REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 472 OF 2014

BERNARD NJOROGE GATHUA.....APPELLANT

VERSUS

MM*(Suing thro' his father and next friend*

GMM) .....RESPONDENT

(Being an appeal from the ruling of Hon. T. Ngugi dated 16th October 2014 delivered in CMCC No. 3168 of 2005)

JUDGMENT

1. This is an appeal against the ruling of *Hon. Mrs. T. Ngugi* (SPM) delivered on 16th October 2014. The ruling arose from a notice taken out by the respondent directing the appellant to show cause why execution should not issue against him following the entry of an *exparte* judgment in favour of the respondent on 3rd September 2009.

2. The events leading to the filing of the appeal are straight forward and are undisputed. The respondent through a plaint dated 16th December 1999 instituted suit against the appellant through his father and next friend *GMM* seeking general and special damages, costs and interest as compensation for injuries sustained in a road accident whose occurrence was blamed on the negligence of the appellant, his driver or agent.

3. Upon being served with summons, the appellant entered appearance and filed a statement of defence dated 18th July 2000 essentially denying all the particulars of negligence and injuries pleaded in the plaint.

4. The court record shows that the suit proceeded for hearing *exparte* as the appellant (then the defendant) did not attend the court on scheduled hearing dates though duly served with a hearing notices. The respondent called three witnesses after which the trial court entered judgment in his favour awarding him general damages in the sum of KShs.600,000 and special damages in the sum of KShs.71,870 together with costs of the suit and interest.

5. Thereafter, the respondent commenced the execution process. On application by the respondent, on 3rd June 2014, the court issued a notice to show cause why the appellant should not be arrested and committed to civil jail in execution of the decree. The appellant opposed the motion by filing grounds of opposition on 20th June 2014 in which he objected to the hearing of the notice on grounds inter alia that the appellant had not been personally served with the notice to show cause and that the decree to be executed had been obtained when an order issued by the High Court in HCCC No. 748 of 2009 barring proceedings of whatever nature in the suit among others were in force.

6. The objection was canvassed by way of written submissions. After considering the parties' respective submissions, the trial court in a ruling delivered on 16th October 2014 overruled the objection and ordered that the notice to show cause should proceed for hearing. This is what provoked the filing of this appeal.

7. In the memorandum of appeal dated 27th October 2014 and amended on 22nd July 2016, the appellant advanced five grounds of appeal which I reproduce hereunder:

> ***i. THAT the learned trial magistrate erred in fact and in law by holding that there were no stay of proceedings order issued in Nairobi HCCC No. 748 of 2009 which orders (despite being pointed out to her) that the orders had the effect of barring proceedings of whatever nature as against United Insurance Company policy holders.***
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> ***ii. THAT the learned trial magistrate erred in fact and in law in not finding that the decree the defendant / appellant was required to show cause to was, obtained when the stay of proceedings orders were still in force and that the plaintiff had proceeded ex parte notwithstanding those orders.***

iii. THAT the learned trial magistrate erred in law and in fact in not finding that despite the defendant /appellant being aware that the matter proceeded ex parte and judgment entered as against him, he was still barred from setting aside those proceedings as that still amounted to proceeding with the matter.

iv. THAT the learned trial magistrate erred in fact and in law in holding that it was not necessary to personally serve the defendant / appellant with the notice to show cause dated 3rd June, 2014 when the rules strictly provided for it.

v. THAT the learned trial magistrate erred in fact and in law in not finding that the defendant / respondent still needed leave of the court in executing a judgment that was more than one year old.

8. The reliefs sought in the appeal were as follows:

a) The appeal be allowed and the court does find that the stay orders granted in Nairobi High Court HCCC No. 748 of 2009 as well as the decision in Nairobi Misc 1345-005 (OS) are still in force and/or were still in force when the matter proceeded for hearing ex parte.

b) The court does find that it was necessary to personally serve the respondent/appellant as well as seek leave of the court in executing a decree that is more than one year old.

c) In the result the orders made by the learned magistrate and all the proceedings leading to the entry of judgment by the subordinate court be set aside.

d) The matter be remitted back to the subordinate court for hearing before a different magistrate.

e) The costs of this appeal and the lower court be granted to the defendant/appellant against the plaintiffs /respondents.

9. By consent of the parties, the appeal was prosecuted by way of written submissions. The appellant filed his submissions on 16th May 2018 while those of the respondent were filed on 10th July 2018. To respond to the respondent's submissions, the appellant filed further submissions on 29th August 2018. The submissions were highlighted before me on 26th November 2018 by learned counsel *Mr. Makumi* who appeared for the appellant and learned counsel *Mr. Chengo* who represented the respondent.

10. This being a fist appeal to the High Court, it is an appeal on both facts and the law. The duty of the first appellate court was succinctly summarized by the Court of Appeal in ***Selle & Another V Associated Motor Boat Company & Others, [1968] EA 123***, where the court stated as follows:

"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect…''

11. I have carefully considered the grounds of appeal, the proceedings before the trial court, the written and oral submissions made on behalf of the parties and all the authorities cited. I have also read the impugned ruling.

12. Having done so, I find that it is not disputed that at the time the accident subject matter of the suit in the trial court occurred, the appellant's vehicle had been insured by the United Insurance Company Limited (hereinafter the insurer). The insurer was thereafter placed under statutory management and on 15th July 2005 in the exercise of his statutory powers under *Section 67 (c) (10)* of the *Insurance Act, cap 487 of the Laws of Kenya*, the statutory manager declared a moratorium on any payment to its policy holders and all other creditors for a period of twelve months.

13. It is also not disputed that on 23rd October 2009, the High Court (*Kimaru J*) issued an order which *inter alia* stayed all proceedings of whatever nature or form against the insurer or its policy holders during the currency of the moratorium declared by the insurer's statutory manager.

14. From the grounds of appeal and the party's submissions, I find that three key issues emerge for my determination in this appeal. These are:

i. Whether the *exparte* proceedings before the trial court which culminated into the judgment delivered on 3rd September 2009 were irregular and unprocedural for lack of personal service on the appellant;

ii. Whether the proceedings, the resultant judgment and decree were a nullity in view of the moratorium and the court orders issued in HCCC No. 748 of 2009; and

iii. If the answer to (ii) above is in the negative, whether the learned trial magistrate erred in her decision to allow the continuation of execution proceedings commenced against the appellant by the notice to show cause dated 3rd June 2014.

15. Turning to the first issue, the appellant submitted that after the issuance of the moratorium, the advocates then on record appointed by his insurer withdrew from the proceedings and that as he was not personally served with hearing notices, he did not participate in the

proceedings; that he only came to learn of the existence of the *exparte* judgment at execution stage; that he was thus denied his right to a fair hearing. For this proposition, he relied on the case of ***County Assembly of Kisumu & 2 Others V Kisumu County Assembly Service Board & 4 Others, [2015] eKLR***.

16. The respondent on his part denied that the appellant had been denied his right to a fair hearing during the trial. It was submitted on his behalf that at all material times in the course of the trial upto delivery of judgment, the appellant was represented by the firm of *Muri & Mwaniki Advocates* who were properly served with hearing notices and that therefore his constitutional rights to a fair hearing had not been violated.

17. At the outset, I wish to point out that though the parties expended much time and effort attacking the legality of the judgment entered against the appellant on 3rd September 2009, that judgment is not the subject matter of this appeal. What is appealed against is the ruling of the trial court in the notice to show cause dated 16th October 2014.

I however appreciate the appellant's reasoning that if the proceedings, judgment and decree whose execution was being sought by issuance of the notice to show cause were a nullity, any subsequent process that was predicated on them was also a nullity including the notice to show cause and subsequent ruling whose validity is challenged in this appeal.

To that extent therefore, this court is duty bound to examine the validity or otherwise of the issues raised by the appellant in attacking the legality of the trial court's proceedings and judgment.

18. On the issue of lack of personal service on the appellant, I have perused the court record and I have confirmed that at the time hearing of the suit proceed *exparte*, the appellant had advocates on record in the name of *Muri & Mwaniki Advocates*. The record shows that before starting the hearing, the learned trial magistrate satisfied herself that the defendant (appellant) had been properly served with a hearing notice through his advocates on record.

19. The appellant's claim that his advocates had withdrawn from the proceedings is not supported by any evidence on record. The law is that for an advocate to withdraw from representing a party, he must seek and obtain leave of the court to cease acting for the party unless he is replaced by another advocate who formally files and serves a notice of change of advocates or the party confirms having withdrawn his/her instructions from the advocates on record by filing and serving a notice to act in person. *Orders 9* through to *Order 13* of the *Civil Procedure Rules* (the Rules) provides that unless any of the above happens, the advocate on record remains the advocate for the party in question until conclusion of the matter or cause.

20. I have thoroughly scrutinized the record of the lower court and I have not come across any proceedings in which the appellant's then advocates applied and were granted leave to cease representing the appellants. I did not also find a notice of change of advocates filed during the period the suit was heard and judgment was delivered. In fact, the court record reveals that the appellant's current advocates, the firm of *J. Makumi & Company Advocates* were granted leave of the court to come on record in place of *Muri & Mwaniki Advocates* on 15th October 2010 which leaves no room for doubt that the firm of *Muri & Mwaniki Advocates* which had been served with the hearing notices in this matter was properly on record for the appellant upto and including the date when the respondent commenced the execution proceedings that gave rise to the issuance of the notice to show cause. The said advocates were thus the appellant's recognized agents and service of court process on them was sufficient.

21. I thus agree with the position taken by the respondent that given the above circumstances, it was not necessary to serve the appellant personally with hearing notices or any court process. I am supported in this finding by the provisions of *Order 9 Rule 3* of the Rules which provides that ***"processes served on the recognized agent of a party shall be as effectual as if the same had been served on the party inperson, unless the court otherwise directs".***

22. The trial court in this case did not make any direction with regard to service of hearing notices. The learned trial magistrate was therefore correct in her finding that service of the hearing notices and of the notice to show cause on the appellant's advocates on record amounted to proper service. The appellant having been given an opportunity through his recognized agents to participate in the proceedings in the trial court and failed to avail himself of that opportunity cannot claim on appeal that he was denied of his right to a fair hearing. Nothing therefore turns on that ground of appeal.

23. On the claim that the proceedings were conducted in contravention of the moratorium dated 15th July 2005 and the orders of the High Court in HCCC No. 748 of 2009, I have noted that none of the parties availed the said moratorium to the court but I have perused the same as reproduced in ***Republic V Senior Principal Magistrate Kiambu Law Courts & 2 Others exparte David N Nthumbi, [2011] eKLR***. The moratorium was in the following terms:

> ***"THE INSURANCE ACT (CAP 487) UNITED INSURANCE COMPANY LIMITED***
>
> ***(Under statutory management)***
>
> ***DECLARATION OF MORATORIUM***
>
> ***NOTICE is given that in exercise of the powers conferred by section 67(c) (10) of the Insurance Act, the Statutory Manager of United Insurance Company Limited, declares a moratorium on the payment of the said insurer of its policy holders and all other creditors for a period of twelve (12) months with effect from the date of this notice.***
>
> ***Dated 15th July, 2005***

JOHNSON GITHAKA

Statutory Manager."

24. It is clear from a plain reading of the moratorium that it only sought to protect the insurer which was under statutory management from claims of payment made by either its policy holders or other creditors. The moratorium did not by itself affect the claims of third party's against the individual policy holders and did not amount to stay of proceedings of cases filed by 3rd parties against the insurer's policy holders..

25. The above position however changed when the High Court in HCCC No. 748 of 2009 in its orders made on 23rd October 2009 extended the protection accorded to the insurer by the moratorium to its policy holders. In Order No. 3, the court stayed all proceedings of whatever nature or form against United Insurance Company Limited or its policy holders during the currency of the moratorium declared by the statutory manager in 2005.

26. Given that the order was issued on 23rd October 2009 and there is no evidence of any other order that was previously issued by a court of competent jurisdiction staying proceedings in cases filed by third parties against the insurer's policy holders, it is my finding that the said order was not in force when the trial court heard and determined the suit filed against the appellant. The court record shows that the hearing kicked off on 10th July 2008 and was concluded on 2nd July 2009. As stated earlier, the judgment was delivered on 3rd September 2009. There is therefore no basis for the appellant's argument that the hearing was conducted in contravention of a court order and that therefore, the resultant judgment and decree were a nullity in law. It is thus my finding that the proceedings were lawfully and procedurally conducted and consequently, the judgment of the trial court was regularly entered.

27. Regarding whether the order in HCCC No. 748 of 2009 was still in force when the notice to show cause was issued and the subsequent proceedings and ruling, I note that it is not clear from the material placed before me whether the said orders were ever subsequently varied, set aside or discharged. The orders issued by *Ochieng J* on 10th April 2010 in HCCC No. 545 of 2006 now High Court Misc. Case No. 67 of 2012 only extended the term of the statutory manager for a further one year.

28. The respondent in his submissions did not dispute the existence of the said orders at the time the impugned ruling was delivered. The respondent only questioned their legality which is a different issue altogether. In the premises, I am persuaded to accept the appellant's claim that the said orders were still in force when the learned trial magistrate made her decision in the ruling of 16th October 2014 allowing continuation of the execution proceedings commenced against the appellant.

29. In arriving at her decision, the learned trial magistrate followed the decision in the matter of ***Blue Shield Insurance Company Limited (Under Statutory Management), HCCC No. 465 of 2011 (OS)*** where the court held that the protection offered to an insurance company through the declaration of a moratorium does not extend to cover policy holders against the claims of third parties though she was clearly aware of the orders issued by the High Court in HCCC No. 748 of 2009 since she made reference to them.

30. In my view, the learned trial magistrate fell into error when she failed to appreciate that the said orders as a matter of fact applied to the proceedings before her since the orders stayed all proceedings involving not only the insurer but also its policy holders who included the appellant. As noted earlier, the order applied to all proceedings of whatever nature which included execution proceedings. The learned trial magistrate was bound by the decision of the High Court. She did not have any discretion whether or not to apply the court order. She therefore erred in law when she failed to implement the said court order by staying the execution proceedings. She instead allowed their continuation by ordering that the notice to show cause should be fixed for hearing.

31. I wholly associate myself with the holding of *Odunga J* in ***Republic V Chairman , Political Parties Disputes Tribunal & Others Ex Parte Susan Kihika Wakarura [2017] e KLR*** that;

> ***" The High Court orders must be obeyed by subordinate courts whether they agree with them or not; whether pleasant or unpleasant. To blatantly ignore High Court orders and expect that the court would turn its eye away, is to underestimate and belittle the purpose for which the High Court is established…''***

32. It is my finding that the proceedings in the notice to show cause and the ruling of the learned trial magistrate contravened the orders of 23rd October 2009 and they were thus in law a nullity. In effect this means that they amounted to nothing.

33. Having found as I have above, I find that all the reliefs sought in the Amended Memorandum of appeal are not merited. None of them is capable of being granted. In the premises, I am satisfied that this appeal is devoid of merit and it is hereby dismissed with no orders as to costs.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this 17th day of October, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Chacha for Mr. Makumi for the appellant

No Appearance for the respondent

Mr. Salach: *Court Assistant*