METHODIST CHURCH IN KENYA

TRUSTEES REGISTERED…………...…....………………1ST APPELLANT

REV. DR. STEPHEN KANYARU M'IMPWII……....…….2ND APPELLANT

AND

REV. JEREMIAH MUKU…………………………...…..1ST RESPONDENT

ATTORNEY GENERAL……………….………………2ND RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Meru (Ouko, J) dated 3rd October, 2007

in
HCCC NO. 80 OF 2005)
****
JUDGMENT OF THE COURT

This is an appeal from the Ruling of the High Court (Ouko, J.) dismissing the appellant's petition on the ground that it was frivolous and an abuse of the process of the court.

It is necessary to give a synopsis of the litigation between the parties. Sometime in June 2003, the Rev. Jeremiah Muku, the 1st respondent, filed a suit – Civil Case No. 412 of 2003 in the Chief Magistrates Court at Meru against the two appellants. He averred in the plaint, among other things, that, he was an ordained church Minister employed by the 1stappellant, that at the material time he was working at Meru General Hospital as a Chaplain,that on 1st March 2003 the 2nd respondent convened a Standing Committee which purportedly suspended him from active service of the Church pending completion of investigation on the misappropriation of Church funds; that the resolution of the Standing Committee was communicated to him through a letter dated 19th March, 2003 and that the decision to carry out investigations and to suspend him was actuated by malice and contrary to the Standing Orders. He sought a declaration that his suspension was null and void and payment of Shs.406,579 being unpaid salary and allowances. The appellants filed a Defence and Counter-claim.

The 1st respondent subsequently filed an application for judgment on admission or alternatively for payment of a monthly stipend of Shs.30,800 on the ground that despite the alleged suspension he had continued to work at Meru General Hospital with appellants'full knowledge and acquiescence.

The Subordinate court allowed the application to the extent that it ordered:

"THAT the plaintiff be remunerated for the work he is doing as Chaplain of Meru Hospital at half pay to wit; Kshs.15,400 (fifteen thousand four hundred) only per month with effect from 13·6. 2003."

A preliminary decree dated 19th March 2004 was issued to that effect.

The appellants thereafter filed Misc. Application No. 417 of 2004 in the High Court of Kenya at Nairobi seeking stay of execution of that preliminary decree but the application was transferred to the High Court Meru for hearing. It is not clear whether the application was prosecuted. In early 2005 the appellants filed an application in the Subordinate Court for review and setting aside of the preliminary decree. Again, it is not clear whether that application was prosecuted. The pleadings were later amended with leave of the court. Since the sum in the appellants' counter-claim was beyond the monetary jurisdiction of the Subordinate Court,the suit was transferred to the High Court at Meru on the application of the appellants and registered as MeruHCCC. No. 80 of 2005.

The hearing of the suit commenced on or about 18th January 2006 and the plaintiff completed his evidence in chief on 16th May, 2006. Before the cross-examination started, the appellants' counsel made an oral application for leave to amend the counter–claim by inserting a prayer thus:-

"The first defendant prays that the plaintiff be ordered to refund to the first defendant all the monies paid to him herein pursuant to the preliminary decree issued herein on 19th March 2004".

The oral application was allowed. Thereafter the 1st respondent was cross-examined at length for two days. The suit was adjourned for further cross-examination for 21st and 22nd June, 2006.

In the meantime, the appellants filed a petition dated 15th May 2006 in the same suit mainly under S.84 of the former Constitution,alleging that the Ruling of the Subordinate court dated 19th March, 2004 and the preliminary decree had contravened the appellants' fundamental rights to liberty,the right not to be held to servitude, the right to property, freedom of conscience and association under the provisions of the Constitution. The main relief sought was an order of certiorari to quash the Ruling and the preliminary decree. The application was made in the suit by virtue of Rule 23 of the **Constitutional of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 –** L.N. No. 6 of 17th February, 2006 which provides:-

"Where a constitutional issue arises in a matter before the High Court the court seized of the matter may treat such issue as a preliminary point and shall hear and determine the same."

Upon the filing of the petition, the appellant filed a chambers summons dated 5th June 2006 seeking, firstly, an order that the Attorney General be joined as 2nd respondent to the petition and, secondly, an order that the execution of the preliminary decree be stayed until the suit is heard and determined or until further orders of the court. The application was allowed and the orders sought granted by Sitati J on 5th October, 2006.

The petition was subsequently prosecuted. It was dismissed by Ouko J on 3rd October 2007 as frivolous and a gross abuse of the process of the court. The learned Judge said in part:-

"But it must be remembered that constitutional references are not a panacea for resolution of all types of legal disputes. Invocation of constitutional remedies should only be reserved for serious breaches of the constitution and not for correction of errors either of substantive laws or procedure committed by courts in the course of litigation. The fact that a judgment or a ruling of the court is wrong does not mean that any fundamental rights of the party aggrieved by it has been breached."

The learned Judge cited **Chokolingov Attorney General** of **Trinidad** and **Tobago [1981] WLR 108** at **p.112** and **Maharaj v. AGof Trinidad** and **Tobago (No.2) [1979] AC 385** to the effect that a collateral attack of a judgment or ruling through appeal or other means and later through a constitutional reference would be subversive of the rule of law entrenched in the Constitution itself. The learned Judge also relied on **Harrikissoon v Attorney General**of **Trinidad** and **Tobago [1980] AC 265** where the Privy Council said in part at page 268 B-C:-

"...............the mere allegation that a human right or fundamental freedom of the applicant has been or is

likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being more solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involvesno contravention of any human right or fundamental freedom".

There are thirteen grounds of appeal against the decision of the High Court. Eight grounds of appeal, namely, grounds nos. 3, 4, 5 , 6, 7, 8, 9 and 11 relate to the merits of the dismissed petition or, in other words, to the constitutionality of the impugned preliminary decree. In those grounds, the appellants fault the learned judge for not holding that the specified fundamental rights were infringed by the preliminary decree. In this appeal, Mr. Ng'ang'a, learned counsel for the appellants, submitted and attempted to demonstrate that the preliminary decree contravened the appellants' fundamental rights in the manner stated.

The remaining substantial grounds are grounds nos. 1, 2, 10 and 12 where the appellants serially state:-

1. that the Judge dropped the mantle of a Judge and assumed the role of an advocate for the respondent,

2. that the trial Judge exhibited a biased disposition towards the appellants in the language he used in his judgment,

10. that the trial Judge erred in holding that in exercise of jurisdiction section 84 (2) of the former Constitution the High Court lacks power to grant prerogative orders as well as reliefs under the Civil Procedure Rules.

11. that the trial Judge erred in holding that the protection of rights under Chapter 5 of the former Constitution does not include protection against violation by the judicial arm of the state.

In support of grounds 1 and 2, Mr. Ng'ang'a submitted that the trial Judge failed to perform his duty of resolving issues of fact; that the trial Judge took the role of the respondents' advocate; that the Judge reliedon two authorities which were not cited by any party; that the Judge was wrong to take the position of parties.

On the other hand, Mr. KilonzoJunior, learned counsel for the 1st respondent supported the decision of the High Court and submitted, among other things, that, the petition was an abuse of process of the court, that the petition was filed on 16th May 2006the same day that leave was given to amend the counter-claim to include a claim for refund of money paid pursuant to the preliminary decree, that the appellants had abandoned appealing against the preliminary decree to pave way for the hearing of the main suit; that after the filing of the petition, the hearing of the suit continued and is still continuing after the dismissal of the petition, that no fundamental right of the appellants has been violated by the preliminary decree and that the court was entitled to rely on the case law not cited by the parties.

We have considered the grounds of appeal and the rival submissions.

It is apparent from the Ruling appealed from that the High Court did not consider the merits of the petition – that is, whether or not the preliminary decree had violated various constitutional rights of the appellants as claimed. Rather, the High Court considered the history of the litigation particularly regarding previous litigation on the preliminary decree, that the appellant had a counter-claim for refund of all monies paid under the preliminary decree and concluded that the petition was not only frivolous but also a gross abuse of the process of the court.

The 1st respondent had in the answer to the petition opposed the petition on the grounds *inter alia* that, the petition was frivolous, vexatious and an abuse of the process of the court, that the petitioners were trying to get through the backdoor what they had failed to achieve through proper litigation and that the orders sought were not constitutional but civil orders that should be sought through proper litigation.

A petition under s.84 (1) of the former Constitution is concerned with public law and not private law. Indeed the Order of certiorari to quash the preliminary decree sought in the petition is a remedy in public law. We appreciate that the preliminary decree was given by a judicial officer in exercise of judicial power of State and that to that extent the preliminary decree has a public law element.

However it is not correct as stated by the appellants that the learned Judge ruled that the protection under s. 84(1) does not include protection against violations by the judicial arm of the state. The decision of the learned Judge is clear fromthe except of the Ruling quoted above. What the learned Judge said, in essence, is that, invocation of constitutional remedies should only be reserved for serious breaches of the Constitution and not for correction of errors either of substantive law or procedure committed in the course of litigation and that the petition was intended to achieve what the appellant had failed to achieve in very many applications i.e the setting aside of the preliminary decree.

In reaching the decision the High Court was guided by several decisions from the Commonwealth interpreting similar provisions of the Constitution which came to his attention through his own industry. A Judge cannot be faulted for ascertaining the law. The law as stated by the learned Judge is undoubtedly correct and supported by the authorities he relied on.

In **Maharaj v Attorney General** of **Trinidad** and **Tobago (No. 2) [1979] AC 385,** the Privy Council said at page 399 – para D.

"In the first place, no human right or fundamental freedom recognized by Chapter I of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say that there was an error. The fundamental human right is not to a legal system that is infallible but to one that is fair.It is only errors in procedure that are capable of constituting infringements of the rights protected by section 1(a); and no irregularity in procedure is enough, even though, it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships do not believe that this can be anything but a very rare event. In the second place, no change is involved in the rule that a Judge cannot be made personally liable for what he has done when acting or purporting to act in a judicial capacity. The claim for redress under section 6 (1) for what has been done by a Judge is a claim against the state for what has been done in the exercise of the judicial power of the state. This is not vicarious liability; it is a liability of state itself. It is not a liability in tort at all; it is a liability in the public law of the state, not of the Judge himself which has been created by section 6(1) and (2) of the Constitution. In the third place, even a failure by a Judge to observe one of the fundamental rules of natural justice does not bring the case within section 6 unless it has resulted, is resulting or is likely to result, in a person being deprived of life, liberty, security of the person or enjoyment of property. It is only in the case of imprisonment or corporal punishment already undergone before an appeal can be heard that the consequences of the judgment or order cannot be put right on appeal to an appellate court"

Section 6(1) of the Constitutionof Trinidad and Tobago referred to is *parimateria* with s.84 (1) and s.84 (2) of the former Constitution.

We have deliberately quoted the majority judgment of the Privy Council at length because it explains to what extent a judgment or order of a court can contravene the human right or fundamental freedoms guaranteed by the former Constitution. As the Privy Council said, it is only in rare cases that an error in the judgment or order of a court can constitute a breach of human right or fundamental freedoms. It is also clear from the quotation that ordinary errors made in the course of adjudication by courts of law should be cured by invoking the mechanism and procedures prescribed by the ordinary law for correction of errors such as appeal or review.

In the instant case, the impugned preliminary decree was given in normal civil proceedings. As the trial Judge observed, several applications were made to set aside the preliminary decree. An appeal was contemplated but was not pursued. An application for review was made. On 16th May 2006 during the

hearing of the oral application to amend the counter-claim to include a claim for refund of the money paid to the 1st respondent pursuant to the preliminary decree, Dr. Kuria, learned counsel for the appellants said:-

"To the best of my recollection all attempts to appeal against that decree were abandoned by the defendant so as to pave way for the hearing of the main suit. If there is any doubt in that regard, I do now formally abandon each and every appeal touching on that preliminary decree"

After that assurance the court allowed the oral application for leave to amend. As the High Court observed, the petition was filed on the same day. The money paid under the impugned preliminary decree could be recovered through the counter-claim in the suit. The hearing of the suit continued even after the petition was dismissed. Further the constitutional petition was filed over two years after the preliminary decree was given.

In the light of the foregoing we are satisfied, like the learned Judge, that the petition was frivolous and that a collateral attack of the preliminary decree through a constitutional petition was a gross abuse of the process of the court.

For the foregoing reasons we dismiss the appeal with costs to the 1st respondent.

Dated and delivered at Nyeri this 5th day of July 2012.

E. M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

D. K. MARAGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR