



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 30 OF 2020

MARTHA KAGIRIA GITONGA.....APPELLANT

VERSUS

KENYA WILDLIFE SERVICE.....1ST RESPONDENT

KENSILVER EXPRESS LIMITED.....2ND RESPONDENT

(Being an appeal from the ruling and order of Hon. K. Orange, Senior Resident Magistrate, Nairobi delivered on 18/12/2019 in CMCC no. 12140 of 2006)

JUDGEMENT

- 1) The appellant herein filed a compensatory suit against the respondents herein before the Chief Magistrate's Court claiming for both special and general damages for the injuries the appellant sustained in a traffic road accident involving motor vehicles registration KAM 931M and KAR 800L on 16th January 2006 along Embu-Mwea road.
- 2) The respondents each filed a defence to deny the appellant's claim. Pursuant to the provisions of Order 17 rule 2 of the Civil Procedure Rules, Hon. I Orange, learned Senior Resident Magistrate dismissed the appellant's suit for want of prosecution on 11th December 2014.
- 3) The appellant filed the motion dated 30th April 2019 whereof she sought to inter alia set aside the dismissal order and reinstate the suit. The respondents oppose the appellant's motion. In his ruling delivered on 18th December 2019, Hon. Orange dismissed the application stating that he was not persuaded by the explanation given by the appellant.
- 4) Being aggrieved by the decision, the appellant preferred this appeal and put forward the following grounds of appeal.
 - i. THAT learned magistrate erred in law and in fact in failing to set aside the order dated 11th December 2014 dismissing the appellant's case for want of prosecution.***
 - ii. THAT the learned trial magistrate erred in law and in fact by failing to direct its mind to the relevant and triable issues raised in the appellant's notice of motion dated 30th April 2019.***
 - iii. THAT the learned magistrate erred in law and in fact in failing to consider the facts of the case as enumerated in the appellants application and affidavits.***
 - iv. THAT the learned magistrate erred in law and in fact in failing to consider the principles governing the exercise of the discretion to set aside dismissal orders.***
 - v. THAT the learned magistrate erred in law and in fact in failing to evaluate the evidence in support of the appellant's case.***
 - vi. THAT the learned trial magistrate erred in law and in fact by wholly relying on the evidence adduced by the respondents and disregarding the appellant's evidence and submissions.***
 - vii. THAT the learned trial magistrate's decision was arrived at in a cursory and perfunctory manner without a detailed consideration of the evidence on record and the ruling against the appellant is unlawful, groundless and unreasonable.***

5) When the appeal came up for hearing, this court gave directions to have the appeal disposed of by written submissions. At the time of writing this judgment, the appellant was the only party who had filed her submissions.

6) I have re-evaluated the rival arguments presented before the trial court. I have further considered the appellant's written submissions. It is apparent from the record that on 11th December 2014 the suit was dismissed in the absence of both parties. Though the appellant put forward a total of seven (7) grounds of appeal, those grounds may be summarized to one main ground which is to the effect that the learned Senior Resident Magistrate failed to consider and analyse the affidavit evidence plus the arguments put forward by the parties over the motion dated 30th April 2019.

7) I have carefully examined the grounds set out on the face of the aforesaid motion plus the facts deponed in the rival affidavits and the rival written submissions filed in support and against the application. The appellant put forward the following grounds in support of the motion dated 30th April 2019:

a) That her suit was dismissed for want of prosecution without notice to the parties.

b) That the suit could not be prosecuted because there was a moratorium placed against Blue Shield Insurance Company the 2nd respondent's Insurer which had been placed under statutory management.

c) That the court file could not be traced until 29th March 2019 when the appellant discovered that the suit had been dismissed.

8) In opposing the appellant's application, the respondents filed the replying affidavit of Felix Momanyi stating that the appellant did not offer any explanation why she took a long time to file the application to set aside the dismissal order. The respondent also pointed out that as of 23rd June 2016 the appellant was aware that the order staying proceedings no longer existed.

9) The learned Senior Resident Magistrate noted that the appellant had stated there was a moratorium. The trial magistrate also noted that the respondents had argued that there was inordinate delay to file the application and that there was satisfactory explanation on the part of the appellant. In his ruling, the learned Senior Resident Magistrate stated that he was not persuaded by the explanation the appellant had offered.

10) With respect, I think the trial magistrate fell into error. It is clear from the record that the appellant expressly averred in the supporting affidavit, first that no notice to show cause why her suit should not be dismissed for want of prosecution was served upon her. This averment was not controverted by the respondents. Had the appellant been given such a notice, she would have been able to explain to the court that the court file could not be traced until 29th March 2014.

11) The appellant would have also informed the court that at the time of the dismissal there was a moratorium which stayed all proceedings in matters involving insureds of Blue Shield Insurance Company Limited which was under statutory management.

12) The appellant also expressly stated and argued before the trial court that proceedings had been stayed in view of the moratorium being in place. The appellant further stated that the court file could not be traced. The respondent argued that the moratorium had been lifted by 23rd June 2016. It is clear that by the time the suit being dismissed, there was in place a moratorium staying proceedings, therefore the respondents' argument could not stand.

13) It is also clear that the respondents did not controvert the appellant's averment that the court file could not be traced until 29th March 2019. The respondent has argued that the delay to file the application to set aside the order was inordinate. That argument could not stand because the appellant merely took 30 days from the date of tracing the court file to file the motion dated 30th April 2019.

14) I am satisfied that the learned Senior Resident Magistrate merely paid lip service to the arguments put forward by the appellant in support of the motion dated 30th April 2019. Had he seriously considered the aforesaid grounds he would have come to the conclusion that the appellant's motion dated 30th April 2019 was meritorious.

15) In the end, I find this appeal to be with merits. The appeal is allowed thus giving rise to issuance of the following orders:

i. The order dismissing the appellant's motion dated 30th April 2019 is set aside and is substituted by an order allowing the application.

ii. The suit i.e Milimani C.M.C.C no. 12140 of 2006 is reinstated to be heard on priority basis by another magistrate of competent jurisdiction other than Hon. I. Orenge.

iii. Costs of this appeal and the motion before the trial court to abide the outcome of the suit.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 30th day of June, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent