



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO.95 OF 2018

CHEPSOI DORCAS.....1ST APPELLANT

CHEPSOI JOEL.....2ND APPELLANT

VERSUS

ANTONY SIMIYU WANGILA.....RESPONDENT

(An appeal from Ex-parte Judgement of S.O. Mogote, Honourable Principal Magistrate in Bungoma CMCC No.21 of 2013 delivered on 11th October of 2013)

J U D G M E N T

This appeal arises from the ex-parte judgement of S. O. Mugote, PM in Bungoma CMCC No. 21 of 2013. The respondent herein by Plaintiff dated 28.01.2013 and filed a suit against the appellant for general damage, special damages, interest and costs of the suit for road traffic accident that occurred on or about 7th September 2012 when the plaintiff was lawfully travelling as a passenger in defendant's motor vehicle registration number KAM 367L MITSUBISHI LORRY/TRUCK .

The 1st and 2nd defendants were served with summons and plaint, they filed their respective Memorandum of appearance and defence dated 12th March 2013 denying the respondent's claim and stated that the court had no jurisdiction to handle the matter.

During the proceedings before appellant could raise any preliminary objection on jurisdiction, there was a High court order vide **Kakamega High Court Civil APPEAL No.127 of 2013** which consolidated with Kakamega High Court No.145 of 2013 staying all matters emanating from the same cause of action in respect of accident which occurred on 7th September 2012 which was issued by Honourable Justice S. J. Chitembwe. The matter appealed against **Bungoma CMCC No. 21 of 2013** was among the matters emanating from the same cause of action thus the said order affected the suit.

The appellants contention is that despite the stay order issued the counsel of respondent proceeded with the matter and ex-parte judgement delivered on 11th October 2017. Aggrieved by the said judgement ruling, the appellant preferred this appeal on the following grounds:

- i. That the learned trial magistrate erred in law and in fact in hearing and determining the matter when there was a stay order in force;*
- ii. That the learned trial magistrate erred in law and in fact without consideration on probable facts as raised on the part of the appellants herein touching on the territorial jurisdiction on where the cause of action occurred.*
- iii. That the learned trial magistrate erred in law and in fact in the appellant did not participate in the proceedings hence rule of natural justice was not adhered to.*

By consent the appeal was canvassed by way of written submissions. Ms. Chepkitway submitted for the appellants. She submitted that there was stay order in respect of all matters that emanated from road traffic accident that occurred on 7th September 2012 involving the suit motor vehicle was issued by Kakamega High Court.

She submitted that the appellants are aggrieved for the suit Bungoma CMCC No.21 of 2013 was among the stayed suits but the respondent disregarded the same. She submitted that this matter ought to have been filed in Mumias not Bungoma.

Counsel Chepkitway submitted that there were consents filed by all parties choosing MUMIAS SPMC NO. 295 OF 2012 as the test suit for purpose of establishing liability. She submitted that respondent's counsel failed to obey court order relying on case of **Judicial Service Commission Vs. The Speaker of the National Assembly & Another, High Court Petition No. 518 of 2013**. Mrs. Chepkitway submitted that

obedience of court order is fundamental to administration of justice. She submitted that the proceedings as from the 26th March 2014 were void. She submitted that they do pray for refund of costs already paid to the respondent and release of the decretal amount deposited in a joint interest earning account as condition.

The respondent submitted through Counsel Mumalasi. She submitted the appellants are estopped from raising issue of territorial jurisdiction at the appeal stage. She submitted that since the appellants failed to raise the issue of territorial jurisdiction in trial court they cannot raise it on appeal. She relied on case law in **Mohamed Shaban V George Mwangi Karoki Bungoma HCC Application No. 13 of 2002**. She submitted that at the time of hearing and judgement of the suit before trial court there was no order staying the trial court's proceedings. She submitted that the order in Kakamega HCCA NUMBER 127 OF 2013 was in force for only 14 days and lapsed on 2.12.03. She submitted that appellants were served severally with hearing notices but they chose to stay away without justifiable cause. She submitted that since the appellants do not question the findings on liability and quantum the same be upheld by this court.

Having considered the parties respective pleadings and submissions it is my finding that the following issues arise for determination;

i. Whether there was an order staying proceedings at the time the matter proceeded to hearing and judgement pronounced?

ii. Whether the ex- parte judgement was properly entered for non-attendance?

On the first issue number it is instructive to note that the High Court at Kakamega had issued a stay order, involving all matters emanating from the same cause of action in respect of an accident which occurred on the 7th September 2012 pending hearing and determination of Civil Appeal 127 of 2013 and 145 of 2013. It is from court records that order was valid for 14 days. Also there existed consents filed by all parties choosing file number Mumias SPMC NO. 295 of 2012 and this affected 113 filed suits including this case.

The issue I need to determine is whether the stay order was still valid at the time of hearing and judgement before trial court. It is not in dispute that a stay order existed, the issue in contention is whether the order was valid at the time of hearing of this suit before trial court. It is my finding that from court record when this matter commenced for hearing before trial court, on the 26/3/14 and subsequent dates of hearing, counsel for plaintiff/appellants herein was asked to produce the stay order issued at Kakamega HCCA Number 127/2013 staying this matter. The appellant in his submission has annexed the judgment in Kakamega HCCC 127 of 2013 dated 13th May, 2015 by Mrima J where he ruled: -

“Having found that the suit relates to a work injury claim and that it was instead dealt with by a Resident magistrate, this court will not deal with the other grounds of appeal and accordingly disposes the appeals herein at this stage and makes the following orders: -

a) Civil Appeal No. 127 of 2013 and Civil Appeal No. 145 of 2013 be and are hereby allowed;

b) The proceedings and the judgment by Hon. G N Sitati Resident Magistrate in Mumias SPMCC No. 295 of 2012 be and are hereby set aside for want of jurisdiction.

c) The suit being Mumias SPMCC No. 295 of 2013 shall be remitted back to Mumias Law Courts for a fresh hearing and determination before a competent court and as so guided under the Gazette Notice No. 9243 of 27th July, 2011.

d) Any sums of money deposited in any Bank Account pursuant to orders of this court in these Appeals be released to the depositor or its Advocates forthwith.

e) The competent trial court shall give priority to the hearing and determination of the suit since it is a test-suit and was filed way back in 2013.

f) Given that the Appellants did not raise the issue of jurisdiction at the earliest possible opportunity each party shall bear its own costs.”

The Judgment subject of the appeal by Hon. Mogute was delivered on 4th October, 2017 almost two years after delivery of the Kakamega Court Appeal No. 127 of 2013 which gave clear directions on the handling of suits emanating from the accident involving motor vehicle KAM 367L on 7th September, 2012. The judgment by the trial magistrate was, therefore, made in ignorance of the decision of the Kakamega High Court. I, therefore allow the appeal set aside the judgment and remit the file to Chief Magistrate's Court, Bungoma for hearing and determination. I make no order as to costs.

Dated, signed and delivered at Bungoma this 30th day of July, 2020.

.....

S N RIECHI

JUDGE