



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 428 OF 2014

UAP INSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

WASHINGTON GATURA KIMANI.....RESPONDENT

(Being an appeal from the Order of Hon S. Atambo (Ms), Principal Magistrate (PM) at the Chief Magistrate's Court at Milimani in Civil Case No 5029 of 2014 delivered on 19th September 2014)

JUDGMENT

1. In her Order of 19th September 2014, the Learned Magistrate, Hon S. Atambo (Ms), Principal Magistrate (PM) directed the Appellant herein to deposit a sum of Kshs 512,212/= in court within seven (7) days. She also granted it leave to respond to the Respondent's Notice of Motion application dated 21st August 2014 and filed on 26th August 2014 within the same period.
2. Being dissatisfied with the said decision, the Appellant filed its Memorandum of Appeal dated 23rd September 2014 on 24th September 2014. It relied on four (4) Grounds of Appeal.
3. It submitted that the Learned Magistrate erred when she ordered it to deposit the sum of Kshs 512,212/= in court when its advocates sought an adjournment to enable it give them further instructions. It was their argument that the Learned Magistrate denied it a right to fair hearing by denying it an adjournment and making substantive orders in respect of the Respondent's aforesaid application contrary to the provisions of Article 50 of the Constitution of Kenya, 2010. In this regard, it relied on the case of **Sceneries Limited vs National Land Commission [2017] eKLR** where the court therein found that the applicant had not been given adequate time to fully present its case.
4. It further placed reliance on the case of **Republic vs Chief Magistrate's Court at Nairobi- Milimani Commercial Courts Ex parte Safaricom Limited & 2 Others [2014] eKLR** where it was held that adjournments should normally be allowed if there was sufficient cause necessitating the adjournment and there was no negligence by the applying party.
5. It added that since the Respondent's application was filed pursuant to the provisions of Order 40 of the Civil Procedure Rules, he did not demonstrate that the subject matter would be in danger of being wasted, damaged or alienated to warrant the said order being given.
6. On his part, the Respondent argued that Section 3A of the Civil Procedure Act Cap 21 (Laws of Kenya) provides that:-

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such order as may be necessary for the ends of justice or to prevent the abuse of the process of the court.”
7. He pointed out that the order directed that monies be deposited in court and not to him and hence the Appellant had not stated what prejudice it would suffer if it complied with the said orders. He was emphatic that the present Appeal was premature, based on misapprehensions, speculative and calculated to ensure that the matter never proceeded for full hearing.
8. In his Notice of Motion application dated 21st August 2014 and filed on 26th August 2014 that had been filed pursuant to the provisions of Section 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 40 Rule 1 and 2, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law, he had sought the following orders:-

1. THAT this application be certified as urgent.

2. THAT pending the hearing and determination of this Application the Defendant be directed deposit (sic) in court the amount of Kshs 512,212/= utilized by the Plaintiff to repair motor vehicle KBQ 934V Premio Saloon.

3. THAT the Defendant be directed to refund to the Plaintiff the amount of Kshs 512,212/= utilized by the Plaintiff to repair motor vehicle KBQ 934V Premio Saloon.

9. A perusal of the proceedings showed that the Respondent's aforesaid application was coming up for *inter partes* hearing on 19th September 2014. However, the Appellant had not filed a response to the same by that time and its advocates thus sought for more time to get further instructions. The Respondent's counsel objected to the said request but added that if the court granted the same, then Prayer No (2) of his aforesaid application ought to be granted.

10. In her direction and/or order, the Learned Magistrate granted the Appellant leave to respond to the said application within seven (7) days and directed that it deposits into court, the sum of Kshs 512,212/= within the same period.

11. Notably, Order 40 Rule 1 of the Civil Procedure Rules provides that:-

“Where in any suit it is proved by affidavit or otherwise—

a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders(emphasis court).”

12. As the Appellant rightly pointed out, the subject matter of the Respondent's application was money. In the absence of proof of the circumstances envisaged in Order 40 Rule 1(b) of the Civil Procedure Rules, the Learned Magistrate erred in ordering it to deposit the said sum of Kshs 512,212/= without first having hearing its side of the story because this said amount was in contention. It was immaterial that the monies were being deposited in court and not being released to the Respondent herein.

13. This court restrained itself from determining whether or not Prayer No 2 of the Respondent's said application could be granted after the *inter partes* for the reason that that was an issue for determination by the trial court. Indeed, any party who would be aggrieved by the decision was at liberty to approach this court to determine whether or not the trial court has arrived at a correct conclusion. What was of concern to this court at this stage was whether or not the Appellant's rights to fair trial had been violated by virtue of the decision of the Learned Trial Magistrate.

14. Accordingly, having considered the facts of this Appeal, this court found itself in agreement with the Appellant that it was denied an opportunity to fully present its case and because the said order violated its fundamental right under Article 50 (1) of the Constitution of Kenya, it could not be allowed to stand. The Respondent's aforesaid application had come for hearing for the first time on 19th September 2014 and consequently, he would not have suffered any prejudice in the matter being heard on another day before the said substantive order was issued.

DISPOSITION

15. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 19th December 2016 was successful. In the premises foregoing, this court hereby sets aside and/or vacates the order by the Learned Magistrate of 19th September 2014 directing the Appellant to deposit the sum of Kshs 512,212/= within seven (7) days pending the hearing and determination of the Respondent's Notice of Motion application dated 21st August 2014 and filed on 26th August 2014.

16. It is hereby directed that the said Respondent's Notice of Motion application dated 21st August 2014 and filed on 26th August 2014 be placed for hearing and determination before any other magistrate other than the Learned Magistrate who granted the order of 19th September 2014.

17. Each party to bear its own costs of this Appeal.

18. It is so ordered.

DATED and DELIVERED at NAIROBI this 28th day of April 2020

J. KAMAU

JUDGE