



**REPUBLIC OF KENYA**

**THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO. 128 OF 2013**

**SHIVA CARRIERS LIMITED.....APPELLANT**

**-VERSUS-**

**DORCUS CHEPKEMOI TANUI (SUING AS THE LEGAL ADMINISTRATOR OF**

**THE ESTATE OF THE LATE) SIMON KIPNGETICH KENDUIYWO.....1<sup>ST</sup> RESPONDENT**

**SAID ALL.....2<sup>ND</sup> RESPONDENT**

**ALI OMARI.....3<sup>RD</sup> RESPONDENT**

**PETER M. WAWERU.....4<sup>TH</sup> RESPONDENT**

**(As consolidated with)**

**CIVIL APPEAL NO. 129 OF 2013**

**SHIVA CARRIERS LIMITED.....APPELLANT**

**-VERSUS-**

**SAMUEL KIPKORIR NGENO.....1<sup>ST</sup> RESPONDENT**

**SAID ALL.....2<sup>ND</sup> RESPONDENT**

**ALI OMARI.....3<sup>RD</sup> RESPONDENT**

**PETER WAWERU.....4<sup>TH</sup> RESPONDENT**

(Being an Appeal from the Ruling of the Senior Principal Magistrate's court at Nakuru in Chief Magistrate's Court Civil Suit No. 662 of 2008 by the Honourable L. Komingoi read on the 4<sup>th</sup> July 2013)

**RULING**

1. On 21<sup>st</sup> January, 2008 a motor vehicle accident occurred along Kericho – Nakuru road in which motor vehicle registration No. KAZ 928Z (Prime Mover) No. ZC 6276 (Trailer) hit motor vehicle registration No. KAT 605B matatu. **Simon Kipngetich Kenduiywo** who was the driver of the matatu sustained fatal injuries. His widow **Dorcus Chepkemoi Tanui** sued in CMCC No.662/2008. In a judgment dated 29<sup>th</sup> November, 2012, the plaintiff was awarded general damages of 1,840,000/= and special damages 25,000/= as well as costs of the suit & interest.

2. In a related suit Samuel Kipkorir Ngeno filed CMCC's No.659/2008 against the defendants in which judgment was entered for him for

special damages of Kshs.573,000/= with costs and interest. Judgment was entered on 29<sup>th</sup> November, 2012.

3. On 28<sup>th</sup> February, 2013, the 3<sup>rd</sup> defendant **Shiva Careers Ltd** filed a Notice of Motion seeking orders that the judgment entered against them on 29<sup>th</sup> November, 2012 and all other consequential orders be set aside and that the 3<sup>rd</sup> defendant be allowed to call his witnesses within a stipulated time. The application was brought on the basis that the applicant was not given a chance to call its witnesses. In a considered ruling delivered on 4<sup>th</sup> July, 2013, the court (**L. Komingoi SPM**, (as she then was) dismissed the application for reason that the applicant had not been denied an opportunity to call witnesses and that the application was an afterthought having been brought to court on 6<sup>th</sup> March, 2013 when the judgment was delivered on 29<sup>th</sup> November, 2012.

4. It is the above ruling that has now been appealed by **Shiva Carriers Ltd**. In appeal No.128 of 2013, the Memorandum of Appeal was filed on 5<sup>th</sup> August, 2013 on the following grounds:

i. The learned Senior Principal Magistrate erred in law and in fact in holding that the third defendant application dated 28<sup>th</sup> February 2010 had no merit and in dismissing the said application.

ii. The learned Senior Principal Magistrate erred in law and in fact in failing to give any or any proper reason for his decision and/or in holding that the third defendant's application had no merit.

iii. The learned Senior Principal Magistrate erred in law and in fact failing to appreciate the legal provision under which the third defendant's application was premised and the purport of the documentation produced in evidence to justify the grounds on which the application was premised.

iv. The learned Senior Principal Magistrate erred in law by holding that he found no reason for the third defendant to call its witnesses at this stage.

v. The learned Senior Principal Magistrate erred in law by failing to consider the authorities and submissions relied on by the third defendant in her ruling which is the subject of this appeal.

vi. The learned Senior Principal Magistrate erred in failing:

a. To appreciate the significance of various facts that emerged in the matter;

b. To consider or properly consider the matter on the evidence before her and/or based on the relevant law, and/or to make proper findings thereon;

c. The learned Senior Principal Magistrate erred in law and in fact in disallowing the third defendant's application on the basis that it had a chance to call its witnesses but failed to do so without paying any heed to the reasons for the third defendant's witness's failure to appear in court on 14<sup>th</sup> September 2012.

5. Appeal No.129/2013 is brought on grounds identical to those in No.128/2013 aforelisted.

6. When the two appeals came up for hearing on 2<sup>nd</sup> March, 2017, parties consented to the two appeals being heard together and by way of written submissions. On 29<sup>th</sup> March, 2017 when the appeals came up for highlighting of submissions, **Mr. Situma** holding brief for **Mr. Patel** told the court that **Mr. Patel** had filed an application to cease acting. The application was allowed on 10<sup>th</sup> May, 2017 when the court directed that the appellant be served in person. The court further directed that the appellants file submissions.

7. The matter proceeded on 12<sup>th</sup> July, 2017 in the absence of the appellant who had been served but did not attend court. He had also not complied with the direction to file submissions. **Mr. Murimi** for the respondent was allowed to highlight the submissions.

8. The main complaint in this appeal is that the trial court did not give the appellant a chance to present witnesses. The appellant prays that the order of the trial court dated 4<sup>th</sup> July, 2013 in which the court dismissed his application to set aside the judgment and reopen the suit for defence hearing be set aside. He prays that the court allows this appeal and orders that their notice of motion dated 28<sup>th</sup> February, 2013 in the trial court be allowed. It is the appellant's contention that the trial court erred in dismissing the application; that no reasons were given for the ruling.

9. As noted above, the appellant having taken directions to file submissions on the appeal failed to do so despite being allowed time extension by the court. I will therefore consider the appeal on the basis of the record of appeal and submissions of the respondent's counsel.

10. This being a first appeal, I am obligated to evaluate the evidence and the record in the lower court in order to arrive at my conclusions. See **Selle v Associated motor boat company [1968] EA 123; Arrow Car Ltd v Bimomo and 2 others [2004] 2 KLR 101**.

11. The only issue in this appeal is whether the appellant's application to re-open the case in the lower court should be allowed and that the lower court's ruling dated 4/7/2013 denying him a chance to re-open the defence case be set aside.

12. In principle, a litigant ought not to be denied an opportunity to be heard. The right to a fair hearing is not only a constitutional imperative but a tenet of justice. In **Richard Nchapai Leiyanguvs IEBC & 2 others [2014] eKLR** cited in **High court of Kenya at Nyeri Civil Suit**

no 101 of 2011 [2016] eKLR, the court stated:-

**“ we agree with the noble principles which go further to establish that the courts’ discretion to set aside *ex parte* judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not assist a person who deliberately seeks to obstruct or delay the course of justice.”**

13. Parties prove their cases by bringing evidence before court and must be accorded the opportunity to do so. To that extent parties or their counsel should actively present their cases and present witnesses in a timely manner. This is because the court is enjoined under section 1A of the **Civil Procedure Act** to give effect to the overriding objective which is to facilitate the just, expeditious proportionate and affordable resolution of civil disputes, governed by the Act. Parties are under duty to assist the court further the overriding objective by participating in the processes of the court and by complying with the directions and orders of the court.

14. In the present case, it appears that the litigation had been prolonged by the failure of the defendant to bring witnesses and proceed with the defence. The following is the chronology of the events as the trial proceeded in the lower court. The two suits in the lower court were, by consent of the parties, consolidated for hearing of the defence case on 25/11/2010. The court did not sit on that date. Subsequently on 14/7/2011 the court fixed the case for hearing on 1/9/2011. When the matter came up, **Mr. Mwinyi** holding brief for **Mr. Patel** for the 3<sup>rd</sup> defendant (now appellant) sought an adjournment on the basis that the witness they intended to call was no longer in the employ of the 3<sup>rd</sup> defendant.

15. Parties consented to mention the matter on 13/10/2011. The defendant failed to attend court. On 2/8/2012 both parties appeared before the trial court with **Mr. Omago** holding brief for **AB Patel** for the defendant. Both parties consented to adjourn the matter to 13/9/2012. On the said date (13/9/2012), **Mr. Omago** held brief for **Mr. Simiyu** for the defendant. He sought an adjournment on grounds that the witness was not able to make it to court. **Mr. Juma** for the plaintiff opposed the application for adjournment stating that the plaintiff case had closed on 10/2/2011 and that the defendants had never availed witnesses. The court disallowed the adjournment and directed that the matter would proceed at 11.30am. At that time **Mr. Omago** told the court that they were not able to get hold of the witness. **Mr. Juma** then prayed that the defence case be closed. He stated that they had agreed to file written submissions. The court consequently marked the defence case closed. On 11/10/2012, **Mr. Omago** held brief for **Mr. Patel** for the defendant and **Mr. Juma** for the plaintiff confirmed to the court that they had filed submissions. **Mr. Omago** went ahead to ask the court to give a judgment date which the court indicated as 29/11/2012. Judgment was duly delivered on the said date.

16. I have set out in detail the proceedings in the lower court to demonstrate that the defendant time and again delayed the case. As the record shows the defence case was not arbitrarily closed by the court. The counsel for the defence seemed to have acquiesced to closing their case. He had sought an adjournment on account of the witnesses not being available. It was the same reason the defence had given on no less than four occasions.

17. To grant or not to grant an adjournment is within the discretion of the trial court. In exercising its discretion the court will consider the reasons given for the application; any prejudice to be suffered by the other party and whether costs would suitably compensate. See **H.K Shan & others vs. Osman Allu [1946] 14 EAC 45** cited in **Odunga’s Digest on Civil Case Law and Procedure 3<sup>rd</sup> Edition Volume 1**. It is also now well established that public policy supports expeditious disposal of justice and in line with **Section 1A of the Civil Procedure Act**, courts should be wary to grant an adjournment where the application is intended to delay the hearing of a case. See **Savannah Development Co. Ltd vs. Mercantile Co. Ltd court of appeal Civil Appeal No. 120 of 1992 [UR]**.

18. In the present case the court in my view exercised discretion rightly when it denied a further adjournment. It also exercised discretion rightly when it refused vide its ruling dated 4/7/2013 to set aside the judgment that arose out of the proceedings. It is trite that an appellate court should in principle not interfere with the discretion of the trial court unless such discretion was not exercised judiciously.

19. From the record, it is not true that the 3<sup>rd</sup> defendant was not present during the hearing. It shows that even on the date that the court closed the defence case, the 3<sup>rd</sup> defendant was represented by counsel. On the reasons for non-attendance of court that date by the appellant’s witness, the record shows that other than their counsel telling the court that he was unable “to get hold of the witness,” no proper explanation was given that would have enabled the court exercise discretion in favour of the appellant.

20. The trial court found no merit in the application seeking to set aside the judgment. Circumstances under which a judgement may be set aside are provided in **Order 10 Rule 11**. This rule, in which the application was brought in the trial court, deals with the situation where an interlocutory judgment or judgement entered as a result of default in appearance may be set aside. In **Shabbir Din –vs- Ram Parkash – Anand [1955]22 EACA 48**, cited in **Milimani Civil Case No 144of 2014, 2015 eKLR** Briggs JA said at page 51:-

**“I consider that under order IX Rule 20 the discretion of the court to set aside an *ex-parte* judgment is perfectly free and the only question is whether upon the facts of any particular case, it should be exercised. In particular, mistake or misunderstanding of the appellant’s legal adviser, even though negligent may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of that particular case. It is neither possible nor desirable to indicate in details the manner in which the discretion should be exercised.”**

21. In **Kenya Commercial bank Ltd –V- Nyantange & another 1990 KLR 443** Bosire J, as he then was held:-

**“1. Order IXA rule 10 of the civil procedure Rules donates a discretionary power to the court to set aside or vary all an *ex-parte* judgment entered in default of appearance or defence and any consequential decree or order upon such terms as are just.**

**2. The discretion is a free one and is intended to be exercised to avoid injustice or hardship but not to assist a person guilty of**

**deliberate conduct intended to obstruct of delay the course of justice.”**

22. In the present case, and has already demonstrated by the proceedings, the defendants (now appellants) were represented and participated in the proceedings. The judgment was therefore not *ex parte*. I have nonetheless been guided by the above principles. I have come to the decision that there was no sufficient cause for the trial court to set aside its ruling denying the appellant an adjournment. To set aside the ruling would visit enormous prejudice to the respondent who had already suffered lengthy delay occasioned by the appellant.

23. For the reasons stated above, I find that the appeal has no merit. It is dismissed with costs to the respondents.

Orders accordingly

**Ruling signed at Garsen on 13<sup>th</sup> day of July 2018.**

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**R. LAGAT KORIR**

**JUDGE**

**Ruling delivered dated and Counter signed at Nakuru this 31<sup>st</sup> day of July, 2018.**

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**A.K NDUNGU**

**JUDGE**

**In the presence of**

.....CA

.....for applicant

.....\.....for respondent