



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU & J. MOHAMMED, J.J.A)

CIVIL APPEAL NO 269 OF 2017

BETWEEN

DANIEL MAINGI MUCHIRI.....APPELLANT

AND

JUBILEE INSURANCE CO. LTDRESPONDENT

(An appeal from the ruling and order of the High Court of Kenya at Nairobi (Mwongo, J.) dated 19th June 2017 in HCCA oo 195 of 2014)

JUDGMENT OF THE COURT

Background

1. **Daniel Maingi Muchiri** (the appellant) was the successful party before the Principal Magistrate's Court *in Civil Suit No 369 of 2003* in which he had sued **Stephen Gichuru Njoroge** and **Julius Maina Warui** for general and special damages for injuries that he suffered in a motor vehicle accident in January, 2000. The appellant was awarded general damages of Ksh. 550,000.00 and special damages of Ksh. 252,233.00 plus costs of the suit and interest. **Stephen Gichuru Njoroge** was the driver of the said motor vehicle (KAC 987D) while **Julius Maina Warui** was the owner and it was insured by **Jubilee Insurance Company Limited** (the respondent). After judgement was entered, the appellant filed **Civil Suit No 6553 of 2013**, being a declaratory suit against the respondent seeking *inter alia* a declaration that the respondent was liable to satisfy the decree in **CMCC No. 369 of 2003**. The appellant filed an application within CMCC No. 6553 of 2013 to strike out the respondent's statement of defence and seeking an order that judgment be entered in favour of the appellant. **Hon. Nchoe** allowed the application.

2. Aggrieved by the ruling of the learned Magistrate, the respondent filed **Civil Appeal No 195 of 2014**. Vide an application dated 6th June, 2014, the respondent sought a stay of execution pending the hearing of the appeal. The stay was granted on condition that the decretal sum was deposited in court. The respondent complied with the order of the court. Civil Appeal No 195 of 2014 was dismissed by a judgment delivered on 17th July, 2015 by **Sergon, J.** who upheld the decision of **Hon. Nchoe**.

3. Aggrieved by this decision, the respondent filed a notice of appeal and an application to this Court to file an appeal out of time. Pending the hearing of the intended appeal, the High Court issued a stay of execution vide a ruling dated 6th November, 2015. The respondent's application for leave to appeal out of time was dismissed by **Githinji, JA**.

4. Consequently, the respondent sought to settle the decretal sum and vide a letter dated 1st March, 2016 to the Executive Officer in the Chief Magistrate's Courts, the respondent requested for a computation of the accrued interest on the Decree. Vide a letter dated 3rd March, 2016, the Executive Officer wrote to the respondent's counsel advising that the accrued interest amounted to Kshs. 115,906.84 as at 1st March, 2016. On the basis of this information, the respondent filed a notice of motion dated 7th March, 2016 seeking the following orders:

a) That service of the application be dispensed with and the same be heard on priority basis;

b) That an order do issue directing the sums of Kshs. 1,417,611.00 deposited on 16th June, 2014 be disbursed as follows:

(i) Kshs. 1,057,937.84 to the appellant's counsel;

(ii) Kshs. 359,676.16 to the respondent's counsel.

c) That the respondent upon release of the said sums to counsel for the appellant be deemed to have discharged its obligation under the decree issued in **CMCC Number 6553 of 2013 (Daniel Maingi Muchiri v Jubilee Insurance Company of Kenya Limited)**.

d) That the court be pleased to make such other or further orders that it deems fit in the circumstances of the case;

e) That the costs of this application be provided.

5. From the record, the advocates for the parties appeared in court on 16th March, 2016 where a consent was entered by counsel for the parties to the effect that the application dated 7th March, 2016 would be mentioned on 11th April, 2016 to give parties time to agree on the balance of the sum due; and that Kshs 1,057,937.84 be released to the appellant's counsel on record. It also appears from the record, that the parties were unable to agree on the sum due, and as a result, the application dated 7th March, 2016 was fixed for hearing on 19th September, 2016.

6. The appellant's counsel did not appear on that date, and the application was then fixed for hearing on 1st November, 2016 before **Njuguna, J.**, who ordered the parties to agree on the amount of interest from the date of the judgment and record a consent in court. Again, this did not happen, and the matter was fixed for hearing on 19th June, 2017. Despite notice of the hearing, the appellant's advocate did not appear. Learned counsel, **Mr. Luseno** who appeared on behalf of the respondent advised the court of the previous consent that had been recorded, and applied for the release of the sum of Kshs 359,676.19 to the respondent. This application was allowed by **Mwongo, J.** who gave the order on condition that should costs become due and payable, they would be paid by the respondent.

7. This leads us to the instant appeal, filed by the appellant who is aggrieved with the order of **Mwongo J.** In his memorandum of appeal, he sets out grounds of appeal and we have considered each of the grounds and we summarize the grievances that the appellant has against the order of **Mwongo, J.** as hereunder:

a) The trial court erred in law in directing money that had been deposited for the due performance of the decretal sum be refunded, despite the fact that an appeal from the award had been unsuccessful;

b) That the trial court unprocedurally sat on appeal on the decision awarding the decretal sum, made the order without jurisdiction, as the High Court was already *functus officio*, and that the order made was in contravention of the **Constitution of Kenya, 2010** and **the African Charter** and thus detrimental to the appellant and his counsel on record;

c) The trial court failed to take into account that as at the 6th August 2015, the decretal sum and the accrued interest stood at the sum of Kshs 1,534,415.10 in favour of the appellant;

d) The trial court failed to consider the replying affidavit of the appellant's counsel on record, and proceeded to hear the matter *ex parte* contrary to the rules of natural justice, the **Constitution of Kenya** and the principles of independence and impartiality of the Judiciary;

e) The effect of the ruling was to deprive the appellant of the fruits of his judgment, and to interfere with his right to property contrary to **Article 40 of the Constitution** of Kenya, 2010.

f) The ruling is a manifestation of deliberate strategies that the Judiciary has used over years to sabotage the legal practice of the appellant's advocates as punishment for previously exposed wrongdoings of the state, and has thus been used to deny the appellant access to justice;

8. The appellant seeks the following orders:

a) That the appeal be allowed and that the ruling and orders issued by **Mwongo, J.** on 19th June, 2017 be set aside with costs to the appellant;

b) That the respondent's notice of motion dated 7th March, 2016 be dismissed with costs to the appellant;

c) That general and exemplary damages be assessed and awarded to the appellant and to the appellant's counsel on record to redress gross violations of their fundamental human rights;

d) That **Mwongo, J.** be rebuked or admonished for conspiring with the respondent and the respondent's advocates to subvert the alleged fundamental human rights of the appellant and those of his counsel on record and for curtailing the Constitution of Kenya as aforesaid to the detriment of the appellant and his counsel on record; and

e) That costs of this appeal and the costs of the entire proceedings of the High Court be awarded to the appellant on a higher scale.

Submissions by Counsel

9. The appellant and respondent filed written submissions that were highlighted orally before us. At the plenary hearing, **Ms. Inamah**, learned counsel for the respondent, raised a preliminary objection.

She submitted that the instant appeal was incompetent due to the fact that the appellant had not sought leave, as required by **Order 43(2)** of the **Civil Procedure Rules** and **Section 75** of the **Civil Procedure Act**, as well as **Rule 39(b)** of the **Court of Appeal Rules, 2010**. As such,

Ms. Inamah submitted, since leave of the court was not sought as required, this Court could not assume jurisdiction and hear the appeal.

10. On this question, **Mr. Ngoge**, learned counsel for the respondent argued that the motion before the Court had been brought in part under **Order 40** of the **Civil Procedure Rules, 2010**, and as such, an appeal lay as of right from the order of the High Court.

11. **Mr Ngoge** further submitted that **Mwongo, J.** had no jurisdiction to order that the sum of **Kshs 359,673.16** be refunded to the respondent as the High Court was *functus officio*; that the impugned order curtailed the socio-economic rights of the appellant contrary to **Article 40 and 43** of the **Constitution** and was contrary to **Article 14** of the **African Charter**; that the appellant was not afforded a fair trial as the proceedings leading to the impugned ruling and order were heard *ex parte*. Counsel further submitted that by finding in favour of the appellant, vide the impugned ruling, the appellant was subjected to unlawful, cruel and degrading treatment contrary to **Articles 28 and 29** of the **Constitution**. Counsel proposed that the sum of Kshs. 50 million be assessed and paid to the appellant so as to redress the said violations. Counsel submitted that the respondent's counsel misled **Mwongo, J.**, thereby deliberately subjecting the appellant's counsel to unlawful, unprofessional, degrading and cruel and unfair treatment contrary to **Articles 28 and 29 of the Constitution**. Counsel proposed that to redress the alleged violations of the alleged fundamental human rights of the appellant's counsel, an award of Kshs 300 million be paid to him by the respondents in general damages. Counsel urged us to allow the appeal.

12. On the question whether the learned Judge erred in allowing the respondent's application, counsel for the respondent submitted that the appellant's counsel failed to compute the accrued interest payable, and also failed to attend court for the hearing of the application despite service of the hearing notice. Counsel submitted that the learned Judge did not therefore err in finding as he did.

13. On the question whether there was a violation of the fundamental rights of the appellant, counsel submitted that counsel for the appellant failed to attend the hearing of the application despite service of the hearing notice on his Firm. It was counsel's submission that the hearing proceeded in the absence of the appellant and their counsel; and that having chosen not to attend the hearing of the application, the appellant's counsel is estopped from faulting the learned Judge from hearing the application and delivering a ruling in his absence. Counsel reiterated that the jurisdiction of this Court is purely appellate and it therefore has no jurisdiction to deal with the appellant's claim of violation of constitutional rights or to award damages.

14. On the appellant's claim that the name of the respondent's advocates, **Majanja Luseno & Company** bears the name of **Majanja, J.**, a sitting Judge, counsel submitted that the claim was frivolous as **Majanja, J.** did not hear any of the suits or appeals. Counsel urged us to dismiss the appeal with costs.

Determination.

15. We have considered the record of appeal, the submissions by counsel, the authorities cited and the law. It is pertinent to note that the appellant herein has over time filed a multitude of applications, suits and appeals related to this matter. This Court in **Daniel Maingi Muchiri v Jubilee Insurance Company Ltd [2017] eKLR** stated as follows:

“This dispute arising from a motor vehicle accident claim instituted by the appellant in 2003 remains unresolved many years later due to what is clearly an abuse of the court process. Applications have been brought in relays and successively in the subordinate court and the High Court on some of the most mundane issues, the determination which have ended before this Court. Arising from some of those interlocutory orders made in the High Court at various stages in the proceedings, we had before us on a single day, 3rd October 2017, five appeals. The appeals were heard back to back, this judgment being our determination of one of them.”

16. We proceed to first deal with the question of jurisdiction because, as was stated by this Court in **Kakuta Maimai Hamisi v Peris Pesu Tobiko & 2 others [2013] eKLR (Civil Appeal 154 of 2013)**:

“So central and determinative is the question of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceeding is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain.

*The proper place of jurisdiction and the necessity to deal with it as the first order of business before an enquiry into merits of a cause was best captured in the timeless words of Nyarangi J.A in **The OWNERS OF THE MOTOR VESSEL LILLIAN ‘S’ Vs. CALTEX KENYA LTD [1989] KLR 1....”**.*

17. It is plain to us that the application before the High Court was brought under **Order 22 Rules 1 and 2** of the **Civil Procedure Rules, 2010**. That order is not among those listed under **Order 43** under which appeals would lie as of right. The failure to seek leave before presenting the appeal would therefore make it incompetent. In **Peter Nyaga Muvake v Joseph Mutunga [2015] eKLR (Civil Application Nai 86 of 2015)** this Court considered the effect of the failure to seek leave to appeal from an order and expressed itself thus:

“Without leave of the High Court, the applicant was not entitled to give notice of appeal. Where, as in this case, leave to appeal is necessary by dint of Section 75 of the Civil Procedure Act and Order 42 of the Civil Procedure Rules, the procurement of leave to appeal is sine qua non to the lodging of the notice of appeal. Without leave, there can be no valid notice of appeal. And without a valid notice of appeal, the jurisdiction of this court is not properly invoked.”

18. Further, as held by this Court in **Kenya Commercial Bank Limited v Manaseh Esipeya [1999] eKLR**:

“The defendant as the unsuccessful party had no right of appeal except with leave. Leave to appeal was not obtained. The consequence of this is that this appeal is incompetent and it is hereby struck out.”

19. It is manifestly clear to us that **Order 40 of the Civil Procedure Rules** would not apply to the proceedings at hand as those relate to temporary injunctions. The application dated 7th March, 2016 and brought before the High Court was explicitly premised on **Order 22 Rules 1 and 2 and Order 51 Rule 1 of the Civil Procedure Rules**, the interim stay of execution having lapsed when the appeal was dismissed.

20. **Order 43 (1)** of the **Civil Procedure Rules** provides for the orders against which an appeal would lie as of right. The application dated 7th March, 2016 was brought under **Order 22 Rules 1 and 2** which is not among the orders listed in **Order 43 (1). Order 43**

(2) of the Civil Procedure Rules provides that appeals from any other order made under these Rules shall lie with leave of the Court.

21. **Order 43(3)** of the **Civil Procedure Rules** provides that:

“An application for leave to appeal under Section 75 of the Act shall in the first instance be made to the Court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.”

22. **Rule 39(b)** of the **Court of Appeal Rules** reinforces this position and provides that:

“Where an appeal lies with the leave of the Court, application for such leave shall be made in the manner laid down in rules 42 and 43 within fourteen days of the decision against which it is desired to appeal or, where application for leave to appeal has been made to the superior court and refused, within fourteen days of such refusal.”

Accordingly, under **Order 43** of the **Civil Procedure Rules, 2010**, and **Rule 39** of the **Court of Appeal Rules**, leave was necessary before the appellant filed the appeal before this Court.

23. On the appellant’s contention that the learned Judge erred in allowing the respondent’s application to release the sum of Kshs. 359,673.16 to counsel for the respondent, from the record, the appellant failed to compute the interest payable despite requests by the respondent’s counsel to do so. Vide letters dated 12th February, 2016 and 25th February, 2016, the respondent’s counsel urged the appellant’s counsel to compute the accrued interest to facilitate settlement of the decretal sum. The requests were not heeded and counsel for the respondent vide a letter of 1st March, 2016 sought the Executive Officer’s computation of the accrued interest. Further, the appellant failed to attend court for the hearing of the application despite service of the hearing notice and failed to make oral submissions or to oppose the application. The learned Judge did not therefore err in relying on the Executive Officer’s computation and in the face of the consent between the parties for the release of the sum of Kshs. 1,057,937.84 to counsel for the appellant.

24. On the appellant’s contention that there was a violation of his fundamental rights as he was denied a fair trial and access to justice, from the record, when the respondent’s application came up for hearing on 19th June, 2017, the appellant failed to attend the hearing despite service. We therefore find that the appellant was not denied a fair trial or access to justice. Nor can we entertain a claim for enforcement of the appellant’s constitutional rights.

25. This Court in **Daniel Maingi Muchiri v Jubilee Insurance Company Ltd [2017]** (supra) stated as follows:

“...we are not persuaded that what is before us is an original petition for enforcement of constitutional rights. To the extent that the issues that the appellant claims to aggrieve him have not been considered by, let alone presented to the High Court, we have no basis for determining that the various rights tabulated by the appellant have been violated as he claims. We find that there is no substance in the appellant’s first argument and we accordingly reject it. It is instructive that the appellant and his advocate in this appeal, had previously raised a similar argument in another matter, but this court promptly rejected the argument. (See Peter Odiwour Ngoge & Another v Jubilee Insurance Co. Ltd & Another, CA No. Nai. 298 of 2015).

26. The impugned ruling and order of **Mwongo, J.** did not relate to the violation of constitutional rights and the jurisdiction of this Court being purely appellate, it does not exercise original jurisdiction like the High Court. Accordingly, we find that this Court has no jurisdiction to determine the same or award damages as redress for constitutional violations as claimed by the appellant

27. On the appellant’s claim that the name of the firm of **Majanja Luseno & Company** bears the name of **Majanja, J.** a Judge of the High Court, it was the respondent’s advocate’s contention that the claim is frivolous in view of the fact that **Majanja, J.** did not hear any of the suits or appeals herein. This issue was dealt with by this Court in **Daniel Maingi Muchiri v Jubilee Insurance Company Ltd [2017]** (supra) where this Court expressed itself as follows:

“The last issue is the claim that the appellant was prejudiced because the law firm that represents the respondent, Majanja Luseno & Company Advocates, bears the name of a serving Judge. It is common ground that upon appointment to the bench, Majanja, J. resigned from the law firm. The complaint is the continued use of his name... This ground of appeal, other than being founded on conjecture bordering on the fanciful, was never raised in the court below and therefore we are persuaded that it is just an afterthought. This Court will not suffer new issues, which were not raised before the High Court to be introduced willy-nilly. (See George Owen Nandy v. Ruth Watiri Kibe, CA No. 39 of 2015). So long as Majanja J. resigned from the law firm, and he is not the one who heard the dispute, we would not find that the ruling the subject of this appeal is vitiated by the mere fact that the firm that represented the appellant bears the name of a judge who formerly practiced in it. We would require much

more than mere “suspicion” to agree with the appellant’s view point. In Peter Odiwour Ngoge & Another v Jubilee Insurance Co. Ltd & Another (supra), this Court rejected the same argument that the appellant is advancing in this appeal.”

28. The upshot is that this appeal has no merit and it is dismissed in its entirety with costs to the respondent. It is so ordered.

Dated and Delivered at Nairobi this 6th day of November, 2020.

M. K. KOOME

JUDGE OF APPEAL

HANNAH OKWENGU

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR