



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 168 OF 2015

AL-GINZA AUTOMOBILES LIMITED.....APPELLANT

- V E R S U S -

SHARON CHERUTO KIRMMOYORESPONDENT

(An appeal against the ruling of the Hon. T. S. Nchoe (Mr) Senior Resident Magistrate delivered on the 15th day of April, 2015 in CMCC No. 2688 of 2004 at Milimani Commercial Courts)

JUDGEMENT

1) Sharon Cheruto Kirmoyo, the respondent herein filed a compensatory suit in the Chief Magistrate's Court, Nairobi against Maina Kimani and Al-ginza Automobiles Ltd, the appellant herein, for the injuries Thomas Kiptoo Kirmoyyo, deceased, suffered when he was knocked down by the appellant's motor vehicle registration no. KAN 838J along University Way Nairobi, on 6th December 2002. The appellant filed a defence to deny the respondent's claim. It would appear from the proceedings that the suit proceeded for hearing ex parte when the appellant and its co-defendant failed to attend court. The respondent was eventually given judgment. When the respondent initiated execution proceedings, the appellant filed the application dated 12.11.2014 in which it sought to have the aforesaid judgment set aside. The application was heard and dismissed on 15.4.15. Being dissatisfied with the dismissal order, the appellant preferred this appeal.

2) On appeal, the appellant put forward the following ground in its memorandum of appeal:

1. THAT the learned magistrate erred in law and in fact in failing to set aside the judgment entered against the appellant delivered on the 29th April 2010.

2. THAT the learned magistrate erred in law and in fact by failing to give reasons for decision as required by the law in dismissing the appellant's application dated 12th November 2014 and filed in court on 13th November 2014.

3. THAT the learned magistrate erred in law and in fact by failing to make a finding that the judgment made against the appellant who was the 2nd defendant in the lower court be set aside and the appellant be given a chance to ventilate its case in respect of the defence which was on record and the matter be heard and determined on merits.

4. THAT the learned magistrate erred in law and misdirected himself contrary to the letter and spirit of the constitution of the Republic of Kenya by failing to find that the appellant had raised triable issues in its defence in which the proper justice of the case was to give the appellant an opportunity to give the side of its story to enable the court to make a fair and considered final

judgment.

5. THAT the learned magistrate erred in law and in fact by making a finding of issues on technicalities instead of allowing the case to be ventilated in a full hearing.

6. THAT the learned magistrate erred in law and in fact in simply stating in his ruling dated 15th April 2015 that the judgment on record was proper and regular and the 2nd defendant/appellant was aware of the whole time of proceedings herein and proceeded to dismiss the appellant's application without clearly canvassing reasons for the decision of such dismissal.

7. THAT the learned magistrate erred in law and in fact by failing to distinguish between a mistake on the part of counsel for the appellant at the time and subsequently allowed the mistakes of the said counsel to be visited upon the appellant by dismissing the appellant's application without the appellant being heard which has occasioned a miscarriage of justice.

8. THAT the learned magistrate erred in law and in fact in not appreciating that the appellant clearly stated in his pleadings especially the further affidavit that it did not have notice of the hearing of the case when it came up for hearing on 18th January 2010 which culminated into the judgment of 29th April 2010 and was never served with a notice of entry of judgment as required by law and in any event execution was levied after 4 years after delivery of the said judgment on 10th November 2014 without any notice whatsoever to the appellant.

9. THAT the learned magistrate erred in law and in fact in not considering the 2nd defendant/appellant herein has a good defence and had pleaded that on 14th June 2001 the 2nd defendant sold motor vehicle registration no. KAN 838J the subject matter of the suit herein to one Sundip Shah well before the accident in which the deceased was involved on 6th December 2002 and by the time the said accident occurred the appellant had no custody or control of the motor vehicle at all.

10. THAT the learned magistrate erred in law and in fact in not appreciating that the plaintiff/deceased filed suit on 17th March 2004 being a claim for personal injuries but died on 30th June 2005 and the cause of the death was tuberculosis 3 years after the accident on 6th December 2002 and there was no explanation why the respondent Sharon Cheruto Kirmmoyyo the administrator of the deceased's estate gave evidence in court on 18th January 2010 relating to personal injuries for a person who had died and the court proceeded to make judgment on the evidence of the said administratrix of the estate of the deceased and the said court assessed damages for personal injuries which led to a miscarriage of justice.

11. THAT the learned magistrate erred in law and in fact in not making a finding that in the defence filed by the appellant which was annexure MAA2 the appellant had already raised an issue at paragraph 3 of the defence that it is a motor vehicle dealer and does not operate passenger services and further stated that the said motor vehicle was sold to one Sandeep pravinchandra Shah of P. O. Box 1034 Nyahururu who was to be made a party to the suit.

12. THAT the learned magistrate erred in law and in fact in failing to give an opportunity to the appellant in respect to its right to be heard in a court of law and proceeded to condemn the appellant unheard by dismissing its application to set aside judgment entered on 29th April 2010.

13. THAT the learned magistrate erred in law and in fact in not appreciating the appellant had fulfilled the condition required in law for stay of execution and setting aside judgment as it had deposited the whole of the decretal sum of kshs.1,336,650/= in court on 21st November 2014 which was barely one week after filing the application to set aside judgment in court on 13th November 2014.

3) When the appeal came up for hearing, learned counsels recorded a consent order to have the same disposed of by written submissions. I have re-evaluated the arguments made before the trial court. I have too considered the rival submissions. In a brief ruling delivered on 15.4.2015, Hon. T. S. Nchoe learned Resident Magistrate indicated that having considered the material placed before him plus the written submissions he was satisfied that the judgment was regular and that the appellant's advocate was aware of the proceedings that gave rise to the judgement now being sought to be impugned on appeal. Consequently, he proceeded to dismiss the appellant's application.

4) Though the appellant put forward a total of 14 grounds of appeal, in my estimation I am of the view that this appeal can be determined on one main ground, which is whether or not the learned Resident Magistrate properly exercised his discretion in dismissing the application. It is the submission of the appellant that the learned Resident Magistrate did not give due attention to the grounds and arguments put forward by the appellant in support of the application dated 12.3.2004. It is pointed out that the appellant was never served with a hearing notice and that the one allegedly served was given to a totally different firm of advocates not representing the appellant. The appellant further pointed out that the learned Resident Magistrate visited the mistakes of the advocate upon it instead of excusing the client. The appellant therefore beseeched this court to give it an opportunity to be heard.

5) The respondent on the other hand strenuously opposed the appellant's appeal arguing that the same lacks merit. It is argued that the appellant was aware of the hearing date hence the trial magistrate rightly exercised its discretion to dismiss the appellant's application. A serious question which was not properly determined relates to the question as to whether or not the appellant's advocate was served with a hearing notice. It is not disputed that a hearing notice addressed to the firm of M/s Oruko Imende & Kiriko Advocates was received by D. N. Oruko & Co. Advocates as shown by the stamp on the face of the hearing notice. It is also not disputed that the firm of D. N. Oruko & Co. Advocates did not file any document to show that it represented the appellant.

6) The respondent's answer to this query is that it was admitted by the appellant that a Mr. Oruko was its advocate. I think this does not clear the doubt and confusion created in this saga. The issue which was left unanswered is whether or not the firm of D. N. Oruko & Co. Advocates was one and the same as M/s Oruko, Imende & Kiriko Advocates. I am convinced that there was doubt as to whether the correct advocate or firm of advocates who appeared for the appellant was served with a hearing notice. The learned resident Magistrate did not give serious attention to this issue thus prejudicing the appellant's application. The proceedings of the trial court for 18.1.2010 shows that the case proceeded for hearing exparte yet there was no affidavit of service presented to the trial court as evidence of service of the hearing notice upon the appellant and or its advocate. For this reason alone I am satisfied that the appellant's application dated 12.11.2014 should not have been dismissed.

7) In the end, I allow the appeal. Consequently, the order dismissing the appellant application made on 15.4.2015 is set aside and is substituted with an order allowing the motion in terms of prayer 4. Costs of the appeal and the motion to await the outcome of the suit. The suit to be heard on priority basis by another magistrate of competent jurisdiction other than Hon. Nchoe. For thr avoidance of doubt, the suit to be heard denovo within a period of 120 days from the date of this judgment.

Dated, Signed and Delivered in open court this 22nd day of September, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent