fair trials and the second, procedural arrangements whereby the steps of trial are carried out in good order within reasonable time…"

See also **Abaham Lenauia Lenkenu –vs- Charles Katekeyo Nakuru (2016) e KLR.**

Even when the court finds an application frivolous or an abuse of court process, it can do so only upon hearing the parties, but not in a summary manner, without either of them. This is but draconian.

10. In the present matter, the trial court's failure to accord the parties opportunity to be heard was unwarranted, and out of order. Applications for recusal of a judicial officer from hearing suits are made every now and then.

They cannot be wished away and dimissed without giving the applicant an opportunity to ventilate his grievances, leading to the said application.

Further, it is unprocedural to give substantive orders upon an application on a mention date or, like in this matter, when it is scheduled for directions, in the parties' absence. It is important to note that a case, application or mention belong to the parties, not to the court. A court cannot give such in the absence of the parties. The court is only an arbiter.

11. I need not go to the matters before the impugned ruling was delivered. Even if the matters raised by the applicant/appellants had been finalised as submitted by the Respondent, the court was under an obligation to list the applications for hearing upon which such issues could have been stated and settled.

That said, I come to a finding that the trial court erred in law and fact in dismissing the two applications by its ruling dated the 9th April 2015. Consequently,

I allow the appeal, and proceed to set aside the ruling of the trial magistrate dated the 9th April 2015. The Appeal is thus allowed, with no orders as to costs.

12. Arising from the above, I order and direct that the trial court file, Nakuru CMCC NO.690 of 2008 be taken back to the Chief Magistrates Court, to be heard by a magistrate with pecuniary jurisdiction, in excess of Kshs.6,000,000/=, and in particular the Appellant's application dated the 30th July 2014. The application dated the 25th March 2015 has been overtaken by events.

There shall be no orders as to costs on this appeal.

Orders accordingly.

Delivered signed and dated at Nakuru this 20th Day of February 2020.

J.N. MULWA

JUDGE