REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 254 OF 2017

WOODVENTURE (K) LIMITED.....APPELLANT

-VERSUS-

TECHNICAL STUDY TOURS LIMITED.....1ST RESPONDENT

SIMON KANANI SAGANA.....2ND RESPONDENT

AHMED SAID SALAM.....3RD RESPONDENT

(Being an appeal from the ruling and order of Honourable L. Kabaria (Ms.) (Senior Resident Magistrate) delivered on 5th May, 2017 in Milimani CMCC NO. 10227 OF 2003)

JUDGEMENT

1. The 1st and 2nd respondents herein instituted a suit before the Chief Magistrates Court at Milimani vide the plaint dated 2nd October, 2003, amended on 14th January, 2004 and further amended on 11th January, 2006 and sought for general damages and loss of user against the appellant and the 3rd respondent, plus costs of the suit and interest on the same.

2. The claim arose out of a road traffic accident on or about 10th January, 2001 along Mombasa-Kilifi Road involving motor vehicle registration number KAD 380N Toyota Corolla belonging to the 1st respondent and being driven by the 2nd respondent at all material times; and motor vehicle registration number KAL 852X belonging to the appellant and being driven by the 3rd respondent at all material times, which accident caused the 2nd respondent to suffer severe bodily injuries and was attributed to negligence on the part of the appellant and the 3rd respondent.

3. The appellant and the 3rd respondent entered appearance on being served with summons and filed their joint statement of defence on 5th December, 2003 to deny the claim.

4. When the suit came up for hearing, the trial court proceeded only with the plaintiffs' (the 1st and 2nd respondent's) case since the defendants (the appellant and the 3rd respondent) were not in attendance.

5. Upon considering the material and submissions placed before it, the trial court delivered judgment on 2nd October, 2015 in favour of the 1st and 2nd respondents and against the appellant and the 3rd respondent as follows:

Liability **100%**

Damages

(i) With regard to the 2nd respondent

a) Pain and suffering **Kshs.220,000/**

b) Special damages **NIL**

Total **Kshs.220,000/**

(ii) With regard to the 1st respondent

a) Special damages **Kshs.200,000/**

Less salvage value **Kshs.60,000/**

Total **Kshs.140,000/**

6. Subsequently, the appellant lodged the Notice of Motion dated 3rd November, 2016 and sought for an order of the review and/or setting aside of the proceedings of 23rd September, 2014.

7. The 1st and 2nd respondents opposed the Motion by filing a replying affidavit sworn by the 2nd respondent.

8. Upon hearing the parties on the Motion, the trial court dismissed the Motion with costs to the 1st and 2nd respondents.

9. Being dissatisfied with the aforesaid decision, the appellant lodged this appeal against the same vide the memorandum of appeal dated 24th May, 2019 and amended on 7th October, 2019 and put forward the following grounds of appeal:

i. THAT the learned trial magistrate erred in law and fact by disregarding the appellant's submissions and authorities to the application dated 3rd November, 2016 stipulating the rationale for reviewing and setting aside the proceedings of 23rd September, 2014, judgment and decree delivered on 2nd October, 2015.

ii. THAT the learned trial magistrate erred in law and fact by narrowly construing the application of the provisions of Order 45 of the Civil Procedure Rules.

iii. THAT the learned trial magistrate erred in law and fact by failing to take into account the interest of justice by affording the appellant an opportunity to be heard on merit.

iv. THAT the learned trial magistrate erred in law and fact by failing to take into consideration the supporting evidence of the appellant.

v. THAT the learned trial magistrate erred in absolutely failing to make reference to the authorities produced by the appellant.

vi. THAT the learned trial magistrate erred in awarding the 1st and 2nd respondents costs against the appellant.

vii. THAT the learned trial magistrate erred in law and fact by failing to set aside the ex parte judgment on 2nd October, 2015.

10. This court gave directions that the appeal be canvassed by written submissions. At the time of writing this judgment, the respondents had not put in their written submissions.

11. On its part, the appellant submits that the trial court did not consider the applicable principles on the setting aside of proceedings, namely that the mistake of an advocate should not be visited on the client since in the present instance, despite the appellant's advocate being served with a hearing notice in the suit, no information was conveyed to the appellant that the suit has been set down for hearing on 23rd September, 2014. The appellant cited the case of **Ahmed v Highway Carriers (1986) LLR 258 (CAK)** where the Court of Appeal held that:

"…a litigant should not suffer for his advocate's mistakes; if the court should be inclined to punish the advocate, it should state so and choose the appropriate punishment without injuring the litigant's rights."

12. The appellant further submits that the trial court did not appreciate that its application had been filed without unreasonable delay.

13. It is the contention of the appellant that the trial court further did not consider its evidence regarding ownership of motor vehicle registration number KAL 852X, particularly the fact that the said motor vehicle did not belong to the appellant at the time of filing the suit and that the only interest held by the appellant in respect to the aforementioned motor vehicle was that of financier.

14. In closing, the appellant has urged this court to exercise its discretion in doing justice by allowing the appeal and having done so, to set aside the impugned ruling and to consequently set aside trial's court proceedings of 23rd September, 2014 and judgment/decree issued against it, and to grant the appellant an opportunity to be heard.

15) The appellant relied upon the case of **Pithon Waweru Maina v Thuka Mugiria [1983] eKLR** in which the Court of Appeal held

thus:

> ***"The principles governing the exercise of the judicial discretion to set aside an ex parte judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing are:***
>
> > ***a) Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just ... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76 C and E b) Secondly, this discretion is intended so 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 course of justice. Shah v Mbogo [1967] EA 116 at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48…"***

16) I have considered the rival submissions plus the various authorities cited. I have also re-evaluated the evidence and proceedings before the trial court.

17) It is noted that the appeal essentially lies against the decision by the trial court to dismiss the appellant's Motion and to decline to set aside the trial court's proceedings and the resultant judgment. I will address the appeal under the three (3) limbs hereunder.

18) The *first* limb touching on grounds (i), (iii), (iv) and (v) of the appeal has to do with the question as to whether the learned trial magistrate considered the evidence, submissions and authorities presented by the appellant.

19) It is apparent from the record that the appellant through its Motion dated 3rd November, 2016 filed before the trial court sought for an order for a review and/or setting aside of the proceedings of 23rd September, 2014, together with the judgment and decree delivered on 2nd October, 2015. The Motion was supported by the grounds set out on its face and the facts stated in the affidavit of Fredrick Muriithi, Nairobi Branch Manager of the appellant. Annexed to the Motion were various proclamation and attachment documents, among others.

20) From the record, it is clear that the appellant filed written submissions on the Motion.

21) Upon perusal of the impugned ruling, I find nothing to indicate that the learned trial magistrate ignored or otherwise overlooked the appellant's evidence or submissions. If anything, I note that she set out the positions taken by the respective parties and went on to provide her reasoning on the issues arising therefrom. I am therefore satisfied that the learned trial magistrate considered the material, evidence and submissions presented by the appellant.

22) The *second* limb is to do with the question as to whether the learned trial magistrate correctly applied the provisions of Order 45, Rule 1 of the Civil Procedure Rules as raised in grounds (ii) and (vii) of the appeal.

23) In his affidavit in support of the Motion, Fredrick Muriithi stated that warrants of attachment had been issued against the appellant pursuant to the decree in the suit and yet at the time of filing such suit, motor vehicle registration number KAL 852X which was involved in the material accident did not belong to the appellant. The deponent further stated that it is the 3rd respondent who ought to have been found liable for the accident and not the appellant.

24) It was also the averment of the deponent that the appellant was not made aware of the hearing date by its advocate or that judgment had subsequently been delivered in the suit.

25) In reply, the 2nd respondent stated that no sufficient reasons have been given to explain the failure of the appellant to attend court for the hearing of the suit despite notice of the hearing being issued to its advocate.

26) The 2nd respondent also stated that the issue of ownership of motor vehicle registration number KAL 852X was settled by way of the copy of records produced at the trial, which shows the appellant as being the owner of the said vehicle at all material times.

27) The learned trial magistrate, upon hearing the parties, came to the conclusion that there was evidence of service of both the hearing date in the suit and the final submissions before judgment, upon the appellant's advocate, yet there was no attendance on both occasions.

28) The learned trial magistrate also concluded that the appellant also had a duty to follow up on its case but did not demonstrate the active steps taken in this regard and hence, she was not persuaded to exercise her discretion in its favour.

29) It was also the finding of the learned trial magistrate that though the issue of ownership was a triable issue, the same could only be countered by way of evidence, which the appellant did not tender since it did not attend the trial of the suit.

30) **Order 45, Rule 1** of the **Civil Procedure Rules** provides inter alia:

> ***"Any person considering himself aggrieved—***
>
> > ***(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
> >
> > ***(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.***

31) It is apparent that the appellant's Motion was brought under the ground of 'sufficient reason.' Going by the lower court record and proceedings, it is clear that when the suit came up for hearing on 23rd September, 2014 both the appellant and his advocate were absent from court despite there being evidence to show that the appellant's advocate had been served with the hearing notice. Consequently, the hearing proceeded ex parte.

32) It is equally apparent from the record that upon filing written submissions, the 1st and 2nd respondents served the appellant's advocate with the same and an affidavit of service was filed to that effect.

33) On the one hand, it is trite law that a client should not be made to suffer for the mistake or omission of his or her advocate. From the record, there is no doubt in my mind that the appellant's advocate did not demonstrate the diligence and seriousness required in the manner in which he handled the defence case.

34) On the other hand, courts have also held that a case belongs to a party at the end of the day and it is therefore the responsibility of such a party to follow up on his or her case. This was the position taken by the Court of Appeal in the case of **Rajesh Rughani v Fifty Investments Limited & another [2016] eKLR** when it held thus:

> ***"In Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR this Court stated that it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of litigation. Courts have always emphasized that the parties have a responsibility to show interest in and to follow up their cases even when they are represented***

by counsel."

35) The appellant was expected and required to demonstrate its diligence in following up on its defence case and going by the record, this was not done. The appellant could not therefore be heard to cast total blame on its advocate for his inadvertence. In my view, both the appellant and his advocate are to share blame for the non-participation from the point of the trial up to the delivery of judgment.

36) However, I am alive to the principle that courts exist to serve substantive justice to all parties to disputes before it. Substantive justice as contemplated by the provisions of **Article 159** of the **Constitution** requires that wherever possible, parties to a dispute should be given an opportunity to be heard before their dispute is determined on merit.

37) In the present instance, I appreciate that the 1st and 2nd respondents' claim arose out of a road traffic accident wherein various reliefs in form of damages were sought. I also appreciate that the appellant already has a statement of defence on record.

38) It is therefore clear that unless the appellant is granted an opportunity to defend its case, it stands to be condemned unheard on liability for the aforesaid claim, thereby undermining the dictates of substantive justice and violating the appellant's constitutional right to be heard on the dispute before the same is conclusively determined.

39) On the subject to do with ownership of motor vehicle registration number KAL 852X and the question to do with who between the appellant and the 3rd respondent should have been found liable, in my opinion these constitute issues that may in fact constitute good grounds for appeal rather than review. I am equally of the opinion that the above issues could only be properly and adequately articulated at the trial and not by way of review, in any case.

40) For all of the foregoing reasons, I am convinced that it would be in the interest of justice to grant the appellant a chance to defend its case.

41) The *third* and final limb brought about by ground (vi) of the appeal concerns itself with the award on costs of the Motion. From my perusal of the impugned ruling, it is noted that upon dismissing the appellant's Motion, the learned trial magistrate awarded to the 1st and 2nd respondent.

42) It is trite law that costs follows the event. The courts have gone a step further in determining that an award of costs is as a matter of general principle, discretionary. This position was reaffirmed by the Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited [2018] eKLR** when it held that whereas the award of costs is discretionary in nature, such discretion ought to be exercised upon reasonable grounds.

43) Upon considering the above principles, I find no fault in the discretion applied by the learned trial magistrate to award costs as she did.

44) In the end therefore, the appeal is allowed in terms of prayers

a), b) and c), and the following consequent orders are made:

a) The ruling delivered on 5th May, 2017 in Milimani CMCC NO. 10227 of 2003 is hereby set aside and is substituted with an order allowing the Motion dated 3rd November, 2016 but with no order on costs.

b) The trial proceedings of 23rd September, 2014 and the resulting judgment and decree are hereby set aside and are substituted with an order reinstating the suit for hearing before any other magistrate of competent jurisdiction other than the magistrate who heard the original suit.

c) The lower court shall at the earliest opportunity give directions on the hearing of the suit within a reasonable time period considering the age of the suit.

d) In the circumstances of the appeal, a fair order on costs would be to direct the parties to each bear their own costs of the appeal.

Dated, signed and delivered online via Microsoft Teams at Nairobi this 18th day of September, 2020.

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J. K. SERGON

JUDGE

In the presence of:

……. for the Appellant

……. for the 1st Respondent

……. for the 2nd Respondent

……. for the 3rd Respondent