REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 258 OF 2014

HENRY NDWARU IKINYA and **ASHTON MBUTHIA NDWARU**(Suing as

Legal Reps of the Estate of **MILICENT IKINYA NDWARU).......APPELLANT**

VERSUS

PAUL MURIUKI NDERITU..RESPONDENT

(Being an Appeal from the Ruling and Order in Nairobi Chief Magistrate's Court Civil Case No. 5168 of 2010 (Hon. S. Atambo (Ms) (PM) delivered on 30th May, 2014)

JUDGEMENT

1. On 23/8/2010 the Appellant instituted fatal accident claim seeking special and general damages under Fatal Accident Act and Law Reform Act, costs and interest.

2. Thereafter summons dated 3rd September 2010 were issued. Affidavit of service was filed on 16/2/2011 indicating that the Defendant/Respondent was served with summons on 20/1/2011.

3. By a letter dated 11/1/2012 the Appellant invited Defendant/Respondent for fixing of hearing date on 20/1/2012. A date was fixed ex-parte as the Respondent did not attend the registry during the fixing hearing date on 20/1/2012 thus the Appellants fixed hearing date on 23/7/2012.

4. On the above hearing date the trial court Hon. Arika (PM) noted that request for interlocutory judgement was filed on 20/7/2012 but was not entered thus hearing was pre-mature. The Hon. Arika directed that the Executive Officer (E.O) to ensure the request for the same interlocutory judgement was acted upon thereafter the hearing date to be fixed in the registry. Once again an ex-parte date was fixed for hearing on 22/5/2014.

5. On 2/5/2014 this time on record there was a motion filed on the same 2/5/2014 seeking extension of validity of summons. The notice of motion was dated 24/4/2014.

6. It was premised on grounds that the summons of 3/9/2010 had expired on 3/9/2011. It was supported by affidavit of **Edith Gathera** which indicated that summons had been served upon the Respondent on 20/1/2011. That the Respondent never made appearance and request was made for interlocutory judgement on 20/7/2002 but same was rejected for lack of prove of service. Thus application for the renewal and extension of validity of the summons to enable re-service of the same.

7. The application was heard and ruling made on 30/5/2014 dismissing the same on ground that the Appellant had over 2½ years span without seeking to renew summons after court asked him to serve again and same was not explained.

8. The application was brought under Order 5 rule 2 and 5, Order 51 rule 1 Civil Procedure Rules and section 3A of the Civil Procedure Act Cap 21.

9. The above decision precipitated the instant appeal in which set out 8 grounds namely:-

> **1. THAT the learned magistrate erred in law and in fact in ignoring the law and fact that the suit was still alive at the time the appellant made an application to renew and extend the validity of summons under Order 5 rule 2 and 5 of the Civil Procedure Rules.**

2. THAT the learned magistrate erred in law and in fact in finding that the suit had been dismissed when this was not the position as the court had never on its own motion ordered for dismissal of the matter.

3. THAT the learned magistrate erred in law and in fact by failing to appreciate the nature of the claim was a fatal claim and refused to apply section 3A of the Civil Procedure Act which is the overriding objective applicable in certain situations.

4. THAT the learned magistrate erred in law and in fact when she failed/refused to consider the binding High Court authorities on the subject and made orders contrary to High Court decisions on the subject.

5. THAT the learned magistrate erred in law and fact by failing to give the plaintiff a chance to present her case on trial and on merit by dismissing it on a technicality.

6. THAT the learned magistrate erred in law and fact by failing to give the plaintiff a chance to present her case on trial thereby defeating the overriding objective of the right to be fairly heard as protected by the Constitution.

7. THAT the learned magistrate erred in law and fact by visiting the mistake of the advocate upon the plaintiff therefore punishing her.

8. THAT the learned magistrate erred in law and fact by failing to appreciate that the orders sought were not fundamentally prejudicial as to affect the rights of the intended defendant.

10. The appeal was directed to be canvassed via submissions. Only appellant filed the same.

ISSUES:

11. After going through the pleadings, record and the submissions I find the issues are ***whether the appeal has merit and what is the order as to costs?***

ANALYSIS AND DETERMINATION

12. The Appellant submitted that the learned magistrate erred in law and in fact in finding that the suit had been dismissed when this was not the position as the court had never on its own motion ordered for dismissal of the matter.

13. It also submitted that the suit was still active and had not abated. On this appellant cited Order 5 rule 2 (7) and **Kenya Shell Limited vs Gaitho Oil Limited [2006] eKLR**. Order 5 rule 2(7) provides:-

> **"Where no application has been made under subrule (2) the court may without notice dismiss the suit at the expiry of twenty four months from the issue of the original summons."**

14. The subrule (7) does not provide for abatement but dismissal. The dismissal is not automatic but by the court and until the court dismisses the suit remains active and validity the summons issued therein can be extended. In ***Kenya Shell Limited vs Gaitho Oil Limited [2006] eKLR*** court stated:

> **"However, under subrule (7) of the same rule, where no application for extension of the validity of the summons has been made under subrule (2), the court may without notice dismiss the suit at the expiry of twenty (24) months from the issue of the original summons. The original summons herein was issued on 5th March, 2003. The suit was liable to be dismissed without notice at the expiry of the twenty four (24) months from the said date; that is on or about 5th March, 2005. But no order of dismissal was made, and therefore the suit is still alive**."

15. Also, the dismissal under Order 5 rule 2 (7) is not couched in mandatory terms and is at the discretion of the magistrate or judge. This can be compared with Order 5 rule 1 (6) and Order 24 rule 3 (2) in which abatement of suits automatic and the wordings are mandatory. Order 24 rule 3 (2) provides:

> **"Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff."**

16. On the other hand Order 5 rule 1 (6) provides:

> **"Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate."**

17. Also, it is not true vide the record that 2 and half years had lapsed between the time when the request for judgment was entered and when the application was filed. That the request for judgment was filed on 20/7/2012 and as at 23/7/2012 the same had not been acted on while applicant's application was filed on 2/5/2014.

18. The court finds that as at the time the Appellant's application was filed the suit was active as it had neither abated nor been dismissed and as such the orders sought could have been granted.

19. Section 3A of the Civil Procedure Act provides:

> **"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to abuse of the process of the court."**

20. On application of section 3A of the Civil Procedure Act the court in ***Kenya Power & Lighting Co. Ltd vs Benzene Holdings Ltd t/a WYCO Paints [2016] eKLR*** stated:

> **"Section 3A of the Civil Procedure Act appears to have been introduced to augment the provisions of section 3, vesting in the courts inherent power to make any orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Of course this power has now been broadened by the introduction in 2009 of overriding objective in section 1A & 1B and in 2010 by Article 159 of the Constitution."**

21. In ***K.G. Patel & Sons Ltd vs John Kabukuru Gituro [2016] eKLR*** even though the court was dealing with an application to set aside orders dismissing an appeal for want of prosecution its analysis and holding on section 3A of the Civil Procedure Act and inherent power of the court are relevant. On section 3A and inherent powers of the court it stated:

> **"Section 3A of the Civil Procedure Act [3] provides that, "nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.**
>
> **In my view, the court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit [4] emphasis. The inherent power, as observed by the Supreme Court of India in [5] "has not been conferred on the court; it is a power inherent in the court by virtue of its duty to do justice between the parties before it."**

22. The learned magistrate was in exercise of the judicial authority ought to have found guidance under Article 159 (2) of the Constitution which provides guiding principles in exercise of judicial authority. Article 159 (2) provides or among other principles, sub-article (2) (d), that, **"justice shall be administered without undue regard to procedural technicalities."**

23. The learned magistrate's refusal to grant the orders sought and dismissing the Appellant's application had the effect of dismissing the Appellant's suit on a technicality without affording him an opportunity to be heard on substance contrary to Article 159 (2) (d).

24. The right to be fairly heard is provided for under Article 50 of the Constitution and is one of the inalienable rights as per Article 25 of the Constitution. In ***Richard Neharpi Leiyago vs Independent Electoral and Boundaries Commission & 2 Others [2013] eKLR*** it was stated:

> **"The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should e done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."**

25. Advocates being human beings are fallible which fact this court and other courts are aware of and have held that mistakes by an advocate should not be borne by litigants where the justice of the case demands.

26. In ***Harrison Wanjohi Wambugu vs Felista Wairimu Chege & Another [2013] eKLR*** the court referred to ***Belinda Murai & Others vs Amos Wainaina [1978] LLR 2782 (CALL)*** where it was stated:

> **"A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel, though in the case of junior counsel the court may feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to have known better. The court pay not condone it but it ought to certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometime overrule."**

27. In **Richard Neharpi Leiyago vs Independent Electoral and Boundaries Commission & 2 Others [2013] eKLR** the court referred to ***Philip Chemwolo & Another vs Augustine Kubede [1982-88] KAR 103*** where it stated:

> **"Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."**

28. The Respondent was not likely to suffer any prejudice from the grant of the said orders and if any the court ought to have weighed the prejudice the Respondent was likely to suffer if the orders were granted and those which the Appellant would have suffered if the orders

were denied. The court would have found that the prejudice the Appellant suffered as result of the denial of the orders outweighed those that would have been suffered by the Respondent.

29. Thus the court makes the following orders ;

i. Appeal is allowed and notice of motion dated 24/4/2014 is allowed as prayed.

ii. No orders as to costs,

DATED, SIGNED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2019.

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C. KARIUKI

JUDGE