REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 45 OF 2008

BETWEEN

MUTUA KALUKU……..……..……..... APPELLANT

AND

PETER NJOROGE CHEGE……..…….....RESPONDENT

(An appeal against the ruling and order of the Chief Magistrates' Court at Machakos (Hon. S.A. Okato, SRM) dated 31 January 2008)

JUDGMENT

Introduction and factual background

1. The appellant, **MUTUA KALUKU**, has appealed against the ruling and order of the Magistrate's Court at Machakos (Hon. Okato SRM) in CMCC No. 572 of 2005. The dispute was with regard to the sale of motor vehicle Reg. No. KAD 614D-Mitsubishi (hereinafter referred to as 'the Motor Vehicle').

2. The facts were relatively clear and largely uncontested. The appellant, entered into an agreement on 12 October 2004 to sell the Motor Vehicle to the Respondent for a consideration of Kshs. 580,000/-. The Respondent was to pay the amount of Kshs. 400,000/= upon execution of the Agreement and the balance of Kshs. 180,000/= within 21 days. The Agreement was signed and the Respondent paid the initial installment. Possession of the motor vehicle was then surrendered to the Respondent. Apparently, the Respondent did not pay the balance of Kshs 180,000/= causing the Appellant to repossess the motor vehicle. The Respondent then launched the suit in the court below and specifically claimed:

> ***i. An order of permanent injunction restraining the Defendant from alienating, disposing, wasting, damaging and or using the motor vehicle KAD 614D Mitsubishi Matatu in such a way as to put the Plaintiff to loss and damage***
>
> ***ii. General damages***
>
> ***iii. Costs and interest***

3. The Respondent was much later to succeed in obtaining an interlocutory order which prohibited the Appellant from accessing or retaining the motor vehicle and which order also directed that the motor vehicle be impounded and retained at the local police station. Both parties indicated to the court at the hearing of the appeal that the motor vehicle is still marooned at the police station.

4. The Respondent's suit was later to be fixed for hearing and the trial proceeded ex parte despite

knowledge of the hearing date on the part of the Appellant's advocates. On 27 February 2007, the trial magistrate proceeded to award the Respondent the amount of Kshs 415,000/= with interest at 30% per annum from 12 October 2004 and costs of the suit. Then on 31 March 2007, the Appellant filed an application seeking to have the judgment of 27 February 2007 reviewed and set aside. Alternatively, the Appellant also sought to have the ex parte proceedings set aside. The application was dismissed by the learned trial magistrate on 31 January 2008, prompting this appeal.

The Appeal

5. The Appellant's seven grounds of appeal were largely to the effect that the learned trial magistrate had erred by allowing the plaint to be amended on the trial date without allowing or affording the Appellant the opportunity to also file an amended defence. The Appellant also grounded his appeal on the fact that the learned trial magistrate had failed to take cognizance of an agreement dated 3 November 2004 which the appellant had annexed to his affidavit in support of the application for review. A third ground of appeal was to the effect there was an error apparent on the face of the record as the learned trial magistrate had failed to deal with the fate of the motor vehicle which had been impounded.

6. Additionally, the appeal was also premised on the ground that the learned trial magistrate had failed to appreciate that an advocate's mistake could not be visited on a litigant. Finally, the grounds contended that the learned trial magistrate ignored facts and law contained in the Appellant's submissions as well as evidence which had been availed to the court. The Appellant stated that there were good reasons for review.

The Arguments

7. The appeal was argued through the parties written submissions filed on 2 May 2017 by the Appellant and on 11 May 2017 by the Respondent. Mrs. Nzei who urged the Appellant's case also highlighted the submission before me on 20 June 2017 as did the *pro se* Respondent.

8. Mrs. Nzei re-stated the grounds for review as outlined under Order 45 Rule 1 of the Civil Procedure Rules. According to Mrs. Nzei, there was an error apparent on the face of the record when the trial court failed to revisit the status of the motor vehicle which had been impounded through a court order. In this respects, counsel faulted the trial court for not stating what was to happen to the motor vehicle. Counsel also submitted that the court below erred when it allowed an amendment on the date of trial which amends were substantial and had prejudiced the Appellant. The amendments in question related to the Respondent amending his prayers to include a specific claim of Kshs. 415,000/= and also interest at the rate of 30% per annum. Counsel concluded his submissions by stating that there were good reasons to review and set aside the judgment and trial proceedings as the Respondent had kept crucial evidence away from the court. Counsel also submitted that there was error on the face of the record when the trial court failed to state or determine the fate of the impounded motor vehicle. There was no justice to the Appellant, added counsel.

9. The Respondent supported the trial court's decision not to review the judgment or set it aside. According to the Respondent, the history of the case and the facts before the court dictated that the judgment be upheld as the Appellant instead of suing for his balance of Kshs 180,000/= had unilaterally repossessed the motor vehicle leading the Respondent to suffer loss and damage. The Appellant, according to the Respondent, had repossessed and used the motor vehicle for years on end as the Respondent suffered.

Determination

10. The trial magistrate heard the parties on the application for review/ setting aside and dismissed it on 31 January 2008.

11. In his ruling, the learned trial magistrate dismissed the application for review on the basis that the applicant had failed to annex a copy of the decree or judgment that he sought to review. The learned trial

magistrate in the absence of the decree or judgment did not find it mete to venture into the merits of the review.

12. With regard to the alternative prayer to set aside the judgment, the learned trial magistrate held that the applicant's previous advocates had failed to show that the mistake leading to non attendance had originated from their offices. The court then held that the applicant was simply indolent and kept to himself his evidence which could have benefited the court.

13. It is to be noted that this is a first appeal. Ordinarily, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated Motor Boat Co. & others [1968] E.A. 123** where it was stated as follows :

> ***"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed sholan (1955), 22 E.A.C.A. 270)".***

14. I must however take note of the fact that the appeal is not as against the judgment of the trial court dated and delivered on 27 February 2007 but rather against the ruling of the trial court delivered post the judgment on 31 January 2008 and which ruling emanated from an application for review and or setting aside of the judgment. The ruling relates to exercise of discretion.

15. The principles of setting aside an ex parte judgment are relatively clear. Where a party proceeds with a trial on the trial date ex parte and in the absence of the other party who was aware of the trial date the court has an unfettered discretion to set aside any judgment that may be entered at the end of the trial. The court does so upon reason being advanced to explain the absence. The court aims at doing justice and thus where there is good reason the court will set aside the judgment and may impose conditions: see ***Kimani v McConnel [1966] EA 547.***

16. This court will not interfere with the exercise of the discretion of the magistrate unless it is satisfied that the magistrate in exercising his discretion has misdirected himself in some manner and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the magistrate was clearly wrong in the exercise of his discretion and that as a result there has been injustice: see ***Mbogo v Shah [1968] EA 93.***

17. In the instant case, the Appellant sought to have the judgment set aside on the basis that the Appellant was not aware of the hearing date as his lawyer had failed to inform him of the hearing date hence his unavailability on the day of the hearing. Apparently, even the Appellant's lawyer also did not show up on the hearing date.

18. It is an acceptable principle of the law that a lawyer's error should not be fetched upon his innocent client where the client is evidently prejudiced: see ***Philip Chemwolo & Another v Augustine Kubende 1982-88 KAR 103***. Where the error is such that can be excused and is not blatant or was intended to simply derail the process of administration of justice the client will benefit from a reprieve. The court must however be satisfied that there was indeed an error on the part of counsel.

19. In the instant case, all that was placed before the learned magistrate was a paragraph in the supporting affidavit of the Appellant that his lawyer never informed him of the hearing date. The Appellant then expected the learned magistrate to simply accept such deposition without more.

20. I hold the view that the evidence was too little, too weak and too distant from the main evidentiary

point as to sway the court to exercise its discretion in favour of the Appellant. It would have been better to avail more in the form of what really happened or attempts at getting the previous counsel to state what really happened. The Appellant did not do so or attempt to do so and I view it that the learned trial magistrate appropriately declined to exercise his discretion to set aside the proceedings as well as judgment.

21. The Appellant also sought in the alternative that the judgment be reviewed.

22. In an application for review brought pursuant to s. 80 of the Civil Procedure act and Order 45 of the Civil Procedure Rules the grounds which ought to be established are definitive. An applicant must establish that there has been a 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 made. The application for review may also be pegged on the ground that there has been a mistake or error apparent on the face of the record. Finally, an applicant may move for a review on the basis of some "other sufficient reason". This generic ground has been held to be analogous to the first two grounds: see **Kuria *v* Shah [1990] KLR 316.** Additionally, the applicant must exhibit some alacrity.

23. There is no doubt that the Appellant in the instant case moved the court expeditiously. He filed his application within a month and there was in my view and in the circumstance of the case no delay which would have prejudiced either party. The court was thus properly seized.

24. The court adopted a short cut approach however when without venturing into the merits of the application dismissed the application on the basis that the decree sought to be reviewed had not been extracted and annexed to the application. The merits of the application were not considered.

25. The trial court seems to have unnecessarily fettered its discretion in the circumstance. It may be appropriate to extract and attach the order or decree sought to be reviewed. It's absence in my view should however not fetter the court's authority and power to review its decision. In any event Order 45 of the Civil Procedure Rules has never made it a requirement : see ***Peter Kirika Githaiga & Another v Betty Rashid, CA No. 210 of 2014***, where the Court of appeal emphasized the fact that the law does not require attachment of a decree or order to an application for review. Such technicalities should never stall the wheels of justice. The court should render substantive justice and endeavor to find out whether the applicant has established the grounds for review as the court's aim should be to render justice.

26. The trial magistrate in my view erred when he simply dismissed the application for review on the basis that the decree sought to be reviewed had not been extracted and annexed to the application for review.

27. Ms. Nzei submitted that there was good reason to review the judgment of 27 February 2007. Counsel submitted that the application for review had not been pegged on the discovery of new and important matter or evidence but on the ground that there had been a mistake or error apparent on the face of the record or that there was other sufficient reason to warrant the review.

28. With regard to error apparent on the face of the record, counsel pointed to the failure by the court to decide what was to happen to the impounded motor vehicle and also the amendments which had been occasioned by the Respondent with the court's permission and in the absence of the Appellant. With regard to sufficient reason for review, counsel pointed to the fact that the Respondent had concealed a subsequent Agreement between the parties from the court. The latter agreement allowed the Appellant to repossess the motor vehicle. Counsel also submitted that the impugned amendments also fell with the 'other sufficient reasons' ground for review.

29. I do not view it that the court's failure to take into account the evidence which was not produced before it at the time of trial constitutes a mistake or error apparent on the face of the record. The Appellant was basically, by drawing the court's attention to the second agreement, inviting the court to reconsider the evidence but without adequately explaining why the evidence had not been availed to the court in the first place. The Respondent was not under any duty to argue the Appellant's case in the sort

of adversarial system that we operate under. The Respondent was only under a duty to prove his case and his claim which he did, in a way.

30. The Respondent's case had been that the Appellant needed to refund him the amount of Kshs. 415,000/- as the amount of failed consideration in addition to interest at 30% per annum. This claim is well pleaded at paragraph 8 of the Plaint. Thus when the Respondent sought to include the amount as part of the prayers or relief, I do not find that the learned trial magistrate could have been faulted for not then adjourning the matter to allow the Appellant to respond.

31. The purpose of pleadings is to place litigants on the alert. It is to ensure that a party is aware of the case its faced with and prepares appropriately. The purpose of amendments of pleadings on the other hand is to bring forth all matters in contention and ensure that with finality the issues are determined. Amendments may be allowed at any stage of the proceedings but not when they significantly change the core of the claim. The amendments which the trial court allowed did not in my view change the substratum of the claim. Even if the appellant had been present, the amendments would not have been a surprise and neither would the appellant have sought to reply to the same. There was no prejudice occasioned by the amendments only.

32. It brings me to the claim itself. The claim was for Kshs 415, 000/= together with interest at 30% per annum. The Respondent was able to prove the amount of Kshs 415,000/= which had never been disputed by the Appellant as an amount which had been paid to the Appellant. The Respondent however was only able to testify that interest was being levied at the rate of 17%. There was no documentary evidence to prove this rate which was itself above the court rates.

33. In these respects, I view it that there was sufficient reason established when the Appellant laments that the rate amended and awarded was not justified. The evidence itself did not support the award of 30% interest which was neither contractual nor proven by the Respondent.

34. I tend to agree with the Appellant that when he raised the issue of the rate of interest, the trial court was duty bound to relook at the same rather than casually dismiss the application. I am satisfied that had the trial magistrate ventured into the merits, he would have reviewed the judgment on the basis that the interest rate awarded was actually contrary to the evidence. This was not a matter of discretion the moment the Respondent sought to claim interest at the rate of 30% per annum with the court's leave and in the absence of the Appellant. The Respondent needed to have done more and in my view, where a judgment is entered in one party's absence, there is sufficient reason when one party points to any discrepancy between the claim made under sworn testimony and the judgment.

35. I also agree with the Appellant when the Appellant states that there was error apparent on the face of the record as the trial magistrate did not fully deal with the subject matter of the dispute which was the motor vehicle. The Respondents core claim was for an injunction to restrain the Appellant from dealing with or alienating the motor vehicle. The trial court ended up granting the Respondent damages but said nothing on the disputes motor vehicle. There was need to bring finality to the litigation by also determining what was to happen to the motor vehicle. As it were everything was left in limbo by the trial court and when the Appellant moved the court for review and drew the courts attention to this omission, there was need for the court to re-open the judgment as appropriate. In failing to do so, the trial court erred.

36. I am satisfied that there was reason to review the judgment which the trial court somehow declined to take into consideration. The judgment of the court of 27 February 2007 is thus reviewed to the extent of the award in interest and also to the extent that it said nothing on the subject matter being the motor vehicle. The award of special damages of Kshs. 415,000/= will however remain undisturbed.

37. In the result, I set aside the award of interest at the rate of 30% and in its stead award interest at the court rates payable from the date of judgment i.e 27 February 2007. The subject motor vehicle being motor vehicle registration no KAD 614D or whatever still remains of the same be released forthwith to the Appellant.

38. Both parties have in one way or the other succeeded in this appeal. Consequently, each party shall bear its own costs of the appeal.

Dated, signed and delivered at Machakos this 28th day of June 2017

J.L.ONGUTO

JUDGE