



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**CIVIL APPEAL NO. 26 OF 2019**

**SILVANA MUKWAIRO MWIANDI .....APPELLANT**

**VERSUS**

**FRANKLINE MUGAMBI MUTEGI .....1<sup>ST</sup> RESPONDENT**

**SEVERINO GITONGA NJOKA.....2<sup>ND</sup> RESPONDENT**

**(Being an appeal from the Ruling/Order of the learned trial magistrate Hon. J. M. Njoroge on 15<sup>th</sup> May 2019 in CHUKA PMCC No. 15 of 2018)**

**BETWEEN**

**SILVANA MUKWAIRO MWIANDI.....PLAINTIFF**

**VERSUS**

**FRANKLINE MUGAMBI MUTEGI .....1<sup>ST</sup> DEFENDANT**

**SEVERINO GITONGA NJOKA..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. This is an appeal against the ruling of Chief Magistrate that was delivered on 15/05/2019 in **CHUKA PMCC No. 15 of 2018**. Silvana Mukwairo Mwiandi, the Appellant herein, sued the Respondents for general damages for pain and suffering and loss of amenities; special damages and future medical expenses following injuries she sustained as a result of a road traffic accident that occurred on or about 13/05/2006.

2. The Appellant obtained an ex-parte judgment and consequently the 1<sup>st</sup> Respondent vide a Notice of Motion application dated 19/04/2018 sought for the vacation of ex-parte proceedings and setting aside, variation and/or review of the judgment. In allowing the said application, the trial court gave the following conditions:

- a) The Appellant's witnesses who had testified shall only be recalled for purposes of cross-examination only.
- b) The 1<sup>st</sup> Respondent shall bear throw away costs of Kshs. 20,000/= payable within the next 30 days.
- c) The 1<sup>st</sup> Respondent shall bear any execution or consequential costs that have accrued.
- d) That in breach of any of the above conditions, the ex-parte judgment shall revert.

3. This appeal relates to the above determination by the trial court. On 14/07/2020, the parties herein were directed to canvass the appeal by way of written submissions. The 1<sup>st</sup> Respondent's written submissions were filed on 19/10/2020. The Appellant's written submissions are however not in the court record despite the Appellant's advocate indicating to the court on 07/10/2020 that he had filed the submissions. I shall nonetheless proceed to analyse the substance of the matter as contained in the record of appeal and the 1<sup>st</sup> Respondent's submissions.

## Grounds of Appeal

4. The Appellant relies on the grounds that:

- i. The Learned trial Magistrate erred in law in entertaining and in allowing the 1<sup>st</sup> Respondent's application dated 19/04/2018 yet the same was res-judicata to the earlier application dated 03/03/2015 and the subsequent ruling dated 10/02/2016.
- ii. The Learned trial Magistrate failed to consider the fact that the 1<sup>st</sup> Respondent has not been candid and indeed not interested in the hearing and final determination of the suit in the lower court and did employ every tactic to stymie its progress as borne by the record of the trial court.
- iii. The Notice of Motion dated 19/04/2018 as filed, there was inordinate delay having been brought well over 18 months after the decree of 28/10/2016 and only desired to frustrate the execution of the decree of the lower court and keep the Appellant away from the fruits of a regular and fair judgment in compensation of her very serious injuries she sustained due to accident occasioned to her by the Respondent's driver/agent (2<sup>nd</sup> Respondent) on 13/05/2006.
- iv. The Learned Magistrate's ruling/order of 15/05/2019 flies on the face of **Article 159(2)(b) of the Constitution** that he cites to allow the Notice of Motion dated 19/04/2018 because it should have guided him to refuse the application for it did not engender the faster determination of the suit and meting out of justice without unreasonable delay.
- v. The Learned Magistrate ruling/order is against the weight of evidence on record the trail thereof.

## 1<sup>st</sup> Respondent's Submissions

5. The 1<sup>st</sup> Respondent submitted that he was not given a chance to be heard in the trial court and that the Appellant proceeded ex-parte until she got a judgment in her favour. He referred to the case of **Njuguna v. Magichu & 73 Others [2003] KLR** and submitted that he should be placed in a position of procedural equality in respect of adducing his evidence. He further submitted that the matter was not *res judicata*. He stated that he had never appointed an advocate to appear on his behalf and was therefore prejudiced by the judgment that was delivered ex-parte. He states that he only came to know of the suit when he was served with an application for committal to jail by an auctioneer. The 1<sup>st</sup> Respondent thus prayed that the matter be directed back to the lower court for re-trial and calling of the Respondents to adduce evidence in court.

## Issues for Determination

6. The main issues raised for determination in this court are as follows:
- a. Whether the issues raised in the application dated 19/04/2018 were *res judicata*; and if so,
  - b. Whether the 1<sup>st</sup> Respondent was given an opportunity to be heard in the trial court.

## Analysis of Issues

7. This being a first appeal, it is trite law that this Court is under a duty to reconsider the evidence adduced in the trial court, re-evaluate the evidence and draw its own conclusions. The principles upon which this Court acts in such an appeal are well settled and aptly stated in the cases of **Selle and Another v Associated Motor Boat Company Limited and others [1968] EA 123** and **Williamson Diamonds Ltd. V. Brown [1970] E.A.L.R.**

## Whether the issues raised in the application dated 19/04/2018 were *res judicata*

8. The principle of *re judicata* is found in Section 7 of the Civil Procedure Act which provides that:

**"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."**

9. The Appellant contends that the impugned application dated 19/04/2018 should not have been entertained or allowed as it was res-judicata to the earlier application dated 03/03/2015 and the subsequent ruling dated 10/02/2016. From the record, the application dated 03/03/2015 was filed by the firm of M/S D. J. Mbaya & Co. Advocates said to be acting for the 1<sup>st</sup> Respondent. However, it is the 1<sup>st</sup> Respondent's contention that he had never instructed the firm of M/S D. J. Mbaya & Co. Advocates to appear or conduct the case on his behalf. The issue of res judicata does not arise since the 1<sup>st</sup> Respondent was never aware of the case against him in the first place. The question that begs is whether the 1<sup>st</sup> Respondent was given his day in court.

## Whether the 1<sup>st</sup> Respondent was given an opportunity to be heard

10. **Section 20 of the Civil Procedure Act** requires that upon the institution of a suit, the defendant should be served in the prescribed

manner in order to enter appearance and answer the claim. The essence of legal service is to notify a party of a case against him in order to respond appropriately and defend himself. It is premised on the right of every person to be heard. **Order 5 of the Civil Procedure Rules** is very clear on the law and rules on service of court process. If the summons is not duly served, then no action can be taken against the defendant.

11. In this case, the *summons to enter appearance* were issued on 29/02/2008 and re-issued on 16/06/2010 for service upon the Respondents herein. As it has been held numerous times before, personal service remains the best form of service in all areas of litigation. However, there is no affidavit of service on record to prove that the 1<sup>st</sup> Respondent was personally served with the summons to enter appearance. Nevertheless, the firm of M/S David John Mbaya & Co. Advocates entered appearance for both Respondents in the trial suit vide a Memorandum of Appearance dated 02/08/2010. There is also a Notice of Appearance both dated 02/08/2010 which clearly indicates that the said firm had been appointed by both the Respondents herein to act for them in the case.

12. According to generally accepted notions of professional responsibility, an advocate's authority to appear in proceedings is conferred by his/her client's instructions. An advocate should therefore not act on the instructions of any person other than his client or authorized agent. Thus, when an advocate appears in court and states that he is instructed, the court will not inquire into his authority to appear nor as to whom he is instructed.

13. After entering appearance, the said firm filed a joint statement of defence for the Respondents and kept acting on their behalf until 01/04/2016 when the firm filed an application seeking leave to cease acting for the 1<sup>st</sup> Respondent. The said application was premised on the ground that the firm had not been able to contact the 1<sup>st</sup> Respondent for instructions on how to proceed with the matter. The trial court allowed the application. Notably, the firm of M/S D. J. Mbaya & Co. Advocates had been on record for the 1<sup>st</sup> Respondent for close to 6 years when the matter was proceeding in the trial court.

14. The witness statements filed by M/S D. J. Mbaya & Co. Advocates in support of the defendants' case included the statement of the 2<sup>nd</sup> Respondent and that of one Jasper Murithi Mutegi. Jasper Murithi Mutegi stated that he is the brother to the 1<sup>st</sup> Respondent and knew the 2<sup>nd</sup> Respondent as the 1<sup>st</sup> Respondent's conductor in the subject vehicle. I have perused a document dated 03/03/2015 drawn by M/S David John Mbaya & Co. Advocates and filed in the trial court on 04/03/2015. The document is titled 'Authority to Sign Documents' and drawn under the provisions of **Order 1, Rule 13 of the Civil Procedure Rules 2010** and effectively, it gave the 1<sup>st</sup> Respondent authority to sign on behalf of the 2<sup>nd</sup> Respondent all documents in the proceedings in the trial court.

15. After allowing the application by the firm of M/S David John Mbaya & Co. Advocates to cease acting for the 1<sup>st</sup> Respondent, the trial court ordered the Appellant to serve the 1<sup>st</sup> Defendant with a hearing notice of the case. When the matter came for hearing on 10/08/2016, the 1<sup>st</sup> Respondent was not in court but it was indicated by the Appellant's counsel that he had been served with a hearing notice. The trial court then noted the affidavit on record and confirmed that the 1<sup>st</sup> Respondent was duly served. The court then proceeded to close the defence case for want of prosecution.

16. I have perused the said affidavit of service that is dated 20/07/ 2016 and sworn by one Evelyn K. Mbungi a licensed court process server. I note that the process server received a copy of the hearing notice from the Appellant on 30/06/2016, she proceeded to "Franklin Mugambi's home". The process server deposed that the 1<sup>st</sup> Respondent was served but he refused to endorse her return of service. In my opinion, since the address of the 1<sup>st</sup> Respondent's home is not given, it is questionable where exactly the alleged service took place. That notwithstanding, paragraph 6 of the affidavit of service reads as follows:

**"6. THAT I hereby make a return of service with documents not duly served."** [Emphasis mine]

Considering the above, it is my view that there was no proper service or any at all and thus, the trial court erred in finding that the 1<sup>st</sup> Respondent was duly served with said hearing notice.

17. The right to a legal representative or advocate of one's choice is one of the most valued constitutional rights available to a litigant. In *William Audi Odode & Another-vs- John Yier & Another Court of Appeal Civil Application No. NAI 360 of 2004 (KSM33/04)*, O'Kubasu, JA stated as follows:

***"Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel."***

18. In the name of fair trial, the 1<sup>st</sup> Respondent herein was entitled to be represented by a counsel of his own choice. The 1<sup>st</sup> Respondent alleges that he was never aware of the suit and that the advocate who came on record on his behalf was instructed by him. The court has to keep in mind not only the need to have the case determined expeditiously but also the need for giving fair opportunity to the 1<sup>st</sup> Respondent.

19. In *Ochieng' Onyango, Kibet & Ohaga Advocates v Akiba Bank Limited [2007] eKLR* Warsame, J. in determining whether the Respondent bank had instructed the Applicant advocate to act on their behalf stated as follows:

***"The retainer is the foundation upon which the relationship of Advocate/client rests. Without a retainer the relationship cannot come into being. Retainer is the mode and method in which the Advocate accepts the offer of employment by the client. It can be express or by implication. The Advocates undertake to fulfill certain obligation and binds himself to protect, preserve and safeguard the interest of the client in a particular matter."***

**It is the position of the law that if there is no evidence of retainer except the oral statement of the Advocate which is contradicted by the client, the court will treat the Advocate as having acted without authority/permission. As was rightly pointed out by Mr. Kipkorir Advocate, the burden of proof to establish the retainer is always on the shoulder of the Advocates. That is the correct proposition of the law. And more weight will be given to the contention of the client that he did not instruct the Advocate to act for him. I hasten to add that the yardstick for such proof is not beyond reasonable doubt. In fact, it is the normal the perimeter of balance of probability.”**

20. The 1<sup>st</sup> Respondent was denied his legal right to counsel of his own if the advocate who came on record acted without his authority. In my view, grave injustice would be done if an advocate is to be forced upon the 1<sup>st</sup> Respondent against his will. It is unfortunate that this matter has been in court for 13 years now. However, bearing in mind the court’s duty to ensure a fair trial, it is my considered view that the trial court did not err in setting aside the ex-parte judgment and ordering the recalling of the Appellant’s witnesses for purposes of cross-examination.

21. From the foregoing analysis, I therefore agree with the trial court that the reasons given by the 1<sup>st</sup> Respondent explaining his absence in the matter cannot be wished away by the courts regardless of the merits of the case. The right of fair hearing which is a fundamental principle of natural justice that is protected by the constitution. In my view, it is in the interest of justice that the 1<sup>st</sup> Respondent be given his day in court.

### **Conclusion**

- a) This appeal is without merits.
- b) I dismiss the appeal with costs.
- c) I direct that the lower court file be returned to the lower court for hearing and determination on merits. Since this is a very old matter, I direct that it be heard and determined within a period of six (6) months.

**Dated, signed and delivered at Chuka this 27<sup>th</sup> day of May 2021.**

**L.W GITARI**

**JUDGE**

**27/5/2021**

Judgment read out online through virtual proceedings.

**L.W. GITARI**

**JUDGE**

**27/5/2021**