REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 503 OF 2015

VARIETY FLOORING WORKS LIMITED.....APPELLANT

VERSUS

FREDRICK MUTINDA MUTUKU.....RESPONDENT

(Being an appeal from the Ruling and Order delivered on 29th September, 2015

by Hon. Elizabeth Usui (SPM) Milimani Commercial Courts

in CMCC No. 2307 of 2009)

JUDGMENT

1. The Appellant, Variety Flooring works Ltd, was sued by the Respondent, Fredrick Mutinda Mutuku for damages for injuries stated to have been sustained by the Respondent in a road traffic accident. The Respondent blamed the accident on the negligent manner that motor vehicle registration No. KBU 222D Toyota pickup owned by the Appellant was driven at the material time.

2. Interlocutory judgment was entered in favour of the Respondent on 27th December, 2010 for failure by the Appellant to enter appearance or file a defence. The case proceeded to formal proof and judgment was subsequently entered for Ksh.152,000/=, interest and costs. This judgment was subsequently set aside on 11th December, 2012 on condition that security was furnished for the decretal sum.

3. The Appellant was given 14 days to file a statement of Defence. The statement of Defence was not filed within the stipulated period. The Appellant subsequently filed the application dated 1st March, 2013 seeking enlargement of the time within which to file a statement of Defence. The application was allowed after the Respondent failed on several occasions to attend court for the hearing of the application. The statement of Defence was filed. Pre-trails were conducted and the suit fixed for hearing.

4. On 29th September, 2015 the case was called out and the Plaintiff's counsel indicated one witness was present. The Defendant's counsel also indicated one witness was present. The case was given a time indication of 11.45 a.m. to proceed to hearing. Before the hearing commenced the Defendant's counsel applied to have the maker of the police abstract called as a witness and also indicated that their witness had been called back to the office and was nolonger available to tender evidence on that day.

5. The trial magistrate ruled that the *exparte* judgment has been set aside and a pre-trial conducted without any notice that the maker of the police abstract required to be called. The trial magistrate saw the application as made at the last minute in bad faith. That the matter was old and that the Appellant's side have taken the court for granted in that their witness had left. The court rejected the application by the Appellant's side and ordered that the suit do proceed to hearing.

6. The Respondent testified in full and produced a Copy of Records from Kenya Revenue Authority for the motor vehicle, a receipt for the same, a police abstract, an attendance card from Kenyatta National Hospital, a P3 form, treatment notes from Msamaria Mwema Health Service & Laboratory, a medical report by Dr. K. Mwaura, receipts for the same and a demand letter. Both the Respondent and Appellant then closed their cases. The parties were to file written submission but the proceedings were then stayed vide the orders of stay of proceedings given herein following the filing of the Appeal herein.

7. The Appellant was aggrieved by the orders of the lower court rejecting the application for the calling of the maker of the police abstract and rejecting the application for adjournment and appealed on grounds that can be summarized as follows:

(a) Whether the trial magistrate erred in failing to allow the application for adjournment.

(b) Whether the trial magistrate erred in allowing the production of copies of the police abstract and the medical report without calling the makers thereof.

8. The parties agreed to canvass the Appeal by way of written submissions. However, the Respondent did not file any. I have considered the written submissions filed by the Appellant.

9. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:

> **"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though 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 this 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 demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)".**

10. Under Order 17 of the Civil Procedure Rules, once a suit has been set down for hearing, it shall not be adjourned unless the party applying for adjournment satisfies the court that it is justified to grant the adjournment. In the case at hand, no satisfactory reason appears on the record. The record reflects that the Defendant's witness had been called back to the office and was therefore unable to tender evidence on that day. There was no explanation why the witness was recalled to the office.

11. Looking generally at the conduct of the matter, that was the first hearing date after the suit had undergone the pre-trials. Although there was no explanation to the court regarding the conduct of the Defendant's witness, the trial court could have considered, in the wider interests of justice, to give the Defendant's witness another chance to testify but condemn the Defendant's side to costs.

12. As was held in the case of **Job Obanda v Stage Coach International services Ltd & another**:

> **"I cannot believe that the judge applied his mind to the possibility of an injustice resulting from the case being heard without the defendant's evidence. Had he done so he must, I think ... come to one conclusion only. He would then have had to consider whether a miscarriage of justice might arise to the plaintiff if an adjournment was granted. I can find no trace in the judge's notes of these points being considered or even discussed or whether an award of costs would not meet the case."**

13. The Court of Appeal in the case of **Japheth Pasi Kilonga & 8 others v Mombasa Autocare Limited** held as follows:

> **"The Court of Appeal will be very slow to interfere with the discretion of the trial judge on matters of adjournment of a trial but it will not hesitate if the result of the adjournment is to defeat the rights of the parties or injustice to one or other of the parties. In the instant case, the appellant has been denied the right to prosecute its suit and the learned trial Ag. Judge failed to consider the possibility of injustice or miscarriage of justice which might result to the appellant..."**

14. The Court of Appeal then proceeded to state the principles applicable in granting or refusal of applications for adjournment to include:

(a) The adequacy of the reasons given in support of the application for adjournment.

(b) The prejudice, if any, to be suffered by the other party if adjournment is allowed.

(c) Whether that other party can be compensated by way of costs.

15. Although the pre-trial had been concluded, it seems there was no full compliance by the Defendant's side by the time the suit was fixed for hearing. During the pre-trial stage, there was no indication whether the parties had agreed on the production of any documents without calling the makers thereof or whether the copies of the originals could be produced. What was produced were the photocopies of the original documents and without the calling of the makers. Order 11 Civil Procedure Rules was not fully complied with. The questioned documents therefore ought to have been produced in accordance with the provisions of the Evidence Act.

16. With the foregoing, this court's conclusion is that the Appeal has merits and is allowed. Consequently, the proceedings of the lower court are hereby set aside. The case to proceed *de novo* before a different magistrate. Taking into account the circumstances of this case, each party to bear own costs of this Appeal.

Dated, signed and delivered at Nairobi this 30th day of April, 2020

B. THURANIRA JADEN

JUDGE