IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 326 OF 2005

DR. JOSEPH NATHANIEL KIPRUTO ARAP NG'OK …..……..…. APPELLANT

AND

THE ATTORNEY GENERAL *(on behalf of the*

Permanent Secretary Ministry of Trade & Industry) **……..…. 1ST RESPONDENT**

INVESTMENT PROMOTION CENTRE ……..……. 2ND RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Ransley, J.) dated 26th September, 2005

in

H.C.C.C. NO. 565 OF 2004)

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JUDGMENT OF THE COURT

This is an appeal against the ruling of the superior court (Ransley, J.) dated 26th September, 2005 whereby the superior court set aside the *"exparte"* judgment entered in favour of the plaintiff in the suit by Ojwang, J. on 15th April, 2005 and in addition, granted leave to Investment Promotion Centre (IPC), the 2nd respondent therein, to enter appearance and to file a defence.

The appellant filed a suit against the two respondents on the basis that the two had wrongfully and fraudulently terminated his contract of employment as Executive Chairman of IPC. According to the plaint, the Attorney General was sued on behalf of the **Permanent Secretary** (P.S.) Ministry of Trade and Industry who had retired or terminated the appellant's services vide a letter dated 4th June, 2001. Further, according to the plaint, IPC is a State Corporation established under the *Investment Promotion Centre Act (Cap 485, Laws of Kenya)*.

Three main reliefs were sought in the plaint, thus:

"(a) A declaration that the Defendant's purported termination of the plaintiff's services were

unlawful, illegal, unprocedural and malicious.

(b) Special damages as claimed in paragraphs 15 and 16 above (particulars to be provided at hearing hereof) together with interest thereon.

(c) General damages".

The particulars of the special damages referred in (b) above were given in paragraph 15 of the plaint, thus:

"1. Gratuity payable on account

of period served - Kshs.1,912,755/=

2. Expenses incurred while on

official business - Kshs.3,546,811/=

3. Accumulated leave days - Kshs. 400,000/=

4. Three months salary in

lieu of notice - Kshs. 450,000/=

5. Damages to plaintiff's

reputation from wrongful

eviction from office - Kshs.2,000,000/=

6. Salary payable for remaining

Contract (31) months

(June 2001 – September 2003) - Kshs.4,650,000/=

Total - Kshs.12,962,566/=

==========".

Upon service of the summons to enter appearance together with plaint on IPC the Managing Director of IPC vide a letter dated 30th June, 2004 requested the Attorney-General (AG) to represent it and forwarded the documents to the AG saying in part:

"We strongly feel that although IPC is a body corporate which can sue and be sued the appointment and termination of services of this officer was a Government action. In the foregoing IPC requests your office to represent us in this case which is in order as all previous correspondence in relation to the same were handled by your office".

Thereafter, the AG prepared a joint Defence and counter-claim of the 1st and 2nd respondents which was verified by the affidavit of **Julius Kipngetich**, the Managing Director of IPC. On 21st July, 2004 the AG entered appearance on behalf of the two respondents and also filed a joint Defence and counter-claim on behalf of the 1st and 2nd respondents.

By the Defence and counter-claim, the two respondents, averred, among other things, that although

the appellant had been appointed by the President as Chief Executive Officer of IPC for a term of three years, the term expired on 1st June, 2000 and thereafter IPC did not enter into any contract of employment with the appellant which could be breached. By the counter-claim IPC counter-claimed for a total of Shs.1,585,044.90 from the appellant comprising of 200,000/= being double salary that appellant allegedly received; Shs.369,542/= which the appellant allegedly, illegally received as house allowance when he was occupying a leased house; Shs.250,000/= allegedly received by appellant as salary advance and, lastly, Shs.965,502.90 which IPC allegedly paid to National Bank of Kenya on appellant's credit card.

Subsequently, on 20th September, 2004 the appellant filed an application for orders that the defence and counter-claim be struck out and for leave to enter judgment for non appearance and default in filling defence by the IPC. The application was mainly based on the ground that the memorandum of appearance and the defence filed by AG on behalf of IPC was an abuse of the process of the court as the AG has no *locus standi* to file pleadings on behalf of IPC since IPC was a body corporate with power to sue and be sued in its name.

The AG opposed the application contending, among other things, that IPC was legally and properly being represented by the AG.

The superior court, however allowed the application on 15th April, 2005 saying that the AG has no legal standing to enter appearance and file a defence and counter-claim on behalf of IPC and that the appearance and defence and counter-claim were thus a nullity with the result that IPC must be taken as not having filed a defence and counter-claim. The superior court thereupon struck out the appearance and the defence and counter-claim and gave leave for entry of judgment against IPC for non-appearance and for default of defence and as a result entered judgment against IPC.

As a consequence IPC instructed a firm of Advocates and on 29th April, 2003, M/s. Wekesa & Co. Advocates entered appearance on behalf of IPC and subsequently filed an application under **Orders IX Rule 1**, **2 (4)** and **6** and **Order IXA**, **Rules 10** & **11** of the *Civil Procedures Rules* (CPR) for setting aside the exparte judgment entered against IPC by Ojwang, J on 15th April, 2005. The application was listed for hearing before Ojwang, J. but the learned judge directed, for reasons of fairness, that the application should be allocated to another judge. The application was ultimately heard and allowed by Ransley, J. on 26th September, 2005 thereby precipitating the instant appeal.

There are 27 grounds of appeal which Mr. Thangei, learned counsel for the appellant condensed into four, namely, that Ransley, J. lacked jurisdiction to set aside the judgment entered by Ojwang, J. as the judgment was not an exparte judgment; that no cause was shown for setting aside a regular judgment; that the Judge misdirected himself in law and in fact in failing to appreciate that there was inordinate delay from the time IPC was served with summons to enter appearance and the time it applied for setting aside of the judgment, and, lastly, that, the Judge erred in law in allowing M/s. Wekesa & Co. Advocates to represent IPC when the firm was not properly on record having failed to seek leave of the court to appear for IPC.

Starting with the last ground, it is true that **Order III Rule 9 A** CPR provides, *inter alia*, that a change of advocate after the judgment has been passed should not be effected without an order of court upon an application with notice to the advocate already on record. It is contended that the application to set aside judgment was made by a firm of advocates which was not properly on record since the firm of Wekesa & Co. Advocates filed a notice of appointment after judgment had been entered and without leave of the court. Mr. Wekesa did not submit on this ground but in the superior court it was submitted, in essence, that, it was sufficient to file a notice of appointment as the appearance and defence filed by the AG on behalf of IPC was struck out.

It is clear that **Rule 9A** of **Order III** CPR applies to a situation where a party who had previously engaged an advocate in a suit intends either to act in person or has engaged another advocate after the court has passed judgment. The situation in this case is different. IPC had not engaged AG as counsel. It had merely requested the AG to represent it. Although AG agreed and filed a notice of appointment and

defence and counter-claim, Ojwang, J. ruled that the AG's documents were a nullity for the reason that the AG had no *locus standi* to represent IPC. The effect of the decision of the superior court was that IPC had not been represented by AG *ab initio*. The superior court entered a default judgment and by the time the firm of Wekesa & Co. Advocates filed a notice of appointment of advocates there was, in conformity with the decision of court, no advocate on record. We agree therefore, that there was in essence no change of advocates and hence no leave of court was required.

It was further submitted, among other things, that Ransley, J. had no jurisdiction to set aside the judgment since it was not an exparte judgment; that IPC should have instead filed application for review before Ojwang, J. or appealed, and, that Ransley, J. sat on appeal against the decision of Ojwang, J. On the other hand, Mr. Wekesa, learned counsel for IPC submitted that since the judgment was entered for non-appearance and for default in filing defence it could be set aside pursuant to **Rule 10** of **Order IXA** CPR.

It is apparent that the appellant's application was brought under both **Order VI Rule 13 (1), (a), (b), (d),** and **Order IXA Rule 5** and **7** CPR. The first prayer in the application sought to strike out the defendants' defence and counter-claim under **Order VI Rule 13 (1) (a) (b) (d)** for being scandalous, frivolous vexatious or otherwise an abuse of the process of the court. The second prayer was an alternative prayer seeking the striking out of the defence of IPC under **Order IXA Rule 5** and **7** on the ground that IPC had not entered appearance. Lastly, the third prayer sought leave to enter judgment against IPC for non-appearance and default of defence. It is clear from the ruling of Ojwang, J. that the court allowed only the second and third prayers. In other words, the defence was struck out on the ground that IPC had not entered appearance as the Appearance filed by the AG was a nullity and leave to enter judgment against IPC was granted under **Order IXA Rule 7** CPR for non-appearance and default in filing defence. Needless to say, the court did not decide the application on the basis of **Order VI Rule 13 (1), (a), (b), (d),** of CPR.

By **Order IXA Rule 10** CPR which IPC invoked, a judgment entered under that order could be set aside. Whether the judgment entered by Ojwang, J. under **Order IXA** can be termed exparte or interlocutory, Ojwang, J. or any other judge of co-ordinate jurisdiction had jurisdiction to set it aside. The application was taken before Ransley, J. on the direction of Ojwang, J. In the event, Ransley, J. had jurisdiction to hear and determine the application. It is not correct to say that Ransley, J. sat on appeal against the ruling of Ojwang, J. for it is patently clear that Ransley, J. did not in any manner deal with, or, fault the finding of Ojwang, J. to the effect that the appearance and defence and counter-claim filed by the AG on behalf of IPC was a nullity.

This appeal is against the exercise of judicial discretion to set aside judgment entered in default of appearance and defence and also against the consequential order giving IPC leave to enter appearance and file a defence. The principles governing the exercising of the court's discretion to set aside a judgment obtained exparte are well known (see **Shah vs. Mbogo** [1967] EA 116). Similarly, the principles on which an appellate court can interfere with the exercise of judicial discretion by a judge are notorious and need no repetition (see **Mbogo vs. Shah** [1968] EA 93). In allowing the application to set aside Ransley, J. stated in part.

"The ruling of Ojwang, J. merely struck out the appearance entered by 1st Applicant for the 2nd Applicant. As a result the Applicant was rendered naked in the proceedings. I see no evidence that the 2nd Applicant did not honestly believe that it could be represented by 1st Defendant. It is an error, which is understandable as the 1st Applicant is the Attorney for Government and the 2nd Applicant is a government parastatal. The 1st applicant was in a better position to know what the scope of his authority was however. Be that as it may, I am satisfied that the Applicant has shown cause why the judgment against it should be set aside under provision of Order 9A Rule 10.

The courts discretion is wide in such cases to enable justice to be done where the errors on the part of the applicant are not so inculpable to render it undeserving of relief".

As it was held in **Shah vs. Mbogo** (supra) the court's discretion to set aside an exparte judgment is

intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but not to assist a person who has deliberately sought to obstruct or delay the course of justice. It is apparent in this case that IPC acted promptly in requesting the AG to represent it upon receipt of summons to enter appearance, and, that, until the superior court declared the Appearance and Defence a nullity, IPC honestly believed that its interest in the suit was adequately protected. Again, IPC acted promptly in appointing a firm of advocates and in filing the application to set aside after the court's decision. Had Ransley, J. declined to set aside the judgment, IPC would have suffered great injustice as it would have been condemned unheard for no fault of its own.

In the result, we are satisfied that the superior court (Ransley, J.) exercised its discretion judicially and that there is no ground warranting interference with his discretion.

Lastly, although this appeal is not directly against the ruling of Ojwang, J. it is nevertheless intimately connected to that ruling for the appellant specifically seeks a restoration of the judgment of Ojwang, J. and has persistently stated in the memorandum of appeal that the decision by IPC to instruct AG was not an error or excusable mistake as it knew its corporate status. Moreover, Mr. Obwayo, learned State Counsel for the 1st respondent (AG) opposed the appeal on the ground that Ransley, J. corrected the errors made by Ojwang, J. and maintained that AG had a right to represent IPC and that IPC, likewise, had a right under the Constitution to be represented by a counsel of its choice. Besides, it is a matter of public interest whether or not the AG can legally represent a State Corporation in civil proceedings. For those reasons, we are duty bound to express our view on the matter.

The **Investment Promotion Centre** was created by the *Investment Promotion Centre Act* (Cap 485) which commenced on 30th May, 1986 for the purpose of assisting and facilitating investments in Kenya. It is a body corporate with perpetual succession and a common seal with power to hold land and to sue and be sued in its corporate name. It is run by a Board of Directors comprising of Chief Secretary, (Head of Public Service) and seven permanent secretaries from various ministries, the Governor of Central Bank, a Managing Director, and, not less than five other members appointed by the President, The Chairman of the Board is appointed by the President and the Managing Director is appointed by the relevant Minister. The Centre is run through advances or grants made by the relevant Minister with approval of the Parliament and its accounts are audited by the Auditor – General (Corporations). The Centre is also exempt from the Companies Act. Although the Investment Promotions Centre Act came into operation five months before the *State Corporations Act (Cap 446)* came in operations, the Investments Promotions Centre is, by virtue of the definition (b) of *"State Corporation"* in **Section 2** of State Corporations Act – a State Corporation.

The appellant was posted from the Vice – President's Office and Ministry of Planning and National Development to IPC as Executive Chairman vide a letter dated 26th September, 1995 signed by *"Permanent Secretary/Secretary to the Cabinet and Head of Public Service"*. He was subsequently retired on attainment of retirement age vide a letter dated 4th June, 2001 signed by the Permanent Secretary, Ministry of Tourism Trade and Industry.

At the hearing of the application in the superior court, Mr. K'Owade, counsel then on record for the appellant relied on the decision of the High Court (Ringera, J.) in **The Attorney General vs. Kenya Commercial Bank Ltd**, *H.C.C.C. No. 329 of 2001* (unreported) (**A.G. vs. KCB**) and on another decision of the High Court (Mwera, J.) in **Amira (K) Ltd. vs. National Irrigation Board** [2001] 2 EA 323. Miss. Gathagu, learned State Counsel on the other hand relied on **Chief Nehemia Gotonga vs. Stephen Kinyanjui** [1959] EA 1096 – a decision of the predecessor of this Court.

In **Chief Nehemia's** case, the subordinate court awarded damages against the **Chief Nehemia** – a public servant (but who was sued in his private capacity) as compensation for use of the respondent's lorry. Thereafter a Crown Counsel gave a notice of appeal and subsequently filed an appeal on behalf of **Chief Nehemia**.

At the hearing of the appeal the respondent's counsel raised a preliminary objection, *inter alia*, essentially, that the Crown Counsel was not competent to conduct the appeal on behalf of the appellant as

the matter was not within the scope of his official duties. The Court (Gould, J.A. with whom the other members of the court concurred) after a survey of the relevant statutes and foreign case law stated in part at page 1099 paragraph G – H.

"The position of the treasury solicitor in England is, of course governed by different legislation but that does not alter the fact that it is open to the Crown to decide that it is in its interest to undertake the defence of any individual. If the Crown so decides, it is not for this Court, at least in any circumstances that readily spring to the mind (and certainly not in the present case which is one in which the Crown might well be expected to deem itself interested) to query that decision …..".

and overleaf at page 1100 paragraph A:

"Similarly, in my opinion, it is entirely within the administrative discretion of the Attorney General to decide whether it is in the interest of the crown that it should provide legal representation for a particular litigant. That decision having been taken and Mr. Rumbold *(Crown Counsel)* **instructed to appear he is clearly acting in a cause or matter within the scope of his official duties and has the right of audience".**

Regarding that decision, the superior court (Ojwang, J.) said:

"I have not been convinced by the old authorities cited by counsel for the defendants tending to show that the Attorney General, who is appointed under a Constitution as the Government's Chief legal adviser has an unfettered discretion to provide legal services to all-and-sundry provided only that in his reckoning a particular suit has some kind of impact on Government interest".

The superior court instead relied on **AG vs. KCB** (supra). In that case the AG filed a suit in his name on behalf of **National Irrigation Board** – a State Corporation which is a body corporate with power to sue and be sued in its name to restrain KCB from exercising the chargee's statutory power of sale. KCB filed a preemptory application to strike out the suit on the grounds, inter alia, that the suit was incompetent as AG had no *locus standi* to bring a suit in his own name on behalf of **National Irrigation Board**. The High Court (Ringera, J.) upheld the preliminary objection and held in part:

"I think the Attorney General's institution of a suit for and on behalf of the National Irrigation Board which is a body corporate with power to sue and be sued in its own name is a legal misadventure. It is an action without juridical basis. The Attorney General has no locus standi to do so ……".

Nevertheless, Ringera, J. agreed with the decision in **Chief Nehemiah's** case (supra) and others, that the Attorney General has discretion to appear as counsel for any public officer even though the officer is sued in a private capacity or for any public body. Indeed, Ringera, J. referred to **Section 34 (1) (e)** of the Government Proceedings Act which authorizes the Government to control or intervene in proceeding affecting its rights, property or profits and said:

"In my view, the Attorney General may step in such proceedings by either offering legal services as counsel or by applying to be joined either as a plaintiff or defendant as the case may be or as a necessary party …….".

In **Amira (K) Ltd.** (supra) a State Counsel infact appeared to defend **National Irrigation Board** – a body corporate with power to sue and be sued in its corporate name and raised a preliminary objection to an application for summary judgment against the Board on the ground that since the Board was a *"government"* it was not amenable to summary judgment. The superior court (Mwera, J.) quite correctly, in our view, held that the Board was not *"government"* in the larger context (of the Government Proceedings Act).

The appearance by a state counsel as counsel for the Board was not in any way whatsoever, contested or doubted in that case.

The decision of the superior court in **AG vs. KCB** (supra) is in our view correct. The AG cannot competently step into the shoes of a State Corporation which has power to sue and be sued in its corporate name and institute a suit in his own name on behalf of a State Corporation. The suit can only be instituted in the name of the specific State Corporation. That case is however clearly distinguishable from the present case in that the AG has not instituted any suit in his own name on behalf of IPC. Rather, the AG and IPC have be sued as co-defendants.

The decision of the superior court that the AG had no *locus standi* to represent IPC was solely based on the narrow ground that IPC was a body corporate with its own power to sue and be sued in its own name. The right created here by statute is the right to sue and be sued and there is no restriction on the right of representation. Since the decision of the superior court was not based on the provisions of any written law – e.g. the Constitution, Government Proceedings Act, Advocates Act or Civil Procedure Act, it is neither necessary nor expedient to inquire further into the sources and limitation of the power of the Attorney General to represent a party or a corporation in civil proceedings. Suffice it to say that the decision of **Chief Nehemia** which was decided when the Government Proceedings Act (Cap 40) was still in force is persuasive enough and in the absence of any specific legislation or any other decision of a court of the last resort limiting the power of the Attorney General to represent a public officer or a State Corporation or any other party in civil proceedings as deemed necessary, the decision is good law and should be followed. In this case, the superior court confused the power of the Attorney General to institute civil proceedings and the discretion of the Attorney General to appear as a counsel for a party in civil proceeding. With due respect, it is not the function of the court to supervise how the Attorney General exercises his administrative discretion as to who to represent or otherwise in civil proceedings. There are other competent bodies including Parliament which supervises how the Attorney General utilizes public funds and which can impose the appropriate sanctions.

In the present case, IPC is a State Corporation. The appellant was posted to IPC as Executive Chairman by the Permanent Secretary, Office of the President/Head of Public Service and was retired by the Permanent Secretary of the relevant Ministry. The appellant was thus appointed and retired by the Government. The cause of action related to that retirement. The role of IPC was peripheral. It was sued because it evicted the appellant from office pursuant to a letter of the Permanent Secretary, retiring the appellant. Although IPC and AG were sued as co-defendants the main party in the suit is the Government through the Attorney General.

This is in our view, a typical case where the AG has unquestionable right to represent a State Corporation in Civil proceedings. It follows from the foregoing, and, we hold, that, the superior court erred in law in excluding the Attorney General from representing IPC and in striking out the Appearance and Defence and counter-claim filed on its behalf by AG. This is an additional and strong reason why the appeal should be dismissed.

For the foregoing reasons, the appeal is dismissed with costs to both respondents.

Dated and delivered at Nairobi this 2nd day of July, 2010.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR