REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. 30 OF 2018

JOSEPH NJOROGE KIMONDO.....1ST APPELLANT/APPLICANT

SAHI MOTOR LIMITED.....2ND APPELLANT/APPLICANT

-VERSUS-

M M W (A minor Suing through her next friend and Father

J W M).....RESPONDENT

RULING

The applicants in this application are defendants in Civil Suit 446 of 2016 pending before the Chief Magistrate at Kajiado. They lodged their application filed in court on 11/9/2018 in which they are seeking the following orders:

1. **THAT orders of stay of proceedings be granted pending hearing and determination of this Appeal**

2. **THAT this Honourable court do make such other or alternative orders as will meet the interest of justice**

3. **THAT the ruling delivered by Hon. Chesang in Kajiado – CMCC No. 446 of 2016 on 14th August 2018 be set aside and/or reviewed and the matter be heard afresh.**

The application by way of a notice of motion is stated to be brought under Section 1A, 1B, 3A of the Civil Procedure Act Article 50 and 159 of the Constitution. The application was made on the grounds:

1. **That when Kajiado – CMCC No. 446 of 2016 came up for hearing on 14th August, 2018, the Applicants' Advocate was denied an audience to address the court and proceed with the hearing because of non-payment of the Respondent's Advocate's and witness costs of Ksh. 29,000/=.**

2. **That Kajiado-CMCC No. 446 of 2016 proceeded for hearing exparte on 14th August, 2018 and the same is coming up for mention on 18th September 2018 to confirm filing of submissions.**

3. **That if orders of stay of proceedings of Kajiado – CMCC No. 446 of 2016 are not granted, the trial court will proceed without hearing the Applicants hearing on merit thereby grossly violating their constitutional rights to a fair hearing.**

4. **If the ruling delivered by Hon. Chesang on 14th August, 2018 is not set aside and/or reviewed, the lower court will proceed to deliver judgement thereby rendering this Appeal nugatory**

5. **This application has been brought without undue delay**

6. **That there will be no prejudice if the sought orders are granted**

7. **That this honourable court has powers and discretion to grant the orders sought in the interest of justice.**

Further the application was supported by an affidavit sworn on 10/9/2018 by legal counsel to the appellants one Dominic Njuguna Mbigi. The affidavit is to the following effect. That the applicants are defendants in Kajiado CMCC No. 446 of 2016 having been sued by the respondent/plaintiff for a claim of an award of both general and special damages. The claim is based on an accident which occurred on 11/7/2015 along Kimana Town – Loitoktok-Emali Road involving motor vehicle KCD 682Happarently owned by the 2nd appellant as agent

or servant of the 2nd appellant. That when the matter came up for hearing on 14/8/2018 before the trial court learned counsel holding brief for Mr. Mbigi Njuguna was denied audience for non-payment of the respondents costs totalling to Ksh. 29,000. That the trial court never gave an opportunity to counsel on record on the issue of non-payment of costs as earlier ordered by the court. That the trial court proceeded to hear the respondents/plaintiffs case who summoned five witnesses without the involvement of the appellants or their counsel. That the respondent/plaintiffs case was closed and an order for submissions made to enable the learned trial magistrate deliver final judgement on the claim. That the appellants in these circumstances are aggrieved that their constitutional rights to a fair hearing have been grossly violated necessitating the intervention of this court.

For the respondent a notice of preliminary objection was raised in opposition to the notice of motion on grounds that no leave to appeal has been obtained rendering the appeal incompetent and fatally defective.

Analysis and Determination

I have considered the application, affidavit in support, and the preliminary objection, the primary record from the trial court and brief submissions by counsel. The pillars in issue are the same and consequently the preliminary objection and the notice of motion were heard together.

Indeed, I consider the complaints lodged by the appellants with respect to the impugned order acted upon by the learned trial magistrate to deny them audience before her court to fall within the ambit of Article 50 of the constitution on the right to a fair hearing.

This is not a case of just a review or appeal but one which touches on the right to a fair hearing under Article 50 and Access to justice in Article 48 being infringed against the appellants. In the administration of justice right to a fair hearing, access to justice and due process remains to be the cornerstone of any legal system which espouses the rule of law. The concepts have been interrogated by various legal Scholars and Superior courts as can be seen herein under. In **Black's Law Dictionary 9th Edition Gardner** defines:

> ***"Access to mean an opportunity or ability to enter, approach, pass to and from, or communicate, with, access to the court."***

Clearly access to court being a constitutional dictate cannot be compromised or restricted or watered down by the wide discretion given to the courts except by the same provisions in the constitution which can limit such a right. Further in **Chambers Dictionary (Harrap Publishers Ltd 1995-SF3** the word Justice is defined as:

> ***"The quality of being just, integrity, impartiality, rightness, the awarding of what is due the administration of law".***

In the administration of justice, there is a correlation between access to justice and the right to a remedy in a dispute. As indicated by Clause 40 of Magna Carta an 800-year-old document which states: ***"To no one will we sell, to no one will we refuse or delay, right or justice."***

For instance, in the case of **Obajin V Adedeji 2008 3NWLR** the court considering the matter on the concept of justice stated this:

> ***"Justice means fair treatment and the justice in any case demands that the competing rights of the parties must be taken into consideration and balanced in such a way that justice is not only done but must be seen to be done".***

The position in relation to right to a fair hearing under Article 50, Article 27 and Article 48 of the constitution applies to both Criminal and Civil administration of justice. The provisions cover rights as to equality before the law between the parties to any proceedings. The right to non-discrimination of all persons before any tribunal or court on any of the grounds specified in Article 27(4) of the same constitution. It is also provided under Article 50 adequate opportunity for both parties to prepare their case, present arguments, evidence and to challenge or respond to the evidence provided by the other party. Under Article 50 (G) a party to a Civil Suit has a right to be represented by a legal counsel of his or her choice at all stages of the proceedings. In so far as Article 48 is concerned access to justice is one of the key rights safeguarded in our Constitution. With all respect it should be borne in mind that the right to legal representation is not only confined to criminal justice administration but also adjudication of Civil claims before any tribunal, body and or court.

This right on right to access to justice guaranteed as expressly stated in Human Rights Commission Comment No. 32: Under Article 14 Right to equality before courts and Tribunals and to a fair trial **9-10 U.N. DOC CCPR/C/GC/32 August 23/2007** where it is stated:

> ***"Access to Administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived in procedural terms, of his or her right to claim justice. The availability or absence of legal assistance offer determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. States are encouraged to provide free legal aid in non-criminal cases for individuals who do not have sufficient means to pay for it. In some cases, may even be obliged to do so."***

This legal right was further re-visited in the case of **B.C.G.E.U 1988 Carwell BC 363 Dickson C.J** highlighted and stated that:

> ***"The right of access to the courts as a fundamental and universally recognized principle. It is not proper or permissible for anyone to interfere with or impede the absolute right of access all citizens have to the courts of justice. There cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice."***

Going by the above illustration the test is whether the Civil Procedure Rules were liberally construed by the Learned Trial Magistrate to

secure the just, efficient and expeditious determination of the dispute on the merits between the parties. Though court orders or directions issued at any given time must be followed by litigants to a suit, any sanctions imposed should not deny any person in pursuing the claim before the court.

The constitutional right of access to justice is novel within the scope of Article 50(1) which states:

> ***"Every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body."***

It is logical to conclude that if the applicant was not permitted to cross-examine the witnesses summoned by the plaintiff or called upon to state his defence. Can a fair and just outcome be reasonably expected from the court on ex-parte proceedings? In my view, I consider such proceedings a negation to the provisions under Article 27 of the Constitution.

In the case of **Kallfrican V Belgium Convention Decision of 9th December 1986** the court dealt with the doctrine of equality of arms as manifested in our Article 50 and 27 of our Constitution where it stated:

> ***"Equality of arms i.e. the premise that everyone who is a party to proceedings shall have a reasonable opportunity of presenting his case to the court under conditions which do not place him at substantial disadvantage vis –a-vis his opponent".***

The appellants notice of motion premised as an appeal is presumed impliedly that the ruling and order of locking them out of the proceedings did violate their rights to a fair hearing and right to equality before the law.

To prove the point, the appellants invited the court to call for the record to satisfy itself as to the propriety, correctness, legality of the order and proceedings.

Looking at the record, it is crystal clear that the appellants were locked out of the entire proceedings by the learned trial magistrate on 14/8/2018. Though the appellant was represented by counsel, unfortunately he was not given an opportunity to cross-examine the five witnesses who testified in support of the plaintiff's case. The trial magistrate in her considered decision held that the proceedings before her will proceed exparte of legal counsel for the appellant. It would be improper in my view, to exercise such a discretion on grounds of non-payment of an interlocutory order of payment of some costs which might as well amount to an excusable mistake to deny a claimant a right to be heard. On what basis can a trial court deny a party an opportunity to explain himself why he has not complied with an order on cost?

Justice to ordinary citizens is about vindication of and claim of legal rights. As to what would be the price of accessing the courts to vindicate those rights is never usually in the minds of a litigant.

It is therefore important that access to justice being a constitutional right should not be impeded by punitive costs or fees.

It is apparent from the record that applicant's legal counsel was never given an opportunity to show cause or give the reasons for the delay and or non-compliance with the court directions. The court conclusively determined the rights of the applicants with regard to all matters to do with their participation in the ensuing proceedings and rendered a decision which violated his right to a fair hearing under Article 50.

My understanding of the court process is that the decisions of the court ought to be respected and complied with at all levels unless there is stay or a variation to the order. Yet in exercising discretion in one way or the other each party to a litigation must be called upon to show by sufficient reasons why he cannot comply with the order or decision.

In the circumstances of this case, the applicant counsel was not given an opportunity to be heard on non-compliance with the order on payment of costs. It is important to bear in mind that in considering any decision being made by the tribunal or a person exercising judicial authority the tenets of procedural fairness must be safeguarded. The following passage by Supreme Court of Canada in the case of **Baker V Canada Minister of Citizenship & Immigration 2 S.C.R 817 1999 2 SCR 817** explains the legal proposition where the court stated that:

> ***"The values underlining the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly and have decisions affecting their rights, interest or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decision"***

The power of the court in adjudicating over disputes under Orders 12 as read with order 18 of the Civil Procedure rules is to do justice to the parties. The purpose of the whole object of Article 50 (1) of the constitution is to have any dispute or suit to be determined on its merits before an independent court or tribunal. The impartiality of the presiding Judicial Officer to referee the proceedings inspires confidence in the process.

In the course of the trial there may be issues arising to effectively deal with the case management schedules to keep the contestants within the scope of procedural fairness. On such instances of course has to do with costs or fees to be paid by any of the parties within the litigation. The penalties imposed at the interlocutory stage are meant and designed for the court as tools to administer justice and not to punish.

However, in exercising the discretion in one way or another to monitor compliance with the orders, the question is whether denying a plaintiff or defendant right to be heard would be an appropriate sanction or remedy.

Looking at this application from the point of view of the applicant the court in the case of **CMC Holdings Ltd v Nzioki (2004) KLR 173** had three observations to make that:

> ***"That discretion must be exercised upon reasons and must be exercised judiciously. In law, the discretion that a court of law has in deciding whether or not to set aside exparte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of among others an excusable mistake or error. It would not be proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertent account or error. Such an exercise of discretion would be wrong principle. The answer to that weight matter was not to advise the appellant of the course open to it as the learned magistrate did here. In doing so she drove the appellant out of the zeal of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate."***

It seems to me from the above principles that the rule that an error of counsel should not be visited on his client is informed by the courts desire to do substantial justice as embodied in Article 159(2) (1) of the Constitution. The dominance effect of a substantial justice is for courts and tribunals to consider each dispute on its merits rather than sticking to unnecessary technicalities without entering into the arena of the competing interest of the parties which are merely aimed at obstructing the hearing and determining of the claim on the merits.

The crux of the matter is whether learned counsel for the appellant had the opportunity to adduce evidence or reasons why the costs of Ksh. 29,000 had not been paid as earlier ordered by the court. In relation to the blunders or omission made by counsel did the appellant know that the inadvertence had backfired rendering the whole trial a travesty of justice. The applicant in this case had no notice of the impending decision that in absence of payment of ordered cost the case would proceed ex-parte.

The issue of such omissions and blunders is a daily occurrence where human conduct is involved. If the matter in question involves where grave injustice would be occasioned to a litigant the discretion should be exercised to avoid such hardship or injustice. The court has the power to exercise the discretion to waive the instant payment of costs to abide the final judgement and decree of the dispute.

I can appreciate from the order that there was a genuine dilemma on the part of the trial magistrate, in regard to varying the words ***"payment be made before the next hearing date."*** Instead of proceeding with the hearing without hearing any arguments on this issue, the learned trial magistrate had the discretion to stop the trial or vary the directions altogether. I cannot over emphasise that judicial discretion in order to attain procedural fairness in each circumstances remains unfettered. In my judgement exercise of discretion cannot waive the provisions of the constitution, on access to justice and right to a fair hearing as espoused under Articles 48 and 50 of our Constitution.

One of the reasons behind this application appears to revolve around the question of completely denying the appellant any opportunity to present his case. It is not in dispute that in accordance with the Civil Procedure Rules a party need not attend court so long as he has retained an advocate.

This was a claim based on tort of negligence against the Appellants. The final judgment if decided in favour of the plaintiff/respondent would be executed against the appellants. In view of the manner in which the suit was prosecuted I do not think the appellants would be bound by the outcome or subsequent decree of the court obtained exparte. It is trite that a mistake of counsel should not be used to punish a litigant who has a legitimate and equitable right before a court of law. In other words, the court should not visit the acts of omission or commission or negligence of counsel on an innocent litigant.

I agree with the submissions by the appellants that in arriving at the decision the trial court wrongly exercised the discretion and improperly applied the law to be in violation of a right to a fair hearing and access the court. Failure to pay interlocutory costs arising in the course of the proceedings cannot entitle the learned magistrate to limit rights to access justice and constitutional right by the appellant to have his version of the case heard and considered.

In the instant application the trial magistrate abused her discretion when she denied the appellant to participate in the hearing and cross-examination of the five witnesses. The court action unfairly prejudiced the appellants/defendants and eventually rendered the proceedings a mistrial.

I take the queue from the well-established principles in the cases of **Shah V Mbogo 1908 EA, Patel V EA Cargo Handling Services Ltd 1974 EA75** and do find that the exercise of discretion by the trial magistrate occasioned prejudice and a failure of justice on the part of the appellants. The principle to right to a fair hearing under Article 50 of the Constitution is applicable to this application. The trial magistrate condemned counsel unheard. The impugned order must therefore be set aside as of right. The exparte proceedings arising and commenced on 14/8/2018 be and are hereby set aside. The trial to commence denovo under the doctrine of equality of arms. That the Chief Magistrate does allocate the case to another Judicial Officer besides the Learned Trial Magistrate. The costs of this application to abide the outcome of the suit.

Dated, delivered and signed in open court at Kajiado this 21st September, 2018.

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R. NYAKUNDI

JUDGE

Representation:

Mr. Wawire for Kaburu for the Respondent

Mr. Mbigi for the Appellant - Absent