IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, OUKO & M'INOTI, JJ.A)

CIVIL APPEAL NO 136 OF 2016

BETWEEN

DANIEL MAINGI MUCHIRI.....APPELLANT

AND

JUBILEE INSURANCE COMPANY LIMITED.....RESPONDENT

(An Appeal from the Ruling and Orders of the High Court of Kenya at Nairobi (Onyancha .J) dated the 3rd day of March 2015

in

HCCA No. 136 of 2015)

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JUDGMENT OF THE COURT

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 of 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. We think we have sufficiently summarized the background to the dispute in Civil Appeal No. 138 of 2016, **Daniel Maingi Muchiri V Jubilee Insurance Company Limited**, against decision of Sergon, J. For that reason no purpose will be served in rehashing them in this appeal which arises from the order of **Onyancha, J.** made on 3rd March, 2015. Suffice though to reiterate briefly that in or about 2003, the appellant filed CMCC No. 369 of 2003, **Daniel Maingi Muchiri V. Stephen Gichuru Njoroge & Another**, in the subordinate court claiming general and special damages against Stephen Gichuru Njoroge and one Julius Maina Warui following a road traffic accident, one being the owner and the other its driver.

The subordinate court awarded Kshs. 802,233/= in damages on 23rd July 2012. After the defendants in that suit failed to settle this sum the appellant brought a declaratory suit, CMCC No. 6553 of 2013 pursuant to **section 10** of The Insurance [Motor Vehicles Third Party Risks] Act, against their insurer, the respondent, to be declared liable to satisfy in full the judgment and decree.

The respondent in response to that suit filed a defence, which was subsequently struck out on 7th May 2014 for being scandalous, frivolous and vexatious. Judgment was then entered in favour of the appellant, although the trial court granted the respondent a temporary order of stay of execution for 30 days. Aggrieved by the ruling, the respondent filed ***High Court Civil Appeal No. 195 of 2014*** where it applied *ex parte* and obtained from **Onyancha, J**. on 6th June 2014, stay of the orders on condition that it deposited the decretal sum in court on or before 16th June 2014. The respondent duly complied with the condition by depositing the decretal sum. From the depositions filed subsequent to this, it would appear that the respondent denied insuring the motor vehicle in question. In one of the affidavits of its Legal Officer, Collin Nyaema, sworn on 23rd June, 2014 the respondent insisted that, from 4 different police abstract forms, with conflicting information it was impossible to vouch for the credibility of the alleged insurer of the motor vehicle. On account of this, on 1st December, 2014 **Onyancha, J** ordered the DTO Pangani Police Station to supply to the appellant the insurance particulars of the motor vehicle in question as at the date of the accident.

When the orders were not complied with, the appellant instituted the application giving rise to this appeal for orders that Mr. Charles Mwangangi, the DTO be cited and committed for contempt of these orders. Leave to commence contempt proceedings, which was then a requirement was granted and the appellant given ten days to bring the motion for contempt. When the motion came up for arguments on 3rd March, 2015, Mr. Ngoge, learned counsel for the appellant informed **Onyancha, J** that the order to supply the insurance details had been complied with, the DTO having supplied him with authentic police abstract confirming that in fact the respondent was the insurer of the accident motor vehicle. Even upon prompting by Mr. Luseno, learned counsel for the respondent, to withdraw the application for contempt as it served no purpose, Mr. Ngoge instead applied that the temporary order of stay be vacated, even though the respondent had filed an appeal to challenge the striking out of their defence upon which the order of stay was granted.

The learned Judge, not making reference to the new development and saying nothing about the spent application for contempt, ordered;

> **"1. Directions on 12th March, 2015**
>
> **2. Interim orders extended**
>
> **3. Hearing/directions notice to be taken out."**

This apparently harmless order aggrieved the appellant, who on 12th March, 2015 evinced his intention to challenge it by filing a notice of appeal. Subsequently he lodged the memorandum of appeal on nine grounds, which we have paraphrased below. The appellant's foremost contention is that the learned Judge subverted **Articles 10, 19, 20, 21, 25, 27, 28, 29, 40, 43** and **48** of the Constitution by;

> i. failing to hear the appellant' application dated 30th January, 2015 which was listed for hearing on 3rd March, 2015;
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> ii. taking directions on the hearing of the appeal before disposing the pending applications.
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> iii. subjecting the appellant and his counsel to discrimination and denying them a fair hearing.
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> iv. contravening **Article 16** of the United Nations Basic Principles on the Role of Lawyers for threatening with arrest counsel for the appellant forcing the latter to flee the courtroom and precincts.
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> v. deliberately failing to keep accurate the record of the court on the day material to the complaint.
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> vi. condemning the appellant and his counsel without being heard by arbitrarily extending the

interim order of 6th June, 2014.

vii. making it difficult for the appellant to commence execution process even after the respondent's appeal was dismissed by **Sergon, J** because the learned Judge blocked the hearing *inter partes* of the appellant's motion dated 16th June, 2014 as amended on 15th November, 2014.

viii. permitting the law firm bearing the name of a High Court Judge, Majanja & Luseno Advocates to represent the respondent, and

ix. subjecting both the appellant and his counsel to unfair trial and mental torture when they were subjected to litigation in both the subordinate court and the High Court.

For those reasons the appellant beseeched the Court to set aside the order of 3rd March, 2015, mark as withdrawn with costs to him the application dated 30th January, 2015, dismiss with costs the respondent's amended motion dated 15th November, 2014, award to him and his counsel damages for the subversion of their rights, order for the immediate dissolution of the firm of Majanja & Luseno Advocates and award to him costs in the appeal and in the High Court.

Before us in this appeal like in the other four related appeals and just like he did earlier in another application before a different bench of this Court in **Peter Odiwour Ngoge & Another V. Jubilee Insurance Co. Ltd & Another,** CA No. Nai. 298 of 2015), Mr. Ngoge insisted that what he had presented to the Court was not an appeal in the ordinary sense but one to enforce a constitutional right; that by **Article 258** this Court has original jurisdiction to determine questions of constitutional violations of individual rights committed by the High Court; and that for the aforesaid violations of his and his client's constitutional rights and fundamental freedoms they were entitled to an award of damages in the sum of Kshs. 20 million.

In opposing the appeal, the respondent urged us, to *inter alia*, hold that the determination of this appeal has to be from the order appealed from and that we should ignore the invitation to find that we have original jurisdiction in matters of constitutional violations. It was further submitted that having received genuine police abstract form, the appellant's application for contempt was spent and that indeed, the orders given on 3rd March, 2015 by **Onyancha, J** did not relate to the application for contempt; that although counsel for the respondent was ready on that day to proceed to argue the appeal, the appeal was not heard and instead it was ordered that directions on the hearing be given on 12th March, 2015.

The respondent argued that when his appeal was finally heard, it was dismissed by **Sergon J,** an illustration of the independence of the judges. On the issue of concurrent jurisdiction, the respondent submitted that it had to move the magistrate's court where the warrants of attachment were issued to question the terms of the decree which was not a money decree. That court agreed with the respondent and proceeded to set the warrants aside. The respondent noted that the primary suit was between the appellant and the insured and not the respondent and that there was no affidavit by the appellant personally complaining that **Onyancha, J** was, in the exercise of his discretion, biased and neither did the appellant seek the recusal of the Judge.

Indeed, we confirm that the appeal arising from the striking out of the respondent's defence was ultimately heard by **Sergon, J.** who by a judgment dated 17th July, 2015 dismissed it holding that the respondent's defence which was struck out by the subordinate court did not raise any triable issue. With that determination, the appellant immediately commenced execution proceedings and on 12th August, 2015 the respondent promptly moved the High Court with an application for stay of the warrants of attachment pending appeal to this Court against **Sergon, J.'s** judgment. **Onyancha, J.** granted the respondent, *ex parte*, an order of stay of execution pending the hearing of the application, after noting, among other things, that the decretal amount was still deposited in court and that the decree was more than one year old. The appellant, for his part, also filed his own application in the High Court on 19th August, 2015 seeking to set aside these orders of stay because, in his view the court was *functus officio.* It

fell upon **Sergon J.** once more to hear the two applications together. By a ruling dated 6th November, 2015, which is the subject of another appeal, No.138 of 2016 aforesaid, he dismissed the appellant's application but allowed that of the respondent. In that appeal, from the ruling of **Sergon J.** made on 6th November, 2015, raising similar grounds as those raised in this appeal, we have determined, among other things, that the argument that what is before us is both an appeal and an original petition for enforcement of the appellant's constitutional rights, at the same time, is not only sweeping but also *avant-garde* as the jurisdiction of this Court is and has always been purely appellate in terms of **section 64** of the former Constitution, **Article 164(3)** of the Constitution and **section 3** of the Appellate Jurisdiction Act. This Court can only enforce constitutional rights and fundamental freedoms in the context of an appeal from the courts below it. To stress the point we referred to **Rafiki Enterprises Ltd V. Kingsway Tyres Ltd,** CA No. Nai 375 of 1996 and **Equity Bank Ltd V. Westlink MBO Ltd,** CA No. Nai 78 of 2011.

On the other hand, the Constitution unequivocally vests in the High Court the original jurisdiction to enforce constitutional rights as clearly stipulated in **Article 165 (3)** and reinforced by **Article 23**. This is supported by the decisions such as **In the Matter of the Interim Independent Electoral Commission,** SC Const. App. No. 2 of 2011 and **IEBC V. Maina Kiai & 5 Others,** CA No 105 of 2017).

On this point and in dismissing that appeal we came to the conclusion that;

> **"Accordingly 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)".**

In the present appeal, we are of the firm view, based on our opinion expressed above, that in so far as it is premised on the alleged violations of constitutional rights and fundamental freedoms of the appellant and his counsel, it was bound to run aground.

On the prayer to dissolve the firm of Majanja Luseno & Advocates the Court (differently constituted) in an earlier ruling in **Peter Odiwour Ngoge & Another V. Jubilee Insurance Co. Ltd & Another** (supra) and ourselves in No.138 of 2016 found no substance in the suspicion that by the mere fact that the law firm bears the name of a judge who was a former partner could have influenced the decision to issue orders in favour of the respondent. We asked if that was the case, why for the same reason **Sergon, J.** who gave a decision in favour of the appellant, was not influenced.

It is our general observation from the record that the appellant's application dated 30th January, 2015 seeking to commit the DTO, Pangani Police Station to jail for contempt of court was coming for arguments *inter partes* on 3rd of March, 2015.

Because the purpose for which the application was brought had been satisfied by the compliance with the orders by the DTO, Pangani Police Station, it became moot to pursue it and the learned Judge fixed the appeal for directions. Those directions were given and the appeal ultimately heard and determined in the appellant's favour.

As the learned Judge embarked on the directions on the hearing of the appeal, no mention was made of the fate of the application dated 30th January, 2015 for contempt and a motion by the respondent dated 16th June, 2014 as amended on 15th November, 2014 for an order of stay of execution of the SRM's ruling and order made on 7th May, 2014 to vary the conditional order of stay by reversing the order to deposit Kshs. 1,417,611.

It is always a good practice to dispose of all interlocutory applications before embarking on the hearing of a suit or main appeal. (See **Order 11 Rule 3 (2) (a)** of the Civil Procedure Rules and Direction 15 of the Practice Directions) relating to Case Management in the Commercial and Admiralty Division of the High Court at Nairobi). In the circumstances of this case, however, no prejudice was occasioned to the appellant as his counsel had received the document he had required to advance his case. He had expressly indicated that he would not pursue the application. At any rate, the appeal for which the appellant's application gave way was heard and determined in the appellant's favour.

We similarly do not see how the appellant was aggrieved by the failure to hear the respondent's own application that sought to vary terms of the orders. The dismissal of the appeal was also detrimental to the respondent.

On the final ground and as a court of record, we have no proof that the learned Judge threatened the appellant's counsel with arrest forcing him to flee the courtroom and precincts. We find no instance on record, for example, pointing to any acts of contempt or other improper conduct by counsel that would have warranted or prompted the learned Judge to resort to such a course.

On the whole, this appeal is bereft of any substance. It is accordingly dismissed with costs to the respondent.

Dated and delivered at Nairobi this 15th Day of December, 2017.

P.N. WAKI

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR