

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 169 OF 2018

FRANCIS KARITHI KARIITHI.....APPELLANT

- VRS -

MARGARET NDUNGE KINYANJUI.....RESPONDENT

{Being an appeal against the Judgement of Hon. N. M. Kyanya Nyamori – RM Thika

dated and delivered on the 3rd day of December 2018 in the original Thika

Chief Magistrate’s Court Civil Case No. 718 of 2010}

JUDGEMENT

The appellant was the defendant in Thika CMCC 718 of 2010 in which he had been sued by the respondent for compensation for personal injuries. The suit was in a series and parties therein agreed that one of the suits, namely Thika CMCC 818 of 2010 would serve as a test suit as provided in Order 38 Rule 1 of the Civil Procedure Rules. CMCC 718 of 2010 and the other suits were stayed pending determination of Thika CMCC 818 of 2010. The record shows that Thika CMCC 818 of 2010 was determined on 26th September 2018 and the appellant was found 100% liable for the collision. Following that judgement, the trial Magistrate in CMCC 718 of 2010 informed the Advocates to file written submissions and the requisite documents for assessment of damages. The Advocate for the appellant protested on the ground that he wished to file an application to set aside the judgement in CMCC 818 of 2010 but the trial Magistrate would hear none of it and when the Advocate for the respondent filed submissions she proceeded to assess and award the respondent general damages in the sum of Kshs. 100,000/= and special damages in the sum of Kshs. 3,700/=. Being aggrieved the appellant preferred this appeal which is premised on grounds that: -

“1. The Learned Trial Magistrate erred in law and fact when she entered judgement based on the Test Suit in THIKA CMCC NO. 818 of 2010 which was the Test Suit in the series of CMCC 718 OF 2010, CMCC NO. 818 OF 2010 AND CMCC NO. 820 OF 2010 where there is an application to set aside judgement in Thika CMCC 818 of 2010 which is still pending before the same Court and when the Learned Trial Magistrate had also granted leave to file an application objecting to proceeding with the submissions and judgement pending the hearing of the application in 818 of 2010.”

On 13th August 2019 directions were given that the appeal which is vehemently opposed be canvassed by way of written submissions. Whereas those of the respondent were received on 11th September 2019 those of the appellant have not been received to-date. The court however received submissions from Paul Mwangi Njoroge on 11th September 2019. Paul Mwangi Njoroge describes himself as an appellant even though the Memorandum of Appeal and Record of Appeal filed by the firm of Dola, Magani & Co. Advocates are in regard to only one appellant Francis Karithi Kariithi. It is instructive that this appeal is not against the assessment/award of the lower court but the decision of that court to assess the damages before the appellant could be heard on the application to set aside the judgement on liability in the test suit. Be that as it may as the first appellate court I have reconsidered the issue before the lower court so as to arrive at my own independent conclusion and it is my finding that this appeal has no merit. The trial Magistrate proceeded to assess damages in this case upon the determination of the issue of liability in the test suit (Thika CMCC 818 of 2010). There was no stay that would have warranted the court to delay the assessment of the damages awardable to the respondent. **Order 38 Rule 1 of the Civil Procedure Rules** expressly provides for stay **“of all steps in the other suits until the selected test suit shall have been determined, or shall have failed to be a real trial of the issues.”** In the instant suit stay of the other suits in the series lapsed once CMCC 818 of 2010 was determined. The application or intended application to set aside the judgement in the test suit did not give rise to an automatic stay as even an appeal does not (**see Order 43 Rule 6 (1) of the Civil Procedure Rules**). Therefore, the argument that the trial court proceeded to assess the damages while there was an application to set aside the judgement on liability cannot hold. Moreover, that application was not even included in the record of appeal as it ought to have been hence rendering the record of appeal incomplete. In the upshot, this appeal is not merited and the same is dismissed with costs to the respondent. It is so ordered.

Signed and dated in Nyamira this 16th day of December 2020.

E. N. MAINA

JUDGE

Judgement dated and delivered in Kiambu Electronically via Microsoft Teams on this 18th day of December 2020.

MARY KASANGO

JUDGE