



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Potter, Hancox JJA & Chesoni Ag JA)

CIVIL APPEAL NO 46 OF 1981

BETWEEN

HALL.....APPELLANT

AND

LOUUI OLE MAIYARESPONDENT

JUDGMENT

Louuai Ole Maiya, who was employed by JJ Hall on his farm, Enasoit Ranch in the Nanyuki District as a labourer, was unfortunately injured while said to be working as a cattle dip assistant on or about November 30, 1979. Even the admitted injury was serious, resulting in the amputation of Ole Maiya's right leg below the knee. He accordingly sued Hall for negligence and for damages over and above that which he has received under the Workmen's Compensation Act (cap 236). Section 25 of that Act provides that nothing therein shall prevent proceedings to recover damages being instituted against the employer, and, conversely, that, if he succeeds, the employee's damages will take into account such compensation in respect of the same injury as he has received under the Act. Before the action came on for hearing, Hall applied for security for costs under order XXV rule 1 of the Civil Procedure Rules, supporting it with an affidavit stating that if the suit was dismissed Maiya would be unable to pay his costs. That was the only affidavit filed and the application is recorded as having been heard by Muli J on June 30, 1981. It was successfully resisted by Mr Imanyara on behalf of Maiya, the learned judge concluding his ruling with the following words:

“I will refuse the application security for costs. I will grant the costs herein to plaintiff. The ruling was done under my direction under section 3A of the Civil Procedure Rules. [Meaning the Civil Procedure Act]. I gave directions for recording of submissions and I directed the Senior Deputy Registrar to refuse the application. Application is refused. Case to proceed to trial without security for costs.”

Hall, through his counsel Mr Nowrojee, now appeals against this ruling substantially on the grounds that section 3A of the Civil Procedure Act, which gives the court inherent powers to make such orders as are necessary for the ends of justice, and to prevent abuse of its process, does not empower a judge to direct that the hearing of an application to the high court may be heard by any other person; neither does it grant jurisdiction to a registrar to hear and determine such application. I assume from the above quoted passage, for the purpose of this judgment, that the application was in fact heard and refused by the Senior Deputy Registrar acting under the judge's direction.

Mr Nowrojee took us through the first six rules of order XLVI and rules 1, 2, 2A & 2B of order XLVIII

of the Civil Procedure Rules. Only rule 6 of order XLVI has occasioned me any difficulty, but after consideration, I am satisfied that that rule is inapplicable in this case because the judge was not absent at the material time, and, in any event, the hearing purported to proceed before him and the ruling was by him. This was accepted by Mr Imanyara in his reply on behalf of the respondent, with the result that, as stated in ground 7 of the memorandum of appeal, such function cannot be delegated, as is clearly stated in *Judicial Review of Administrative Action* 3rd Edition by Professor SA de Smith at page 263.

I do not think section 3A confers any such power as was purportedly exercised in this case. Without going into the question of when that section may be applicable, it is manifested that it does not affect jurisdiction, so as to permit the Registrar to conduct a hearing and reach a decision which, at that time, was reserved to a judge, or even under his direction.

In 1982 extensive amendments were made to the Civil Procedure Rules and by LN 90/1982, dated June 22, 1982, rule 5 was added to the existing order XLVIII subrule (1) of which empowers the Registrar to hear and determine applications made, *inter alia*, under order XXV. A further amendment, by LN 126 of 1982 enlarged the powers of the Registrar under rule 5(1), as then substituted, but did not affect the power previously granted to hear and determine applications under order XXV.

The first of those amendments, however, occurred nearly a year after Muli J's decision, and there was thus no power in the Registrar to hear and determine an application for security for costs in a High Court action on June 30, 1981. Even if there had been, the Registrar would have had to hear and determine the application himself in the exercise of his own jurisdiction and not under the direction of the judge. In other words, if the amending rule had been passed at that date is it to be said that section 3A could be prayed in aid? In my view it cannot. The Registrar could not usurp the function of the judge (who would still have had jurisdiction) and neither could he exercise his own discretion at anyone else's direction. But in any case the Registrar had no jurisdiction to hear this matter at that time.

I would therefore allow this appeal and set aside the order of the High Court dated June 30, 1981. I would refer the matter back for hearing accordingly. I would also award the appellant his costs of this appeal and of the proceedings against which it is brought.

Chesoni Ag JA. I agree with the draft judgment of Hancox JA which I had the advantage of reading.

Order XXV rule 1 of the Civil Procedure Rules provides as follows:

“In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party”.

The appellant, Mr Hall, owns a farm at Nanyuki. He had employed the respondent Louuai Ole Maiya as a herdsman or dip assistant. Louuai was injured in the course of his employment. The injury was so serious that his right leg had to be amputated below the knee. He was paid compensation under the Workman's Compensation Act (cap 236). He then filed a civil suit against the appellant alleging negligence on the part of his employer. Section 25 of the Act allowed him to do so provided he established that the injury was caused by the personal negligence or wilful act of his employer, and if he succeeded the award under the Act would be taken into account when computing the damages to be awarded to him in the suit. After the appellant had filed his written statement of defence he applied to the court under order XXV rule 1 for security for costs so that in the event of Louuai losing the suit he, the appellant, would recover his costs in the suit. The application was argued and the ruling delivered on June 30, 1981. In the last paragraph the ruling reads as follows:

“This ruling was done under my direction under section 3A of the Civil Procedure Rules. I gave direction for recording of submissions and I directed the Senior Deputy Registrar to refuse the application. Application is refused. Case to proceed to trial without security for costs.”

The learned judge must have meant section 3A for the Civil Procedure Act and not Rules. Mr Ghadialy applied for and was granted leave to appeal. There are eleven grounds of appeal. In my view if the

answers to grounds 2 and 3 are in the negative there will be no need to consider the other grounds. Ground 2 in brief is whether the Senior Deputy Registrar had jurisdiction to hear the application and ground 3 is whether section 3A of the Civil Procedure Act grants jurisdiction to a judge of the High Court to direct a hearing of, and a decision upon, an application to the High Court. Mr Nowrojee for the appellant also argued ground 7 on delegation. The judges of the High Court exercise jurisdiction as provided in the Judicature Act (cap 8) which must be in conformity with, subject to the constitution, all other written laws. The Civil Procedure Act and Rules are amongst such written laws. Neither the said Act nor the Rules empower a High Court judge to confer jurisdiction upon the Registrar, his senior deputy or deputy. In my view a High Court judge cannot confer jurisdiction in exercise of the inherent powers under section 3A of the Civil Procedure Act because that section does not give a judge the power to confer jurisdiction on some other court officer. Section 3A did not apply to the application by the appellant. The making of an order for security for costs is an exercise of a discretion by the court. The learned judge by the procedure he adopted purported to delegate the exercise of his discretion. This is the subject of ground 7. With respect to the learned Judge an exercise of a judicial act or discretion is not capable of being delegated. See de Smith, *Judicial Review of Administrative Action* (3rd Edn) p 263.

I am satisfied that neither the Senior Deputy Registrar had jurisdiction to hear the application nor had the learned judge power under law to confer jurisdiction by a direction or otherwise upon the Senior Deputy Registrar. The application was neither a ministerial act nor a judgment on application which may be done or entered by the Registrar or an officer authorised by the Chief Justice under order XLVIII rules 1 and 2. It was not the order envisaged under rule 2A of the same order or order XLVI rule 6. For the reasons I have given I am satisfied that the procedure adopted by the learned judge was so fatally irregular that it rendered the proceedings before and the decision of the Senior Deputy Registrar a nullity. Indeed the learned judge could not in law properly sign and pronounce a ruling prepared by someone else when he was not the presiding officer in the matter. I would allow this appeal, set aside the High Court order and refer the application back to the High Court for hearing. I would award costs here and in the High Court to the appellant.

Potter JA. I agree with the judgments herein of Hancox JA and Chesoni Ag JA. Accordingly this appeal is allowed; the order of the High Court is set aside; the application for security for costs is referred back to the High Court for hearing. The appellant shall have his costs of this appeal and of the proceedings the subject of this appeal.

Dated and delivered at Nairobi this 25th day of May, 1983.

K.D POTTER

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JUDGE OF APPEAL

A.R.W HANCOX

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JUDGE OF APPEAL

Z.R CHESONI

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Ag.JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

