Monyenye & another v Obure (Civil Appeal E1303 of 2023) [2024] KEHC 9359 (KLR) (Civ) (29 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9359 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1303 OF 2023

AC BETT, J

JULY 29, 2024

BETWEEN

NOAH ELIJAH MONYENYE .... 1ST APPELLANT

JACOB LOGOMERE AREKWE .... 2ND APPELLANT

AND

ALICE NYANCHAMA OBURE .... RESPONDENT

(Being an appeal from the Ruling delivered by the Hon. A.S. Lesootia (Mr) on 20th November 2023)

RULING

1. This appeal originates from a claim for general damages and special damages for pain and suffering from injuries sustained by the respondent from a road traffic accident involving the 1st appellant's motor vehicle registration number KCE 896W on 27th June 2018. When the appellants were served with summons to enter appearance, appearance and defence were filed on their behalf by the firm of M.J., Okumu And Associates on 4th April 2019. Thereafter the suit was set down for hearing and on 13th December 2020, the parties recorded a consent judgement on liability in which they apportioned 90%:10% in favor of the respondent. The parties agreed to file their written submissions after which judgement was delivered on 7th July 2020.

2. By a Notice of Motion dated 13th April 2021, the appellants sought orders to review and set aside the interlocutory judgement entered on liability on 13th February 2020 and the judgement delivered on 7th July 2020. In support of their application, the 1st Appellant averred that he was insured by Xplico Insurance Company and upon receiving summons to enter appearance, he forwarded the same to his insurer and was assured that they would appoint an advocate to represent them in the matter. It was

the 1st appellant's averment that he was never notified of the matter until March 2021 when he received a call from Xplico Insurance notifying him that judgement had been delivered against him. The 1st appellant's contention was that on perusal of the court file, he discovered that a consent judgement on liability had been entered without instructions from him. It was the 1st appellant's case that the judgement and further consent to admit documents without him being informed to attend court as a witness was a violation of his right to a fair hearing as provided by the *Constitution* of Kenya.

3. The application was opposed, and the respondent filed a replying affidavit sworn on 7th May 2021. Thereafter, the parties filed their written submissions. Upon considering the application, the trial magistrate dismissed the appellant's application. The ruling was delivered on 20th April 2023 in the presence of the respondent's advocate and in the absence of the appellants or their legal representative.

4. The appellants were aggrieved by the decision of the court. By a memorandum of appeal dated 28th November 2023, the appellants set out their grounds as follows: -

    1. That the learned trial magistrate erred in law and in fact by not setting aside consent judgement on liability dated 13-2-2020 and final judgement delivered on 7-7-2020 entered by the Appellant's Advocates without express instructions and/or knowledge of the Appellant thereby depriving them of their right to a fair hearing.

    2. That the learned trial magistrate erred in law and in fact by not setting aside the court judgement on the mistake of the Advocate which in law cannot be visited on a litigant.

    3. That the learned trial magistrate delivered a ruling without notice to the Appellant's advocates thereby occasioning a miscarriage of justice.

    4. That the learned trial magistrate erred in law and in fact by holding that the consent judgement entered by the appellant (sic) counsel was binding on them despite lack of instruction and their consent.

    5. That the learned trial magistrate erred in law and in fact by not considering the principles of setting aside judgement thereby, arriving at a wrong decision.

    6. That the learned trial magistrate erred and misdirected himself when he failed to consider the Appellant's submissions on both points of law and fact.

    7. That the learned trial magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned miscarriage of justice.

    The appellants therefore urged that the court do allow the appeal, set aside the ruling dated 20th November 2023, and allow the appellant's notice of motion dated 13th April, 2021.

5. After the appeal was admitted to hearing, directions were issued directing the parties to file their written submissions to enable the court to dispose of the appeal. I have carefully considered the appellants grounds of appeal. I find the appeal raises the following issues: -

    a. Whether the advocates for the appellants had instructions to record a consent judgement on liability.

    b. Whether the appellants should be condemned for what they term as mistake of their advocates.

    c. Whether the appellants had fulfilled the grounds for setting aside a consent judgement.

6. First, I wish to deal with what I deem to be a fundamental ground of appeal. The appellants faulted the trial magistrate for delivering the impugned ruling without notice to the appellant's advocates thereby occasioning a miscarriage of justice. I have perused the record of appeal. I note that there is no record of the appellants seeking and obtaining leave to appeal out of time. The appeal was filed on 28th November 2023, six months after the impugned ruling was delivered. My efforts to trace any documents to support an application for such leave either in the court file or in the online system were futile. The only application available was an application for typed copies of proceedings which was made and paid for on 22nd November 2023. Assuming it is on 22nd November 2023 that the appellant's advocates learnt that a ruling had been delivered, then they ought to have sought leave to file appeal out of time while citing the aforesaid reasons. Despite the absence of an order of leave to appeal out of time, the appeal was admitted on 16th May 2023. A close perusal of the records shows that the reason the appeal was admitted was because the court was under the bona fide mistaken belief that the appeal was against a judgement dated and delivered on 20th November 2023. In the preamble of the appeal, the appellant clearly stated their appeal is against a judgement delivered on 20th November 2023. The grounds of appeal however are in respect of a ruling delivered on 20th April 2023. Clearly the appellants would have been deemed out of time had they cited the real date of the delivery of the ruling against which they were appealing. Nonetheless, the appeal was admitted to hearing and therefore the appellant's claim that they were occasioned a miscarriage of justice by delivery of the ruling without notice cannot stand.

7. The 1st appellant's case was that the advocates on record for the defence in the lower courts recorded a consent on liability without his express instructions and therefore he was deprived of an opportunity to be heard. From his affidavit sworn in support of his application to set aside the judgement, it is clear that the appellant's insurer retained the services of the firm of M.J. Okumu and Associates to act for the defendant. Under Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act* ,Cap 405 Laws of Kenya, the insurer was under legal obligation to indemnify 1st, appellant who was its insured. The said appellant did not aver that the insured withdrew its instructions to the said law firm before the matter was determined. To all intents and purposes, judgement on liability that was entered was entered under the instructions of the appellant's insurer who were then duty bound to settle the subsequent decree on behalf of the appellant.

8. In their submissions, the 1st appellant sought to have set aside the judgement entered against him on the grounds that he was not served to attend court and adduce his evidence hence, he was denied an opportunity to be heard. The appellants relied on the case of *Wachira Karimi v Bildad Wachira* [2016] eKLR where the court held that a party should not be forced to bear the consequence of his advocate's default unless the default results from failure on the part of the litigant to give his advocate instructions. The appellants also cited the case of *Patel v East Africa Cargo Handling Services* [1974] EA 75 where it was reiterated that the concern of the courts is to do justice to parties by applying its unfettered discretion.

9. It was the appellants' submissions that the court failed to exercise its powers under section 1A, 1B and 3A of the *Civil Procedure Act* for the interest of justice. The appellants further relied on the case of *David Bundi v Timothy Muthee* [2022] eKLR where the court held: -

> " The fundamental duty of the court is to do justice between the parties. Fundamental to that duty is parties should be allowed a proper opportunity to put their case upon merit of the matter. The court is not powerless to grant relief when the court of justice and equity do demand, because the powers vested in the court case so wide in scope and ambit."

The appellants urged the court to consider the new approach of substantive justice and allow the appeal.

10. The respondent submitted that the appeal lacks merit, reason being that is well established that counsel on record for a party has ostensible authority to compromise an action. The respondent relied on the case of *Kenya Commercial Bank Limited v Benjoh Amalgamated*, Civil Appeal No.276 Of 1997 Where The Court Citing The Case Of *Brooke Bond Liebig v Mallya* [1975] EA 266 stated:

> "The compromise agreement was made an order of the court and was thus a consent judgement. It is well settled that a consent judgement can be set aside only in certain circumstances, e.g. on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reason as would enable the court to set aside or rescind a contract. In this case, the parties and their advocates must have consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed."

11. The respondent further relied on the case of *Flora N. Wasike v Destimo Wamboko*[1987] eKLR to reiterate that the law on review of a consent judgement is now settled and in absence of proof of fraud, collusion, illegality, mistake, an agreement contrary to public policy, mistake or ignorance of material facts the courts cannot set aside a consent judgement. The respondent submitted that there were no grounds as contemplated by law to justify a review and setting aside of the consent judgement and so the trial court did not err in the impugned ruling that dismissed the appellant's application.

12. The respondent also submitted that Section 1(A), 1(B) and 3A of the *Civil Procedure Act* would have been relevant if the appellants had offered a reasonable excuse to persuade the court to rule in their favor.

13. The application dated 13th April 2021 that led to the ruling that precipitated this appeal was brought under Order 12 Rule 7 *Civil Procedure Rules*, Section 3A, 1A ,1B and 63E of The *Civil Procedure Act*. Order 12 Rule 7 of The *Civil Procedure Rules* provides: -

> "Where under this order, judgement has been entered or the suit dismissed, the court, on application, may set aside or vary the judgement on order upon such terms as may be just."

14. Looking at the records, the appellants were fully represented and took part in the proceedings that culminated in the judgement he was seeking to set aside.

15. Although the supplementary Record of Appeal contains the typed proceedings, the typed proceedings are not an accurate record of the proceedings because from the handwritten original record on, 13th February 2020, the advocates informed the trial court that they had a consent to record. They dictated the terms of the consent and the court adopted the consent as an order of the court. Order 12 Rule 7 of The *Civil Procedure Rules* was therefore not the right procedure for the appellant. He ought to have moved the court for review under Order 45 Rule 1. However, the failure to move the court using the right procedure did not prejudice the appellant at the trial court. The trial court considered the appellants' submissions which extensively dealt with the issue of the consent and dismissed his application for variation of the judgement.

16. The 1st appellant's, submissions were that his insurer appointed an advocate who did not represent him properly as he entered into a consent judgement apportioning 90% liability to him and failed to

call him to give evidence. The question is, who was the instructing client? Was it the 1st appellant or his insurer, Xplico Insurance Company Limited?

17. By his own admission, the 1st Appellant said that upon receiving summons to enter appearance, he handed over the same to his insurer who informed him that they would appoint an advocate to act for them. Being the 1st appellants insurer, the insurance company was obligated by law to indemnify the 1st appellant. It was not averred by the 1st appellant that the insurer repudiated the insurance contract nor that the insurer had withdrawn legal representation. There were no submissions that the advocate appointed by the 1st appellant's insurer failed to act in accordance with the insurer's instructions or acted contrary to public policy. The only thing that triggered the 1st appellant to appoint his own advocate and apply for setting aside of the judgement was a call he received from the insurer's staff that there was judgement in the case. Apart from this discovery, the consent judgement was a regular and lawful judgement, and the 1st appellant should have pursued his insurer to settle the same instead of taking over and pursuing the matter on his own.

18. The duty of an insurer to satisfy any decree arising from a judgement against their insurer is founded on Section 10(1) and (2) of *The Insurance (Motor Vehicle Third Party) Risks Act*, Cap 405, Laws of Kenya. The insurer is therefore an interested party from the time a suit is instituted against its insured and hence the need for the insured to inform the insurer which has an interest in the proceedings and outcome of the case. Once the insured has informed the insurer of the proceedings against him, the insurer then appoints a legal representative to secure its interests. At this point, the insured is a witness in the case and the insurer may or may not call him to give evidence. The insurer may opt to enter into a consent judgement and compromise the suit.

19. Section 10 (1) of the *Insurance(Motor Vehicle Third Party) Risks Act* provides: -

> "If, after a policy of insurance had been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.
>
> Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in section 5(b) prescribed in respect thereof in the Schedule."

20. The appellant herein wants the court to find that the trial court failed to set aside a consent judgement entered into by his insurer's advocate, on instructions of his insurer. The insurer did not challenge the judgement. In the case of *SMN v ZMS and 2 Others* HCCA No.205 of2015, the court of appeal held as follows:

> "A consent order entered into by counsel is binding on all parties to the proceedings and cannot be varied unless it is proved that it was attained by fraud, collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material or misrepresentation or ignorance of such facts in general for a reason which would enable the court to set aside the agreement."

21. It is evident from the proceedings that the 1st appellant was satisfied with his representation by the insurer's instructed advocate and that his only ground of dissatisfaction was the failure by his insurer to settle the decree arising from the consent judgement.

22. The consent judgement entered between the appellants' advocate and the respondent's advocate is deemed to have had the ostensible authority of the appellants through his insurers. It has the effect of a contract and therefore ousts the court's jurisdiction to exercise its discretion. In the case of *Anura Perera v Nation Media Group Limited And 2 Others*[2015] eKLR, Hon. Justice R. Aburili held that: -

> " In this case, it is trite from the order of 2nd October 2014 that the parties agreed to the terms of the consent which the learned Judge Waweru J recorded as an order of the court. In my view, an order of the court which is recorded out of or arising from a consent of the parties is a binding contract between the parties to the dispute and as such, is like any other order of the court leaving no room for the discretion of the court to set aside that order save where the complaining party shows to the satisfaction of the court that the consent was entered into by mistake, fraud or misrepresentation. Thus a consent between the parties to the suit presents an impermissible fetters of the discretion of the court to tamper with that consent without the consent of both parties or as would a court set aside a contract between parties thereto, and enlargement of time for compliance with a consent is equally fettered where such time is fixed by consent between the parties."

23. From the above analysis and the cited authorities, it is my finding that the trial court did not err in law or in fact in disallowing the appellant's prayer to set aside the consent judgement. The appellant has not satisfied the court that the learned trial magistrate was required to exercise her discretion in his application as contemplated by Section 1(A)(1)(3) and 1B and 3A of the *Civil procedure Act*. The consent judgement was regular, and the appellant is advised to pursue his insurer to satisfy the ensuing decree as required by law.

24. For the above reasons, I dismiss the appellant's appeal and uphold the decision of trial court.

    There shall be no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 29TH DAY OF JULY, 2024.

A. C. BETT

JUDGE

In the presence of:

Nyakiayana for appellants

No appearance for respondent

Court Assistant: Polycap Mukabwa