



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO. 20 OF 1999

NASHON FITZWANGA.....PLAINTIFF

VERSUS

ENVIRONMENT DISASTER RESEARCH FOUNDATION.....DEFENDANT

RULING

On 3.12.2002 this court was in the process of hearing an application filed by Kenya Revenue Authority (hereinafter referred to as KRA) dated 4.5.2000 and seeking that the said KRA be joined into this suit as a party. The application was brought under Order 1 rule 10(2) and rule 22 as well as S.3A of C.P.A and other enabling and relevant provisions. It was during the plaintiff's counsel's submissions that the attention of the court was drawn to the fact that the application before it should be dismissed because it was filed on 17.5.2000 when the main suit was not in existence. It was claimed that it had been dismissed on 2.5.2000. As a result, this court decided to examine the court records to establish the correct situation, which if so established would indeed affect the application being argued, one way or the other. Both counsel then put on the record their submissions in relation thereto and sought the court's ruling and directions over the issue to enable them decide what course to take each to protect their client's interests.

Having carefully perused this court's records as so recorded by the Judges and the Deputy Registrars, the following is the position they establish.

The Plaintiff is one Nashon Fitzwanga who is a male adult. The Defendant is said to be a corporation described as an international organization carrying on non-profit business in Kenya and Uganda. Its local address is c/o Post Office Box 99845, Mombasa. The Plaintiff filed its claim against the Defendant on 25.1.1999. On the same day he filed an application by Chamber Summons seeking certain restraining orders against the Defendant, and in particular restraining the defendant from removing the motor vehicle the subject of this case, to wit, C600 a Range Rover, from Kenya to Uganda, until the suit is heard and determined. Two days after the filing of the case and an application thereunder, consent orders were filed purportedly after being properly signed by both parties. The consent orders were filed purportedly after being properly signed by both parties. The consent orders were admitting completely the plaintiff's claim. The motor vehicle could now not be transited to Uganda. It was to be fully insured, licensed and mechanically maintained in Kenya purportedly by both parties. The vehicle could or was surrendered to the custody and use of the plaintiff in Kenya although it was not to be registered in his name until this suit is disposed off.

On 26.1.1999, a day after the suit was filed, the defendant appears to have entered appearance. He must have been served very very promptly and acted as much. Careful perusal confirms that there was no affidavit of service filed in this file. On 28.1.1999 the Deputy Registrar of this court recorded the consent order aforementioned filed on 27.1.1999. On 9.2.2000 the Deputy Registrar entered an interlocutory judgment on the basis that the defendant had failed to file a defence and on the same day fixed the case

for formal proof to take place on 2.5.2000. He did not serve the 14 days notice required under Order 1XB rule 1(2) nor did he serve a hearing notice on the defendant who had entered appearance.

When the case came before Hon. Commissioner Khaminwa on 2.5.2000 and no party appeared before her, she dismissed the whole suit for such non-attendance and impliedly for lack of prosecution. It would however appear that the plaintiff was either unaware of this dismissal or if he was aware of it, he assumed that there was no such dismissal. This is because on 27.1.1999 he had filed purported consent orders which were recorded by the Deputy Registrar on 18.9.2000. One of the terms in the consent was to fix the case for a formal proof on 2.5.2000. There is no entry thereafter dated 9.2.2000 showing that this case was to be placed before the court for formal proof on 2.5.2000.

On 27.11.01 the case was placed in court but once more there was no attendance of the plaintiff or the defendant. It was stood over generally.

On 2.10.2002 the case came before me for the purpose of hearing the KRA application seeking to be joined as a party but the defendant was not in court as it had not been served. Mr. Matuku for KRA complained in court that he was unable to serve a hearing notice because the defendants are physically nowhere to be found in their given address in Mombasa. The application was adjourned to 3.10.2002. At the same time the court prevailed upon the plaintiff to guide Mr. Matuku to the offices of the defendant in Mombasa, if indeed any existed. The plaintiff undertook to show Mr. Matuku for KRA, the defendants' offices. When the matter came up again before me the next day Mr. Matuku complained that the plaintiff had failed to lead him to the offices of the defendants in Mombasa but had instead led him to the offices of one Mr. Ongera Advocate who claimed that he had been instructed by the defendant to represent the defendant in future but had not filed his appointment Notice. It was surprising that he could have been so instructed overnight by letter allegedly from Kampala. It was odd also that the plaintiff is the one who alone appeared to know that Defendant was represented by Mr. Ongera. However, it was no issue then. Mr. Ongera claimed that the letter of instruction was dated 19.9.2002. He could not explain why he had failed to file his Notice of Appointment since 19.9.2002 or thereabouts. He nevertheless promised to file his Notice of Appointment without delay and the court ordered that he receives service on behalf of the defendant. The case was fixed for mention to confirm service on 15.11.2002.

On 15.11.2002 the case was mentioned before Hon. Justice Onyango Otieno who re-fixed it before me on 19.11.2002 for the hearing of the KRA application.

It is at this stage that something irregular happened. The plaintiff on 18.11.2002 filed an application by Chamber Summons dated the same date.

Among the reliefs sought therein was one to the effect: -

“That the ex parte judgment, or order or decree and all consequential orders or decrees incidental thereto entered or granted in this suit on 2.5.2000 against the plaintiff be set aside or discharged.”

This application which was under certificate of urgency was in my view deliberately placed before Hon. Justice Ouna by the Registry officer(s) and not before me, despite the fact that there was an order on the record by Hon. Justice Onyango Otieno that the file be placed before me the next day on 19.11.2002. Rightly, Hon. Justice Ouna refused to hear the application seeking to discharge the orders of 2.5.2000, which included the order dismissing this suit. In my view it is strange that the application to reinstate the suit could so speedily be taken before another court which was not dealing with or handling the file only a few minutes after it was filed and only a day before the file was coming before this court. But what is even more perplexing is the fact that although the application was not **heard** and **determined** by Hon. Justice Ouna on 18.11.2002, and was not heard nor determined by me on 19.11.2002, the Deputy Registrar in charge of the High Court Civil Registry, proceeded to extract an order purportedly related to the said application. It is dated the 19.11.2002 and is shown to have been issued or signed on 29.11.2002. As had become the practice in this file, the plaintiff had filed a consent document signed by the plaintiff and the defendant's advocate Mr. Ongera on behalf of Ongera Adembesa & Company

Advocates. It was filed probably in the morning of 19.11.2002. The consent is purportedly signed before a Commissioner of Oaths called L. J. Mangenani of P.O. Box 81306, Mombasa. Why the consent would need to be commissioned before a Commissioner of Oaths when it was not an affidavit is itself perplexing. But be that as it may, the three pleadings, to wit, the application to set aside, the dismissal order, and the extracted Order of the Deputy Registrar, were not brought to the attention of my court on 19.11.2002. What is clear from the extracted Order is that the Deputy Registrar on his own and without placing the application before a judge, decided to and indeed compromised the application. He purported to set aside the dismissal of the suit. He went even further to extract orders which in my opinion were totally beyond the scope of the application to set aside. I will do no better than record some of the orders extracted by the Deputy Registrar without the same having been validly made by this court. They include the following: -

“1. That by consent, the Chamber Summons dated 18th day of November, 2002 and filed by the Plaintiff on the said 18th day of November, 2002, is hereby wholly, against the Plaintiff, determined and or disposed of.

2. That by consent the ex parte order or decree and all consequential orders or decrees incidental thereto entered or granted in this suit on 2nd May, 2000 against the plaintiff for alleged non-attendance are hereby wholly discharged.

3. That by consent the ex parte order or decree and all consequential orders or decrees incidental thereto entered or granted in this suit on 2nd May, 2002 against the plaintiff for alleged non-attendance are hereby deemed to be void in law.

4. That by consent the ex parte judgment or decree and all consequential orders or decrees incidental thereto entered or granted in this suit on 2nd May, 2000 against the plaintiff for alleged non-attendance are hereby deemed in law to have been overtaken by the subsequent judicial event of the court Order given on 15th September, 2000 currently in force.”

(The underlining is mine made to stress the points).

I have carefully perused the file records. The Deputy Registrar who is empowered to enter any consent orders, did not enter any such consent orders in the court file records on the 18th or 19th November, 2002. It is my opinion also that any consent that the Deputy Registrar would enter under the special powers given to him under Order 48 rule 2A would and must be regular orders which are within and not outside the purview of the reliefs sought in the application and must be within the provisions of the applicable law. Referring to the extracted order quoted above, I have searched for but found no recorded orders which alone can be the final basis of any extracted order(s). I find as already indicated, that the consents filed by the plaintiff on 18.11.2002 were not recorded in the file and therefore were not adopted into the court proceedings. In my view until the consents are made part of the record by being reduced into the court file record by the Judge or the Deputy Registrar, they do not become orders of court and cannot be available for extraction as court's final orders. One of the extracted orders, to wit Order No. 4 above quoted, does not also appear to have been based on any order entered in the court's proceedings on 15.9.2000 as none exists from that date. That means that it is not possible to know what orders if any were made on 15.9.2000. In the meantime Kenya Revenue Authority filed an application under this suit seeking to be joined as a party. For some reason the application was not pursued until sometimes in May 2002 when again it was fixed for a hearing on 2.10.2002.

It would however appear from the record that the KRA's counsel's application upon the defendant could not be served because defendant apparently could not be traced in Mombasa. Indeed, this court on the said occasion had to go out of its way to request the plaintiff to supply the physical address of the defendant and the court adjourned the case to 3.10.2002 for the purpose of getting the proper address from the plaintiff personally as the latter had promised to do so. It was during the arguments in respect of the application that it came to the court's attention from the respondent, that the suit had on 2.5.2000, been dismissed. The plaintiff argued also that the suit was re-instated on 19.11.2002. That is when the court decided to establish the correct position. For if indeed this suit was dismissed on 2.5.2000 and was

not re-instated at all or if it was re-instated on 19.11.2002, then the fate of the application would entirely depend on the said established facts, inter alia.

The issues before me now are: -

- (1) Was the suit dismissed on 2.5.2000?
- (2) Was the suit successfully re-instated on 19.11.2002?
- (3) What if the answers to (1) and (2) are answered positively or negatively?

As earlier indicated, it is true that on 2.5.2000 this main suit was dismissed for want of prosecution by Hon. Commissioner Khaminwa. It cannot therefore be doubted that in that situation any subsequent proceedings in the file under the said suit were being held in a vacuum. They were not only irregular and void but amounted to a nullity. Like a builder who tries to construct a building without a foundation, the plaintiff herein continued to add proceeding after proceeding on a structure without foundation. The result of such is the crumbling of the same into a heap of rubble. As restated in a recent appeal, Civil Appeal No.22 of 2001, **ASSOCIATION OF MEMBERS OF EPISCOPAL CONFERENCE IN EASTERN AFRICA (AMECEA) –vs- AFRED ROMANI (t/a ROMANI ARCHITECTS) AND THREE OTHERS**, at Page 3: -

“...If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stop there .It will collapse”.

On the quoted principle above I have no hesitation in holding that all the proceedings that were conducted in this file and the Orders made on those proceedings except regular administrative ones, were void and in law a nullity. They were incurably bad and are automatically null and void and the act of declaring them so, such as this, is only for convenience and clarification of the situation. The attempt by the plaintiff to pile on the dismissed case other proceedings like formal proof, consent orders other than that of re-instating the case were all futile.

The next issue to decide is whether the suit was successfully re-instated. The plaintiff on 18.11.2002 filed what appear to be consent orders. Without considering the nature or extent of the same and thus without determining the legality of the said “Consent Orders”, I wish to point out that my examination of the file records, as earlier pointed out, confirms that the “consent orders” were received in court. They were stamped and filed in this file. **BUT** they were not recorded in the file by the Deputy Registrar. I hold the opinion that no such consents by the parties or their counsel in a suit, become part of the court proceedings or judicial proceedings until they are so recorded and duly signed by the Deputy Registrar. The act of recording the consent and signing it, is not merely administrative, in my view. It is judicial and holds judicial or legal consequences. The converse would in my opinion equally have similar serious consequences. In this case the Deputy Registrar failed to record the so-called “consent orders”. Whether such failure to so record was deliberate or accidental is an issue which requires administrative investigations. However, the result of the said failure is that the same failed to form or become part of the judicial or court proceedings of this suit. There were therefore no judicial orders of court from which the Deputy Registrar could, later on 19.11.2002, or 29.11.2002 could extract an order as he purported to do. It is my view and I so hold, that the extracted Order of the court dated 19.11.2002 and issued by the Deputy Registrar on 29.11.2002, was therefore null and void for not being based on any lawful order of this court. The order was based on nothing. I do not, as it has been said, need to declare it so, but for the convenience of everybody, I hereby declare the Deputy Registrar’s extracted order a nullity.

The consequences of my findings are as follows: -

- (a) That this suit filed by the Plaintiff, Nashon Fitzwanga on 25.1.1999 was dismissed by this court

on 2.5.2000 for lack of prosecution.

(b) That the devious attempt to re-instate it by the plaintiff using “consent orders” were not recorded in the court proceedings by the Deputy Registrar and therefore failed to become part of the court or judicial proceedings.

(c) That the extracted Order by the Deputy Registrar dated 19.11.2002 and issued on 29.11.2002 is hereby declared a nullity.

(d) That accordingly, all substantive proceedings and order in this suit subsequent to 2.5.2002 are hereby declared null and void.

(e) That the court therefore holds that the Kenya Revenue Authority’s application attempting to seek leave to be joined as a party is also null and void.

Having said what I have said hereinabove, I find it necessary as a Judge to make the following observations: -

That my reading of the records in this file have seriously saddened me because I formed a strong, very strong, impression that the plaintiff has on several occasions, indeed throughout the existence of this case attempted to manipulate court officers and flagrantly tried to abuse the regular court process to his personal and indeed selfish advantage. I will point out two instances to support my observation. Reference may be made to the Order extracted by the Deputy Registrar dated 28.1.1999 and issued on 29.11.1999. Item number 4 of the same reads: -

“That by consent in pursuance of maintaining the suit vehicle during the pendency of this suit the parties herein shall cause valid party insurance and current road licence to be displayed upon the windscreen of the suit vehicle, to wit, vehicle registration number C600 SDY at all times and the said third party insurance certificate and road licences, shall be issued promptly by all the appropriate insurance and road licensing authorities in Kenya including Customs & Excise Departments without any delays or obstruction whatsoever upon the request or application by the parties herein.” (The underlining is mine).

The reliefs sought by the plaintiff in the suit did not include prayers directed at third parties like Customs and Excise Department or the road licensing authority who were not parties in the suit. How then could the Deputy Registrar condone and accept into the court proceedings any so called consent orders which clearly were beyond the purview of the suit and obviously were condemning third parties who were not parties, without an opportunity being given to them to state their case or defend themselves? What followed this Order signed by the Deputy Registrar is what, in my view, the plaintiff deviously planned from the start when he filed the suit and more so, when he filed his so called “consent order” dated 27.1.1999!! He seized the Order and proceeded to confront the road licence issuing authority as well as the Customs & Excise Department, and flashing the Order on their faces, demanded that they must issue the licences and customs exemptions as per the orders of this court. The third parties could not clearly disobey court orders and proceeded to issue those licences, insurance policies and exemptions on the first time and each year thereafter. I view this process not only as fraudulent and illegal as against the said third parties but also as a serious abuse of the court process.

The second example is the process used by the plaintiff to attempt setting aside the orders of court which dismissed this suit dated 2.5.2002. The application was filed on 18.11.2002 and there was another application by KRA ordered for a hearing on 19.11.2002 before me by Honourable Justice Onyango Otieno on 15.11.2000. On what basis then would the Deputy Registrar find it proper to fix the setting aside application before Honourable Justice Ouna on 18.11.2002? And when Justice Ouna rightly declined to hear the application and ordered it to be heard before me on 19.11.2002, why did the Deputy Registrar decide to compromise the application by purporting to enter some so called consent orders and in so doing avoid the application being placed before the Judge who would properly hear the application and set aside the dismissal orders of 2.5.2000 in the proper exercise of the court’s discretion given to it under

Order 9A? Worse than all the above why did the Deputy Registrar purport to set aside a Judge's order of 2.5.2000 by extracting orders setting aside the said Judge's order when there were no legal or judicial orders made to that end in the record of this file? I have carefully examined the acts of the Deputy Registrar in this respect. In extracting non-existent orders, he was participating in the game of the plaintiff which in my finding was edging on fraud, putting it softly. Furthermore the extracted orders of the Deputy Registrar dated 18.11.2002, if properly perused, are quite beyond the purview of the prayers in the plaintiff's application dated 18.11.2002. I have had the opportunity to record them at the beginning of this ruling. However, at the expense of repeating myself, the Deputy Registrar's extracted order dated 19.11.2002 which as I have pointed out is extracted from a non-existent order in this file, provided in its order number 3 that: -

"...The exparte order or decree and all consequential order or decrees incidental thereto entered or granted in this suit on 2nd May, 2000 against the plaintiff for alleged non-attendance are hereby declared to be void in law."

How can the Deputy Registrar exercising his special orders, probably under Order 48 rule 2A of the Civil Procedure Rules, order that the Judge's orders, (in this case those dated 2.5.2000) are null and void? Even much so, how can he extract such an order when there is no such order on the record of the proceedings since none was recorded by the same Deputy Registrar or any other such officer? The deputy Registrar states in the same order that the Judge's order of 2.5.2000 is overtaken by the subsequent judicial event of the court order given on 15.9.2000. I have examined the record to appreciate the purported order said to have been made by the court on 15.9.2000. The truth is that no such order in the sequence of orders on the record was ever made. Once more the Deputy Registrar is extracting yet another court order from a non-existent order in the record of court. In my view apart from the fact that the order number 4, dated 19.11.2002 is once more beyond the scope of the prayers in the application dated 19.11.2002, it is indeed illegal as against the Judge's regular order of 19.11.2000, It is glaring and deliberate abuse of the court process and the Deputy registrar should come forth and explain whether the plaintiff was capable of achieving so much of what he achieved without being assisted to do so by court officers.

I have probably said a little too much. I am frightened to think that what has clearly happened in this suit is a wider practice than an isolated case. I hope the latter is the case. I would on my part hope that a thorough investigation should be conducted of all the cases now pending in our courts which were filed by the plaintiff in this case to establish whether he has applied similar devious methods to obtain illegal and fraudulent orders as he has done in this case. The cases include: -

(1) HCCC NO.204 of 1994 and

(2) HCCC NO 615 of 1996.

I was tempted to refer this case to the Criminal Investigations Department for full investigations touching the wider aspects of the issues arising in this case. I for example wondered whether or not the plaintiff in this case has not committed criminal acts in his conduct. It would also be proper to establish whether or not the court officers' conduct herein from time to time was merely accidental or deliberate. I also had the impression that the defendant in this case does not and never existed. Put in another way I believe that the plaintiff is one and the same person as the defendant. That should be established with all the consequences that may arise from it. I have reconsidered my earlier view and think that this case should be properly placed before the Mombasa Court's administrative and Judicial authorities to handle it and further investigate it and also investigate similar and other issues in the other cases referred to above with a view to preventing further possible fraud.

I order that this file and this Ruling be placed before His Lordship the Resident Judge, Mombasa for him in his discretion, to consider whether or not any investigation should be undertaken.

Dated and delivered at Mombasa this 19th day of March, 2002

D. A. ONYANCHA

JUDGE