REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 459 OF 2018

SAMUEL GITO.....1ST APPELLANT

KEVIN KIMEMIA.....2ND APPELLANT

-VERSUS-

PETER GITAU KIMANI.....1ST RESPONDENT

EQUITY BANK LIMITED.....2ND RESPONDENT

KAMAU PAUL.....3RD RESPONDENT

(Being an appeal from the ruling of Hon. A. N. Makau, (Ms.) SRM delivered on

21st September, 2018 in Nairobi Milimani CMCC No. 4005 of 2014)

JUDGMENT

1. On 11th July, 2014, **Samwel Gito** and **Kevin Kimemia** (hereafter the Appellants) filed a suit, namely, **Nairobi CMCC No. 4005 of** against **Peter Gitau Kimani**, **Equity Bank Limited** and **Kamau Paul** (hereafter the 1st, 2nd and 3rd Respondents) seeking damages in respect of an accident that occurred on 27th March, 2014, involving the Appellants' motor vehicle registration number **KBU 167R** and the Respondents' motor vehicle registration number **KBF 271B** , the former which was allegedly being lawfully driven along Outering Road towards Thika Superhighway. It was averred that the accident occurred due to the negligence of the 1st Respondent who was then driving motor vehicle registration number **KBF 271B**, at all material times co-owned by the 2nd and 3rd Respondent and as such were vicariously liable for the actions of the 1st Respondent.

2. The 2nd Respondent filed a statement of defence on 22nd August, 2014. Thereafter a consent dated 24th November, 2014 was recorded, and by which the suit against the 2nd Respondent withdrawn with no orders as to costs. The 1st and 3rd Respondents filed their joint statement on defence on 2nd April, 2015. When the matter came up for hearing on 30th April, 2018 the trial court dismissed the Appellants suit for non-attendance. Subsequently the Appellants filed the motion dated 3rd May, 2018. Expressed to be brought under Section 3A of the Civil Procedure Act and Order 12 Rule 7 of the Civil Procedure Rules , the motion sought that the re-instatement of the Appellants' suit.

3. The motion was supported by the affidavit of **Judy N. Muriithi**, counsel having conduct of the matter on behalf of the Appellants. To the effect that prior to the hearing date the parties had initiated correspondence on possible settlement of the matter; that on the morning of 30th April, 2018 when the matter was scheduled for hearing she had another matter before the High Court, namely, **Succession Cause No. 3142 of 2003;** that prior to attending to the High Court matter, she had unsuccessfully attempted to contact counsel for the 1st and 3rd Respondent to inform her she was agreeable to pursuing an out of court settlement; and that she later learned that the Appellants' suit had been dismissed. She asserted that her mistake was inadvertent, and the Appellants were keen to prosecute the suit as such it is in the interest of justice the suit be re-instated.

4. The 1st and 3rd Respondent opposed the motion through a replying affidavit sworn by **Stella Mathenge**, counsel for the Respondents. The gist of the affidavit was that the hearing date had been served on the Appellants on 27th November 2017 and no explanation had been offered for the non-attendance by the Appellants and their counsel on the hearing date; that no negotiations had commenced beyond initial correspondence, and besides, "*without prejudice*" correspondence was unavailable to the Appellants in support of their motion; and that the suit was an old one and the Respondents stood to be prejudiced if the same was reinstated. Parties canvassed the motion through written

submissions. By a ruling delivered on 21st September, 2018 the lower court dismissed the motion, provoking the instant appeal which is based on the following grounds:

> **"1. The learned magistrate erred in law and in fact by finding that the absence of the plaintiff's advocates in court on the set hearing date was unjustified.**
>
> **2. The learned magistrate erred in law and in fact by failing to appreciate that the Appellant had always been keen on prosecuting their case and the non-attendance on the said hearing date was in advertent mistake by their advocate that should not have been visited upon them.**
>
> **3. The learned magistrate erred in law and in fact in dismissing the Appellants application against the overwhelming weight of evidence in support of the Application for reinstatement and the relevant factors before her.**
>
> **4. The learned magistrate erred in law and in fact in failing to appreciate the circumstances leading to the dismissal of the suit.**
>
> **5. That the learned magistrate erred in law and in fact to appreciate that the Appellant's advocate was involved in a High Court matter and the Appellants absence was premised on the fact that there were ongoing negotiations on settlement.**
>
> **6. The learned magistrate erred in law and in fact in failing to recognize the prejudice to be occasioned to the Appellants by dismissing the Appellants application.**
>
> **7. The learned magistrate misdirected herself on the facts and erred in finding that the Appellants did not demonstrate their case to warrant a reinstatement.**
>
> **8. The learned magistrate misdirected herself on the facts and the law and based her findings on wrong and irrelevant considerations.**
>
> **9. The learned magistrate erred in law and in fact in being openly biased in favour of the Respondents.**
>
> **10. That in all circumstances of the case, the learned magistrate failed to do justice to the Appellants.**
>
> **11. Any other ground(s) that may arise during the hearing."** (sic)

5. The appeal was canvassed by way of written submissions. Counsel for the Appellants while relying on the famous case of **Philip Chemwolo & Another v Augustine Kubende (1982-88) KAR 103**, the decisions in **Gold Lida Limited v NIC bank Limited & 2 Others [2018] eKLR**, **Mbogo & Another v Shah EALR 1908** and **Belinda Murai & Others v Amoi Wainaina (1978)** submitted that her non-attendance was not caused by indolence or intent to delay justice the Appellants stood to suffer prejudice if their case was not reinstated and heard on merit. Further citing **Mwangi S. Kimenyi v Attorney General & Another [2014] eKLR** counsel asserted that from the record of proceedings the Appellants had always been keen and eager to prosecute the matter. Further, it was submitted that pursuant to Article 159 of the Constitution of Kenya, 2010, parties were attempting an out of court settlement, a fact well within knowledge of counsel for the 1st and 3rd Respondents.

6. Relying on the decisions in **Utalii Transport Company Limited & 3 Others v NIC Bank Limited & Another [2014] eKLR** and **Rover International Ltd v Cannon Film Sales Ltd (1986) ALL ER 722** as cited in **John Nahashon Mwangi v Kenya Finance Bank Limited (In liquidation) [2015] eKLR** counsel proceeded to argue the 1st and 3rd Respondents have not demonstrated that allowing the appeal herein and reinstating the suit grants the Appellants undue advantage over the 1st and 3rd Respondents whereas failure to reinstate would occasion great prejudice to the Appellants. Finally, while citing the rendition in **Metropolitan Properties v Lannon [1968] 3 All ER 304** it was submitted that systemic blunders should not cost a vigilant party from accessing justice .The court was urged to allow the appeal with costs.

7. The 1st and 3rd Respondent supported the trial court's decision. Citing the decision in **Josephat Muthui Muli v Ezeetec Ltd [2014] eKLR** counsel argued that no justifiable explanation was given by the Appellants to warrant reinstatement of the suit and that the trial magistrates' decision was sound, merited, justified, fair and reasonable in view of the relevant circumstances and the appeal lacks merit and ought to be dismissed.

8. The court has perused the record of appeal and considered the material canvassed in respect of the appeal. The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have opportunity to see or hear the witnesses testify while noting to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence. See **Peters v Sunday Post Ltd (1958) EA 424; Selle and Anor. v Associated Motor Boat Co. Ltd and Others (1968) EA 123; William Diamonds Ltd v Brown [1970] EA 11** and **Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) 1 KAR 278.**

9. The Court of Appeal stated in **Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** that:

> **"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are**

to stand or not and give reasons either way.

10. The appeal emanates from a ruling of the lower court delivered on 21st September 2018. The Appellants motion before the subordinate court was primarily anchored on the provisions of Order 12 Rule 7 which provides that:

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

11. The lower court in dismissing the subject motion stated that:

> **… "The record is clear that on 20/4/2018** ((sic) the correct date is 30.04.2018) **the matter was listed for hearing, the hearing date had been fixed by the Plaintiff on 23/11/2017 and a hearing notice served upon the Defendant. The Plaintiffs and their advocates were absent that day and that led the court to dismiss the suit for non-attendance. The decision of the court was justified in the instance.**
>
> **The plaintiffs advocate does not dispute this fact. Her explanation is that she was before Hon. Justice Musyoka for another matter. She attached a cause list to her affidavit. It is however noted that her clients whereabouts that day was unknown because the records does not show of either of them was present and if any was present it was well in order for her to direct them on what to do or what to tell court if indeed, she was before another court why didn't she send her clerk or fellow advocate to hold her brief. She had a professional obligation to the court and her clients.**
>
> **She further explained that, the parties were trying on out of court settlement, a fact that the defendants denied. She did not attach any document to the defendants as a proof that they were negotiating on out of court settlement.**
>
> **The plaintiffs are found not to have a justified explanation on why they failed to show up on the hearing date. I find that she did not sufficiently demonstrate their case to warrant the reinstatement of their suit"**. (sic)

12. The grant or refusal to reinstate a suit entails exercise of discretion by the court. The Court of Appeal in **Mashreq Bank P.S.C v Kuguru Food Complex Limited [2018] eKLR** stated;

> **"This Court ought not to interfere with the exercise of a Judges' discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice. Conversely, a court exercising judicial discretion must be guided by law and facts and not ulterior considerations. This much was stated by the Court of Appeal in the case of Mbogo v Shah, (supra)**
>
> **"A court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice". [**Emphasis added**]**
>
> **See;** ***United India Insurance Co. Ltd v. East African Underwriters (K) Ltd [1985] E.A 898: -***

13. What the Appellants asserted in their submissions is that plausible reasons were given to explain the absence of counsel and the Appellants on 30th April, 2018, and that in any event, the mistake of counsel failing to attend court on the date of the hearing should not be visited on the innocent litigant. Reliance was placed on **Phillip Kiptoo Chemwolo and & Anor. v Augustine Kubede (1986) eKLR where Apaloo, J.A**. (as he then was) famously stated**:-**

> **"I think a distinguished equity judge has said:**
>
> **"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 merit."**
>
> **I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of parties and not for the purpose of imposing discipline...."**

14. In its later decision the Court of Appeal in **Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others, [2015] eKLR** no doubt adverting to the overriding objective in section 1A and 1B of the Civil Procedure Act made the following remarks:

> **"From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side…"**

15. The court has wide discretion in setting aside an ex parte judgment or order. In the case of **Shah –vs- Mbogo and Another [1967] E.A 116** the Court of Appeal set out the purpose of the discretion as follows:

> **"The discretion to set aside an ex-part judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."**

16. The onus was on the Appellants to persuade the trial court to exercise its discretion in their favour by giving plausible explanations for their absence. At the time of dismissal, the Appellants' suit had been pending in court for four years and had been listed for hearing twice and adjourned once at the behest of both parties. Although the trial Court appeared to accept the explanation for the absence of the Appellants' counsel on the hearing date, it questioned the unexplained absence of the Appellants themselves and why counsel did not request another counsel to hold her brief. These questions were pertinent and justified, and in addition, this Court notes that the copy of the High Court cause list placed the trial court **(Annexure SMG -5)** was by itself not proof of the deposition that the Appellants' counsel indeed attended **Musyoka J** in the **P& A case No. 3142 of 2003** on the material date.

17. Moreover, while the Appellants and not their counsel own the case, they did not deem it important to swear an affidavit to explain their own absence on the hearing date .In my view, it is improper and too late in the day for the Appellants to attempt to offer in their submissions before this Court, and for the first time, the explanation that the Appellants were absent because their counsel did not ask them to attend in view of alleged ongoing negotiations. A perusal of annexures **SMG 1** to **SMG 3** to the supporting affidavit exhibited as purported evidence of negotiations, and disputed by the Respondent, discloses no more than that some discussions had been initiated by the Respondent's advocate just days before the hearing date, and had barely progressed to what could be termed as negotiation stage. In any case, annexure **"SMG 1"** is covered by the *"without prejudice"* rule and the Appellants could not properly use it against the Respondent.

18. The Appellants and their advocates appeared to presume on the trial Court by absenting themselves at the hearing, and by their subsequent failure to explain their absence in a satisfactory manner, or at all. It was not enough to merely reiterate their interest in prosecuting their case or likelihood of prejudice if their application failed. They were therefore undeserving of the exercise of the court's discretion in their favour. Parties and Counsel are duty bound to co-operate with the Court in the furtherance of the overriding objective to facilitate the just, expeditious, proportionate, and affordable resolution of disputes in accordance with section 1A and 1B of the Civil Procedure Act.

19. In **Karuturi Networks Ltd & Anor. Vs. Daly & Figgis Advocates, Civil Appl. NAI. 293/09** the Court of Appeal had the following to say concerning the overriding objective in section 1A and 1B of the Civil Procedure Act:

> **"The jurisdiction of this Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective….. and its principal aims. In our view, dealing with a case justly includes inter alia reducing delay, and costs expenses at the same time acting expeditiously and fairly. To operationalize or implement the overriding objective, in our view, calls for new thinking and innovation and actively managing the cases before the court".**

20. In view of the foregoing, this court is not persuaded that the trial court misdirected itself in any way. While the Appellants were entitled to be heard on the merits of their case, they squandered the opportunity accorded to them by the trial court by absenting themselves without any good reason, and the Respondent cannot be made to pay the price for their revealed casual conduct towards their case. The case had been pending for four years and extending its life by reinstatement would have evidently prejudiced the Respondent by way of additional legal costs and the sheer burden of pending litigation. The motion by the Appellants was properly rejected and this Court finds no merit in this appeal which is hereby dismissed with costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 24TH DAY OF MARCH 2022

C. MEOLI

JUDGE

In the presence of:

For the Appellants: N/A

For the Respondents: N/A

C/A: Carol