



IN THE COURT OF APPEAL

AT NYERI

SITTING IN NAKURU

(CORAM: NAMBUYE, OKWENGU & KIAGE, JJ.A)

CIVIL APPEAL NO. 75 OF 2010

BETWEEN

CHARLES MASESE.....1ST APPELLANT

DAVID GITAU KAMURA.....2ND APPELLANT

AND

JULIUS MAINA MWANGI.....RESPONDENT

(Being an appeal from the ruling of the High Court at Nakuru (Maraga, J) delivered on 1st April, 2009

In

H.C.C.C. No. 635 of 1993)

JUDGMENT OF THE COURT

The respondent **JULIUS MWANGI** moved to the High Court of Kenya at Nakuru and filed a suit against the appellants **CHARLES MASESE** and **DAVID GITAU KAMURA**. In summary, the respondent averred that on the 26.8.1993 while he was lawfully and carefully driving his motor vehicle registration number KLQ 662 along the Nakuru-Gilgil Road, the 2nd appellant while in the course of his employment with the 1st appellant so carelessly and negligently drove motor vehicle No. KTS 212 that it violently collided with the respondents' motor vehicle aforesaid causing it to roll and in the result causing bodily injuries to the respondent and material damage to his motor vehicle. The respondent set out particulars of negligence that were attributed to the 2nd appellant, particulars of the bodily injuries sustained by him as well as particulars of material damage to his motor vehicle. The respondent sought from the appellants jointly and severally special damages, general damages, interest, costs and any other relief that the court may deem fit to grant.

The appellants resisted the claim vide the 2nd appellant's defence dated the 2nd day of November 1993 and an undated defence by the 1st appellant filed on a date which is also not legible from the court stamp. Thereafter the matter was set down for hearing. On the date fixed for hearing only the respondent and

his advocate attended court. The trial Judge **Rimita, J.** being satisfied that the appellants had due notice of the hearing date allowed the respondent to proceed ex parte. In a judgment dated 4.7.1995, the learned trial judge found the 2nd appellant solely to blame for the accident and the 1st appellant vicariously liable for it. In consequence thereof the learned Judge allowed Kshs 160,000/= as general damages for the loss of the respondents' motor vehicle; Kshs.120,000/= for bodily injuries suffered by the respondent and another Kshs. 4,600/= for unspecified general damages that we suspect may have been meant for the special damages claim. The total aggregate sum awarded came to Kshs. 284,600/= together with costs and interest.

The respondent then set in motion the execution process. Of concern to us in this appeal are the proceedings relating to a preliminary objection the appellant had raised against the execution process. It was the appellants arguments in the said proceedings that the execution process against them was stale having being pursued after the lapse of the twelve (12) years statutory limitation set by **section 4(4)** of the **Statute of Limitation Act**; Cap 22 Laws of Kenya; while the respondent's argument was that the execution process was alive and kicking having been given a new lease of life by the appellants' conduct of acknowledging the debt through part payment from which date time started running afresh and had not expired.

Ruling on the preliminary objection, **J. Onyiego PM** on 18.11.2008 pronounced himself inter alia thus:-

“There is no dispute that the judgment debtor owes the D/H the sum quoted above. In fact part payment was made on 10.2.2001 by cheque No. 000138 for Kshs.10,000/= and a further Kshs.10,000/= on 10.3.2001 vide cheque No. 000139. Under Section 23(3) of Cap 22 time started accruing after part payment was made on 10.3.2001. Sometime 12 years have not elapsed hence execution herein is well within time and section 4 (4) of the limitation of actions does not apply...”

On that reasoning the learned Deputy Registrar dismissed the appellant's preliminary objection. The appellants were aggrieved by that decision. They filed a notice of motion dated the 23rd day of March, 2009. Of concern to us in this appeal are prayers 3 and 4 thereof. These read:-

“3 That this Honourable Court be pleased to order or declare that the judgment dated 4th July 1995 is incapable of being executed and that the plaintiff cannot and is estopped from executing the said decree

4. That the said judgment dated 4th July 1995 entered against the defendant/applicant and any other consequential orders and decree, be set aside”

The application was grounded on the grounds on its body and the supporting affidavit. It was opposed by the respondent's replying affidavit which had been previously filed in opposition to the appellant's application dated the 20.11.2008.

Maraga, J (as he then was) by a ruling dated the 1st day of April 2009, dismissed the application. The appellant being aggrieved by that decision is now before us on a first appeal. He has set forth seven (7) grounds of appeal.

In urging us to allow the appeal, Mr. Kanyi, learned counsel for the appellants compressed the seven grounds of appeal into three. These may be summarized that the learned Judge erred both in law and fact:

(1) when he failed to find that the appellants had demonstrated sufficient grounds to warrant an order for setting aside the exparte judgment;

(2) When he failed to uphold the appellant's arguments that there was no valid acknowledgement of debt; and

(3) When he failed to appreciate that there was no valid decree capable of execution.

In support of ground 1, Mr. Kanyi urged that the learned Judge ought to have set aside the *exparte* judgment because; the first appellant had denied ownership of motor vehicle registration number KTS 212 (*sic*) (KJS 212) and put the respondent to strict proof; the particulars of vicarious liability were not pleaded; and the learned Judge never gave reasons as to why he pinned vicarious liability on to the 1st appellant.

With regard to ground 2, Mr. Kanyi argued that they have no quarrel with the learned Judge's finding that a lapsed decree can be revived for purposes of execution through an acknowledgement of debt. What they have an issue with is the learned judge's finding that the alleged acknowledgement of debt was well founded on the alleged payment of the dishonored cheques by Imali Gembe. In Mr. Kanyi's view, the learned judge's finding cannot hold because he failed to appreciate that Imali Gembe featured nowhere in the proceedings as having been instructed by the appellants to act for them as no letter of such instructions was ever exhibited by the respondent to prove their assertion.

Secondly, the appellant's letter to the Advocates Complaints Commission that Imali Gembe had no instructions to bind them in any proceedings elicited no response from Imali Gembe or the Complaints Commission thereby confirming that the appellant's complaint to the said commission was well founded. Thirdly, no supporting affidavit was sourced by the respondent from the said Imali Gembe to support the respondent's assertion that Imali Gembe had authority to so act on behalf of the appellants. Fourthly, there was no proof that the dishonoured cheques were replaced by cash. In Mr. Kanyi's further view, had the learned Judge properly appreciated the content of the record before him, he would have arrived at the conclusion that there was no proper acknowledgement of the debt, in order to breathe life into a lifeless decree for purposes of execution.

Turning to ground three (3) Mr. Kanyi continued to argue that such acknowledgement of debt, if any, notwithstanding, the learned Judge's finding still stand faulted as there was no valid decree capable of execution. In his view, the only decree relied upon by the respondents for execution was the one dated 22.08.2007, long after the purported part payment of the debt through the dishonoured cheques as well as the subsequent alleged replacement of the dishonoured cheques by Imali Gembe.

To buttress his arguments, Mr. Kanyi cited the case of **NIMROD N. NCHOGU & ANOTHER versus MS. CHODHA & SONS LTD [1995] eKLR** for the holding that where a defendant has denied in his written statement of defence that he was vicariously liable as the motor vehicle alleged to have collided with the plaintiff's motor vehicle did not belong to him, a refusal to give such a defendant a chance to press his defence in this regard even on terms may lead to a failure of justice which no court of justice in this land should countenance. The case of **Bouchard International Services Ltd vs M'Mwereria [1987] KLR 193** was cited for the holding that to pin liability on the judgment debtor for the damages resulting from a collision between two or more motor vehicles, the sole issue to prove was who had been driving the vehicle alleged to have been negligently driven and what the relationship of that person was with the vehicle's owner.

Lastly, Mr. Kanyi relied on the case of **Abdi S. Rahaman Shire versus Thabiti Finance Co. Limited NRBI Court of Appeal No. 76 of 2000 (unreported)** for the holding that where a letter which forms a purported acknowledgement of debt is a mere inquiry on the details for the alleged debt, it is not an acknowledgement that a specific sum of money is owing.

In response, learned counsel Mrs. Muthoni Gathecha for the respondent urged us to dismiss the appeal on the grounds, first, that the learned Judge's finding that the appellant's acknowledgment of debt was through the dishonoured cheques subsequently replaced with cash payments through Imali Gembe was well founded as it is borne out by the record which shows that Imali Gembe appeared severally in court on behalf of the appellants. She could only have done so after receipt of full instructions from the appellants to so act on their behalf. This position was further followed by the correspondence exchanged between the firm of Imali Gembe and the respondent's advocates then on record for him. Secondly, that the learned Judge rightly found that Section 23(3) in part III of the Limitation of Actions Act (*supra*) was

applicable to the determination of the issues in controversy before him, a position admitted by the appellants' counsel.

Thirdly, the appellant's conduct of applying to set aside an *ex parte* judgment was sufficient proof that the judgment sought to be executed was alive as the appellant could not have applied to set aside a none existent judgment. Fourthly, vicarious liability had properly been established as the learned trial Judge had before him the proceedings and findings of a traffic case in which the 2nd appellant had been charged with traffic offences arising from the same collision.

To buttress her arguments learned counsel cited **Kantaria Investments Limited versus the Attorney General [2011] eKLR** for the proposition that a preliminary objection on a point of law cannot lie where the facts relied upon by either side are in dispute; and the case of **Afro Freight Foundation Ltd versus African Liner Agencies [2029] eKLR** for the finding that **section 23(3)** of the **Limitation of Actions Act** (*supra*) applies to revive a cause of action where there is a proven acknowledgement and time would start running afresh from the date of such acknowledgement.

This is a first appeal. Our mandate is as set out in rule 29(1) of the Rules of the Court. It provides that we have power:-

(a) to reappraise the evidence and draw inference of fact.”

The appeal is against the learned Judge's refusal to exercise his discretion in favour of the appellants for the reliefs then sought. As a Court of Appeal, we will not interfere with the exercise of discretion of a judge acting within his jurisdiction clearly satisfied that he was wrong. See Bouchard International Services Ltd versus M'Mwereria (*supra*).”

We have given due consideration to the content of the record in the light of the rival arguments above.

With regard to the complaints that the learned judge unjustifiably withheld the relief of setting aside of an *ex parte* judgment, we find that indeed this relief had been prayed for as prayer 3 in the application then under review before the learned Judge. However our review of the record of the submissions made by the parties do not reveal evidence of any arguments that were made on prayer 3 by either side. Neither is there on record evidence of the withdrawal of the same. The learned Judge's ruling impugned herein has also not made any reference to this relief. The above position notwithstanding, both learned counsel have submitted on this same issue before us. They deserve a merit finding on it even if for jurisprudential purpose only.

The principles that guide the setting aside an *ex parte* judgment (orders) were well-captured by the predecessor of this court, the Court of Appeal for Eastern African in the *locus classicus* case of **Shah versus Mbogo [1968]** held thus:-

“... the court's discretion to set aside an *ex parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, ...”

The judgment the appellants sought to set aside had been entered into way back on 4.7.1995. The hearing proceeded *ex parte* because neither the appellants nor their advocate then on record attended the trial after the hearing date had been initially agreed upon by the parties. There followed a series of mentions made by the respondent with a view to execute the resulting judgment through Notices to Show Cause. One resulted in the ruling of Onyiego PM of 18.11.2008.

From 4.7.1995 to 23.08.2009 a period of fourteen (14) years had elapsed before the appellants made the first move to upset the said judgment. There has been no deposition or submission advanced on their behalf that they were never aware of the existence of the said judgment. Neither have they explained their failure to take timeous action to upset the said judgment.

The appellant chose not to argue that point to give the learned judge an opportunity to make a pronouncement on it either way. The learned Judge believed that it had been abandoned and made no pronouncement on it, the appellants by their conduct having buried it. They cannot be allowed or be heard to introduce it through the back door. We can address only those issues that were raised by the parties and ruled upon by the learned Judge. Validity of the ex parte judgment was not one of them. Our hands are therefore tied. We are bound by the record.

Moreover; we hold that the grounds advanced in its support are without merit. Our reasons are as follows:-

- (1) The appellants took too long to raise any complaints against the validity of the said judgment. They only raised complaints both as a shield and sword against the execution process that had been leveled against them. The move was therefore an afterthought.
- (2) The very fact that the appellants moved to fault it is proof enough that it (the judgment) was alive.
- (3) The appellants' failure to seek particulars of vicarious liability disentitles them to any right to belatedly complain. They are deemed to have been satisfied with the respondent's mode of pleading of vicarious liability attributed to the 1st appellant and are therefore bound by their pleadings (see the case of **Nzoia Sugar Company Limited versus Capital Insurance Brokers Ltd [2014] eKLR**). They chose not to participate at the hearing and thereafter made no move to have an opportunity accorded to them to be heard on their defences at the earliest opportunity. They can only blame themselves for their indolence.
- (4) Vicarious liability had been rightly pinned on to the 1st appellant following the successful prosecution of the 2nd appellant for a traffic offence(s) arising from the same collision, a finding that was never challenged on appeal by the appellants. As long as that decision stood liability had been pinned on to the 2nd appellant, and through vicarious liability on the 1st appellant.
- (5) The cases of **Nimrod M. Mchogu & another** (supra) and that of **Bouchard International (Services) Ltd** (supra) are distinguishable because, the appellants herein were accorded an opportunity to exercise their right of defence which they exercised by filing their defence. They were also accorded an opportunity to tender evidence in support of their defences which they opted not to exercise.

On ground 2, the learned Judge held that the judgment before him was over 12 years and could not therefore be executed in that state. Upon construction of the two provisions, he was satisfied that Section 3 of part II of the Limitation of Actions Act (supra) was subject to Section 23 (3) of the same Act that deals with "acknowledgement" and "part payment". Section 23 provides for the extension of the limitation period where a right of action has accrued to recover a debt or other liquidated pecuniary claim and the person liable or accountable acknowledges the claim or makes part payment of it. The decree holder's execution proceedings fell under the category of recovery of other liquidated pecuniary claims.

We agree with the learned Judge's finding that a stale or expired decree is incapable of execution unless the judgment debtor acknowledges it or makes part payment towards its liquidation. In the instant appeal, it is undisputed that the decree the respondent moved to execute was over 12 years old. The learned Judge upheld that move because he found acknowledgement and part payment in the actions of Imali Gembe advocate who had issued cheques which apparently were dishonoured but were then replaced with cash. This action on the part of Mrs. Gembe revived the decree in terms of section 23(3) of the Limitation of Actions Act.

The 1st appellant had an opportunity to demonstrate through those papers that the firm of Obiero & Co. Advocates on whose behalf Mrs. Gembe appeared were in fact busy bodies in the proceedings. He never did so. He retained the benefit of their services as he was released from civil jail. Contrary to what Mr.

Kanyi has asserted, it is his firm which ought to have solicited an affidavit either from Mrs. Gembe or Mr. Obiero & Co. Advocates to explain their brief appearance in the matter. The respondent had no obligation to do that as he has not been linked to that firm in any way. The only inference that can be drawn from the appellant's failure to source such an affidavit is that it would have been adverse to their interest.

The learned Judge had no alternative but to rule as he did that Mrs. Gembe through the firm of Obiero & Co. Advocates on whose behalf Mrs. Gembe appeared had authority to act for the 1st appellant and did in fact acknowledge the indebtedness on his behalf and did make part payment towards its liquidation thereby reviving the decree for purposes of execution, which the 1st appellant cannot escape.

As for ground three (3), we have revisited the record and find that throughout the proceedings in the execution of the decree both before the Deputy Registrar and the learned Judge, nowhere did the issue of invalidity of the decree ever arise on account of non-extraction. The application of 23.3.2009 that gave rise to the impugned ruling, never raised it whether in the grounds or in the supporting affidavit. Nowhere in the representations made before the learned Judge was this issue raised. He made no pronouncement on it. We cannot deal with it. We find this complaint to be an afterthought. In the alternative we find the 1st appellant to have waived his rights to complain. He has participated in the execution proceedings since 2.12.1998. He was represented on 8.11.2007 when it was adjourned by consent. We find no sincerity in that complaint.

The upshot of all the above is that there is no merit in this appeal. It is accordingly dismissed with costs to the respondent both on appeal and the court below.

Dated and delivered at Nakuru this 27th day of April, 2016.

R. N. NAMBUYE

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR