REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Civil Appeal 52 of 2001

DIOCESS OF KITUI (C/O KALILI)…………………..…………...APPLICANT

VERSUS

TITUS KITEMU MUNYWOKI (C/O M. MAITHYA)………..….RESPONDENT

(Being an appeal from the ruling and order of the Learned Senior Principal Magistrate in Kitui SPMCC No. 181 of 1998 dated 20/04/2001)

JUDGMENT OF THE COURT

1. Titus Kitemu Munywoki was the plaintiff in Kitui SPMCC No. 181 of 1998 in which he sued Josiah Mutia and Diocese of Kitui claiming the following reliefs:?

(a) Special damages of Kshs.14,100.00

(b) General damages

(c) Costs of this suit

(d) Interest thereof at court rates (*sic*)

(e) Any other relief

2. The plaintiff's claim was based on allegations of negligence against the defendants jointly and severally in respect of a road traffic accident that allegedly occurred on 4/06/1999 along the Mutomo-Kitui road involving the plaintiff and a motor vehicle registration number KAB 448Z. The plaintiff alleged that the said motor vehicle, which was said to be owned by the 2nd defendant (present appellant) at all times material to the suit was so carelessly and negligently driven and/or managed by the 2nd Defendant that the said 2nd defendant caused and/or permitted the said motor vehicle to lose control and to overturn as a consequence of which the plaintiff sustained bodily injuries and suffered pain loss and damage. The plaintiff is said to have suffered the following injuries:?

(a) Head injury

(b) Fracture of the left collarbone

(c) Neck injury

(d) Injury of the left leg joint and midshaft

(e) Injury on lower hip.

The plaintiff also claimed to have spent a total of Kshs.14,100/= on the hospital, the police abstract and transport to hospital.

3. The plaintiff gave his evidence on 15/06/1999 (the plaintiff), 3/08/1999 while PW2 – Sophia Francis Masila testified on 3/081999 and 3/09/1999 PW3 – Dr. Patel Sore testified on 3/09/1999. On 3/09/1999, defence hearing was stood over to 23/11/1999. On the 23/11/1999, Mr. Kinyua Musyoki, advocate for the 2nd defendant applied for adjournment on the ground that he had not seen a representative of his client. The application for adjournment was granted and the case stood over to 25/01/2000. On the 25/01/2000, the court noted that there was no appearance of the parties and marked the matter stood over generally. Though the time for the said order is not apparent on the face of the record, it must have been before 10.30 am, because the record shows that at 10.30 am, Mr. Kibang'a for the plaintiff was marked present in court while there was no appearance for the 2nd defendant. Mr. Kibanga then addressed the court and said that the plaintiff had already closed his case and noted that the 2nd defendant was not present. The court then made the following order:?

"***Order*. Defence presumed to have no evidence to offer. Same is closed. Judgment on 29/2/2000. Written submissions before then.**

N. Ithiga

P.M."

4. The judgment was not delivered on 29/02/2000. Both the plaintiff and his counsel were present. Mr. Kibanga for the plaintiff asked for more time to put in submissions. Judgment was then stood over to 16/03/2000. Again on the 16/03/2000, Mr. Kiambi for the plaintiff informed the court that the plaintiff's submissions were not ready. Judgment was stood over to 18/04/2000. It is instructive to note that the orders of 25/01/2000, 29/02/2000 and 16/03/2000 did not include an order requiring that the 2nd defendant be notified of what was happening in the matter.

5. From the record, judgment was delivered on 18/04/2000 for Kshs.300,000/= being general damages for pain suffering and loss of amenities, Kshs.14,100/= in special damages costs (to be assessed) and interest. On the 23/06/2000, plaintiff's Bill of Costs was assessed at Kshs.128,938/=. It was the decree of that judgment that the plaintiff proceeded to execute. Proclamation was done on 24/11/2000.

6. By its application dated 28/11/2000, the 2nd defendant prayed for, among others (i) an order for stay of execution pending hearing and determination of the application interpartes (ii) that judgment against the 2nd defendant/applicant entered on 18/07/2000 and all consequential orders be set aside; (iii) that the 2nd defendant be allowed to give its evidence in its defence. That application was canvassed before the court below and dismissed. The court below noted that when the 2nd defendant failed to turn up for the adjourned hearing on 25/01/2000, the court assumed that the 2nd defendant had no evidence to offer. Learned trial magistrate concluded that it was wrong for the 2nd defendant to claim that it had been denied an opportunity to state its case when it had been given two chances on 23/11/1999 and 15/01/2000 and which chances had been thrown away. The learned trial magistrate also noted that the 2nd defendant had not taken any steps to find out what may have transpired in court after 25/01/2000 until execution took place. The learned trial magistrate was also of the view that the 2nd defendant/applicant took too long (some seven months) to bring the application to court.

7. It is that ruling delivered on 20/04/01 that the 2nd defendant/appellant was aggrieved with and against which he filed the present appeal. The Memorandum of Appeal has four grounds of appeal as follows:?

1. The learned Senior Principal Magistrate erred and misdirected himself when he failed to find that when the case was called at 9.30 am on 25.1.2001 and marked SOG for non-attendance of all the

parties, and consequently re-mentioned at 10.30 am at the instance of the respondent, it was necessary that the appellant be served with fresh notice and he erred in law when he proceeded to close the defence case without the appellant being informed that the case was for 10.30 am, when the said case had already been dealt with at 9.30 am and this was quite irregular in the circumstances.

2. The learned Senior Principal Magistrate erred and misdirected himself, when he failed to find that the appellant had not been informed of the date of defence hearing and that it was unjust for the appellant to have been condemned unheard due to mistakes or sins of his former advocate and since the appellant had filed defence in case, it was only just in the wider interests of justice that the said appellant be allowed to adduce evidence in support of its defence.

3. The learned Senior Principal Magistrate erred and misdirected himself when he held that there was in-ordinate delay in presenting the appellants application when indeed it was clearly on record that the appellant came to know about the judgment of the court upon execution being levied on against its property consequent upon which an application under Certificate of Urgency was duly filed and interim orders sought and issued, and that the same was not an afterthought.

4. The findings of the learned Senior Principal Magistrate was against the weight of the evidence adduced before him.

8. At the hearing of the appeal, Mr. Kalili for the appellant combined grounds 1 and 2 and argued them as one. Mr. Kalili contended that when the matter was marked stood over generally on 25/01/2000, the 2nd defendant was not notified of the developments that had taken place, nor the other developments that took place thereafter. He submitted that by re-opening the case at 10.30 am without notice of any kind to the 2nd defendant was highly prejudicial and that the proceedings of 25/01/2000 at 10.30 am were irregular for want of notice to the 2nd defendant.

9. Regarding ground 3 of the appeal, Mr. Kalili submitted that the delay of seven (7) months in bringing the dismissed application was not inordinate considering the fact that the 2nd defendant was never given any notice of matters that transpired in court after 25/01/2000. It was also contended on behalf of the 2nd defendant that it only became aware of the judgment of the lower court during execution. Ground 4 of the appeal was abandoned.

10. The appeal was opposed. Mr. Maithya for the respondent contended that the appellant's complaints against the ruling of the lower court have no basis. He also contended that the 2nd defendant did not bring up the issues of what transpired in court on 25/01/2000 during the hearing of the application dated 28/11/2000. Mr. Maithiya also argued that the court below properly addressed its mind to the circumstances of the case before deciding to presume the 2nd defendant's case closed on 25/01/2000. Mr. Maithya also submitted that there was indeed inordinate delay by the 2nd defendant in bringing the application whose outcome is the subject of this appeal. In summary, Mr. Maithiya contended that the 2nd defendant/appellant was guilty of laches and it should not seek to have the sympathy of the court.

11. Mr. Kalili for the appellant cited the following authorities to the court:?

(a) Court of Appeal at Kisumu – **CA No. 46 of 2005 – between National Hospital Insurance Fund Board of Management and Baya Rural Nursing Home Ltd**. in which the court held that denial of an opportunity to be heard is a serious breach of the rules of natural justice.

(b) Court of Appeal at Nairobi – **CA No. 178 of 2002 Between Kiai Mbaki & 2 Others And Gichuhi Macharia & Another**. This was an appeal which considered the issue of whether the appellants were accorded a fair hearing before the superior court. After considering the facts and background to the appeal, the court said the following in part of its ruling: at page 6 thereof:?

"***The right to be heard is a valued right. It would offend all notions of justices if the rights of a party were to be prejudiced or affected without the party being offered an opportunity to be heard. This***

court has indeed reiterated that principle on many occasions and we need only cite one for emphasis:? <u>Matiba –vs- Attorney-General</u> [1995-1998]1 EA 192 where in an application for leave to seek an order for certiorari, the superior court refused to grant the prayer for stay without hearing counsel for the applicant who was present in court. On appeal this court stated:?

"***On the face of the record, it appeared that the appellants counsel had made no submissions before the learned Judge in the court below, since if they had been made, they would have been reflected in the record. There was thus an order on record in the presence of the appellant's counsel but without affording him an opportunity to address the Judge. This was a fundamental breach of the rule that no man shall be condemned unless he has been given a fair opportunity to be heard, which is a cardinal principle of natural justice. Any order that flowed from such a fundamental breach cannot be sustained."***

(c) Court of Appeal at Nairobi – **<u>CA No 24 of 1983 between Mutiso and Mutiso [1984]KLR 536</u>** in which the court held that it is a fundamental principle of justice that before an order or decision is made, the parties and particularly the party against whom the decision is to be made should be heard.

(d) Court of Appeal at Nairobi – **<u>Prime Salt Works Ltd. –vs- Kenya Industrial Plastics Ltd. [2001]2 E.A. 528</u>**. At page 530, the court made the following pertinent remarks:?

"***Implicit in the concept of fair adjudication lie two cardinal principles namely that no man shall be a judge in his own cause and that no man shall be condemned unheard. These two principles, the rules of natural justice, must be observed by courts where their application is not excluded expressly or by necessary implication."***

12. It is now the duty of this court to reconsider the circumstances of the instant appeal and to determine whether the court below reached the right conclusions in refusing to allow the 2nd defendant/appellant to be heard on its defence. I have carefully considered those circumstances, and particularly the record of 25/01/2000. I have also carefully considered the cardinal principles of natural justice as set out in the authorities cited above and I have no doubt in my mind that both on 25/01/2000 and on the application dated 28/11/2000 by which the 2nd defendant/appellant sought an opportunity to be heard, the 2nd defendant/appellant was condemned unheard. Infact the two records of 25/01/2000 appear strange to me. It is clear that earlier in the morning, the court below made an order standing the matter over generally for non-appearance of both parties. Then at 10.30 am, the plaintiff's counsel appeared and informed the court that counsel for the 2nd defendant was absent. I think that it was a breach of the rules of natural justice and procedure for the court to reopen the case without assigning any reasons for doing so and to assume that the 2nd defendant had closed its case. I think that the application made by the 2nd defendant/appellant to be allowed to adduce evidence in defence was reasonable, particularly in view of the fact that the 2nd defendant/appellant had filed a defence. I also find that the 2nd defendants/appellants explanation for the seven (7) month delay was reasonable and the court below should have found as much.

13. In the result, I am satisfied that the appellants' appeal has merit. Accordingly I set aside both the ruling and order of the learned principal magistrate dated 20/04/2001 and all consequential orders arising therefrom. The case shall be remitted back to the court below for further hearing and determination.

14. The costs of this appeal shall be costs in the cause.

It is so ordered.

Dated and delivered at Machakos this 15th day of April, 2008.

R.N. SITATI

JUDGE

Delivered by: Lenaola, J

In the presence of:: Mr. Mulu holding brief for Mr. Kalili for Applicant

No appearance for Respondent

I. LENAOLA

JUDGE