



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL APPEAL NO 188 OF 2018**

**BENJAMIN SHIKUKU ILOKE.....APPELLANT**

**VERSUS**

**ABDI ALI.....RESPONDENT**

**(Being an appeal from the Ruling and Order of Hon M. W. Murage (Ms), Resident Magistrate (RM)**

**at the Chief Magistrate's Court at Milimani in Civil Case No 5948 of 2012**

**delivered on 4<sup>th</sup> April 2018)**

**BETWEEN**

**BENJAMIN SHIKUKU ILOKE.....APPELLANT**

**VERSUS**

**ABDI ALI.....RESPONDENT**

**JUDGMENT**

1. In her Ruling of 4<sup>th</sup> March 2018, the Learned Magistrate, Hon M.W. Murage (Ms), Resident Magistrate (RM), dismissed the Appellant's Notice of Motion application dated 21<sup>st</sup> August 2017 in which he sought to file an Amended/ Supplementary List of Documents and List of Witnesses out of time.
2. Being dissatisfied with the said Ruling, on 18<sup>th</sup> April 2018, the Appellant filed his Memorandum of Appeal of even date. He relied on eight (8) Grounds of Appeal.
3. Having looked at his Grounds of Appeal, it appeared to this court that the issue that had been placed before it for determination was whether or not the Learned Magistrate misdirected herself when she dismissed his aforesaid application. All the grounds of appeal were heard together as they were all related and intertwined.
4. The circumstances of the Appellant's case was that on 10<sup>th</sup> December 2011, he was lawfully crossing along old Nairobi-Mombasa Road at Mlolongo when he was hit by the Respondent's Motor Vehicle Registration Number KAK 856A as a result of which he sustained injuries.
5. When the matter came up for hearing on 13<sup>th</sup> June 2017, both he and the Respondent recorded consent on apportionment of liability at 75%-25% in his favour. They further agreed that the Medical Reports of Dr G. K. Mwaura and Dr P.M. Wambugu dated 8<sup>th</sup> April 2012 and 12<sup>th</sup> June 2013 respectively and Medical notes from MP Shah and Mater Hospitals be admitted without calling the makers thereof. It was a further term of the consent that the issue of quantum would be canvassed by way of written submissions.
6. The matter was to be mentioned on 13<sup>th</sup> July 2017 with a view to confirming the filing of Written Submissions and to take a judgment date. The Appellant filed his aforementioned application on 25<sup>th</sup> August 2017. The Learned Magistrate dismissed the said application on the ground that at the time the consent was recorded, he already had in his possession the medical reports he had sought to have admitted out of

time. She found and held that allowing the said documents at that juncture would suggest that he was re-opening the case and the Respondent would not have had an opportunity to cross-examine him on those documents.

7. He argued that he suffered serious injuries and great financial loss as a result of the Respondent's negligence and that the evidence he wanted to adduce was not new but rather, it was true medical evidence of the injuries that he sustained.

8. It was his contention to the contrary, the Respondent would not suffer any prejudice if he was allowed to file his Amended/Supplementary List of Documents and List of Witnesses which were pertinent to his case, out of time, because he had a right to have his case heard and determined and without undue regard to procedural technicalities under Article 50 and Article 159(2)(d) of the Constitution of Kenya, 2010. He added that mistakes of counsel ought not to be visited on their clients.

9. In this regard, he placed reliance on the case of **Pinnacle Projects Limited vs Presbyterian Church of East Africa, Ngong & Another [2019] eKLR** where the court therein allowed additional evidence despite the plaintiff therein having closed his case.

10. On his part, the Respondent submitted that the Appellant was required to have filed all his documents at the time he filed his Complaint as provided for in Order 3 Rule 2 of the Civil Procedure Rules, 2010. He argued that once they recorded a consent on liability, each party effectively closed their respective cases. In this respect, he relied on several cases amongst them the cases of **Margaret Walegwa & 2 Others vs Changamwe Housing Scheme Limited & Another [2011] eKLR** and **Agnes Molonzi vs Jackson Mutunga & Another [2002] eKLR** to buttress his argument that once parties had closed their cases, they could not re-open them and all that would be pending would be the writing of judgment.

11. A perusal of the Appellant's Notice of Motion aforesaid application showed that he had sought to file an Amended/Supplementary List of Documents and List of Witnesses out of time on the ground that his advocates had inadvertently omitted to file further medical reports after his Notice of Motion application dated 12<sup>th</sup> October 2015 was allowed unopposed.

12. There was an amended List and Bundle of Documents that was attached to the said application. The Amended Complaint was to be filed within fourteen (14) days from 26<sup>th</sup> January 2012 when the said application was allowed. There was no indication from the Record of Appeal that the Amended Complaint was filed as had been directed in the aforesaid Ruling. The failure to file the Amended Complaint, if at all, also meant that the said Amended/Supplementary List of Documents and List of Witnesses were also not been filed by the time the consent was recorded on 13<sup>th</sup> June 2017.

13. Notably, when the matter came up for mention on 21<sup>st</sup> July 2017, neither of the parties had filed their respective Written Submissions. They do not appear to have been filed by the time the Appellant filed his aforesaid Notice of Motion application dated 21<sup>st</sup> August 2017. In fact, until the Ruling was delivered by the Learned Magistrate on 4<sup>th</sup> April 2018, there was no indication that the parties had indeed filed their Written Submissions on quantum to be assessed by the Trial Court.

14. Whereas it was true that parties had closed their cases, it was prejudicial for the Learned Magistrate to have dismissed the Appellant's said Notice of Motion application dated 21<sup>st</sup> August 2018 for the reason that she had not reserved a Judgment. Indeed, Section 100 of the Civil Procedure Act Cap 21 (Laws of Kenya) stipulates as follows:-

**“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in the suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised (emphasis court) by or depending on the proceedings.”**

15. The spirit behind the aforesaid Section 100 of the Civil Procedure Act is that provided judgment has not been delivered, any defect or error in any proceeding in a suit can be amended for the purpose of determining the real question or issue raised. This essentially means that even where Written Submissions have been filed and an error has been discovered before the court had written its judgment, a party ought to be given an opportunity to regularise the defect and/or error.

16. All that the court should be concerned about at that juncture is considering the compensating the respondent by way of costs as it would have taken backwards in the proceedings and/or allowing the said respondent file further submissions to address the new issues that have been filed by the applicant, if at all. This court thus agreed with the Appellant that the Respondent did not suffer any prejudice because of several grounds.

17. Firstly, parties had not filed their respective Written Submissions and further no judgment date had been reserved.

18. Secondly, even where a party had closed its case, it ought to be allowed to re-open its case if it is for purposes of determining the real question or issue raised in any proceeding. Substantive justice therefore demanded that the Appellant's case be re-opened with a view for giving the court an opportunity to consider all material evidence pertaining to the case for purposes of determining the real question between him and the Respondent herein. In this regard, this court fully associated itself with the holding in the case of **Pinnacle Projects Limited vs Presbyterian Church of East Africa, Ngong & Another** (Supra).

19. Thirdly, the documents the Appellant wanted to file out of time had been attached to his Notice of Motion application dated 12<sup>th</sup> October 2015. The Respondent did not oppose the said application as was evidenced in the proceedings of 26<sup>th</sup> January 2016. The Respondent could not therefore purport that he would be prejudiced if the documents were filed out of time as he had already had sight of the same. In any event, he did not seek to file additional documents to rebut the evidence that was now being adduced by the Appellant herein. It was this court's opinion that the Respondent was proceeding on technicalities to shut out the Appellant from fully presenting his case.

20. Fourthly, the issue of cross-examining the Appellant herein as the Learned Magistrate alluded to in her Ruling did not arise. This is because the parties had admitted the Medical Reports by consent and the issue of quantum was to be canvassed by way of Written Submissions. There was nothing in the proceedings to show that the hearing proceeded *viva voce*. In any event, witnesses could always be recalled to be cross-examined.

21. Fifthly, it was apparent that the blame for failing to file the Amended/Supplementary List of Documents and List of Witnesses lay squarely on the Appellant's advocates. There was evidently lack of diligence on their part. They ought to have exercised due care to ensure that they prepared their case well. Failure to do so greatly prejudiced the Appellant herein.

22. Having said so, it is trite law that no party should be penalised just because there was a blunder particularly by his or her advocate. Indeed, in the case of **Republic vs Speaker Nairobi City County Assembly & Another Ex Parte [2017] eKLR**, it has been held that blunders will continue being made and that just because a party has made a mistake does not mean that he should not have his case heard on merit.

23. Accordingly, having considered the parties' Written Submissions and the case law they each relied upon, this court came to the conclusion that there was good reason for it to interfere with the discretion of the Trial Magistrate in dismissal of the Appellant's Notice of Motion application dated 21<sup>st</sup> August 2017 as her holding had the great potential of prejudicing him and removing him from the seat of justice. It was best that the matter be heard on merit so that whichever party was not satisfied, it could approach the appellate court to determine the matter on merit rather than determine an appeal that was won on technicalities. Indeed, Article 159(2)(d) of the Constitution of Kenya mandates courts to administer justice without undue regard to technicalities.

24. Weighing the Appellant's right to have his dispute determined fairly in a court of law or competent tribunal as provided in Article 50(1) of the Constitution of Kenya and the equally important Respondent's fundamental right that justice delayed is justice denied as stipulated in Article 159(2) (b) of the Constitution of Kenya, this court determined that there would be more injustice and prejudice to be suffered by the Appellant if his Appeal was not allowed.

#### **DISPOSITION**

25. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 18<sup>th</sup> April 2018 was successful and the same is hereby allowed in the following terms:-

**1. THAT the Ruling and Order of Hon M. W. Murage (Ms), Resident Magistrate (RM) at the Chief Magistrate's Court at Milimani in Civil Case No 5948 of 2012 delivered on 4<sup>th</sup> April 2018 be and is hereby set aside and/or vacated.**

**2. THAT in its place, the said Ruling be and is hereby replaced with an order from this court that the Appellant's Notice of Motion application dated 21<sup>st</sup> August 2017 and filed on 25<sup>th</sup> August 2017 be and is hereby allowed as prayed with a condition that he shall file his Amended Complaint, if not filed, and his Amended /Supplementary List of Documents and List of Witnesses within fourteen (14) days from the date of this Ruling.**

**3. THAT the Appellant shall pay to the Respondent throw away costs in the sum of Kshs 30,000/= within thirty (30) days from the date of this Ruling.**

**4. THAT this matter be allocated to any other magistrate other than Hon M. W. Murage (Ms), Resident Magistrate (RM) for the hearing and determination of the issue of quantum.**

**5. THAT each party shall bear its own costs of the Appeal herein.**

26. It is so ordered.

**DATED and DELIVERED at NAIROBI this 26<sup>th</sup> day of May 2020**

**J. KAMAU**

**JUDGE**