REPUBLIC OF KENYA

High Court at Bungoma

Civil Appeal 54 of 2010

LAWRENCE PAPAKESOKOKAT IJONO .... APPELLANT

V

JOSEPH MANYURU IWUONI .... RESPONDENT

JUDGMENT

The Appeal

[1] This appeal emanates from the Ruling of the Honourable trial magistrate P.M. Achieng in Bungoma CMCC No.563 of 1998 delivered on 19th May, 2010. In the Ruling, the trial magistrate dismissed the Appellant's application dated 12th April, 2010 in which he sought to set aside the judgment of the trial court entered against the Appellant jointly and severally.

[2] The arguments put forth in support of his application dated 12/4/2010, are also the arguments that are put forward in support of the appeal.

[3] The Appellant contends that:

(a) He entered appearance and filed defence in person on 25th January, 1999.

(b) He never authorized the Attorney General to represent him in the proceedings.

(c) He was not notified of the hearing that culminated into the judgment against him.

(d) As a result he was deprived of his Constitutional right to fair trial.

[4] The Appellant has expounded his position on the issue of service of a hearing notice. He is of the view that representation by the A-G was not sufficient for him as a Defendant who had already entered his own appearance and filed defence. Accordingly, under the law he was entitled to be notified of the hearing date. Service of process on him personally of any proceeding undertaken in the matter was mandatory under Order 5 rule 8(1) of the CPR. He relied on the case of **Kenya Bus Service Ltd v Sammy Njeru & Another [2005] e KLR.**

The Appeal is opposed

[5] The Respondents are opposed to the appeal. The major grounds are that:

(a) The appeal is devoid of parties since the Attorney-General is not cited as a Respondent.

(b) The appellant was aware of the proceedings and later instructed the Attorney-General to represent him.

(c) The memorandum of appearance filed by the A-G on 26/11/1999 superseded the one filed by the Appellant on 25/1/1999.

COURT RENDERS ITSELF THUS:

[6] It is a well-established and known law that where there are more than one Defendants, service of process must be effected upon each Defendant in person or on their respective recognized agents. Service of Summons to Enter Appearance was served on the appellant in person, and, he entered appearance and filed defence in person on 25/1/1999. It is then taken, as a matter of law, that all court processes should be served upon him in person. The subsequent entry of appearance by the A-G on behalf of the Appellant does not *per se* take away that right to be served with court process nor obviate the necessity to serve the Appellant with a hearing notice inviting him to the hearing of the case against him. Needless to say, that, the right of a party in a suit to participate in the hearing of the case, is not a favour by the court, or a technical requirement: it is an important facet of fair hearing and due process that is and must be seen for what it is; an integral part of natural law. See the case of **BGM HCCC No.109 of 2010 Jane Nasimiyu v. Dr. Samwel Kamau & 3 others {2013} e KLR.**

[7] The trial court ought to have considered that it entered a judgment against the Appellant and Attorney-General *jointly and severally*, with the attendant possibilities of execution being sought against the Appellant too. It is when a court of law is confronted with these realities, that it realizes the issue of personal service and legal representation is and should have been the dominant factors in deciding the application to set aside the judgment entered against the Appellant. The application before the Honourable trial magistrate was based on failure to invite the Appellant for the trial: a grievance that was

founded in constitutional right to be heard. In simple terms, the Appellant was telling the trial court that he was acting in person and he should have been invited to the hearing of his cause. On that basis alone, the trial magistrate should have developed a strong desire to allow the Appellant an opportunity to be heard before he is condemned. The concerns that were raised before the trial magistrate were constitutional in nature, and required a much more public-spirited approach, because the Appellant's gravamen was that his right had been violated in the manner the proceeding had been conducted. Unfortunately, the approach the trial magistrate took on the matter was not the most desirable, especially that it was faced with concerns which could not be said to be light, and it was wrong for the trial court to have weighed them against the prospects of his case as if it was considering an application for summary judgment or for striking out a pleading. Whether or not the Appellant had raised any triable issues in his defence was not available to the court at that stage when the question that the case had proceeded in the absence of the Appellant, who had not been served with a hearing notice had not been resolved. That was a matter of fair trial which ought to have been accorded appropriate proportion of importance.

[8] The constitutional right to a fair trial, due process and opportunity to be heard cannot be taken away from a party. On the contrary, it is the mandatory constitutional duty of the court to accord and protect that right at all times. This constitutional necessity is seen in the crudest example, that, even if a party's pleading does not disclose any triable issues, that communication by the court, as a judicial communiqué, should be rendered by the court after an application to that effect had been made and all parties have had due notice for the hearing. Similarly, when the court has to make a finding, within the trial, that a pleading is a demurrer, all parties must have been given an opportunity to appear in court and make submissions on the issue, unless the party who has been given due notice fails or declines to attend during the trial. In any of the situation, a party who has appeared and filed defence is entitled to an opportunity to be heard, and a notice for the date and place for the hearing should be served or communicated accordingly. These matters are not glibly stated in law: they are solidly engraved as constitutional rights of parties in a trial.

[9] There is nothing in the record of appeal that shows that the Appellant expressly instructed the Attorney-General to represent him in the proceedings. Although, I think, this is an area that needs more searching jurisprudence – making ventures by the courts because, it is not uncommon that, in cases where the Attorney-General is the sole representative of parties who had been sued jointly and severally, the results have been that judgments are entered against the individual parties severally, who are usually left in the dark for the entire tenure of the proceedings only to be awakened by execution.

[10] Before I close, there is another important aspect on representation by the Attorney- General of parties who should ordinarily represent themselves: and I respectfully agree with the remarks of *Justice J. B. Ojwang* (as he then was) in the case of **Ng'ok v. Attorney General & Another [2005] 1 KLR 485** that:

"The Attorney-General does not have an unfettered discretion to provide legal services to all-and-sundry, provided only that in his reckoning a particular suit has some kind of impact on Government interests. That was an extravagant proposition and would result in considerable waste of Government resources."

[11] See also this courts resolution in ***Jane Simiyu case*** (supra) that:

"I take the view that the A-G represents public interest either as a friend of the court or as a substantive party in civil proceedings where the Government is a party as per Article 156 of the Constitution... The right of the individual doctors sued herein to be invited for the hearing of the case does not abate just because the A-G has entered appearance for all Defendants..... the fact that they were employees of the 3rd Defendant does not remove the necessity of personal service, or obviate the risk of liability befalling the 1st and 2nd Defendants severally. In that context the appearance by the A-G may not be sufficient in law."

On Fundamental Principles of Law

[12] I have to make a conclusion based on fundamental considerations of the law: that, the Judgment entered by the trial magistrate, to the extent that relates to the Appellant, cannot be left to stand. Accordingly, the judgment of the trial court in so far as entered against the Appellant is hereby set aside. I am acutely aware the judgment in question was entered into jointly and severally, and I have not set aside the judgment against the A-G. I make it clear, therefore, that, any other matter corollary to this judgment should not be imputed as part of this judgment.

[13] Each party to bear own costs for this appeal.

Dated, signed and delivered in open court at Bungoma this 7th day of May, 2013

F. GIKONYO

JUDGE

In the presence of:

Court assistant: Khisa

Madam Makhoha for Respondent

Situma for Wanyama Wanyonyi for Appellant

F. GIKONYO

JUDGE