REPUBLIC OF KENYA

IN THE HIGH COURT KENYA

AT KERICHO

CIVIL APPEAL NO.3 OF 2017

(Appeal arising from the ruling in Kericho CMCC No.573 of 2006 by Hon. S. K. Ngetich (SRM)

JOSEPGH ALWANDO.....APPELLANT

VERSUS

BOARD OF TRUSTEES NAIROBI PENTECOSTAL CHURCH.....1ST RESPONDENT

SAMMY MUGADI.....2ND RESPONDENT

STEVEN LWANGU AVISTINU.....3RD RESPONDENT

JUDGMENT

1. This is an appeal from the ruling of the trial magistrate in Kericho CMCC No.573 of 2006 dated 27th January 2017, in which the magistrate concluded as follows:

> *"I therefore find that the application has merits and is allowed to the effect that the judgment entered against the first defendant/applicant be and is hereby set aside, and the first dependent/applicant granted leave to file his defence within 14 days from today's date. As per consent recorded by parties, this order applies in 574, 576 and 577 of 2006. It does not apply to 575 because a decision was already made and this court cannot sit on appeal. Costs in the cause. "*

2. Thereafter, Joseph Olwando being aggrieved by the decision in that ruling has filed the present appeal on the following grounds-

> **1. That the learned magistrate erred in law and fact by failing to properly and adequately evaluate all material evidence and submissions presented before him by the respondent thereby arriving into totally wrong conclusion hence wrong ruling.**
>
> **2. That the learned magistrate erred in law, misdirected himself and went out of the way to dwell on presumptions as opposed to hard facts, documents and record before him hence wrong finding.**
>
> **3. That the learned magistrate erred in law and in fact in making a finding that the respondents were not served with summons and hence unrepresented and yet at all times throughout the trial there was a firm of advocates adequately representing the respondents.**
>
> **4. That the learned trial magistrate erred in law and fact by failing to appreciate the fact that this matter alongside Kericho CMCC No.575 of 2006 are so intertwined and inseparable having arisen out to the same action, parties represented by the firm of advocates, judgment made therein and decree thereon adequately satisfied hence arriving at a wrong ruling on the issue of service of summons.**
>
> **5. That the learned magistrate erred in law and fact in failing to find the respondent's application an abuse of court process and delaying tactics for all intent and purpose.**

3. The appellant concluded the Memorandum of Appeal, by seeking the ruling of the learned magistrate made on 27th January 2017 be set aside and that this court dismisses the respondent's application dated 24th March 2014 (actually it was 2012).

4. For the record, the application dated 24th March 2012 filed by PC Onduso & Co. Advocates for the applicants/1st defendant in the

magistrate's court, who is the 1st respondent in this appeal, sought the following orders from court-

> **1. That this matter be certified as urgent, service of the same be dispensed with and the same be heard exparte in the first instance.**
>
> **2. That the 1st defendant be granted leave to appoint PC Onduso & Co. Advocates to come on record and act for it in place of the firm of Moronge & Co. Advocates.**
>
> **3. That this honourable court grant stay of execution pending hearing of this application.**
>
> **4. That the judgment entered and all consequential orders and proceedings be set aside.**
>
> **5. That the court be pleased to order that this matter proceeds to hearing inter-partes on merits in the presence of the 1st defendant representative who is keen to defend the interests of the 1st defendant now that they know that they have been served.**

5. The appeal proceeded by way of filing written submissions. Appellant's counsel filed written submissions on 3rd May 2018. The 1st respondent's advocates did not file any written submissions.

6. Counsel in the submissions emphasized that it was very clear from the record that in Kericho CMCC No.575 of 2006 the 1st respondent (Trustee of Nairobi Pentecostal church) was represented and defended by Moronge & Co. Advocates which represented all the defendants. Counsel therefore asserted that it was wrong for the learned magistrate to hold in the ruling that the 1st respondent was not served with summons and therefore did not participate in the proceedings in court while the record clearly indicated to the contrary. Counsel closed the submissions by saying the magistrate failed to adequately evaluate the evidence before him and that the 1st respondent's application was a delaying tactic meant to deny the appellant and other plaintiff's the fruits of their judgment. Counsel asked this court to allow the appeal and dismiss the 1st respondent's application dated 24th March 2012 with costs to the appellant.

7. I have considered the appeal, the submissions of the appellant's counsel and perused the ruling of the magistrate. Counsel for 1st respondent did not file written submissions. In this appeal though M/s PC Onduso & Co. Advocates have been served with notices to attend court on several occasions, they have not bothered to attend court or give an explanation on the reason for their absence. They were the advocates for the 1st defendant, now 1st respondent, in the application for setting aside judgment dated 24th March 2012. They filed a Notice of Change of Advocates same day. Though there was a prayer 2 in the application for them to be granted leave to come on record in place of Mong'are & Co. Advocates for the 1st defendant/1st respondent herein, the learned magistrate in the ruling in contest did not address that issue. Counsel for the appellant has also not told me whether the said advocates are properly on record and how. Whatever the case, since they accepted service they should have informed the court as officers of the court have to, about their difficulty in the matter, and they have not done so which in my view cannot be condoned.

8. That said, this is an appeal by one person Joseph Alwanda. Though the appellant's counsel has stated in the written submissions that there are other plaintiffs in the subordinate court in the same boat, they are neither appellants here nor are they interested parties herein. They are thus not interested in this appeal and I cannot take them into account in this judgment.

9. Coming to the merits of the appeal, though the counsel for the appellant has talked about evidence that was before the magistrate which the magistrate did not consider in making the ruling, what was before the magistrate was an application, and averments in the filed documents therein and submissions. Only affidavits filed qualified to be evidence, but the challenge is that they are usually not proved through cross-examination. In the present case, the deponents of affidavits before the magistrate were not cross-examined and nobody asked for cross-examination of deponents of affidavits. The magistrate was thus required to weigh the contents and consistency of the documents filed and come to his own conclusion. He did so.

10. The issue of whether Moronge & Co. Advocates were appointed by the 1st defendant was argued before the magistrate without the involvement of the said advocates. They did not even file an affidavit to say how, and when they were appointed by the 1st defendant to act for them. This was the main issue, and the magistrate in my view considered the issue adequately, and with what was placed before him, I find no fault as alleged by counsel for the appellant. I do not think that the fact of an advocate filing a Memorandum of Appearance and acting for a party is proof that he was appointed or instructed by that party. It is merely a rebuttable presumption that he was the advocate, and same can still be challenged.

11. Aside from the above, I am of the view that all courts and advocates should appreciate that litigation belongs to the parties and not the courts or the advocates. The Constitution of Kenya 2010 is very clear that parties are at liberty to appoint advocates of their own choice. Parties can also act on their own without any legal representation. The provisions on fair hearing under Article 50, fair administrative action Article 47, and how judicial authority should be exercised under Article 159 of the Constitution all protect the rights of parties, not the courts or tribunals or advocates. My understanding of the Magistrate's ruling was that he gave all parties or litigants a chance to be heard, and the parties could go to the same trial court and file consents if they so wish.

12. In my view, therefore, this appeal has no merits as it seeks to determine a civil case between parties through an application on procedural considerations, rather than a substantive hearing as already ordered by the trial court. The appeal will thus fail.

13. Talking about delay in reaping fruits of the judgment as the counsel for the appellant has stated, filing this appeal in my view caused more delay than would have happened if the appellant fixed the cases for hearing and obtained judgment in default orders, if the defendants did not show up.

14. The upshot of this is that, I dismiss the appeal of the appellant, with no order as to costs, as none of the listed respondents attended court.

Dated at Kericho this 7th October 2019.

GEORGE DULU

JUDGE