REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. 23 OF 2019

DAMARIS MUYAA alias

DAMARIS TUMELEI MUNYA.....APPELLANT

VERSUS

JAMES KATOO SOLO

(suing as the legal representative of

the Estate of Robert SOLOKITEMANGE).....RESPONDENT

(Appeal from the ruling and order (Hon. B. Cheloti, SRM), dated 9th

April, 2019 in CMCC No.50 of 2015 at the Chief Magistrate's Court, Kajiado)

JUDGMENT

1. The respondent filed a suit in the Chief Magistrate's Court at Kajiado through a plaint dated 13th February 2014, seeking general damages; special damages of Kshs. 102,995, costs and interest. The suit arose out of a road traffic accident that occurred on 9th December, 2011, along Isinya-Kitengela Road, involving Robert Solo Kitemange-(deceased) and the appellant's motor vehicle registration No. KAV 652ZT. The deceased died due to severe bodily injuries he sustained as a result of that accident. The appellant filed a defence denying the respondent's claim and particulars of negligence.

2. The suit was heard through oral testimony of witnesses. Mwangangi Mbithi testified on behalf of the respondent, that he was informed of what had happened since he was not at the scene of the accident. The appellant testified that he was driving the motor vehicle at a normal speed when the deceased abruptly dived onto the road. He applied emergency brakes to avoid hitting him, but unfortunately he was hit by the vehicle's left side mirror and the co-driver's door.

3. The trial court **(Hon. Chesang, RM,)** delivered judgment on 22nd October, 2018 apportioning liability at 90% to 10%. The court awarded Kshs. 50,000/= for pain and suffering and Kshs. 576,000 for loss of dependency and expectation of life. The court stated that the respondent failed to prove his case and had relied on hearsay evidence.

4. The respondent extracted a decree indicating the decretal sum of Kshs. 576,000. The respondent then instructed auctioneers to execute the decree against the appellant. The appellant filed an application dated 25th March,2019 before the trial court seeking to have the decree set aside for being irregularly obtained and incompatible with the judgment. According to the appellant, the respondent had been paid Kshs. 62,600 in satisfaction of the decree being 10% of the appellant's liability, and the only issue that remained was that of costs.

5. On 9th April,2019 when the appellant's application came up for hearing, the trial court **(Hon. Cheloti, SRM),** directed the party aggrieved with judgment and decree to file an appeal. The court extended stay of execution pending determination of the appeal.

6. On 25th June,2019, the appellant sought a capping of the decree at definite amount but this was opposed by respondent. The court further extended the order for stay of execution of the decree and directed any aggrieved party to file an appeal.

7. The Appellant was dissatisfied with that ruling and filed a memorandum of appeal dated 12th July 2019 raising the following grounds:

> ***1. THAT the learned trial magistrate erred in law and in fact and misdirected herself rendering a ruling and issuing orders that were alien to the pleadings and submissions by both parties to the application.***

2. THAT the trial magistrate erred in fact and law by failing to consider the substance of the application before her, the submissions therein and the submissions of the applicant's counsel at the hearing therefor. By doing as she did, the learned magistrate acted per incuriam.

3. THAT the learned trial magistrate erred in law and fact by giving orders that were not prayed for in nor submitted on the application.

4. THAT the learned trial magistrate erred in fact and in law by failing to give orders on the merits of the application.

5. THAT the learned trial magistrate erred in fact and in law by failing to be bound by the pleadings and submissions of the parties as is the practice.

6. THAT the learned trial magistrate erred in law and fact by failing to consider the appellant's evidence and submissions on the application and to critically analyze the same and accord it due weight to the extent that the decree still remains contrary to and incompatible with the judgment.

7. THAT the learned trial magistrate erred in fact and in law by failing to recognize that the Decree does not correspond to, reflect and or mirror the judgment and is in fact specious and erroneous.

8. THAT the learned trial magistrate erred in fact and in law by failing to recognize that the irregular and un procedural extraction of the Decree which illegally revered the parties' liabilities, in total contravention of the Judgment.

9. THAT the learned trial magistrate erred in fact and in law by failing to appreciate that failure to address the discrepancy in and correcting or setting aside the Decree would leave the appellant with no recourse and justify the respondent's attempts to injudiciously execute for monies he is not entitled to.

8. The appellant prayed that the trial court's order delivered on 25th June,2019 be set aside, and in its place, this Court do set aside of the decree dated 26th February,2019, and further, order for extraction of a fresh decree reflecting the correct apportionment of liability in the judgment as 90% to 10% in favour of the appellant against the respondent. The appellant also prayed for costs of the appeal and application before the trial Court.

9. Parties agreed to disposed of this appeal through written submission.

10. The appellant submitted that the order of 25th June,2019 was irregular and or similar to the ruling of 9th April,2019. According to the appellant, the trial court never gave rationale and reasons for granting stay of execution yet it was aware of the discrepancies between the judgment and the decree extracted and the need to regularize them. He argued that the respondent had received a cheque for Kshs. 62,600 from them and the only remaining issue for settlement was that of costs. The appellant was of the view that the trial court's ruling of 9th April,2019 was synonymous to dismissal of their application, rendering the decree valid.

11. The appellant again submitted that the trial court's ruling did not determine their application seeking to set aside the decree on merit. Instead, it issued further directions on 25th June 2019, that were detrimental and prejudicial to her, and was made without giving the rationale of the ruling which neither allowed nor dismissed the application. It was further argued that the trial court issued directions which were never sought by any of the parties hence placed them in suspense regarding the validity of the decree in question.

12. The appellant asserted that courts are bound by parties' pleadings. She relied on the decisions in ***Independent Electoral and Boundaries Commission and another v Stephen Mutinda Mule & 3 Others*** [2014] eKLR and ***John Kamunya & another v John Nginyi Muchiri & 3 Others*** [2015] eKLR. She further argued that the trial court's directive in that ruling was speculative as it was neither related to the parties' prayers nor their submissions.

13. Regarding this court jurisdiction to hear and determine the application dated 25th March,2019 on merit, it was submitted that, this court being the first appellate court, has jurisdiction to hear and determine the appeal through reexamination, re-evaluation and reassessment of evidence. Reliance was placed on ***Kenya Power & Lighting Company Ltd v E K O & another*** [2018] eKLR and ***Moses Odhiambo Muruka & another v Stephen Wambembe Kwatenge & another*** [2018] eKLR.

14. On the validity of the decree dated 26th February,2019, the appellant submitted that the trial court delivered its judgment in favour of the appellant on grounds that the evidence was hearsay and issued a decretal for Kshs. 626,000/= which comprised of Kshs. 50,000/= for pain and suffering and Kshs. 576,000/= for loss of dependency and expectation of life. The respondent extracted a decree containing a sum of Kshs. 576,000, which comprised of liability apportioned at 90% to 10% in favor of the respondent which was wrong.

15. Relying on Order 21 Rule and 5 of the Civil Procedure Rules,2010**;** ***Landmark Holdings Limited v Robert Macharia Kinyua*** [2018] eKLR and ***Eco Bank Limited v Elsek & Elsek (Kenya) Limited & 3 Others*** [2015] eKLR**,** the appellant argued that the respondent did not forward the draft decree to them for approval or rejection. He also relied on ***Henry Simiyu Murwa v Timothy Vitalis Okwaro t/a Tim Okwaro & Company Advocates & Another*** [2019] eKLR, to argue that the decree was incompatible with the trial court's judgment as it was irregularly obtained. It should be set aside and a new one issued in conformability with the judgment.

16. The respondent on his part submitted that he was not aggrieved by decree dated 26th February 2019 and he therefore did not see the need to appeal. He therefore instructed auctioneers to execute that decree. He urged that the appeal be struck out with costs on grounds that the nine grounds of appeal challenge the trial court order of 9th April 2019. He further argued that the appeal was filed on 19th July,2019 instead

by 9th May,2019 and was, therefore, filed out of time and without leave of court. He prayed that the appeal be struck out with costs.

17. As a parting shot, the respondent argued that the appeal relates to the interpretation of the trial court's judgment on who between the appellant and the respondent is to bear 90% and 10% liability, and therefore, no single judicial officer can interpret another judicial officer orders. According to the respondent, the trial court did not grant orders sought but asked any dissatisfied party to appeal. It was the respondent's view that the trial court's judgment is capable of many interpretations and, therefore, the appellants' interpretation cannot be held as the right one.

18. I have considered this appeal, submissions by parties and the decisions relied on. I have also perused the trial court's record and the impugned decision. This being a first appeal, it is by way of a retrial, and parties are entitled to this court's reconsideration, reevaluation and reanalysis of the evidence on record and to its own conclusions on that evidence. The court should however bear in mind that the trial court had the advantage of seeing the witnesses testify and give due allowance for that.

19. In ***Williamson Diamonds Ltd and another v Brown*** [1970] EA 1, the court held that:

> ***The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.***

20. Further, in ***PIL Kenya Limited v Oppong*** [2009] KLR 442, it was held that:

> ***It is the duty…of a first appellate court to analyze and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeking the witnesses and their demeanor and giving allowance for that.***

21. Similarly, in ***Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates*** [2013] eKLR, the Court of Appeal stated;

> ***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.***

22. What is before this court is an appeal against a decision on an application that was before the trial court to set aside a decree that had been extracted following that court's judgment delivered on 26th February 2019. According to the appellant, the decree extracted was not in conformity with the judgment and, therefore, it ought to have been set aside. The appellant further argued that the decree was un procedurally extracted in that the respondent did not send it to them for approval which was in violation of the Civil Procedure Rules. This, in his view, made the decree unlawful. The appellant also felt that the trial court was in error for issuing orders that had not been sought by any of the parties.

23. The respondent maintained that the application was properly declined and the trial court rightly urged the party aggrieved with the judgement of the trial court to appeal against the judgment.

24. On failure to send the decree for approval, the appellant did not point out the particular rule that was offended. This being a judgment in the magistrate's court, a decree is extracted as a matter of course and there is no requirement for to be sent to the other party's advocate for approval. That is a procedure in the Superior Courts.

25. I have gone through the record and arguments of the parties in this appeal. It is true that the appellant filed an application before the trial court dated 25th March,2019. The application came up before **B. Cheloti, (SRM)**, a court that had not delivered the judgment whose decree was impugned. Counsel for the parties addressed the court but instead of delivering a ruling, the court directed any aggrieved party to lodge an appeal. The court ordered a stay of execution pending the hearing and determination of the appeal to be filed.

26. The trial court did not determine the merit application that was before it. It also did not state whether the application had been dismissed or not and give reasons for that. The court also made an order that none of the parties had sought. The trial court had an obligation to address the concerns of the parties in the application before it and make a decision one way or the other, giving reasons for its decision. Instead, parties were left without a decision on that application and did not know what the court's reasons were for the order it made. Even when the court directed any aggrieved party to appeal, it did not state why it was making such an order given that parties had an application before it seeking specific orders.

27. That notwithstanding, the court was again approached on 25th June to determine the issue but still it asked the aggrieved party to file an appeal to this court without resolving the issue that was before it. The trial court thus fell into error and committed a dereliction of duty.

28. The respondent argued that this appeal was filed on 19th of July 2019 instead of 9th of May 2019 and, therefore, it was filed out of time. I have perused the order and the memorandum of appeal which shows that the appeal is against the order made on 19th April 2019. It may well be that the appeal may have been filed after the time for lodging appeal had lapsed. This court must however state that it has a duty and obligation to do substantive justice of the matter before it, taking into account peculiar circumstances of each case, rather than applying technical rules to drive an aggrieved party from the seat of justice.

29. Article 159 of the Constitution behooves courts to administer justice without undue regard to procedural technicalities. This court is also acutely aware that Article 159 cannot be the solution to every problem and that procedure is the handmaiden of justice. (See ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*** [2013] eKLR. However, the court should at all times strive to do justice and decline

to be a prisoner of rules of procedure where such a course would lead to grave injustice.

30. In the present appeal, the trial court did not determine the application that was before it. The appellant had az specific complaint that the decree as extracted, was not in tandem with the judgment. Parties appeared to disagree what the judgment was and in particular who was to bear how much responsibility for the accident. According to the appellant, they had already paid what they considered to be the decretal amount based on their understanding of the trial court's judgment, while the respondent held a contrary view.

31. If this court was to agree with the respondent and dismiss the appeal on whatever ground, including that the appeal may have been filed out of time, such a course would lead to an injustice as the disputed decree would be enforced without knowing who actually won and to what extent. This is more so given the fact that the appellant argues that he has paid the full amount and the only remaining issue is that of costs. The respondent on the other hand maintains he won and only part of the decretal sum had been paid. That is, each party claims to have won in the suit before the trial court.

32. Applying the principle of prescribing substantial justice, I decline to agree with the respondent that this appeal should be dismissed on account of having been filed out of time when the issue of who won remains unresolved. That will not do justice of the matter. In any case, the approach adopted by the trial court to advise the aggrieved party to appeal instead of determining the application having heard the parties was an unlawful decision that could be reviewed by this court in exercise of its supervisory powers under Article 164(6) as read with Sub Article (7) to ensure there is fair administration of justice.

33. Having carefully considered the appeal and the respective parties' arguments, and given that the trial court did not determine the application that was before it, the appropriate order that commends itself to me, and which I hereby make, is to remit the matter back for determination of that application dated 25th March 2019.

34. Consequently, this appeal is allowed and the orders of the trial court made on 9th April 2019 and 25th June 2019 directing any aggrieved party to appeal, set aside. The matter is hereby remitted to the Chief Magistrate's Court, Kajiado, for hearing of the application dated 25th March 2019 before any other magistrate other than **B. Cheloti, SRM**.

35. As the mistake leading to this appeal was occasioned by the court, there shall be no order on costs in this appeal.

36. **Orders Accordingly**

DATED, SIGNED AND DELIVERED AT KAJIADO THIS 25TH DAY OF JUNE 2021

E C MWITA

JUDGE