Otieno v Chelisa & another (Civil Appeal 138 of 2021)
[2023] KEHC 1674 (KLR) (28 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1674 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL 138 OF 2021

TA ODERA, J

FEBRUARY 28, 2023

BETWEEN

WALTER ODHIAMBO OTIENO ..... APPELLANT

AND

EPHRAIM SAVA CHELISA ..... 1ST RESPONDENT

HARDEEP SINGH PANDAHO ..... 2ND RESPONDENT

(Being an appeal from the Ruling and Order of Hon R. S. Kipngeno (PM) delivered at Nyando in Principal Magistrate's Court Case No 86 of 2019 on 2nd November 2021)

JUDGMENT

Introduction

1. In his decision of 2nd November 2021, the Learned Trial Magistrate, Hon R. S. Kipngeno (PM), set aside the Trial Court's Judgment and granted leave to the 2nd Respondent to defend himself.

2. Being aggrieved by the said decision, on 1st December 2021, the Appellant filed a Memorandum of Appeal dated 29th November 2021. He relied on nine (9) grounds of appeal.

3. His Written Submissions were dated and filed 13th January 2023 while those of the 2nd Respondent were dated and filed on 11th January 2023.

4. The Judgment herein is based on the said Written Submissions which the parties relied upon in their entirety.

LEGAL ANALYSIS

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of *Selle & Another vs. Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

7. Having looked at the Grounds of Appeal and the Written Submissions by both parties, it appeared to this court that the Appellant had only challenged the Trial Court's ruling on the grounds that that the issues raised herein are *res judicata* .

8. All the Grounds of Appeal were related and intertwined, this court therefore dealt with the said issues as hereunder.

9. The Appellant submitted that the case involved a mere technical objection to the execution process in that the 1st Respondent did not demonstrate in his application dated 3rd August 2021 that he had suffered any prejudice in the decree that was executed in this suit. He asserted that the 1st Respondent did not lay out any patent errors or defects in the decree that was being executed in the suit. He added that the said Decree was signed and sealed by the magistrate after he confirmed that it was drawn in accordance with the judgment delivered on 30th March 2021.

10. It was his case that the 1st Respondent was by the operation of the doctrine of estoppel precluded from claiming that the decree as extracted had prejudiced him yet he offered to settle the same by his letter dated 3rd July 2021.In this regard, he relied on the case of *Lochab Transporters Ltd vs Fanuel Kambona Mutesa* [2017]eKLR where the court held that Order 21 Rule 8(2) was not coached in mandatory terms and failure to comply with the said provision is not fatal to the execution process.

11. He argued that Legal Notice Number 22 of 26th February 2020 which was contained in the Kenya Gazette Supplement Number 11 amended Order 5 Rule 22 of the *Civil Procedure Rules* and introduced Order 5 Rule 22 B on email service and Order 5 Rule 22 C on mobile-enabled messaging applications to the Defendant's last known telephone number in use. It was therefore his case that the Notice To Show Cause Why the 1st Respondent should not be committed to civil jail was properly served.

12. He invoked Section 120 of the *Evidence Act* Cap 80 of the Laws of Kenya and the case of *Bank of Africa Kenya Limited vs MITS Electrical Company Limited & 2 Others* [2009]eKLR where it was held that when a man has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so. He submitted that it would be unjust and inequitable for the 1st Respondent to claim that the decree should not be executed against him yet he had already settled two (2) previous cases arising from the same cause of action and even made an offer to settle this suit *vide* his advocates' letter to the Plaintiff's advocates dated 3rd July 2021.

13. He further invoked Section 7 of the *Civil Procedure Act* and relied among several cases, the case of *Independent Electoral & Boundaries Commission vs MainaKiai & 5 Others* [2017]eKLR where the court outlined the elements that must be satisfied conjunctively for the doctrine of *res judicata* to be invoked. The said elements were as follows: - the suit or issue was directly and substantially in issue in

the former suit, that former suit was between the same parties or parties under whom they or any of them claim, those parties were litigating under the same title, the issue was heard and finally determined in the former suit, the court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

14. It was his contention that the Judgment and decree in this suit was settled and the 1st Respondent had not appealed against the said Judgment nor made any application seeking to review, vary and or set it aside. He asserted that the 1st Respondent's application dated 4th June 2021 where he was seeking to review and or set aside the Judgment in this suit was dismissed on the merits with costs on 22nd June 2021 and the 1st Respondent had never appealed against the said court's Ruling.

15. He further submitted that the Trial Court had entered Judgment on liability at 100% in two other cases arising from the same cause of action and that the 1st Respondent had already settled the decrees in the said cases. He argued therefore that it was a travesty of justice for the Trial Court to make a contrary finding on the issue of liability at the behest of the 1st Respondent's application herewith yet the matter had already been heard and determined. He added that the 1st Respondent was properly adjudged to be the equitable owner in the possession and or management of the suit motor vehicle registration number KBU 951D/ZE 1783 which caused the accident that gave rise to the cause of action in this suit.

16. It urged the court to set aside the impugned Ruling of the Trial Court and allow his appeal with costs.

17. On his part, the 1st Respondent submitted that according to the Appellant, several other related cases where he was a Defendant had been settled without his objection and that he was obligated to show how he was related to the registered owner and insured in respect of the suit motor vehicle. He argued that the burden and incidence of proof of ownership rested with the Appellant and that from the documents availed to court he was not the registered owner of the said motor vehicle or trailer. He added that there was no evidence that he ever gave the information written on the police abstract produced as exhibit 5 in the Trial Court's proceedings. He pointed out that there was no evidence that he had ever been in possession of the suit motor vehicle.

18. In that regard, he placed reliance on the case of *Thuranira Kaururi vs Agnes Mucheche* [1997]eKLR the court held that as the defendant denied ownership it was incumbent on the plaintiff to place before the Judge a certificate of search signed by the Registrar of Motor vehicle showing the registered owner of the lorry. He also cited the case of *Charles Nyanguto Mageto vs Peter Njuguna Njathi* [2013]eKLR where the court held that the police abstract is not on its own proof of ownership of a motor vehicle if however, where the is other evidence to corroborate the contents of the police abstract as to the ownership then the evidence in totality may lead the court to proof on a balance of probability that there is ownership.

19. He asserted that he produced in court a copy of his national identity card showing that he was Hardeep Singh Pandhal and not Hardeep Singh Pandhao, a motor vehicle records from the National Transport and Safety Authority (NTSA) showing that the subject motor vehicle registration No KBU 951D is registered in the name of Amarjeet Singh Pandhal and not in the name of Hardeep Singh Pandhal, T registration No ZE 1783 was registered in the name of Amarjeet Singh Pandha & Sons and not in his name and Motor Confirmation Insurance Policy Schedule showing that the Policy of Insurance No 15/21/016482/12 commencing on 14/12/2015 and expiring on 13/12/2016 for the subject motor vehicle was taken out in the name of Amarjeet Singh Gurdial Pandhal and not in his name.

20. He argued that the aforesaid documents exonerated him from liability for the actions, omissions and/or commissions of the 2nd Respondent who is named as the driver of the accident motor vehicle. He relied on several cases among them the case of *Gerita Nasipondi Bukunya & 2 Others vs Attorney*

General [2019]eKLR where the court held that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that the proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.

21. He further submitted that the Learned Trial Magistrate appreciated that he had been represented by Counsel and that he had handled his matter in a dilatory and pedestrian manner by not giving his Counsel sufficient instructions but nonetheless concluded that in the interest of justice, it was proper that the matter is heard and decided on its merits. In that regard, he relied on the case of *Ongom vs Owota SCCA* [2003]KALR3 where it was held that a litigant ought not to bear the consequences of the Advocate's default, unless the litigant is privy to the default, or the default results from failure on the part of the litigant, to give the Advocate due instructions.

22. It was his contention that the Learned Trial Magistrate exercised his unfettered discretion in allowing his application and setting aside the impugned Judgment. He asserted that it was now settled law that an appellate court will not interfere with the exercise of discretion by a Trial Court until it is established that the Judge misdirected himself in law, secondly, that he misapprehended the facts, thirdly that he took account of considerations of which he should not have taken account, fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, a discretionary one is plainly wrong, as was held in the case of *United India Insurance Co. Ltd vs East Africa Underwriters (Kenya) Ltd* [1985]E.A.

23. The impugned application was brought under the provisions of Article 50 and 159 of the *Constitution* of Kenya, 2010, Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act* and Order 22(2) of the *Civil Procedure Rules*.

24. Article 50 of the *Constitution* generally provides for the right to fair hearing. It is trite law of natural justice that no person should be condemned unheard as was rightly submitted but but in this case, this must be read together with the good old maxim ''justice delayed is justice denied''.

25. In the lower court, the suit proceeded after the 2nd Respondent's advocate applied to cease acting and whereby the matter proceeded to conclusion without the 2nd Respondent's participation and a Judgment was delivered. I have seen the application dated 9.1.20 filed by P.D Onyango and Co. Advocates and supported by the affidavit of Peter Onyango Daniel advocate who said that the 2nd defendant failed to give him instructions needed to file statements. He thereafter appointed M/S Odumbe Ayieta & Co advocates to act for him and they filed application dated 4.6.21 which was dismissed for non attendance after which he appointed M/S Onsongo and co advocates who are currently on record . The conduct of the 2nd Respondent is clear that he was out to delay the case and thus obstruct justice.

26. In allowing the application dated 3/8/2021 the Trial Magistrate stated that;

> " Considering the full effect and implications of the present application, it takes the matter backwards to the very beginning of the case. This may be oppressive to the Plaintiff who has been waiting to get justice from the courts. However, the Applicant has raised the issue of ownership of the accident M/V even though he admitted liability and had already settle the other two matters arising from the same accident. The Applicant appears desperate to defend the matter, and has raised every conceivable justification for the application."

27. This court had due regard to the case of *Philip Keipto Chemwolo & Another vs Augustine Kubende*[1986]eKLR where the court of Appeal stated:-

> " Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits."

28. On the doctrine of estoppel, in this case the appellant said that respondent had by a letter to committed to settle the claim herein only to turn around and challenge the proceedings but for this particular case, he now wants a determination on the issue of ownership of the motor vehicle and his liability .This has not been denied. In the case of *Serah Njeri Mwobi v John Kimani Njoroge* (2013) eKLR, where the Court held that;

> ''The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person."

29. I find that since the matter is not yet settled and there is no consent filed in court, this court cannot compel the respondent to pay the decretal sum based on the proposal as a proposal is not binding. In any event, estoppel is used a defence not a cause of action. The doctrine of estoppel therefore does not arise.

31. On application of order 21 Rule 8 of the *civil procedure rules*, this is the rule that requires the decree holder to prepare a draft decree for approval for the judgment debtor and before it it forwarded to the registrar for sealing. the respondent says this was not done while the appellant admits this and says the rule is not couched in mandatory terms as it used the word ''May ''I have looked at the said rule and I find that the operative word in it is ''May ''. ''May" means the action is not mandatory as opposed ''Shall" which makes the intended act which does not leave room for discretion. I find that no prejudice was occasion by the decree not being sent for endorsement and in any event we are not told the decree has an error.

32. On the issue of *Res Judicata*, appellant submitted that the issue of liability is now *Res judicata*. The respondent submitted that the doctrine does not apply herein. I have considered this issue and I find that the Judgment herein was delivered on and no appeal or review was filed against it.

34. Respondent came too late in the day to set it aside. The issues 2nd respondent wishes to challenge now were determined in the trial court and he had a chance to challenge them but opted not to. I agree with counsel for appellant that the issues are now *Res judicata* under section 7 of the *Civil Procedure Act* as the issues were directly and substantially in issue in the trial before the lower court which has since been determined.

35. The 2nd Respondent had a chance to defend himself but he squandered the same. He cannot be heard to allege denial of the right to defend himself. Appellant's claim when the matter was heard in his absence after his advocate applied to cease acting for him for failure to instruct him and a notice of entry of judgment was served upon him on 30.3.21at 17.:43 pm via Whats app through mobile number 0714058999. Amended order 5 Rule 22 C and 22B of the *civil procedure rules* introduced mobile phone enabled and email service and of pleadings and documents, this is not disputed. I find that the respondent was duly served.

36. Basically, the power to set aside ex-parte and/or any judgment is a discretionary one. Such discretion is a free one and is intended to be exercised to avoid in-justice or hardship but not to assist a person guilty

of deliberate conduct, intended to obstruct or delay the course of justice (see, *Waweru vs Ndun'gu* (183) KLR 236 and *Kenya Commercial Bank .vs. Nyataige* (1990) KLR 443).

37. In this case, it is clear that the 2nd respondent was out to delay the case from the beginning and so he was not entitled to the equitable orders he had sought. It is therefore the finding of this court that the trial court erred when it set aside the judgment dated 6th April 2021 and other consequential orders.

38. This appeal is succeeds with costs to appellant.

DELIVERED VIA TEAMS PLATFORM IN THE PRESENCE OF;

T. A. ODERA - JUDGE

28/2/2023

Naube for Appellant,

No Appearance for 1st Respondent,

No Appearance for 2nd Respondent,

Court Assistant; Apondi.