



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CIVIL APPEAL NO.4 OF 2016

CHARLES MWAURA.....APPELLANT

VERSUS

BENSON MATHENGE.....1ST DEFENDANT

DHL EXEL SUPPLY CHAIN (K) LTD.....2ND DEFENDANT

(Being an appeal arising from the ruling of Hon. Kiage RM in Bomet PMCC No.114 of 2013)

JUDGMENT

1. By way of a plaint dated 5th September 2013 the Plaintiff/appellant sought damages and costs against the defendant/respondents for the tort of negligence. The case arose out of an accident that occurred on the 13th day of January 2013 when the 2nd Defendant/respondent's motor vehicle registration number KBG 398 H ZD 7022 which was being driven by the 1st defendant/respondent along Bomet-Narok road near Longisa rammed into the plaintiff/appellant's motor vehicle registration number KBJ 691D, Isuzu tipper Truck thereby extensively damaging the plaintiff/appellant's said motor vehicle occasioning total loss.

2. The plaintiff/appellant filed an amended plaint dated 19th June 2015 which included a claim for damages for loss of user assessed at kshs.2,400,000/-.

3. The suit came up for hearing on 2nd March 2016. During the plaintiff/appellant's hearing, he sought the production of documents namely delivery notes in the name of Geokama Construction but an objection was raised at that point by counsel for the defendant/respondents on the grounds that:-

a) The impugned documents had not been served upon the Defendant/respondents at the time of the hearing.

b) The plaintiff had not established a nexus between himself and Geokama Construction. Counsel for the appellant submitted that failure to serve the impugned documents before the hearing was an oversight on the part of the plaintiff/appellant's Advocate and this should not be visited on the appellant. The court was called upon to administer justice without undue regard to technicalities.

4. The court was further informed that there would be no prejudice occasioned on the defendant/respondents as the witness sought to produce the documents was the first to testify and the defendant/respondents had ample time to cross-examine on the documents and to call and lead evidence they deemed necessary to counter the effects of the impugned documents.

5. In his ruling delivered on 2/3/2016, the learned trial magistrate barred the plaintiff/appellants from relying on the impugned documents giving the reason that there was no service of the documents upon the defendant/respondents.

6. Being aggrieved by the ruling of the learned magistrate, the plaintiff/appellant lodged this appeal on the following grounds:

a) That the learned trial magistrate erred in law and in fact is disregarding the appellant's claim that the documents sought to be produced were omitted arising from a genuine mistake and was not meant to prejudice the respondents.

b) That the learned magistrate erred in law and in fact in allowing the objection as to the admissibility of the documents sought to be relied on the support of the claim for loss of user whose effect was to divert the appellant of what he perceives to be a crucial subtraction of his claim by denying adduction of the invoices and delivery notes.

c) That the learned trial magistrate erred in failing to preserve the ends of justice as the Respondents would have been accorded an opportunity to cross-examine, respond to and or address any issues in respect of the documents.

d) That the learned magistrate's findings are totally unsupported in law and are an affront to the ends of justice as they deny the appellant a colossal amount in form of damages for loss of user.

e) That the learned magistrate erred in fact and in law by visiting the mistake of counsel on the appellant in total disregard of the appellant's counsels concession on the mistake and binding precedent on the issue.

Appellant's Submission

7. The appellant had distilled four issues for determination by this court;

a) Whether failure by the appellant to serve the impugned documents upon the Respondents was sufficiently, explained to warrant production thereof to be allowed by the trial court.

b) Whether any prejudice would have been occasioned upon the Respondents had the trial court allowed production of the impugned documents.

c) Whether it is in the interests of justice for the appellant to be allowed production of the impugned documents.

d) Whether it is in the interest of justice for the appellant to be allowed to file, serve, testify on and produce the impugned documents as well as any other document in support of this case.

e) Who should bear the costs of the appeal.

8. In respect to the 1st issue whether failure to serve was sufficiently explained. It is submitted that the failure stemmed from an oversight on the part of the advocate. Reliance is placed in the Case of **Phillip Chemwolo & Ano. –vs- Augustine Kubede (1992-88) KAR 103 at pg 104** where it was held;

“Because a mistake has been made, a party should not suffer the penalty of not having his case heard on merit- courts exist for the purpose of deciding rights of the parties and not the purpose of imposing discipline.”

9. It is submitted that the appellant sought to produce delivery notes which were to show that the motor vehicle registration KBJ 691D, Isuzu tipper Truck was before the said accident being used commercially for transport purposes and to prove the earnings of the plaintiff from use of the said vehicle which in effect would assist the trial court to determine the plaintiff's claim for damages for loss of user.

10. The plaintiff had prayed for damages for loss of user to the sum of kshs2,400,000/-. Counsel relies on Article 159 (2) (d) of the constitution which provides:-

“In exercising judicial authority the courts and tribunals shall be guided by the principle that justice shall be administered without undue regard to technicalities.”

11. Counsel also notes on the Case of Stephen Boro Gittha –vs Family Finance Building Society Civil Appeal No.203 of 2009 as cited with approval in the Case of **Abdullahi Mohamud –vs- Mohamud Kahiye (2015) eKLR** to wit;

“The overriding objective overshadows all technicalities, precedents, rules and actions which are the conflict with and whatever is in conflicts with must give way. A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time..”

Whether any prejudice would have been occasioned if the impugned documents were produced;

12. It is submitted that the defendants would have had ample opportunity to challenge the evidence that would have been adduced through;

a) Cross-examination of the plaintiff on the contents of the impugned documents.

b) Adducing of evidence through defence witnesses to counter the evidence adduced by the plaintiff

c) Filing of written submissions, counsel for the appellant relies in the Case of **Johana Kipkemei Too –vs- Hellen Tura 92014) EKLR** where it was held; **“If for example, the trial has not started, little prejudice may be caused to introduce additional evidence. The prejudice to the other party no doubt increases as the trial progresses..”**

d) Whether it would be in the interest of justice for the appellant to be allowed to file and serve the impugned documents to support of this case. It is submitted that each party should have an opportunity to advance its case and to have the case determined on merit. It is submitted that should the court find that in allowing the appeal- some prejudice would be occasioned if it has the discretion to award the costs as the justice of the Case may demand.

Submissions by the Respondents

13. It is the submissions by the Respondents that during the hearing on 2/3/2016 of the Plaintiff's case and while during cross-examination in chief, he intended to produce a delivery book in support of his case which document did not form part of those listed for reliance in the Case and which was not served on the other party which was contrary to the Provisions of Order 11, of the Civil Procedure Rules. An objection was raised on the production of the impugned documents.

14. Counsel for the Plaintiff conceded that the document was not on the list of those to be relied on and that it had not been served. He relied on Article 159 of the Constitution of Kenya and section 3A of the Civil Procedure Act.

15. It is the Respondent's contention that parties are guided by Order 3 and 11 of the Civil Procedure rules as to the procedure on the conduct of Civil suits Order 3, rule 2 on documents to accompany a suit.

16. It is submitted that the only recourse the plaintiff had was to seek leave of the court to be allowed to file a supplementary list of documents and not to ambush the defendant during the trial.

17. Reliance is placed on the Case of **Nicholas Kiptoo Arap Korir Salat-vs- IEBC (2013) eKLR** where Kiage J observed

"Courts must never provide succor and cover to parties who exhibit scant respect for rules and timelines which make the process of judicial adjudication and determination fair, just, certain and even handed."

18. The case of **Levile Obedo Akuna –vs- National Bank of Kenya (2015) eKLR** where it was held;

"Discovery of documents is a request of our law of procedure and be process of concept which is adequately supported by legal practice and legal jurisprudence. This is a short cut to this process. It must be done both in the substantive law and procedural law. Where a party had failed to do so or complete discovery of documents, the party must take full responsibility for the consequences and lay the blame on its own door."

19. Counsel for the Respondent relied on the Case of **Orade Productions Limited –vs- Decapture Limited & 3 Others (2014) eKLR** where it was held;

"The true purpose of discovery level the litigation field, to expedite hearing, reduce costs and allow parties to gauge the case they will face at the trial."

20. It is further submitted that even if the plaintiff was to be allowed to produce the documents, they bear the name of Ndeiya and not the plaintiff.

Analysis and conclusion

21. It is not in dispute that the appellants attempted to introduce documents during the hearing of their case that were not in the list and had not been served on the respondents. This fact was conceded by counsel for the appellants who blamed an oversight on their part.

22. An objection was raised by counsel for the Respondents on the grounds that:-

a) The impugned documents had not been served upon the Defendants at the time of the hearing.

b) The plaintiff had not established a nexus between himself and Geotama construction. A ruling was delivered by the learned trial magistrate whereupon he upheld the objection on 2/3/2016. The reason being that there was no service of the documents on the defendants.

c) Whether there was sufficient explanation by the appellants for failure to serve the impugned documents.

23. The reason given for failure to serve is based on mistake of counsel which was one to an oversight on their part. It is trite law that mistake of counsel should not be visited on a litigant. Reliance is placed on the Case of **Phillip Chemwelo –vs- Augustine Kubede(Supra)**.

24. In the suit the plaintiff had prayed for damages for loss of user in the sum of kshs2,400,000/-. The impugned documents were delivery notes which were meant to show that the subject vehicle was being used for transport purposes. The court in its ruling barred the plaintiffs from adducing evidence in respect to the claim for loss of user.

25. The issues for determination are as follows;

Whether any prejudice would have been occasioned if the impugned documents were produced?

Whether it is in the interest of justice for the appellant to be allowed to file and serve the impugned documents

26. On the first issue, the plaintiff was the first witness;

i. There was room for cross-examination on the contents and relevance of the documents to the suit at hand.

ii. There was room for adducing of evidence by defence witnesses to counter the evidence adduced by the plaintiff in the impugned documents.

27. On the second issue, I find that the impugned documents are very important and form the basis of the claim for loss of user. Without them the claim is a non-starter. There is need for the appellant to be allowed to file and serve the impugned documents as prayed.

28. It is noted that this suit would have proceeded to hearing and determination had the appellant exercised the diligence in ensuring discovery had been complied with. It is not in the interest of justice to visit the mistakes of counsel upon the Appellant.

29. I allow the appeal on the following conditions':

i. This court finds that the delay has been caused by the appellant and hence there has been prejudice occasioned on the respondent but the same can be compensated with costs of this appeal to the respondent.

ii. That the Appellant to be allowed to file and serve the impugned documents.

iii. That the case starts afresh and be heard by any other magistrate other than the one who was hearing it.

Judgment delivered dated and signed at Bomet this 4th day of August 2020.

A.N. ONGERI

JUDGE