



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL APPEAL NO. 163 OF 2013

RUFUS KIUNA KUNGU1ST APPELLANT

GEOFFREY KARIUKI NJUGUNA.....2ND APPELLANT

VERSUS

FRANCIS NJUE NYAGARESPONDENT

**(Being an Appeal from the Ruling delivered by the Honourable C.C. Kipkorir Resident Magistrate
(Ms.) on the 8th of March 2013 in Nairobi CMCC No. 5563 of 2013)**

JUDGEMENT

1. The background to this appeal is that the Respondent herein sued the Appellants in the Lower Court for the recovery of damages for personal injuries sustained in a road traffic accident. After the close of the pleadings, a pre-trial conference was conducted. During the pre-trial conference, the parties by consent agreed that the suit would proceed to hearing on 5th December, 2012. The parties further agreed that if the witnesses were not availed on the hearing date or there was failure to comply with any of the pre-trial directions the provisions of Order 17 rule 4 Civil Procedure Rules would apply.

2. When the matter came up for hearing on 5th December, 2012 the learned counsel Mr. Ratemo who appeared for the Appellants indicated to the trial court that he needed some clarification from his client. The case was set for hearing at 11.00 a.m. At 11.00 a.m. Mr. Ratemo informed the court that he did not have their file. That he had earlier on asked for time to get clear instructions from the client as he was not the one handling the matter. That by mistake the case had been mis-diarized and the client had not been informed of the hearing date. Mr. Ratemo sought adjournment to secure the attendance of the client and urged the court not to visit the mistake on the client.

3. Mr. Thuku learned counsel to the Respondent opposed the application. He stated that the hearing date was taken by consent. He stated that his witnesses were present and requested the trial court to take the Plaintiff's case if adjournment was allowed.

4. The trial court rejected the application for adjournment and made orders for the case to proceed as per the pre-trial directions.

5. The Plaintiff's case proceeded. Three witnesses testified and the Plaintiff's case was closed. The Appellants' counsel then made an application seeking leave to appeal and a stay of the proceedings in the matter, stating that his witnesses had been denied an opportunity to testify. The application was opposed

on the grounds that the Appellants had more than two months to prepare for the case. The trial court dismissed the application and ordered the Appellants to proceed. The Appellants counsel sought leave to appeal and also sought a stay of the proceedings. The trial court invoked the provisions of Order 17 rule 4 and marked the Appellants case closed. Further orders were made for the Appellants to file a formal application seeking leave to appeal and stay of the proceedings.

6. The Appellants filed Notice of Motion dated 11th December, 2012. The application was expressed to be brought under Order 45 Rule 1, Order 51 Rules 1 and 3 of the Civil Procedure Rules, and Section 3 and 3A of the Civil Procedure Act. The application sought the following orders:

“1. THAT this Honourable Court be pleased to stay any further proceedings pending the hearing and determination of this application.

2. THAT this Honourable Court be pleased re-open the Defendants/Applicants case.

3. THAT the Defendant/Applicants be allowed to call witnesses so as to form part of the evidence in this matter to enable the court reach a justifiable conclusion.

4. THAT the Honourable court be pleased to review, vary and or vacate its order disallowing the Defendant/Application an adjournment.

5. THAT the application be heard *inter partes* on such date and time as this Honourable Court may direct.

6. THAT the costs of this Application be provided for.”

7. The application was premised on the grounds stated on it’s body and the affidavit of Linah Wawira. It is stated that the matter was inadvertently mis-diarized on 6th December, 2012 instead of 5th December, 2012. That Mr. Ratemo happened to be in the same court attending to CMCC 8746 of 2009 and 377 of 2010 when the case was called out. That Mr. Ratemo requested for the file to be placed aside to enable him get instructions from the client. That when Mr. Ratemo called the office it turned out that the case had been mis-diarized, hence the application for adjournment. The Appellants sought the re-opening of their case to enable them adduce evidence.

8. The application was opposed. The Respondent filed a replying affidavit. It was stated that the parties entered into a consent on the way to proceed with the matter during the pre-trial conference. That the memorandum signed by the parties under Order 11 rule 8 Civil Procedure Rules was binding to the parties and was as such a consent order. That the issue of the matter having been mis-diarized did not crop up on the hearing date. That the Appellants were granted seven (7) days to file their medical report or their list of witnesses but failed to do so and cannot therefore purport to call any such evidence. It is further stated that the Appellants failed to appeal against the order refusing them adjournment.

9. In her ruling the trial magistrate dismissed the application. The Appellant was aggrieved by the same ruling and appealed to this court on the following grounds

“1. The learned Magistrate erred in Law and in Fact in failing to appreciate that the misdiarization of the matter was occasioned by mistake of the Appellants Counsel.

2. The Learned Magistrate erred in Law and in Fact in failing to appreciate that mistake of an advocate ought not be visited upon an innocent litigant.

3. The Learned Magistrate erred in Law and in Fact in denying the Defendants/Applicants an adjournment on 5th December 2012 when the matter came up for hearing.

4. The learned Magistrate erred in Law and in Fact in failing to find that the Appellants Counsel did not deliberately refuse to diarize CMCC No. 5563 of 2011 as there was a Counsel

from the Defendants/Appellants Advocates Firm in court handling CMCC Nos. 8746 of 2009 and 377 of 2010

5. The learned Magistrate erred in law and in Fact in finding that the Appellants Application lacked merit and therefore denied the appellants the right to put forward a genuine defence.

6. The learned Magistrate erred in Law and in Fact in failing to appreciate that the respondent would not stand to suffer any prejudice if the case was re-opened and the Defendants/Appellants allowed to call witnesses.

7. The Learned Magistrate erred in Law and in Fact in upholding procedural technicalities as opposed to substantive Justice.”

10. The appeal was heard by way of written submission which I have duly considered.

11. It was argued by the Respondent’s side that the trial court made orders that appellants do file a formal application to seek leave to appeal and stay of proceedings. That instead the Appellants filed the application in question, hence the ruling the magistrate arrived at was justified. In the said ruling, the trial magistrate held that prayer No. 1 was interim and would lapse upon the determination of the application. That in respect of prayer No. 2 and 3 the parties were bound by their pre-trial consent orders. That the trial magistrate having proceeded in accordance with Order 17 rule 4, the Appellants ought to have appealed against the refusal to adjourn. That prayer No. 4 of the application was *res judicata*.

12. There is no doubt that prayer No. 1 of the application was interim in nature. The trial magistrate had made a decision refusing to re-open the Appellants case or the calling of the Appellants’ witnesses. However, prayer No. 4, of the application sought orders **“that the Honourable court be pleased to review, vary and or vacate its order disallowing the Defendants Application and adjournment”** My view is that the prayer fell within that mandate of the trial magistrate’s jurisdiction and the matter are was not res-judicata.

13. Order 45 rule 1 (1) Civil Procedure Rules 2010 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.”

15. A counsel on his feet in court who has just heard a matter being called out in court and he is not the one who has conduct of the matter may not have all the evidence or the reasons in support of his application for adjournment. In the application for review, the Appellants supported the application with the affidavit of the counsel who had the conduct of the matter, Ms Linah Wawira. The relevant entries in the diary in question have also been exhibited. In my view, this was important and new evidence which the counsel who was in court did not have and could not have produced on the hearing date. The application in that regard was not *res judicata* and the trial magistrate ought to have considered the same on the merits and not visited the counsel’s mistake on the litigant. As stated by the court of Appeal in the case of **Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR**, while quoting the case of **Belinda Murai & 9 others v Amos Wainaina [1979] eKLR** where Madan, J.A. (as he then was) stated as follows:

“A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel.”

The Court of Appeal further quoted the case of **Philip Chemowolo & Another v Augustine Kubede, [1982-88] KAR 103** at 1040 where Apalo, J.A. (as he then was), posited as follows:

“Blunders will continue to be made from time to time and it does not follow that because a mistake had been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”

16. What about the failure by the Appellants to comply with pre-trial directions? I have considered order 11 Civil Procedure Rules 2010 which deals with pre-trial directions and conferences. Order 11 rule 4 provides that upon conclusion of the case conference the court shall issue a Case Conference Order in terms of Appendix C. I have also considered the provisions of order 11 (7)(4)(a) Civil Procedure Rules 2010 which provides that the parties or their advocates shall sign a memorandum as prescribed in Appendix E hereto setting out the results of the conference. With due respect to the trial magistrate, pre-trial orders or directions cannot be equated to a consent order which the court cannot set aside except in circumstances as would afford a ground for varying or rescinding a contract between the parties. The court’s discretion to allow adjournment in deserving cases was not taken away by order 11 Civil Procedure Rules 2010. Indeed Order 11 rule 8 Civil Procedure Rules 2010 stipulates as follows:

“The memorandum and order stipulated in rule 4 (4) shall bind the parties unless the court otherwise orders.”

17. Turning to Order 17 rule 4 Civil Procedure Rules, it does not take away the discretion of the court either. The said order states as follows:

“Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the suit forthwith.”

The order is not couched in mandatory terms.

18. In the case of **Stephen Makare Mulewa v Linda Newman [2015] eKLR**, the Court of Appeal did not frown on the adjournments allowed after the pre-trial directions as is evident in the following excerpt:-

“Nor can the appellant rightfully complain about failure to comply with the pretrial procedures provided under Order 11 of the Civil Procedure Rules 2010. This is because it is evident from the record of appeal that the suit was adjourned several times to enable the parties comply with the pre-trial procedures. For instance, on the 19th March, 2012 when the hearing of the suit first commenced, the hearing was adjourned (sic)the court making the following orders:

“Let witness be stood down so that Mr. Muoko can take instructions in mortgage documents and defendant’s statements. Also the plaintiff to serve additional list of documents. Hearing on 4th June 2012. All witness statements and documents to be filed and served not later than 30th April, 2012”

Mr. Muoko was the appellant’s then counsel. The record of appeal reflects that thereafter despite several adjournments no documents were filed by the appellant, nor did the appellant raise any objection to the hearing of the suit on the ground that the pre-trial procedures were

yet to be finalized.”

19. In the case at hand, that was the first hearing date. The trial magistrate could have exercised the courts discretion and allowed the adjournment. The Respondent could have been compensated by way of costs. I am fortified in this view by the dicta of Court of Appeal in the case of **Richard Ncharpi Leiyagu (supra)** where it was stated:

“However in our view the Judge misapprehended both the time factor and the overriding objective which he cited by dismissing the petition for non-attendance on the 11th June, 2013, in the presence of the appellant, his counsel and witnesses. We are of the view that the Judge should have proceeded to hear the petition on merit. Dismissing the Petition did not advance the overriding objectives in the administration of justice, nor did the court save time.”

20. With the foregoing, this court’s conclusion is that the appeal has merits and is allowed with costs in cause. The ruling of the Honourable magistrate of 8th March, 2013 is hereby set aside. The Defendants/Appellants’ application dated 11th December, 2012 is hereby allowed and the Defendants/Appellants are at liberty to adduce evidence.

Dated, signed and delivered at Nairobi this 29th day of Sept, 2016

B. THURANIRA JADEN

JUDGE