



IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CIVIL APPEAL 209 OF 2005

BETWEEN

NATION MEDIA GROUP LIMITEDAPPELLANT

AND

**BUSIA TEACHERS CO-OPERATIVE CREDIT
AND SAVINGS SOCIETY LIMITED1ST RESPONDENT
ANDEREA LUMUMBA KECHULA.....2ND RESPONDENT**

(An appeal from the judgment of the High Court of Kenya at Busia (Sergon, J) dated 10th June, 2004

in

H. C. C. C. NO. 15 OF 2001)

JUDGMENT OF THE COURT

This is an old case, with a chequered history. It began in 2001 with the filing of a plaint in which Busia Teachers Co-operative Credit and Savings Society Limited (1st respondent) and Anderea Lumumba Kechula (2nd respondent) claimed damages for defamation arising out of a publication by the Nation Media Group Limited (the appellant) of an article in the Daily Nation of 19th February, 2001 entitled “*Society Issues Bad Cheques*”, which the respondents alleged was untrue and had damaged their reputation.

The respondents denied the allegations claiming that the publication was fair comment on a matter of public interest.

The hearing of the suit commenced on 6th March, 2002 before Ang’awa, J in Busia. The appellant was represented by Mr. G. K. Mbiyu, while Mr. F. O. Wanga appeared for the respondents. The respondents called two witnesses, Mr. Anderea Lumumba Kechula, Chairman of the 1st respondent, and Mr. Chrispinus Ombare, Manager of the 1st respondent, and thereafter closed their case. The appellant had four witnesses present in court, but were disqualified from giving evidence because they had sat in court throughout the hearing of the respondents’ case. At that point, the appellant’s learned counsel, Mr. Mbiyu, sought, and was granted, adjournment for one day to enable him present other witnesses. When the case resumed the following day, the appellant had no witnesses, and Mr. Mbiyu said he was constrained to close the appellant’s case. Thereupon, the learned Judge heard submissions, and rendered judgment, in which she found for the respondents, and awarded them damages of Kshs.1 million. The appellant filed an appeal, and immediately filed an application by way of notice of motion dated 4th May, 2002 for stay of execution. That application initially came up ex parte before Ringera, J (as he then was), who certified the same urgent, granted interim orders, and set the same down for hearing inter-partes on 4th June, 2002 at Busia.

On that day, the parties, still represented by the same advocates, entered into a consent, and recorded the following order:

“By consent

- 1. The application dated the 4th May, 2002, seeking stay of execution be and is hereby withdrawn.**

2. ***The judgment entered herein on the 7th March, 2002, be and is hereby set aside with thrown away costs to the Plaintiffs in any event.***
3. ***The suit herein is to be heard, De Novo on the 1st and 2nd July, 2002.***
4. ***The issues recorded for trial before the Judge on the 6th March, 2002, do remain as issues for trial.***
5. ***The documents recorded on the 6th March, 2002, as admissible without calling the maker to be admitted without calling the maker.”***

The order was subsequently extracted, and forms part of the record. It will become evident later why we have chosen to narrate in detail this background, and to reproduce the consent order in full. At this point we simply note that the record is unclear as to why the parties chose to have the suit heard “**de novo**”. That was not part of any of the prayers in the application dated 4th May, 2002 before the superior court at that time, but the parties themselves chose to include it in their consent and the learned Judge saw no reason to reject it. Be that as it may, part of the order of the superior court, as extracted, is clear that the suit was to be heard “**de novo**”.

The hearing of the suit then commenced, presumably “de novo” on 1st July, 2002 before Ringera, J (as he then was). On that occasion, the appellant was represented by a new counsel, Mr. Kagucia, while Mr. Wanga continued to represent the respondents. As the appellant’s main witness was unwell, Mr. Kagucia successfully applied for adjournment. The suit then came up for hearing before Mitey, J when the respondents applied for, and were granted, an order to amend their pleadings. Both parties subsequently amended their respective pleadings, and the suit came up for hearing before Sergon, J on 2nd December, 2008. On that day Mr. Wanga, again appearing for the respondents, applied to rely on the entire evidence taken before Ang’awa, J on 6th March, 2002 and stated that he would call no other witness, and close the respondents’ case. Mr. Mbiyu, for the appellant, strongly objected to that approach, relying on the consent order of 4th May, 2002, and in particular order no. 3 which specifically stated that the suit would be heard “de novo”. The learned Judge (Sergon, J) would have none of that, and ruled that the respondents were entitled to rely on the proceedings taken before Ang’awa, J; that although Ang’awa, J’s judgment had been set aside, the “proceedings” had not been set aside, and that there would be no prejudice to the appellant if the respondents relied on the proceedings taken before Ang’awa, J. He then ordered the appellant to begin its case. The appellant was aggrieved by that decision, and sought leave to appeal against the same. It was granted leave, but never, in fact, filed any appeal. Meanwhile, the suit proceeded to hearing. The appellant had no witnesses, closed its case, and made submissions on points of law. In a judgment delivered on 10th June, 2004, the superior court found for the respondents, and awarded them general and aggravated damages totalling Kshs.2.4 million. It is that judgment that is the subject of this appeal. It is based on the following eight grounds of appeal:

- “1. ***The Learned Judge erred in Law and misdirected himself, in passing Judgment upon the Defendant (Appellant) without evidence being taken contrary to the Consent Order recorded on the 4th June, 2002.***
2. ***The Learned Judge erred in Law and misdirected himself in finding that the article was defamatory of the Plaintiffs (Respondents).***
3. ***The Learned Judge erred in Law in not finding that the Verifying Affidavit accompanying the Plaint was incompetent and defective.***
4. ***The Learned Judge erred in Law in not finding that the claim by the Second Plaintiff (Second Respondent) against the Defendant (Appellant) was defective as no Verifying Affidavit as required by Law was filed.***
5. ***The Learned Judge erred in Law in his appreciation of the Law of Defamation, in particular libel, or in not appreciating the Law, to the extent of:-***
 - (a) ***The ingredients of the Tort.***
 - (b) ***The essence of the publication.***
 - (c) ***The test to be applied on publication, the right thinking members of society.***
 - (d) ***The evidence receivable to establish libel.***
 - (e) ***The ingredients of innuendo.***
6. ***The Learned Judge erred in Law in awarding the Plaintiffs (Respondents) a sum of Kshs.2,400,000/=, General Damages, and aggravated damages, which award is without basis and is excessive.***
7. ***The decision was arrived at on consideration, to the extent that this was done, of (sic) wrong principles of Law.***
8. ***The decision was against the weight of evidence.”***

At the hearing of the appeal before us in Eldoret on 22nd September, 2010, Mr. Kagucia, learned counsel for the appellant, argued that the superior court had no jurisdiction to proceed with the hearing of the suit in violation of the previous court order of 4th May, 2002 which required that the suit be heard “**de novo**”. That, he argued, caused prejudice to the appellant, who having subsequently amended its defence, was unable to cross-examine the appellant’s witnesses, nor was able to present its own witnesses. He acknowledged, however, that the appellant, although granted leave to do so, had not preferred an appeal against the decision of the superior court not to proceed with the suit “de novo”. However, he argued that the superior court had no jurisdiction to proceed with the suit in the way it did, and asked us to set aside that judgment. He also argued on the merits of the appeal. We do not wish to go into the merits of the appeal at this time for reasons that will be evident from our conclusion in this judgment.

Mr. Gitonga Muriuki, learned counsel for the respondents, argued, with respect to the issue of jurisdiction, that the appellant never having preferred an appeal against the superior court’s decision to rely on the proceedings taken before Ang’awa, J, it was now too late for the appellant to raise that point. Mr. Gitonga also made submissions on the other grounds raised in the memorandum of appeal, and again we choose not to comment on the same, for the same reason that we have stated earlier.

Having considered the submissions made before us, we are in agreement with the appellant’s counsel that the superior court’s decision not to proceed with the hearing of the suit **de novo**, and to rely on the previous proceedings taken before Ang’awa, J was without jurisdiction, and in breach of an earlier court order that required hearing de novo of the suit before the superior court. That order, which was made on 4th May, 2002 had not been set aside, and it simply could not have been violated willy nilly. It (i.e. the Order) was, as it were, a contract between the parties and could have only been set aside either by the consent of the parties who had bound themselves by it or on any of the grounds upon which a contract can be set aside – see ***Brooke Bond Liebig (T) Ltd vs Mallya [1975] EA 266 and Flora Wasike vs Destimo Wamboko (1982-88) 1 KLR 626***. Seron, J erred and acted without jurisdiction when he altered the course of trial, thereby causing serious prejudice to the appellant who was then unable to cross-examine the respondents’ witnesses, especially in the light of the fact that all the pleadings had, by then, been amended. Nor did the learned Judge’s decision allow time to the appellant to call other witnesses, the previous witnesses having been disqualified by an earlier court ruling.

With regard to Mr. Gitonga’s argument that the appellant never having appealed against the decision of the superior court to allow the respondents to rely on previous proceedings instead of hearing the suit de novo, that it was now estopped from challenging the same, we would say that the issue of jurisdiction is central and fundamental to litigation, and when the court has no jurisdiction, it simply cannot proceed further. It must lay down its tools, and anything it does after, is of no consequence, and null and void for all intents and purposes. The learned Judge had no jurisdiction to depart from the terms of the consent order, which required that the suit be heard de novo.

Accordingly, and for reasons cited, we would allow this appeal, and set aside the judgment and decree of the superior court made on 10th June, 2004, and order that the suit in the superior court be heard **de novo**, in accordance with the terms of the consent order dated 4th May, 2002. Hearing of the suit “**de novo**” means a new hearing, conducted as if the original hearing had not taken place. We further direct that the suit be heard by any judge of the superior court other than Ang’awa and Seron, JJ. Each party shall bear their own costs so far, both here and in the superior court.

Finally, it is now clear that it would have been prejudicial to the parties to comment upon the other grounds of appeal, and to submissions made in respect of the same, since a retrial was inevitable.

Orders accordingly.

Dated and delivered at Nairobi this 5th day of November, 2010.

R. S. C. OMOLO

.....
JUDGE OF APPEAL

P. N. WAKI

.....
JUDGE OF APPEAL

ALNASHIR VISRAM

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR