REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 110 OF 2012

CHRISTOPHER MAINA GICHUHI.....APPELLANT

VERSUS

VIRJI VISHYAM PATEL T/A

RADESHYAM ENTERPRISES.....RESPONDENT

(Being appeal against the order in Nyeri Chief Magistrates Court Civil Case No. 197 of 2010 (Hon. W. Juma, Chief Magistrate)

JUDGMENT

The appellant sued the respondent in the Magistrates' Court for both general and special damages as a result of a road traffic accident alleged to have occurred on 28 May 2008 at TimauTownship. According to the appellant's plaint dated 17 April 2010, the appellant was said to have sustained multiple injuries in the accident which he attributed to the negligence of the respondent or his driver.

The respondent denied the appellant's claim and to that end filed a statement of defence.

By a motion dated 20 February 2012, the respondent sought to have the appellant's suit dismissed for want of prosecution. According to the affidavit sworn by the respondent's counsel in support of the motion, the suit had remained dormant for close to two years since it was filed and that the delay in its prosecution was proof enough that the appellant was no longer interested in it.

The appellant's learned counsel filed a replying affidavit opposing the motion; in that affidavit, counsel gave reasons why it had taken long for the suit to take off.

The respondent's motion was scheduled for hearing on 28 March 2012; however, neither the appellant's counsel nor the appellant himself appeared in court on the material day. In their absence, the motion was allowed and the appellant's suit dismissed for want of prosecution.

In an effort to salvage the situation, the appellant moved the court vide a motion dated 10 August 2012 to review its order dismissing his suit and set it aside so that the appellant could be heard on the respondent's motion. His motion was based on Order 45 Rule 1 of the Civil Procedure Rules, 2010 and sections 3 and 3A of the Civil Procedure Act, cap. 21. Once again, the learned counsel for the appellant swore an affidavit in support of the motion basically saying that as much as he was aware that the respondent's motion was scheduled for hearing on 28 March 2012, it was not listed on the cause list posted on the judiciary's website of the matters listed before the Nyeri Law courts on the material day. In any event, he swore, he had, on the previous day agreed with the learned counsel for the respondent to have the matter adjourned.

George Mahugu, the learning counsel for the respondent, filed a replying affidavit opposing the motion. He admitted that indeed he had talked to Mwangi Kariuki, the learned counsel for the appellant, on the eve of the hearing of the respondent's motion but that they never we discussed or agreed on adjourning the motion; on the contrary, he confirmed to the counsel for the appellant that he would be proceeding with the respondent's motion.

The learned magistrate was not persuaded by the reasons given for the appellant's counsel's failure to attend court and in a ruling delivered on 26 September 2012, she dismissed the appellant's motion. The appellant felt aggrieved by the ruling and the order of the learned magistrate and for that reason, he filed the present appeal. In the memorandum of appeal dated 8 October 2020 he faulted the decision of the learned magistrate on the following grounds:

1. The Honourable chief magistrate erred in failing to consider that the absence of the appellant's counsel at the hearing of the respondent's application dated 20 February 2012 on 28 March 2012 was occasioned by absence of the matter on the cause list or, in the alternative, the learned magistrate erred in failing to accord due and appropriate weight to the respondent's explanation of his absence in court on 28 March 2012 as having been due to the absence of the matter on the court's cause list.

2. The honourable chief magistrate erred in proceeding to hear the respondent's application dated 20 February 2012 when the same was not on the cause list of 28 March 2012.

3. The honourable chief magistrate erred in concluding that there was a delay in filing the appellant's application without considering that the appellant's counsel had no prior notice that the respondent's motion had been heard and the appellant's suit dismissed on 28 March 2012.

4. The honourable chief magistrate erred in arriving at the finding that the appellant's late attempt to prosecute his suit was meant to confuse the respondent.

5. The honourable chief magistrate erred in failing to consider the gravity of the subject matter and visiting the mistake of counsel upon the appellant.

The statutory basis for the application and the order for review is section 80 of the Civil Procedure Act. That section reads as follows:

> ***80. Review***
>
> ***Any person who considers himself aggrieved—***
>
> ***(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***
>
> ***(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit. (Emphasis added).***

It is apparent from part (b) of this section that to grant or not grant an order for review is within the discretion of the court to which the application has been made. Of course, there are some certain basic conditions prescribed in Order 45 (1) of the Civil Procedure Rules, any of which the applicant must demonstrate to exist before an application for review is considered and an order made in his favour; for instance, he must demonstrate that he has discovered a new and important matter of evidence, which after the exercise of due diligence was not within his knowledge or could not be produced by him at the material time; or that there is a mistake or error apparent on the **f**ace of the record; or any other sufficient reason.

Ultimately, however, it is the discretion of the court that counts. Talking of discretion, the general law on its exercise is that it is a function of the trial court and the appellate court will not, in the ordinary course of things substitute its own decision for that of the trial court if the discretion was judiciously exercised. Whether the discretion is judiciously exercised or not is normally measured against these parameters: firstly, that the trial court appreciated and properly directed itself on the law; secondly, that it appreciated and properly directed itself on the facts; thirdly, that the court only took into account those matters that ought to have been taken into account; fourthly, that the court did not take into account matters which ought not to have been taken into account; and finally, the decision is not plainly wrong. **(See United India Insurance Co. Ltd versus East African Underwriters (Kenya) Ltd (1985) E.A 895).**

It follows that an appellate court will only interfere with exercise of discretion by a trial court if it can be demonstrated that the trial court misdirected itself on the law; or that it misdirected itself on the facts; or that in exercise of its discretion, it did not take into account matters which it ought to have taken into account; or it took into account matters which it ought not to have taken into account; or, that its decision is plainly wrong and no reasonable court or tribunal would have arrived at such a decision.

Turning back to the appellant's case, two factual issues arose which ought to have been considered in the exercise of the learned magistrate's discretion. The first of these issues was that the case was not listed on the online cause list of cases coming before court on 28 March 2012. The appellant's learned counsel exhibited a copy of the cause list on his affidavit to demonstrate this point. The respondent, on the other hand, did not deny this fact.

In the absence of the appellant's case on the cause list, the appellant's counsel was entitled to believe that perhaps the respondent's application dated 20 February 2012 had been removed from the cause list, for one reason or the other. In those circumstances, neither the appellant nor his counsel should have been faulted for believing that the hearing of the respondent's motion did not take off as scheduled. Of course, had he been diligent enough, the learned counsel for the appellant would have taken a step further to enquire from the court registry why the motion was not listed; nevertheless, he certainly ought not to have been punished for having proceeded on the assumption that since the respondent's motion was not listed, it was improbable that it was going to proceed for hearing on the material day.

The second issue I have noted which the learned magistrate ought to have considered is this: while the learned counsel opposed the appellant's motion, he was open to the orders sought being granted if only the appellant would pay him Kshs. 7,000/= as thrown away costs. This in my humble view was a practical and reasonable offer that would have, in a way, balanced the interests of both the appellant and the respondent and for this reason it ought to have been taken on board.

I am persuaded that had the learned magistrate considered these two issues, she would probably have reached a different conclusion. In short, I am convinced that the appellant's appeal is merited. I will allow it; the order dismissing the appellant's motion dated 10 August 2012 is hereby set aside and is substituted with the order allowing the motion. The appellant shall, however, pay the respondent's counsel Kshs. 7,000/= as throw away costs.

In order to expedite the conclusion of the appellant's case in the magistrates' court, I direct that the respondent's motion dated 20 February 2012 be fixed for hearing inter partes within thirty (30) days of the date of this judgment.

Parties will bear their respective costs of appeal. Orders accordingly.

Signed, dated and delivered on 20 November 2020

Ngaah Jairus

JUDGE