



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CIVIL CASE NO. 53 OF 1996

PAUL GICHUKE KIBATHI PLAINTIFF

VERSUS

NATIONAL IRRIGATION BOARD DEFENDANT

J U D G M E N T

The Plaintiff, PAUL G. KIBATHI was injured when the motor vehicle he was travelling in lost control and collided with a lorry. He testified that on the 3rd April 1995 at about 8.30 p.m. he was travelling as a passenger in the Defendant's motor vehicle from Nairobi to Mwea. He was by then employed by the Defendant and was travelling in the front seat with the driver. At Makuyu the driver, who was driving very fast, failed to negotiate a corner properly and collided with the oncoming lorry. It was his evidence that the lorry driver could not do anything to avoid the collision as he had already swerved off the road.

The Defendant took out Third Party Notice but did not proceed with the same. At the time of the hearing the Defendant did not tender any evidence. On the evidence before me I hold that the plaintiff has proved his case against the Defendant on the required standard. I hold the Defendant liable.

The Plaintiff sustained the following injuries.

- (i) Fracture of right clavicle
- (ii) Fractures of the neck and shaft left femur
- (iii) Fracture of tibial plateau.

He was hospitalised for 3 weeks and 3 days. He was treated by Professor J. A. O. Mulinda who prepared two Medical Reports. In his 1st Report dated 17th June 1996 the Professor was of the opinion that the fracture of the clavicle will eventually settle. The fractures of the femur have healed though a further surgery will be required to remove the metal implants. He was however worried of the knee fractures and stated that there will give maximum trouble. Osteoarthritic changes were bond to occur. A

further surgery was recommended.

The Professor again reviewed the Plaintiff and prepared his Report dated 19th May 1999. He stated that there was pain in the left knee. The left limb was shorter than the right limb and he still walks with a limb. The clavicle is now normal. X-ray of the knee showed severe osteoarthritis left knee joint. The femur is well healed. In his opinion the plaintiff required a total knee replacement at an approximate cost of Ksh.500,000/=. Permanent disability was assessed at 30%.

The plaintiff testified that he cannot walk or stand for long. He is 35 years.

The Reports show that the Plaintiff underwent a lot of pain and because of osteoarthritis changes to the knee joint he is bound to suffer a lot of pain especially during cold weather. A knee replacement has been recommended at a cost of Ksh.500,000/=. I cannot however award this sum as the same was not pleaded.

Noting that the femur and clavicle have healed, I assess general damages for pain and suffering at Ksh.800,000/=. I award Sh.100/= for the Police Abstract.

I therefore enter judgment for the Plaintiff against the Defendant in the sum of Ksh.800,100/=.

The Plaintiff shall also have the costs of this suit and interest.

DATED 25th day of January 2000.

J. V. O. JUMA

JUDGE

25.1.2001

Mutahi – C/C Mr. Mindo for Plaintiff Mr. Kimani for Defendant Court: Judgment read.

J. V. O. JUMA

JUDGE

14/5/2001 Upon receipt of a letter Ref: 008/X/96/1 dated 12/4/2001 duly signed by Mamicha Advocate for the Plaintiff and Munene & Co. Advocate for the defendant requesting the following consent be recorded.

CONSENT ORDER:

That by consent the plaintiff's party and party costs against the defendant's be and are hereby agreed at Kshs.70,727/= only.

C. D. NYAMWEYA

D.R.

5.12.2001

Geoffrey for Mamicha & Co. Advocate for the plaintiff N/A for respondent Application dated 21.6.2001 fixed for hearing on 17-1-2002 at 8.30 a.m. Application to be served. 17.01.2002

Before Hon. J. V. O. Juma – Judge

Mugo – C/C

Mr. Muiruri for Applicant Objector

Mr. Angima for Respondent D/H

Mr. Muiruri – Application dated 21.6.2001 pray for lifting of the attachment order. Issue is whether Defendant is a Government body. Refer – Cap 2 on definition of “Government” Section 3 “Public Body” – not exhaustive Refer Webster Dictionary. N/B is an Agency – an instrument of the Government. All property of NIB are government. How is the property acquired supporting affidavit. Estimates Board only a recipient of such funds.

If held NIB is government then attachment is improper. O. 28.

J. V. O. JUMA

JUDGE

Mr. Angima

Application opposed. Rely on replying Affidavit. What are legal status of NIB. Reply on Irrigation Act – Cap. 347 S. 3 of the Act. S. 18 money voted for NIB not only source. Does not follow that what is purchased remains government property. Registration of vehicles – civilian not GK. Even Universities get funds from GK. Pray – Application be disallowed.

J. V. O. JUMA

JUDGE

Mr. Muiruri – Though it has corporate status that does not take it away from the government.

J.V. O. JUMA

JUDGE

Order – S.O. 25.2.2002 for ruling.

J. V. O. JUMA

JUDGE

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R U L I N G

The Applicant's motor vehicle was involved in a road accident while being driven by its employee. The passenger was another employee. The passenger was another employee of the Applicant and he was injured in the said accident. He brought suit against his employee as the owner of the motor vehicle and obtained judgment. The Applicant was represented by a firm of advocates.

The Applicant was unable to pay the decretal sum and the employee, the present Respondent, now attached the Applicant's assets. By an application dated 21st June 2001 the Attorney General prays that the attachment be lifted as the Applicant. National Irrigation Board, is a government body. The proper mode of execution was not thereby followed. The Application was opposed.

The Application was supported by an affidavit of Samuel Bundotich, the Financial Secretary to the Treasury. He deponed that the Permanent

Secretary Ministry of Finance is an Board member of the Board and that the Board is wholly funded out of the Consolidated Fund of the Republic of Kenya. That the property sought to be attached has been purchased and financed by funds. That the Board is an agent of the Government and has no property of its own. That the Accounting Officer responsible for the government Department is the one liable to pay the debt.

Mr. Muiruri for the Attorney General strenuously argued that the Board is a public body, an agent of the Government and so the attachment is invalid as you cannot attach government property.

Mr. Angima in opposing the application relied on section 3(1) of the Irrigation Act which provides as follows:-

"There is hereby established a Board, to be known as the National Irrigation Board, which shall be a body corporate having perpetual succession and a common seal, with power to sue and be sued, and capable of purchasing or otherwise acquiring, holding, managing and disposing of any property movable or immovable, entering into contracts, and doing all things necessary for the proper performance of its duties, and discharge of its functions under this Act and any subsidiary legislation made thereunder".

Assuming that the Applicant is a government department as deponed by Mr. Bundotich and that the Accounting Officer is the one to pay the decretal sum then why has the Accounting Officer not paid or entered into some payment arrangements with the Respondent" Why waste public funds by making such an application instead of negotiating a settlement"

I have perused the Irrigation Act Cap. 347 Laws of Kenya. It is not in dispute that the Government has a large stake in the Board just like it has in the Kenya Ports Authority, Kenya Railways and other bodies. It was the intention of the Legislature to safeguard the Board against attachments it would have incorporated such safeguards as it did in the Acts incorporating the Kenya Ports Authority and the Kenya Railways. There are no such safeguards in the Irrigation Act.

Section 3(1) of the Act clearly states that the Board is a corporate body capable of suing and being sued. In the instant case the Respondent was an employee of the Board and was injured in the course of his employment with the Board. Had the Respondent been in breach of his duty with the Board, the Board would have been in order to sue him by virtue of section 3(1) of the Act. Similarly the Respondent was entitled to sue and he sued the Board. The Board instructed a firm of advocates to represent it. It did not instruct the Attorney General. As a government department it did not plead the defence of the Attorney General not being given the statutory notice prior to the filing of the suit. But when it came to execution it now remembered that it was a government department.

I am not persuaded despite being referred to the Webster's Third New International Dictionary that the Board is a government department. Once a body is established as a body corporate, it becomes a separate legal entity. It becomes responsible for all its activities unless clearly stated otherwise in the Act establishing such a body. It is immaterial where such a body gets its funding. A poor man does not lose his legal entity simply because he is kept alive by his brother.

For the foregoing reasons the application to lift the attachment is hereby dismissed with costs to the Respondent. Dated this 19th day of March 2002.

J. V. O. JUMA

JUDGE

19.3.2002

Coram: Juma – Judge

Mugo – C/C

Mr. Muiruri for A.G.

Mr. Nderi for Plaintiff

Court: Ruling read.

J. V. O. JUMA

JUDGE

19/3/2002

Mr. Muiruri – I apply for stay of execution and for leave to appeal. Court: There shall be a temporary stay of execution for 30 days pending filing of a formal application to that effect.

J. V. O. JUMA

JUDGE

17.4.2002

Coram: Juma – Judge

Mugo – C/C

Mr. Muiruri for Applicant – Formal Application filed pray for a date
and extension of order.

Order: S.O. 28.5.2002 temporary order extended till then.

J. V. O. JUMA

JUDGE

28.5.2002

Before Hon. J. V. O. Juma – Judge9 Mr. Runo for Applicant Mr. Angima for Respondent Order by
cosnent S.O. 2/7/2002 interim orders extended till then.

J. V. O. JUMA

JUDGE

28/5/2002

2.7.2002

Before Hon. J. V. O. Juma – Judge Mugo – C/C

Mr. Muiruri for Defendant/Applicant Mr. Angima for Plaintiff/Respondent Order by consent S.O.
17/7/2002 to enable Mr. Muiruri obtain instructions. Interim Orders extended till then.

J. V. O. JUMA

JUDGE

2/7/2002

17.7.2002

Before Hon. J. V. O. Juma – Judge

Mugo – C/C

Mr. Nderi for Plaintiff

N/A for Defendant

Later Mr. Muiruri appears for the defendant. By consent interim orders extended. S.O. to 16.9.2002 for hearing.

J. V. O. JUMA

JUDGE

16.9.2002

Before Hon. J. V. O. Juma – Judge

Mugo – C/C

Mr. Angima for Plaintiff

Mr. Mureithi for Defendant

Order at the request of Mr. Mureithi to be given the last chance, matter S.O.

4.11.02. Costs of plaintiff.

J. V. O. JUMA

16/9/02

4/11/02

Before Hon. J. V. O. Juma – Judge

Mugo – C/C

Mr. Muiruri for Applicant

Mr. Angima for Respondent

Mr. Muiruri: Application dated 15.4.02 for stay of execution. Application under O.41 Rule 4. 0.50 R. 1 and 2 and S. 3A CP Act against order of 19.3.2002 pending Appeal. Rely on the grounds set out in the Application and supporting Affidavit of Prof. Shem Adhola. Property, subject of execution is public property and as such cannot be attached. Applicant will suffer loss if execution carried out. Same will not be refunded should appear succeed. See A.G. v/s EQUIP AGENCIES c.a. 432/01.

J. V. O. JUMA

JUDGE

4/11/02

Mr. Angima: See reply and Affidavit and Grounds of Objection. Notice of Appeal filed out of time. No attempt to prosecute the appeal. Replying Affidavit he is a man of means, copy of payslip attached. He has 8 properties in Nairobi. Will not be rendered nugatory.

- Money decree – see Kenya Shall v/s Benjamin Karuga. - Equip case involved billions of shillings whose payment would have crippled the running of the ministry.

Alternatively conditional stay of execution.

J. V. O. JUMA

JUDGE

4/11/02

Mr. Muiruri: Property market has gone down.

J. V. O. JUMA

JUDGE

Order S.O. 9.12.02 for Ruling.

J. V. O. JUMA

JUDGE

9.12.02

Coram: Juma – Judge

Mugo – C/C

Mr. Njoroge for Applicant

Mr. Nderi for Respondent

Court: Ruling read.

J. V. O. JUMA

JUDGE



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