



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: TUNOI, O’KUBASU, JJ.A. & DEVERELL, AG.J.A.)
CIVIL APPEAL NO. 169 OF 2004
BETWEEN

DR. WILSON MWONGA NGOKA APPELLANT

AND

ANNE NDINDA NGOKA RESPONDENT

(Appeal from the Ruling and Order of the High Court of

*Kenya at Nairobi (Ojwang, Ag. J.) made and passed on 4th
June, 2004*

in

H.C.MISC.CIVIL APPLICATION NO. 227 OF 1997(O.S.)

JUDGMENT OF THE COURT

Before us is an appeal against the ruling of Ojwang, Ag.J. (as he was then) delivered on *4th June, 2004* . What gave rise to that ruling was an application by way of chamber summons in which the appellant (as the applicant in the superior court) sought the following orders:-

- “1. THAT the application be heard EX PARTE in the first instance.***
- 2. THAT the Court be pleased to certify this application urgent and that it can be heard during the vacation.***
- 3. THAT the court be pleased to ORDER that the chamber Summons (sic) filed on 30.12. 2003 be heard during the vacation due to its urgency.”***

That application was brought on the following grounds:-

- “1. THAT even though the court is on vacation the respondent plaintiff should not be allowed to avoid service.***
- 2. THAT service on the plain tiff can be done anytime even if the court is in vacation.***
- 3. THAT the plaintiff’s attempt to avoid service is malicious, an abuse of the court process and the court cannot be taken for a ride and should not countenance such demeanor.***
- 4. THAT the court s hould use its powers even during the vacation to THWART such blatant***

abuse of the court process.”

The appellant who conducted his own case made submissions citing various authorities. But the appellant's submissions and authorities appear to have been directed at another application and not what was before the superior court. The learned Judge having considered what was before him and what the appellant stated in his submission concluded his ruling as follows:-

“Now the submissions and the authorities relied upon, as I have already indicated are not in tune with the relevant chamber summons application that of 30th December 2003 . The chamber summons application is purely procedural being concerned exclusively with mode of effecting service, and it is not attached to any other application turning on substantive matters of the rights of parties. Yet the entire submission rendered by the applicant is about rights of parties.

No decision can in these circumstances be rendered which addresses the formal application as set out in the chamber summons; and I have no option but to declare the hearing which was conducted on 28th April 2004 a mistrial. Specifically, I will make the following orders:

- 1. There being a striking mismatch between the formal application by chamber summons and the submissions of the Applicant, the entire hearing was conducted on an invalid footing and, consequently, I declare it a mistrial.*
- 2. The Applicant shall review his several applications pending on file, and obtain dates for hearing in a proper order.*
- 3. The Applicant shall bear his own costs.”*

Being aggrieved by the above ruling the appellant filed this appeal citing seven grounds of appeal.

When the appeal came up for hearing before us on *9th December 2004* the appellant, acting in person, addressed us at length referring to various authorities. He told us that there was an originating summons which had been amended and served on him 2 ½ years later. It was his argument that he should have been served within 14 days. He urged us to hold that the orders made by the learned Judge were not correct.

What did the appellant want from the superior court? The orders he sought were that the application before the superior court be heard *ex parte* in the first instance. The application was heard *ex parte* . The other order sought was that the application be certified urgent. That was also done. Lastly, he sought an order that the chamber summons filed on *30th December 2003* be heard during vacation. In that chamber summons application, the appellant sought the following orders: -

- 1. THAT the Amended originating summons served upon the Respondent is invalid, unprocedural, an abuse of the court process and should be dismissed.***
- 2. THAT the suit be dismissed.***
- 3. Costs of this application be provided for.***

The above has yet to be determined by the superior court. It would appear that instead of prosecuting the above stated application, the appellant embarked on a fruitless effort by filing the application which was dismissed by Ojwang Ag. J.

Taking into account what was before the learned Judge and what the appellant stated, we are satisfied that there was no proper application before the superior court for determination. The application was purely procedural being concerned with the mode of service. We are, therefore, in entire agreement with the ruling of the superior court as what was before the superior court was purely procedural issues being concerned exclusively with mode of effecting service. It follows that this appeal has no merit and ought to be dismissed. But before we come to the final conclusion, we have one or two matters to deal with.

We have perused the entire record of appeal and what we have found is that the appellant has made it a habit (almost a speciality) of filing numerous, frivolous and vexatious applications which consume, and indeed waste, a great deal of judicial time and thus denying genuine litigants opportunity to be heard. We have also noted that the applicant was granted a waiver on court fees and instead of utilizing that assistance carefully he thought he had unlimited access to the court which has led him into coming to court whenever he felt like doing so. If any advice is required, we would tell him to go to the superior court, set down for hearing his chamber summons application dated 30th November 2003 and have it determined. Since his perennial opponent (his former wife) has chosen never to respond to court summons or appear in court, we are almost sure the appellant's wishes will be granted which will bring this protracted litigation to an end. In dealing with a similar litigant, in **James Mwashori Mwakio V. The Attorney General & 2 others** – Civil Application No. NAI 123 of 2004 (unreported) this Court stated: -

“It appears from the record that the applicant has been granted a waiver on court fees and as a result of this he has misused the noble assistance by inundating the Courts with numerous frivolous and vexatious applications which consume, and indeed waste, a great deal of judicial time and thus denying genuine litigants opportunity to have their cases heard. The right to a waiver on fees granted to the applicant as regards the same subject matter must be withdrawn forthwith and we so order.”

If the appellant herein persists in filing frivolous and vexatious application as he has been doing in the past, this Court would not hesitate withdrawing the waiver on fees granted to the appellant.

We think we have said enough on this appeal. As already stated, we found no merit in this appeal and we order that the same be and is hereby dismissed, with no orders as to costs.

Dated and delivered at Nairobi this 4 th day of February, 2005.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

W.S. DEVERELL

.....

AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR