



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO 514 OF 2002

KARIUKI ASSOCIATES ADVOCATES APPELLANT

BETWEEN

HARRISSON K NJAGI T/A

H. K. ENTERPRISES CLAIMANT

AND

KITHUNGURURU FARMERS

CO-OPERATIVE SOCIETY LTD RESPONDENT

JUDGMENT

This appeal emanates from proceedings which were initiated in Co-operative Tribunal. Mr Peter Wambugu Kariuki is an Advocate of this court practicing as such in the name and style of Wambugu Kariuki & Associates. He is the Appellant in this appeal. On 18th July, 2002, the Appellant filed a statement of claim in the Tribunal on behalf of Harrison K. Njagi t/a H. K. Enterprises seeking Judgment against Kithungururu Farmers Co-operative Society Limited which is the Respondent in this appeal. The Co-operative Society entered appearance and filed defence to the suit. One of the defences in the suit was that the Tribunal did not have jurisdiction to entertain the claim.

On 23rd August, 2002 the Appellant filed an application on behalf of his client in the same claim in the Tribunal seeking Summary Judgment. The Co-operative Society filed Grounds of Opposition to the application for Summary Judgment as well as a Replying Affidavit. It also filed a Notice of Preliminary Objection on the Ground that the Tribunal did not have jurisdiction to hear the suit.

The record of proceedings of the Tribunal is very brief. It shows that on 23rd August, 2002 when the application for Summary Judgment was filed, an order was made that the same was to be heard on 11th September, 2002. On the later date there is no record that the Tribunal heard Counsel for the parties but made the following order:

“We have considered the pleadings and we find that this Tribunal

has no jurisdiction to entertain the matter and the matter is dismissed

and costs to be borne by advocate for claimants.”

The Appellant was aggrieved by the decision of the Tribunal and filed this appeal. The Appeal was based on five Grounds but the only issue which was raised for my decision was whether the Tribunal was justified in making an order against the Appellant Advocate to pay costs personally. I say this because the Appellant was not a party to the case in the Tribunal and the only order in that case which affects him and against which he could appeal from was that in respect of the costs ordered to be paid by him. This view is supported further by the fact that the Appellant's client in the Tribunal case took a different position from the Appellant in this appeal and in fact opposed it.

That aside, I was myself concerned with the fact that the decision appealed from did not contain reasons for it. I adjourned the appeal in the course of the hearing and asked Counsel to make further submissions on how an appeal court ought to deal with a situation where the lower court's decision is given without reasons and where the proceedings do not indicate those reasons. I did not receive much assistance in that respect. The reason for this is not hard to find. Nobody was really interested in the merits of the appeal and that is why I said that this is an appeal by the Advocate against the order made that he shoulders the costs of the case in the Tribunal.

The Appellant argued the appeal in person. He began by urging the merits of the appeal but as I have said he had no interest to do so as he was neither a claimant in the Tribunal nor personally affected by the decision of that Tribunal except on the question of costs. I, therefore, see no reason to consider his submissions on the merits of the appeal.

The Appellant attacked the Tribunal's order that he personally pays costs of the case in the Tribunal on two fronts. Firstly, he argued that that order was made contrary to the rules of natural justice as he was not heard on that matter. Secondly, he said that an Advocate can only be ordered to pay costs personally where he had no instructions to do the act for which costs are ordered. For the later proposition, he referred to the cases of ***Bugerere Coffee Growers Limited vs Sebaduka (1970) E. A 147; and J. B. Kohli & Others vs Bachulal Popatlal (1964) E. A 219*** .

Mr Gitonga who appeared for the Co-operative Society in the Tribunal and in this appeal opposed the appeal on the other grounds but conceded that it was improper for the Tribunal to order that the costs be borne by the Appellant as an Advocate.

Mr. Mwaura for the claimant in the Tribunal (who was the Appellant's client in that cause) argued that the Tribunal was entitled to order the Appellant to bear the costs in the Tribunal as the Appellant was an Advocate who ought to have known where to file the claim. He said that when the Preliminary Objection was raised, the Appellant should have been put to caution and rectified the situation which he failed to do. For that reason, it was proper to order him to meet the costs personally.

I have considered the rival submissions and the authorities cited and I do not think that the Tribunal properly applied its mind in coming to the decision that the Appellant should personally bear the costs of the case in the Tribunal. This is mainly because although the Appellant was present when the order was made it is evident that he was not heard before the order was made. This was contrary to the rules of natural justice and is sufficient ground for this appeal to succeed, but I will say further as follows. From the nature of practice, Advocates are professional men who act on the instructions of their clients and except in very clear cases where it is shown that they acted without instructions it is not proper to call upon them to shoulder costs of an act for which they are instructed. He may carry out the instructions wrongfully but so long as he is acting on instructions he should not be made personally liable for them. (See the cases of ***Bugerere and Kohli supra***). In this case, the Appellant was instructed by a client. The client does not dispute having given the instructions but says that the Appellant acted unprofessionally so he should be made to bear costs. The short answer to this in my view is that it is not the function of this court to Judge presently whether the Appellant acted professionally or not. The concern of this court is whether the Advocate had instructions to act for his client. We have seen that the Appellant was duly instructed and in those circumstances it was not proper to order him to shoulder costs on behalf of his client who was the one with interests in the cause. However, in saying this, I do not want to be

misunderstood as being unsympathetic to the plight of the numerous innocent citizens who have fallen into the hands of some incompetent Advocates who have managed to destroy their cases and cause misery.

I am afraid that a lot of litigants fall into that trap and are called upon to pay for the mistakes of their Advocates but in these matters the clients may be advised to pursue a separate claim, for example a claim for professional negligence. However, it is not open for a court to call upon an Advocate who has been instructed in a matter by a party to personally shoulder the costs of the case. The exception to this rule is as set out earlier, that an Advocate who has no instructions must shoulder the costs of his unauthorised actions.

In the result, I allow the Appellant's appeal in part by setting aside the order requiring him to meet the costs of the case in the Tribunal personally and substitute therefor with an order referring the matter back to the Tribunal to decide who is liable as between the parties to the case in the Tribunal to bear the costs of the case before it.

Here, before me, however, I order that each party should meet their own costs of the appeal since although the Appellant has succeeded, it was not the fault of any of the other parties that this appeal arose from an incorrect Order of the Tribunal.

Dated and delivered at Nairobi this 15th day of July, 2004.

ALNASHIR VISRAM

JUDGE