REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL 36 OF 2007

HENRY MIRIANGA ……..……. 1ST APPELLANT

PETER KAIYANTHI ……...…… 2ND APPELLANT

PROTASIO KIRAMANA …….....……..…. 3RD APPELLANT

VERSUS

PETER MARII ……. 1ST RESPONDENT

CELESTINO MEEME …… 2ND RESPONDENT

LAWRENCE KOBIA *(Suing on behalf of*

***URA WATER PROJECT)* …… 3RD RESPONDENT**

JUDGMENT

When I sat to consider the judgment of this appeal it occurred to me that this appeal had not been admitted. Therefore on 20th August 2009 I duly admitted the appeal for hearing. On that date also, I made an order for the Deputy Registrar of this court to extract a certified copy of the order in Maua PMCC No. 29 of 2007 which was made on 30th March 2007. That document is one of the essential documents listed under Order XLI Rule 8 (B) (4) (f) (ii) of the Civil Procedure Rules. That Rule provides:-

"***Before allowing the appeal to go for hearing that judge shall be satisfied that the following documents are o the court record, and that such of them are not in the possession of either party have been served on that party, that is to say:-***

(a) …….

(b) ……..

(c) ……..

(d) ……..

(e) ……

(f) The judgment, order or decree appealed from and where appropriate, the order (if any) giving leave to appeal:

(g) …….

Provided that:-

(i) ……..

(ii) ***The judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a) (b) and (f)"***

It is on obtaining that vital document that I proceeded to consider this judgment. The respondents filed a claim in the lower court by way of a plaint dated 19th March 2007. In their plaint, they described themselves as officials of Ura Water Association. They averred in their plaint as follows:-

"***On various dates between 24th January 2007 and 19th March 2007 the defendants (appellants) have interfered with the operations of Ura Water Association and have been illegally withdrawing money from accounts of the pipeline thus causing the plaintiff loss and damage."***

In their final prayer, the respondents prayed for judgment against the appellants jointly and severally as follows:-

"***A permanent injunction restraining the defendants, themselves, their agents and/or servants from interfering with the operations of Ura Water Association in any manner whatsoever."***

Apart from that prayer and the prayer for costs, there was no other prayer in the plaint. The plaint was supported by a verifying affidavit sworn by one of the parties namely, Peter Marii who described himself as the chairman of the Ura Water Association. He did not swear the affidavit on behalf of the other parties namely, Celestino Meeme and Lawrence Kobia. Order VII Rule 1 (2) of the Civil Procedure Rules requires a plaint be accompanied by a verifying affidavit. That rule is in the following terms:-

"***The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint."***

The mischief addressed by that rule is to ensure that all, not just one, of the plaintiffs verify the correctness of the averments in the plaint. According to that rule, all the plaintiffs ought to be held to account for matters that are pleaded in the plaint. It therefore follows that Celestino and Lawrence failed to verify the contents of the plaint as required by that rule. Order VII or Rule 1 (3) provides:-

"***The court may of its own motion or on application of the defendant order to be struck out any plaint which does not comply with sub rule (2) of this rule."***

On my own motion, I do hereby strike out the suit that is, Maua PMCC no. 29 of 2007 in respect of Celestino Meeme and Lawrence Kobia with costs to the appellant hereof. The respondents in the lower court filed an interlocutory application by way of chamber summons dated 19th March 2007 although filed in Maua Magistrate Court on 19th February 2007. That application was supported by an affidavit sworn by Peter Marii. That affidavit was sworn on 19th March 2007 but was filed in court on 19th February 2007. As it is clear from those dates, the affidavit was sworn on a date later than it was filed in court. Section 5 of the Oaths and Statutory Declaration Act Cap 15 provides:-

"***Every commissioner of Oaths before whom any oath of affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and what date the oath or affidavit is taken or made.***"

In this case, the said affidavit was sworn before Commissioner Andrew J. O Mandi on 19th March 2007 yet as it is stated before the said affidavit was filed on 19th February 2007. That was the affidavit that was considered by the magistrate when he presided over the interlocutory application at Maua Court on 28th March 2007. The obvious question that arises is, what date was the oath taken in respect of that affidavit? The other more important question is, was the oath truly administered and if so, on which date was it administered? That issue of the date of the affidavit being a date later than the date that the affidavit was filed in court is not a mere irregularity. It goes to the very root of the validity of the affidavit. I do hereby find that that affidavit was invalid and could not be the basis of orders that were subsequently granted by the Maua Court. The present appeal relates to the interlocutory orders granted by D. Morara R.M. on 30th March 2007. The grounds presented by the appellant in this appeal are disturbing in that they allege bias and even outright illegality over the presiding magistrate D. Morara R.M. But as they are disturbing the procedure followed by the said magistrate more than not leads one to believe the allegations made by the appellant. The grounds of appeal are as follows:-

1. The learned trial magistrate erred in law and fact in that he was biased against the appellants and refused to find that the respondents had not complied with Order XXXIX R. 3(3) in that they did not serve the appellants within 3 days of the order and did not serve the pleadings.

2. **The learned trial magistrate erred in law and in fact in not finding that the appellants were served on Sunday 25th March, 2007 which service was improper and such service did not allow them to file the replying affidavit and have three clear days the matter was fixed for hearing on 28th March 2007.**

3. **The learned trial magistrate erred in law and in fact in that he gave permanent order of ex-parte injunction against the provisions Order XXXIX and L. of the Civil Procedure Rules.**

4. **The learned trial magistrate erred in law and went beyond his oath of office by removing the return of service from the file which he had kept after his ruling when he heard the appellants wanted to take photocopies of the court record for purposes of appeal.**

5. **The ruling of the learned magistrate was biased and he also failed to exercise his discretion judicially by failing to find that the plaint disclosed no cause of action and that he plaintiff had not undertaken to pay damages in case he lost the action.**

6. **The leaned trial magistrate erred in law and in fact in striking out the defendants replying affidavit.**

On the 19th March 2007, the respondent's counsel appeared *ex parte* before the said magistrate to argue the application by way of chamber summons dated 19th March 2007. That chamber summons sought the following prayer:-

"***That the defendants themselves, their agents and/or servants be restrained from operating the accounts of Ura water Association held at Nyambene Arimi SACCO Ltd account numbers 06-54 CDFM 04-677 PHII and from interfering or meddling whatsoever with the operations of Ura Water Association pending the hearing and determination of this suit.***"

It is that application that was supported by the affidavit of Peter Marii whose date was a date prior to the date of its filing. On 19th March 2007 when counsel for the respondents appeared before the said magistrate *ex parte*, the magistrate did not specifically certify as urgent the chamber summons. Without certifying it as urgent the learned magistrate proceeded to grant interim orders as per the prayer hereinabove. The said magistrate was required to consider whether the matter was urgent and then to

certify it as being urgent to justify it being heard *ex parte.* This was stated in the case of **Omega Enterprises (Kenya) Ltd Versus Kenya Tourist Development Corporation & others** HCC No. 6776 of 1992 as follows:-

"***Indeed, where proceedings are taken by a plaintiff in the absence of the defendant, it is most important that there should be every stage of the proceedings a strict compliance with the rules."***

The said magistrate ought to have complied with the provisions of Order XXXIX Rule 3(1) of the Civil Procedure Rules. That is in the following terms:-

"***Where the court is satisfied for reasons to be recorded that the object of granting the injunction would be defeated by the delay, it may hear the application ex parte."***

On 28th March 2007, when the matter came up for *inter partes* hearing, the respondent's counsel sought to proceed *ex part*e on the ground that the appellant had served their replying affidavit not giving three clear dates as provided by order L Rule 16(1). In response to that prayer, counsel for the appellant addressed the court but the said magistrate recording of that address is illegible. Even reading the typed proceedings, one is unable to fully follow the argument of the appellant counsel. In the end, the magistrate struck out the appellant's replying affidavit by his ruling dated 30th March 2007 and in his final order in that ruling stated:-

"***Order-applicant (respondents) to proceed ex parte with the chamber summons application dated 19th March 2007."***

Thereafter, without receiving any arguments in support of the application, the proceedings show that the magistrate made the following order:-

"***Status quo be maintained."***

That outline of how the proceedings were handled by the said magistrate undoubtedly gave the basis to the allegations of bias by the appellants. In perusing through the lower court file, I was unable to trace an affidavit of service which would indicate when the appellants were served with the chamber summons application. It is that affidavit that would have assisted the magistrate to determine whether the appellants had sufficient time to comply with the provisions of Order L Rule 16 (1). Even if the appellant had failed to file and served their replying affidavit within the period provided in Order L Rule 16(1) they were entitled to reply they should have not been shut out from participating in the hearing of the chamber summons. They ought to have been allowed to address the court on point of law. A statement in **Wikipedia Encyclopedia is** apt to be quoted here in relation to the manner with which the magistrate proceeded with the matter.

"***Proceedings should be conducted so they are fair to all parties ex pressed in the Latin, "maxim audi alteram partem" let the other side be heard."***

Rules of natural justice also require a decision maker to be impartially and is required to make decisions based on balanced and considered assessment of evidence before him without favouring one party over the other. It does not escape my attention that the manner in which the said magistrate conducted the proceedings would indeed lead one to suspect bias. Moreover, the injunction granted by the said magistrate was the same as was prayed in the plaint. It therefore follows that in granting the injunction the respondents obtained the final orders of the suit by an interlocutory application. That is highly irregular. For the reasons that I have set out in this judgment, I find that the appellant appeal does succeed. The judgment of this court is as follows:-

1. This court does hereby set aside the ruling/decision of the resident magistrate Maua Mr. D. Morara in Maua PM CC No. 29 of 2007 dated 30th March 2007. The same is substituted with an order dismissing the chamber summons dated 19th March 2007 with costs to the appellant.

2. The suit in respect of Calestino Meeme and Lawrence Kobia being Maua P.M. CC No. 29 of 2007 is hereby struck out with costs to the appellant for lack of verifying affidavit.

3. The affidavit of Peter Marii dated 19th March 2007 filed in court on 19th February 2007 is hereby struck out with costs to the appellants.

4. The appellant is awarded costs of this appeal

Dated and delivered at Meru this 8th day of October 2009.

MARY KASANGO

JUDGE