IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, GATEMBU & SICHALE JJ.A)

CIVIL APPEAL NO 165 OF 2008

BETWEEN

ANTHONY MILIMU LUBULELLAH, ADVOCATES.....APPELLANT

AND

PATRICK MUKIRI KABUNDU.....1ST RESPONDENT

JACOB MWONGO.....2ND RESPONDENT

JASON KIMBIU.....3RD RESPONDENT

BISHOP LAWI IMATHIU.....4TH RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Nairobi (Ojwang, J.) dated 31st August, 2004

in

H.C. C.C. NO 649 OF 1996

****

JUDGMENT OF THE COURT

On 7th day of May 2004, ***Ojwang, J.*** (as he then was) made certain orders in in HCCC No. 649 of 1996 that affected the appellant in his capacity as legal counsel.

The parties in the suit were ***Kabundu Holdings Limited*** and ***Ruth Wakonyo Kabundu*** (the 1st and the 2nd plaintiffs) and ***Patrick Mukiri Kabundu, Jacob Mwongo***, ***Jason Kimbiu*** and ***Bishop Lawi Imathiu,*** the 1st, 2nd, 3rd and 4th defendants respectively and the 1st, 2nd 3rd & 4th respondents herein, respectively.

A brief background to this appeal is that the appellant in his capacity as legal counsel instituted ***HCCC No. 649 of 1996*** on behalf of ***Kabundu Holdings Ltd.*** and ***Ruth Wakonyo Kabundu (***the then 1st and 2nd plaintiffs). The appellant remained so instructed until July, 1999 when the matter was taken over by ***Githinji & Co. Advocates***, then later by ***Lumumba & Mumma Advocates.*** Thereafter the brief was taken over by ***Akoto & company Advocates*** and finally by ***Njage Wanjeru & Co. Advocates***.

According to the appellant, Ombija *J.* (as he then was) was seized of an application dated 12th August 2003 wherein the 1st respondent raised a preliminary objection contending *inter alia*, that the 2nd plaintiff had no authority from the Company (the 1st plaintiff) to represent the Company. On 10th February 2004 Ombija, J. rendered himself thus:-

> ***"There is no evidence that at the time the plaintiff's suit NRB HCCC No. 649 of 1996 was filed on 30th January 1997 the plaintiff had authority to file the suit by reason of absence of the resolution from the first plaintiff company. See paragraph 8 of the replying affidavit of Timothy Bryant sworn on 29th October, 2003. In the premises the suit was void ab-initio and/or ultra-vires. It follows from that illegality that any subsequent steps taken in the matter including the filing of the subject application is tainted with that illegality and in furtherance thereof. I therefore find and hold that, in law, the firm of Njage Wanjeru & Co***

Advocates had no capacity to file the subject application on behalf of the 2nd plaintiff."

On 3rd March ***Ojwang, J.*** proceeding on the footing that the plaintiff's suit had been dismissed by ***Ombija, J***., proceeded to hear the respondents' counter claim by way of submissions. The ***"hearing***" of the counter – claim gave rise to the judgment of 7th May 2004. The learned judge, (Ojwang, J.) found against the 1st and 2nd plaintiff. In order No. 7 of the said Judgment he directed that:-

"***That the costs of the first, second, third and fourth defendants in the suit shall be borne by all counsel who from the beginning of the suit, have been on record for the second plaintiff, and such counsel shall carry this burden jointly and severally, the said costs carrying interest at court rates as from the date of the judgment***."

On 31st August 2004 the matter was once again before ***Ojwang, J.*** The record shows that on that day the 1st respondent appeared in person whilst the 2nd, 3rd and 4th respondents were represented by Mr**.** ***Muguku*** who was holding brief for ***Mr. Deche Nandwa Bryant***. The 1st respondent sought to have certain issues clarified including:

"***Also on Order No. 7 we had argued that there were firms which were on record. We had raised the point about their capacity to represent the plaintiff. We had prayed for them to pay costs jointly and severally – i.e. all the Advocates who took part in the proceedings in respect of which there were no resolutions of the company, during which time they gave representation illegally – and which illegality had already been pronounced upon by the Hon.Mr. Justice Ombija.***

All the advocates who then represented the company had misled the court. Their lack of capacity had been raised for some 7 years. Order No. 7 should have referred to all counsel who have been on record from the beginning of the suit-right through to the present."

On the same date (31st August 2004) ***Ojwang, J***. '***clarified***' the judgment of 7th May, 2004 thus:-

"***Order No. 7 will therefore be clarified, for the avoidance of doubts as follows:***

The costs of the first, second, third and fourth defendants in the suit shall be borne by all counsel who from the beginning of the suit, have been on record for the second plaintiff, and such counsel shall carry this burden jointly and severally, the said costs carrying interest at court rates as from the date of the judgment."

The appellant was aggrieved by the said '***clarification***' and in a memorandum of appeal dated 13th August listed 14 grounds of appeal. However, during the oral highlights of the submissions made before us on 19th September 2018 by learned counsel ***Mr. Mutubwa***, the 14 grounds were urged as grounds Nos.1, 2 and 11 on their own and Nos. 4,5,6,7,10,12,13 and 14 were abandoned as they related to the formal proof which did not affect the appellant herein. In grounds 1, 2 and 11 the appellant faulted the orders made on 31st August 2004 on the basis that this was a mention date and no substantive orders should have been made on a mention date. Further, that even on 3rd March 2004 when the matter proceeded on formal proof, the persons present were: ***Mr. Kabundu*** in person and ***Mr. Gitau*** for the 3rd and 4th respondents; that there was no evidence of service of hearing notices upon the plaintiffs and the appellant as well as advocates previously on record for the second plaintiff.

In response, the 1st respondent highlighted his submissions filed on 17th September 2018. He maintained that no substantive orders were made on 31st August 2004; that no notice of appeal was filed against the ruling of ***Ombija, J.*** delivered on 10th February 2004 and that of ***Ojwang, J.*** of 7th May 2004; that failure to include ***Kabundu Holding Ltd*** and ***Ruth Wakonyo Kabundu*** as parties to the memorandum of appeal makes the appeal defective in law; that the appellant instituted suit on behalf of ***Kabundu Holdings Ltd*** without the Company's resolution and that S.99 of the Civil Procedure Act gives the court the general power to amend its judgment and/or its orders and hence it was in order for ***Ojwang, J.*** to ***'clarify'*** the order of 7th May, 2004..

Mr. Makori, learned counsel holding brief for ***Mr. Bryant*** for the 2nd, 3rd and 4th respondents opposed the appeal. Counsel contended that the orders of 7th May 2004 have not been challenged and that the substantive parties in the appeal (namely (***Kabundu Holdings Ltd*** and ***Ruth Wakonyo Kabundu)*** have not challenged the orders that the appellant is raising in this appeal.

We have considered the record, the rival oral and written submissions, the authorities cited before us and the law.

For a start, it is not disputed that the hearing of the formal proof that gave rise to the judgment of 7th May 2004 was premised on the ruling of ***Ombija, J.*** delivered on 10th February 2018. Without going into the merits or demerits of whether ***Ombija, J.*** dismissed the plaintiffs' suit (as the grounds of appeal relating to this were abandoned by the appellant), the fact of the matter is that on 31st August, 2009 ***Ojwang, J*** made the following order:

"***The costs of the First, Second Third and Fourth defendants in the suit shall be borne by all Counsel who from the beginning of the suit have been on record for the Second plaintiff and each counsel shall carry this burden fully and severally, the said costs carrying interest at Court rules as from the dated of Judgment***."

As stated above, there had been several advocates who had acted for the plaintiffs including the appellant. In the judgment of 7th May 2004,

Ojwang, J. directed that:

> "***The costs of the first, second, third and fourth Defendants in the suit shall be borne by counsel on record for the second plaintiff, jointly and severally, and the same shall carry interest at Court rates as from the date of this Judgment***."

As it was not clear who was to shoulder the burden of costs, the 1st respondent sought clarification of this issue. This resulted in the clarification that was made on 31st August 2004. The order extracted therefrom is found at page 302 of the record. It reads:

> "***The Costs of the first, second, third and fourth defendants in the suit shall be borne by all counsel who from the beginning of the suit, have been on record for the second plaintiff, and such counsel shall carry this burden jointly and severally, the said costs carrying interest at court rates as from the date of the judgement."***

It is not denied, as rightly reflected in the order extracted therein, that the orders of 31st August, 2004 were made during a mention. Further, it is not in dispute that the appellant (as well as the other counsel who had acted for the plaintiffs) were not invited to attend the mention.

This court has had occasion to address complaints of substantive orders being issued during a mention. In ***J.B. KOHLI & ANOTHER VS. BACHULAL POPATLAW [1964} EA*** this Court stated:

> "*The Judge erred in ordering the 1st appellant to pay costs personally without giving him an opportunity to answer the complaint against him."*

Similarly, in ***RAHAB WANJIKU VS ESSO KENYA LIMITED [1995-1998 EA 332*** this court stated:-

> ***"We have no doubt that where a matter is fixed for mention, as it was in this case, the learned judge had no***
>
> ***business determining on the date, the substantive issues in the matter. He can only do so, which was not the case here, if the parties so agree and of course, after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties, which he did not do and moreover, gave no good reasons for adopting such a procedure which is repugnant to the administration of justice. As regards whether the learned judge erred in invoking his inherent jurisdiction under section 3A of the Civil Procedure Act, which has been described by Hancox, J.A. as he then was, in WANGUKU V. KANI [1982-1988] 1 KAR 780 at 785 as "residual jurisdiction which should only be exercised in special circumstances… in order to put right that which would otherwise be a clear injustice" the learned judge gave the following reason for taking this course:***
>
> > ***"this is because business premises which (sic) are closed awaiting the hearing of the application and the case."***
>
> ***With respect, there is nothing special about this state of affairs, neither does it entitle the learned judge to ignore basic requirements such as those demand by the principles of natural justice, in determining substantive issues in contention between opposing parties without their consent on a mention date. Having regard to the wording of section 3A, the unsolicited action taken by the learned judge could, ironically, be seen to have been the type of injustice which section 3A itself, was intended to avoid or prevent."***

The right to be heard is an enduring principle of natural justice that ensures a party is not condemned unheard. We are of the respectful view that the learned Judge ought not to have condemned the appellant to pay costs without hearing him. There was no hearing notice served upon the appellant to justify the making of the orders that were adverse to the appellant, his absence not withstanding.

The upshot of the above is that we find merit in this appeal. In the result we allow the appeal and set aside the orders of ***Ojwang, J***. issued on 31st August 2000 in their entirety. Costs to the appellant.

Dated and delivered at Nairobi this 8th of March, 2019

P. N. WAKI

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the origina

DEPUTY REGISTRAR