



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO 37 OF 2016

STEPHEN G. ITUNGA.....1ST APPELLANT

ZIPPORAH MBAI.....2ND APPELLANT

NICHODEMUS KIMULE.....3RD APPELLANT

-VERSUS-

DAVID ALI.....RESPONDENT

(Being an Appeal from the Ruling delivered by Honourable CA Ocharo Principal Magistrate on the 5th April 2016 in Machakos CMCC No. 99 of 2012)

BETWEEN

DAVID ALI.....PLAINTIFF

-VERSUS-

STEPHEN G. ITUNGA.....1ST DEFENDANT/APPLICANT

ZIPPORAH MBAI.....2ND DEFENDANT/APPLICANT

NICHODEMUS KIMULE.....3RD DEFENDANT/APPLICANT

JUDGEMENT

1. The Respondent herein filed a suit against the Appellants seeking damages in respect of a road traffic accident which allegedly occurred on 20th December, 2006 involving motor vehicle registration No. KAR 930A which was alleged to have rolled as a result of the negligence of the 3rd Appellant/Defendant who was its driver. It was alleged that the said vehicle was either owned by or under the control of the 1st and 2nd Appellants/Defendants. On 24th January, 2014, the trial court extended the summons to enter appearance with 12 months and directed that service thereof be effected by way of registered post. On 2nd July, 2014 a default interlocutory judgement was entered and it was directed that the matter proceeds to formal proof which proceeded on 30th April, 2015. Judgement was subsequently delivered on 14th August, 2015 in which the court found the Appellants/Defendants 100% jointly and severally liable and awarded the Respondent Kshs 600,000/- as general damages and special damages of Kshs 28,700/- together with interests and costs.

2. By an application dated 20th November, 2015, the Appellants/Defendants sought inter alia to have the said judgement set aside. The application was based on an affidavit sworn by a deponent who deposed that she was the Claims Director of Directline Assurance Company Limited, the insurer of the said vehicle. According to the deponent, the insured was the 1st Appellant who passed away in 2004 hence summons to enter appearance could not have been effected on him. It was deposed that the suit was thus being defended by the insurance company on the basis of the rights of subrogation under the relevant policy of insurance and the common law. It was further the Appellants' position that they had a good defence to the claim a draft copy of which was attached. The gist of the said draft was that the 1st and 2nd Appellants were not the registered owners of the said vehicle and that the accident in question was not caused by their negligence of the defendants but was caused by or substantially contributed to by the Respondent. They also challenged the particulars of special damages

pleaded.

3. After hearing the said application, the learned trial magistrate found that the allegation that the 1st defendant had passed away by the time of the service of the summons to enter appearance had not been substantiated and was not a ground for setting aside judgement against all the Defendants. It was further found that the Applicant had not explained the reasons why it failed to act upon being notified of the intention to sue and judgement. According to the court equity does not aid the indolent. The court further found that the applicants had not disclosed the prejudice they stood to suffer in the event that the orders in question were not set aside. The court further found that the draft defence did not disclose any triable issues. It proceeded to dismiss the application with costs.

4. It was that decision that provoked this appeal in which the appellants contend that the learned trial magistrate erred in finding that the defence did not raise any triable issue yet they had a good defence on merits. They contended that since they had a credible defence, they ought not to have been condemned unheard. In opposing the appeal, the Respondents submitted that the Respondent demonstrated from the records of the Registrar of Motor Vehicles that the vehicle was registered in the names of the 1st appellant hence that was prima facie evidence of ownership. It was further contended that there was no evidence that the 1st Appellant was deceased and if that was so, the Respondent wondered how the appeal was lodged in the 1st appellant's name. It was in any case averred that since the suit was filed against three Appellants, the 1st Appellant's death could not invalidate the suit. It was contended that the allegation that the accident was not caused by the negligence of the appellants was unmerited since the 3rd defendant was charged and pleaded guilty to the offence of careless driving and was convicted accordingly. The court was therefore urged not to interfere with the lower court's decision.

Determinations

5. I have considered the foregoing, the submissions filed on behalf of the parties herein and the authorities relied upon in support thereof.

6. It is important to reiterate that the application before the trial court was based on only two grounds and these were the fact that the 1st Appellant being deceased could not have been served with summons to enter appearance and secondly that the Appellants had a good defence on merits to the suit. As regards the first issue as rightly pointed out by the learned trial magistrate no evidence was placed before the court to prove that the 1st appellant was deceased. Assuming that the 1st appellant was deceased, this appeal itself as regards the 1st appellant would be incompetent since a deceased person cannot institute legal proceedings unless a legal representative is appointed in his place. Whereas the deponent of the supporting affidavit claimed that the application was made by the insurance company that insured the vehicle in question vide the principle of subrogation, subrogation applies in situations where, by virtue of being an insurer, the insurance company is entitled to be placed in the position of the insured and to succeed to all their rights and remedies against third parties in respect to the subject matter of insurance. See ***General Principles of Insurance Law* by E R Hardy Ivamy** at page 415. In ***However*** as was held in **Opiss vs. Lion of Kenya Insurance Company Civil Appeal No. 185 of 1991:**

“the right to subrogate does not create a privity of contract between the insurance company and the third party; it only gives the insurance company the right to take over the rights and privileges of the insured and therefore must be brought in the name of the insured.”

7. It was therefore held in **Egypt Air Corporation vs. Suffish International Food Processors (U) Ltd and Another [1999] 1 EA 69** that:

“The whole basis of subrogation doctrine is founded on a binding and operative contract of indemnity and it derives its life from the original contract of indemnity and gains its operative force from payment under that contract; the essence of the matter is that subrogation springs not from payment only but from actual payment conjointly with the fact that it is made pursuant to the basic and original contract of indemnity. If there is no contract of indemnity then there is no juristic scope for the operation of the principle of subrogation.”

8. It was however held in **Indemnity Insurance Co. of North America and Another vs. Kenya Airfreight Handling Ltd and Another [2004] 1 EA 52** that:

“Under insurance law principles, for an insurer to be subrogated to the rights of the insured, the latter must have been indemnified by the former; only then can the insurer step into the shoes of the insured.”

9. In this case there was no evidence that the insurance company had indemnified the 1st appellant and that being the position, the principles of legal representation and substitution had to be complied with if the 1st appellant's application was to succeed. To that extent even this appeal is fatally incompetent. This must be so since as was held by the Court of Appeal in **Peter Mark Gershom Ouma vs. Jagam s/o Marega & Lubalo Warega & 4 Others Civil Appeal No. 52 of 1980 [1982] KLR 288**, the court cannot make orders in favour of a dead man, as opposed to orders in favour of his estate. It was therefore held in **Auto Garage and Others vs. Motokov (No. 3) Civil Appeal No. 22 of 1971 [1971] EA 514** that where a suit has been brought in the name of a dead man, the plaint is a nullity and there can be no amendment by way of substitution.

10. The foregoing takes care of the application in so far as the 1st appellant was concerned. As regards the other Appellants, there was completely no reason advanced why they never appeared to defend the suit. It must always be remembered that the decision whether or not to set aside a default judgement is an exercise of judicial discretion and As was held in **Shah vs. Mbogo (1967) EA 166:**

“this discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

11. Without disclosure as to the circumstances which prevented the other two Appellants/Defendants from appearing, there is simply no material on record on the basis of which this court or the trial court could exercise its discretion in their favour. This being an exercise of judicial discretion, like any other judicial discretion must on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders.

12. In the premises, I find no merit in this appeal which I hereby dismiss with costs.

13. It is so ordered.

Read, signed and delivered in open Court at Machakos this 26th day of May, 2020

G V ODUNGA

JUDGE

Delivered the absence of the parties.

CA Geoffrey