



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 421 OF 2013

SOCFINAF COMPANY LIMITED(Githumuini Estate).....APPELLANT

VERSUS

JOSEPH YASULWE MAKALAMA.....1ST RESPONDENT

KENYATTA UNIVERSITY.....2ND RESPONDENT

(Being an appeal from the ruling delivered on 29th July, 2013 by Hon. D.M. Ndungi Resident Magistrate Gatundu Law Courts in SRMCC No.216 of 2010)

JUDGMENT

1. The Appellant, Socfinaf Company Ltd (Githumuini Estate) was the 1st Defendant in the suit filed by the 1st Respondent, Joseph Yasulwe Makalama who was the Plaintiff in the lower court. The 2nd Respondent, Kenyatta University was the 2nd Defendant.
2. The 1st Respondent had sued the Appellant (Socfinaf) as the owner of the motor vehicle registration No. KAH 188Y make Nissan Lorry (herein after lorry). The 2nd Respondent, Kenyatta University, (hereinafter the university) was sued as the owner of the bus registration No. KBB 584S (hereinafter bus). The 1st Respondent who was a passenger in the lorry was injured in an accident on 12th May, 2010 when the two aforesated motor vehicles collided. The 1st Respondent attributed the accident to the negligent manner that the two motor vehicles were being driven at the time of the accident.
3. In the statement of defence, the Appellant (Socfinaf) denied any negligence and blamed the accident on the university bus. On the other hand the university denied any negligence and blamed the accident on the 1st Respondent for being an unlawful passenger in the lorry which was meant for transportation of goods and thereby exposing himself to danger.
4. During the hearing of the case before the lower court the parties agreed that the suit do proceed as a test suit on the question of liability in respect of all the other suits arising from the same accident.
5. The 1st Respondent's side called two witnesses. Their evidence blamed the bus for losing control while overtaking and veering into the pathway of the lorry.
6. Socfinaf called two witnesses who in their evidence blamed the university bus for losing control while overtaking and swerving unto the lorry's pathway.

7. On their part the university closed their case without calling any witnesses after their counsels application for adjournment to enable him trace their witnesses was rejected by the trial court. The case was closed and parties given a date to file their submissions.

8. In the trial court's judgement, the university was found 100% liable for the accident.

9. The university subsequently filed the application dated 4th April, 2013 seeking orders, *inter alia*, for the review and setting aside of the judgment in the test suit on the grounds that the University was prejudiced by being condemned to liability on 100% basis after the case proceeded without the evidence of their witnesses.

10. The application dated 4th April, 2013 was allowed on 29th March, 2013. Orders were made that the case be heard afresh and that the other related cases be heard separately. That is what triggered the appeal herein.

11. In the memorandum of appeal dated 31st July, 2013, the grounds of appeal are as follows.

“1. That the learned Resident Magistrate erred in both fact and law in that in holding that the Application dated 4th April, 2013 which sought to review a Decree was merited inspite the same having not met the threshold set out under Order 45 of the Civil Procedure Rules, 2010.

2. That the learned Resident Magistrate erred in both fact and law in basing his decision on section 3A of the Civil Procedure Act and Article 159(2)(d) of the Constitution while determination an Application for Review when the law required of him to be otherwise guided.

3. That the learned Resident Magistrate erred in law in exercising an appellate jurisdiction over a decision of a fellow Magistrate when he was not a judge of the High Court.

4. That the learned Resident Magistrate erred in elevating an application for Review to the status of an Appeal against a decision refusing to adjourn a matter when in fact there was no such application before him.

5. That the learned Resident Magistrate erred in both law and fact in failing to be guided by decisions cited by the Appellants which were binding on him.

6. That the learned Resident Magistrate erred in failing to dismiss the 1st Respondent's application dated 4th April, 2013.

7. Other grounds and reasons to be adduced at the hearing hereof.”

12. The prayers sought were as follows:

“(a) The Ruling and Order against it by the Honourable Resident Magistrate D.M. Ndungi made on 29th July, 2013 be wholly overturned.

(b) The 1st Respondent's Application dated 4th April, 2013 be dismissed with costs.

(c) The further and other orders be made as are just in the circumstances of this case.”

13. During the hearing of the appeal the parties opted to proceed by way of written submissions. I have considered the said submissions.

14. This being a first appeal, 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)”.

15. The application (amended) dated 4th April, 2013 was brought under Order 45 rule 1 subrule 1(a), (b), Order 45 rule 2 Order, 38 Rule 1 of the Civil procedure Rules 2010, Order 51 Rule 1 and Sections 1A, 1B and 3A of the Civil Procedure Act (Cap 21 of the laws of Kenya). The application sought the following orders:

“(1) That this Honourable Court be pleased to order that Gatundu SRMCC 216 of 2010, Joseph Y Makalama vs socfinaf Co. Ltd & Another has failed to be a real trial of the issues in Gatundu SRMCC 217,218,220 & 221 of 2010.

(2) That is honourable court be pleased to review and set-aside the judgment pronounced by the honourable D.G.Karani on 24th October 2012.

(3) That this Honourable Court be pleased to set aside its judgment and all consequential orders in this matter.

(4) That this Honourable Court be pleased to set aside its judgment and all consequential orders in Gatundu SRMCC 217,218,220 & 221 of 2010.

(5) That this matter be tried on its own merit.

(6) That Gatundu SRMCC 217,218,220 & 221 of 2010 each be tried on its own merit.

(7) That the costs of this Application be provided for.”

16. The application was based on the grounds stated in the body of the Application and was supported by the affidavit and further affidavit sworn by professor Paul Wainaina, the Deputy Vice Chancellor in charge of Administration, Kenyatta University.

17. Essentially, the Applicant’s complaint is that it was denied the opportunity to call its witnesses. It was stated that the witnesses in question had left employment and adjournment was sought to secure their attendance but the application was rejected. That the case herein being a test suit the judgment on liability herein is binding on all the other related suits. That the suit herein has therefore failed to be a real trial of the issues and ought to be set aside.

18. The application was opposed. The Appellant (Socfinaf) filed the Preliminary Objection dated 15th April, 2013 which raised the following grounds:

“(i) The 2nd Defendant having participated in the trial of the test suit and having filed submission in respect thereof is estopped from seeking the reliefs sought in the said application;

(ii) The 2nd Defendant is seeking to have this Honorable Court to seek as an appellate Court on a decision respecting an application for an adjournment.

(iii) This Honorable Court having delivered a judgment in the test suit is *functus officio*.”

19. The 1st Respondent (Joseph Yasulwe Makalama) opposed the application. According to the replying affidavit sworn on 25th February, 2013, the case proceeded as a test suit. That the university was granted the last adjournment but failed to avail it's witnesses. That judgment was delivered and the University held 100% liable for the accident. That the trial court was now *functus officio* in respect of the issue of liability.

20. The application the subject of this appeal was brought under Order 45 rule 1. (1)(a)(b) & 2, Order 38 rule 1 Civil Procedure Rules Order 51, Section's 1A,1B & 3A of Civil Procedure Act. Section 1A & 1B provide for the overriding objective of the Civil Procedure Act while Order 38 Civil Procedure Rules provides for selection of test suits.

21. The crux of the application was whether the application the subject of the appeal met the threshold set out under Order 45 Civil Procedure Rules 2010 Order 45 Civil Procedure Rules which provides as follows:

“1. (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the 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 the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

22. It is evident that the application was not based on the grounds of the discovery of new evidence or error apparent on the record. The application was based on the ground of **“any other sufficient reason”**. The said reason was stated in the application as the failure by the trial magistrate to allow an application for adjournment to allow the university to secure the attendance of it's witnesses. Was this a sufficient reason as provided for under Order 45 Civil Procedure Rules? The refusal to allow adjournment was an exercise of the trial court's discretion. The university if dissatisfied with the said order ought to have lodged an appeal against the judgment of the trial court. Purporting to review the order of adjournment amounted to sitting on appeal on a judgment of the same court.

23. As stated by the court of appeal in the case of **National Bank of Kenya Ltd v Ndungu Njau [1997] eKLR:**

“..... the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law.”

24. The judgment of the lower court was delivered on 30th March, 2012. The application the subject of this appeal was delivered on 6th December, 2012. That was a period of slightly over eight (8) months.

No reason was given for the delay in filing the application. The period eight months was unreasonable delay.

25. The application having failed to satisfy the grounds for review Section 1A & 1B Civil Procedure Act and Article 159 (2) of the Constitution could not come to the university's rescue. Although the test suit failed to determine the real issues as the university did not manage to call its witnesses, the university did not lodge an appeal.

26. With the foregoing, my finding is that the appeal has merits and is allowed. The ruling dated 29th July, 2013 is hereby set aside and substituted with one dismissing the application dated 4th April, 2013. Costs of the appeal to the Appellant, Socfinaf Company Ltd. (Githumuini Estate) and the 1st Respondent, Joseph Yasulwe Makalama.

Dated, signed and delivered at Nairobi this 25th day of July, 2017

B. THURANIRA JADEN

JUDGE