Daudi v Wanjala (Civil Appeal 73 of 2018) [2023] KEHC 3479 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3479 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL 73 OF 2018

WM MUSYOKA, J

APRIL 28, 2023

BETWEEN

JACOB MASILA DAUDI ..... APPELLANT

AND

RASHID MAUKO WANJALA ..... RESPONDENT

(An appeal arising from the ruling of Hon. Khapoya, Senior Resident Magistrate, delivered on 28th April 2018, in Kakamega CMCCC No. 28 of 2016)

JUDGMENT

1. The suit at the primary court was initiated by the respondent against the appellant, and another, for compensation, on account of damages arising from a road traffic accident, where he specifically prayed for general damages, special damages of Kshs 965, 685.92, costs and interests. The respondent was a passenger in a motor vehicle belonging to the appellant, KBX 623H, when the same had a self-involving accident, on July 14, 2015, along Lurambi-Nambacha road, causing him serious injuries. He blamed the appellant on account of negligence.

2. Judgment was entered against the appellant in default of appearance and defence, on March 15, 2016. The case was formally proved on September 22, 2016, where 2 witnesses testified. Judgment was delivered on November 17, 2016, for Kshs 2, 000, 000.00 general damages, and Kshs 965, 685.92 special damages.

3. The appeal herein arises from orders that were made in respect of an application dated January 17, 2017. That application had been filed at the instance of the appellant , seeking stay of execution of the judgment of November 17, 2016, the setting aside of that judgment, leave to file defence out of time, and for the matter to go to full hearing. The grounds on the face of the application are that the appellant had been condemned unheard, he had a good and arguable defence, and the application was brought in good faith.

4. In the affidavit in support, the appellant averred that he was never served with the summons to enter appearance, and that the affidavit of service, by Hebron Odhiambo Omolo was false, and he craved leave to cross-examine the deponent of that affidavit. He also averred that his co-defendant was unknown to him. He stated that he did not know Mr. Nzeki and Hebron Odhiambo Omolo. He further averred that he was not served with notice of entry of judgment. He asserted that every party to a case had a right to be heard, and that he had been condemned unheard. He argued that he had an arguable defence, and had brought the application in good faith, and without undue delay.

5. Directions were given on March 16, 2017, for canvassing of the application by way of written submissions. The matter was mentioned several times for written submissions, and it was eventually listed for ruling, on November 16, 2017. The ruling was delivered on April 28, 2018. The court was not altogether persuaded that the appellant had made a case for setting aside, for, apart from denying service, he did not explain how he got to know that the suit was pending. The application was declined, the appellant was directed to deposit the judgment sum in court, as a condition precedent to the matter being allocated a date for hearing.

6. The appellant was aggrieved, hence the instant appeal. In the memorandum of appeal, dated May 25, 2018, he has listed a total of 14 grounds, which I need not recite here. Directions were given on May 6, 2020, for canvassing of the appeal by written submissions. Both sides have filed written submissions., which I have read through and noted the arguments made.

7. The matter is fairly straightforward. The appellant filed an application dated January 17, 2017, for stay of execution and setting aside of the judgment the subject of the proceedings. The application was canvassed by written submissions. The ruling the court delivered on April 28, 2018, makes no sense to me. It is not clear as to whether it was allowed or disallowed. On the one hand, the court states that the application is declined, to mean it is not allowed, or is dismissed. On the other, the court orders the appellant to deposit the decretal amount in court as a prerequisite to obtaining a date for hearing. The issue of depositing the claimed amount in court arises only where an application is allowed conditionally. It does not arise at all where the application is dismissed. When the deposit is made, in this case, as a condition for being allocated a hearing date, the question that I ask is what hearing date? For hearing what? The application has been declined, it is, therefore, not pending, and is not available for hearing. The main suit had been determined, and the application was seeking setting aside of the judgment to pave way for a re-hearing, since the application to set aside has been declined, the door for a re-hearing has been shut. So, what hearing is the court talking about.

8. The ruling of April 28, 2018 did not provide an answer to the application dated January 17, 2017, for it dismissed it on one hand, and kept it alive by the deposit ordered. It created a situation where the parties have no way of going forward. I believe the justice of the situation should be to grant the orders sought in the application dated January 17, 2017, to unlock the impasse. Compliance should be within the next 30 days of date of this judgment, in default of which the orders made herein shall lapse automatically. The orders that Njagi J made on October 18, 2018 shall remain in force, to the extent of the deposit ordered, until the matter at the trial court is heard and fully determined. The trial court records to be returned to the relevant registry forthwith. Each party shall bear their own costs. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THI 28TH DAY OF APRIL 2023

WM MUSYOKA

JUDGE

Erick Zalo, Court Assistant.

Appearances

Mr. Oribo, instructed by Omwenga & Company, Advocates for the appellant.

Mr. Udoto, instructed by Ojode Udoto & Okello, Advocates for the respondents.