REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CORAM: D. K. KEMEI – J

CIVIL APPEAL NO. 32 OF 2019

JACKSON MUEMA NZAU.....APPELLANT

VERSUS

STELLA MUTHOKI MULANDI &

ALEX WAMBUA MUSEMBI (being sued as the personal representatives of the

estate of **SYLVESTER MUSEMBI**

TILAS (DECEASED)**.....RESPONDENTS**

(Being an appeal from the judgment and order of Hon. Martha Opanga (P.M) in Kangundo Senior Principal Magistrate's Court in Civil Case No. 140 of 2017 delivered on 12th February, 2019)

BETWEEN

JACKSON MUEMA NZAU.....PALINTIFF

VERSUS

STELLA MUTHOKI MULANDI & ALEX WAMBUA MUSEMBI

(being sued as the personal representatives of the estate of

SYLVESTER MUSEMBI TILAS (DECEASED).....DEFENDANTS

JUDGEMENT

1. The Appeal arises from the judgement and order of Hon. Martha Opanga (PM) in **Kangundo SPMCC No. 140 of 2017** dated 12/02/2019 wherein she set aside an interlocutory judgment against the Respondents and dismissed the Appellant's suit.

2. Being aggrieved by the said decision, the Appellant lodged his memorandum of appeal dated 8/03/2019 where he raised the following grounds of appeal:

(i) That the learned trial magistrate erred in law and in fact in dismissing the appellant's suit against the Respondents.

(ii) That the learned trial magistrate erred in law on failing to uphold the doctrine of precedent that has previously been binding to the honourable court based in various similar cases by this Honourable court.

(iii) That the learned trial magistrate erred in law and fact by ruling that the Appellant had not proved his case despite judgment in default having been entered on 26/08/2018 against the said Respondents herein and the matter having been confirmed for formal proof by the court on 10/07/2018.

(iv) That the learned trial magistrate erred in law and fact by setting aside the interlocutory judgment entered against the Respondents when the matter was only before the court for the sole purpose of assessing the award of damages.

(v) That the learned trial magistrate had no jurisdiction to set aside the judgment already entered on liability against the Respondents in favour of the appellant and especially at the final stage of delivering judgment on quantum damages when there was no such application to do so.

(vi) That the learned magistrate erred in law and fact by unilaterally, setting aside her own judgment on liability which she had awarded at 100% against the Respondents by virtue of the interlocutory judgment at the final judgment stage when the Appellant could not prosecute his case hence perpetrating an injustice to the appellant by locking him out of his own case.

(vii) The learned magistrate erred in law and fact by dismissing the appellants suit on an issue that already been determined by the same court hence denying the Appellant the opportunity to canvass the issue of liability and capacity at the hearing since the only issue open at the hearing was the issue of quantum of damages.

3. The Appellant now seeks the following reliefs:

(a) Judgment be set aside and the court do allow the appeal.

(b) This court be pleased to find for the appellant and award judgment on general damages to the Appellant as already proposed by the trial court.

(c) Costs of this appeal be awarded to the Appellant.

(d) This court to make such further and orders as it may deem just in the circumstances.

4. This being a first appeal, the role of this court is to re-evaluate and subject the evidence to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same. It was held in the case of **Selle –vs- Associated Motor Boat Co [1986] EA 123 as follows:-**

"***The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal from the trial court by the high court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions through it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect in particular the court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."***

5. An interlocutory judgment had already been entered against the Respondents for failure to enter appearance or file defence and hence the matter was to proceed for formal proof on the assessment of quantum of damages. **PW.1** was **No.81912 PC. Peter Nyandemo** a police officer stationed at Kangundo police station performing traffic duties. His testimony was received in **Kangundo SPMCC No. 139 of 2017** and was suggested by the appellant to be adopted in the series of case numbers **140, 141 and 142 all of 2017**. His testimony is to the effect that a report of an accident was lodged at the police station on 19/09/2014 and which involved motor vehicle registration No. KBB 127 K driven by one Richard Muthiani. He stated that the said vehicle was being driven towards Kangundo about 7.20 p.m. when the driver lost control and the vehicle veered off the road to the left and rolled severally as a result of which the driver and some passengers died on the spot while others suffered injuries. According to him, the accident was self-involving and he produced the police abstract as an exhibit.

6. The appellant herein testified as Pw2. He sought to adopt his statement dated 18.9.2017. His evidence is that he was a passenger in motor vehicle registration number KBB 127K and blamed the driver for overspending. He added that he received treatment at Kangundo level four hospital. He produced the treatment notes, P3 form, medical report by Dr. Wokabi and receipt of payment. He prayed for compensation and costs of the suit.

7. The trial magistrate considered the evidence and found that the Appellant had failed to present evidence to the effect that the Respondents who were sued on behalf of the estate of the deceased owner of the accident vehicle had letters of grant of administration of the said estate. The suit was thus dismissed and that the earlier interlocutory judgment entered against the Respondent was set aside as well.

8. Directions were given to the effect that the appeal be canvassed by way of written submissions. It is only the Appellant's counsel who filed submissions dated 26/05/2020. It is noted that the Respondents were duly served with the pleadings and notices in this appeal as confirmed by the affidavits of service but it seems they have opted to give this appeal a wide berth and in any case they had not participated in the lower court case. Learned counsel for the Appellant urged this court to interfere with the judgment of the trial court delivered on 12/02/2019. It was argued that the setting aside of the interlocutory judgment by the trial court was made in error since none of the parties made an application seeking the same. Counsel further submitted that upon the entry of interlocutory judgment, the remaining task was the presentation of formal proof evidence on the assessment of quantum of damages. It was submitted that the relevant grant of letters of administration giving the Respondents *locus standi* to be used was already filed alongside documents by the Appellant as can be seen on the record of appeal. Counsel pointed out that the counsel who led the Appellant in his evidence in chief might have erroneously left out the crucial document and this court has inherent powers under Article 159(2) (a) (b) of the Constitution to do justice by finding that the document in question was already on the court record. Reliance was placed in the case of **Shah – vs- Mbogo [1974] EA** where the court held that the primary function of the court is to do justice to all parties where a mistake has been inadvertently committed provided that no irreparable damage was suffered by the opposite party. Further reliance was placed in the case if **Belinda Murai & 9 others –vs- Amos**

Wainaina [1979] eKLR where the issue of a mistake was handled by the court. Also the case of **KCB Limited –vs- Sheikh Osman Mohammed – CA No. 179/2010** was relied upon.

9. I have given due consideration to the appeal as well as the record of the trial court. I have also considered the submissions by the Appellant's counsel. It is not in dispute that the Respondents failed to enter appearance or file defence which paved way for the entry of interlocutory judgment against them. It is also not in dispute that the Appellant duly complied with the pre-trial directions in which he filed all the requisite documents in support of his case. It is also not in dispute that one of the documents namely a grant of letters of administration intestate issued to the Respondents was not brought to the attention of the trial court though filed on record. This being the position, I find the following issues necessary for determination namely:-

(i) Whether the dismissal of the Appellants suit by the trial court on the ground of lack of proof on the locus standi of the Respondents was proper.

(ii) Whether the setting aside of the interlocutory judgment entered against the respondents by the trial court was proper.

(iii) What quantum of damages if any is awardable to the Appellant?

(iv) What orders may the court make?

10. As regards the first issue, it is noted that the learned trial magistrate threw out the Appellant's case which was undefended on one ground namely that the Appellant had failed to avail evidence of proof that the Respondents had locus standi to represent the estate of the deceased owner of the accident vehicle. The Appellant has taken great exception at the decision of the trial court and maintains that he had duly filed a list of documents one of which was a grant of letters of administration intestate issued to the Respondents and hence they had been properly sued. I have duly perused the lower court file and note that indeed the Appellant had filed such a grant as part of his documents dated 2/08/2018 and filed on 14/08/2018. The grant in issue is dated 6/03/2017. The description of the Respondents in the plaint and the relevant grant of letters is found in pages 23-25 of the record of Appeal. At the time of the hearing of the suit, the said copy of grant of letters of administration intestate was already part of the Appellant's documents which then properly supported the Appellants description of the Respondents in the plaint. At the time of reception of the Appellant's evidence, an interlocutory judgment had already been entered against the Respondents and hence what was being presented was actually the formal proof hearing on the assessment of quantum of damages. It would appear to me that during the presentation of the Appellant's testimony and production of documents, the counsel then for the Appellant omitted to present the said crucial document. Learned counsel for the Appellant has now implored this court to exercise discretion and to excuse the said oversight and do justice for the Appellant as the document in question was already part of the court record. The issue that arises is whether the failure to introduce the document in evidence was fatal. It is noted that the Appellant duly gave a description of the respondents and pointed out the capacity in which they were sued. The grant made to the Respondents dated 6/03/2017 gave them the *locus standi* to sue and be sued over matters relating to the estate of the deceased owner of the accident vehicle. Up to that extent, I find that the Respondents had been properly sued by the Appellant. The Appellants had already complied with the pre-trial direction by filing and serving all the requisite documents sought to be relied upon and hence the Respondents were duly aware of the Respondents case in advance and had the trial magistrate perused the documents she would have established that the Appellant had satisfied the court on the issue of the *locus standi* of the Respondents even without reception of evidence. I have been urged to excuse the oversight by Appellant's counsel in availing the copy of the grant of letters of administration to the court during the hearing of the case. I am aware of the provisions of Article 159 (2) (a) and (b) of the Constitution as well as section 1A and 1B of the Civil Procedure Act which mandates the court to do substantive justice to the parties. The court's duty is to do justice to the parties even where a mistake has been inadvertently committed as long as the adverse party is not prejudiced. In the present case, the Respondents were properly described in the plaint and duly served with summons to enter appearance but they failed to do so paving way for entry of interlocutory judgment against them. As they have not participated in the trial, I find that they have suffered no prejudice. It is common knowledge that parties do make blunders all the time as human beings are prone to err. In the case of **Belinda Murai & 9 others –vs- Amos Wainaina [1979] eKLR** the Court of Appeal considered the issue of mistakes made by parties when it held as follows:-

"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule. It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of the years since the decision was delivered so requires. It is all done in the interest of justice. A static system of justice cannot be efficient. Benjamin Disraeli said change is inevitable. In a progressive country change is constant. Justice is a living moving force. The role of the judiciary is to keep the law marching in time with the trumpets of progress."

It is my view that the inadvertent mistake of non-production of the grant of letters of administration during the hearing on 14/08/2018 is excusable since a copy of the same had already been filed and formed part of the court record. Had the learned trial magistrate been patient to peruse all the documents relied upon by the Appellant, she would not have arrived at the decision she did. The Respondents all along were in possession of the documents having been served by the appellant and thus they were not prejudiced if the trial court had accepted the same as answering the question of the Respondents status in the proceedings. In the case of **KCB limited –vs- Sheikh Osman Mohammed CA No. 179 of 2010** the court held as follows:-

"***It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff's claim. Pleadings must be deployed to serve their function, namely to inform the other party and the court with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear."***

From the foregoing, it is clear that the learned trial magistrate went into error when she failed to consider that even though the grant was not presented by the Appellant, the same was already on record and formed part of his documents and which supported the capacity in which the Respondents had been sued. The non-production of documents did not prejudice the Respondents as they already were aware of the capacity in which they had been sued and in which they opted not to oppose the claim brought by the Appellant. This leads me to come to the conclusion that the dismissal of the suit by the trial magistrate was improper and which warrants this court to interfere with same.

11. As regards the second issue, it is noted that an interlocutory judgment was entered against the Respondents on the 4/07/2018 for failure to enter appearance or file defence within the stipulated period despite being served. Upon the entry of the said judgement, the trial court proceeded to receive evidence on the assessment of quantum of damages which took place on the 14/08/2018. The learned trial magistrate vide her judgment dated 12/02/2019 set aside the interlocutory judgment that had been entered against the respondents. The Appellant's counsel has taken issue with the said order since no application was made before the court. It is noted that setting aside of judgment is provided for in Order 12 Rule 7 of the Civil Procedure Rules which provides that while judgment has been entered or the suit dismissed, the court on an application, may set aside or vary the judgment or order upon such terms as may be just. The power to set aside interlocutory judgments is discretionary and the court has to resort to on a case by case basis. In the case of **Patel -VS- East Africa Cargo Handling Services Ltd [1974] EA 75**, the court held as follows:

> ***"There are no limits or restrictions on the Judge's discretion to set aside or vary an ex parte judgement except that if he does vary the judgement he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules."***

Again in the case of **Shah –VS- Mbogo [1967] EA 166** the court held that:-

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

Being guided by the above authorities, I find that the trial magistrate had not been presented with any application by any of the parties to set aside the ex parte judgement. She did it on her own volition. Indeed, the trial magistrate had the discretion to set aside the ex parte judgement of her own volition. In my view, I find the circumstance did not warrant such an order since the Respondents who had been adjudged for failing to enter appearance or file defence did not seek to disturb the same. Hence, the setting aside of the interlocutory judgement was irregular as the trial court at the time was to determine the main suit according to the evidence of the applicant. The ex parte judgment took care of the issue of liability while the formal proof hearing was intended for the issue of assessment of quantum of damages and upon a determination on both issues. It was erroneous for the trial court to stray onto the issue of the interlocutory judgment which had already been subsumed into the proceedings of 14/08/2018. The interlocutory judgment should have been left and maintained as part of the proceedings and record.

12. As regards the third issue, and in view of the observations in paragraphs 10 and 11 above, I am satisfied that the appellant's appeal is meritorious and hence the need to proceed to make a determination on the twin issues of liability and quantum since this was a running down matter.

On liability, it is noted that the Respondent failed to enter appearance or file defence within the stipulated period and hence interlocutory judgment was entered against them on 4/07/2018. As at the time of conclusion of the matter in the lower court, no pleadings had been filed by the Respondents and further that no application for setting aside of the ex parte judgment made and further the Respondents have not participated in this appeal. The search certificate (copy of motor vehicle records) showed that the late Sylvester Musembi Tilas is the registered owner of the accident vehicle KBB 127K. The evidence of the police officer (PW1) who produced the police abstract confirmed that the accident was self-involving and no other vehicle was involved. The officer testified and stated that the driver of the ill-fated vehicle was over speeding and lost control of the vehicle which rolled severally killing the said driver and some passengers. From such evidence, it is clear that the driver was reckless and negligent. The appellant stated that the driver was over speeding at the time and it hit a pot hole and rolled. A properly driven vehicle does not just veer off the road unless the driver is reckless and negligent. The Appellant who was a passenger had no control in the way the vehicle was driven or managed. Again, the Respondents failed to enter appearance or file defence. I am satisfied that the Respondents should be held solely liable in damage to the appellant which I attribute it at 100%.

On the question of quantum, the Appellant sought for general and special damages. The trial Magistrate awarded general damages of Kshs.640, 000/-. The Appellant sustained blunt injuries on the head, fracture of left upper end of the humerus, pain on the right hip and buttock area.

Dr. Wokabi's medical report dated 18/7/2017 contained at pages 33 to 34 of the Record of Appeal revealed that the Appellant did not sustain any abnormality on the head and the fracture of the left humerus had united. The Appellant had suffered a permanent disability of 12% as result of the left upper humerus fracture according to the said doctor.

The Appellant had proposed Kshs. 800,000/- as adequate compensation but the trial magistrate awarded Kshs. 640,000 by placing reliance in the case of **Mumias Sugar Company Ltd vs Nohammed Kweyu Shaban [2018] eKLR** that had been relied upon by the Appellant.

Guided by the case of **Gicheru vs Morton and Another (2005) 2 KLR 333** this Court stated:-

> ***"In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled."***

I note that in **Mumias Sugar Company Ltd** the injuries sustained were more severe noting that the doctor had assessed 15% incapacity. The trial Magistrate's award of Kshs.640, 000/- is within the range of awards for such injuries.

On special damages, I note that a receipt of Kshs. 2,000/- for medical report and treatment expenses receipt of Kshs.1, 600/- were produced as Exhibit 4(b) and Exhibit 8 respectively. No other receipts were produced and hence I award the sum of Kshs.3, 600/- on that head.

13. As regards the last issue and in view of the forgoing observations, I find that the Appellant's appeal must succeed. The Respondents have not participated in the appeal despite being served and hence I find that the Appellant is entitled to the costs of the appeal and in the lower court.

14. In the result, the Appellant's appeal succeeds. The judgment of the trial court dated 12/02/2019 is hereby set aside and substituted with an order that judgment be and is hereby entered for the Appellant against the Respondents as follows:-

(a) Liability 100%

(b) General damages .....Kshs. 640,000/-

(c) Special damages .....Kshs. 3,600/-

Total.....Kshs. 643,600/-

The Appellant is awarded costs of the appeal in this court and in the lower court plus interest at court rates.

It so ordered.

Dated and delivered at Machakos this 23rd day of February, 2021.

D. K. Kemei

Judge