



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 87 OF 2014

NATVARLAL GOR1ST APPELLANT

KUMAR ALICE2ND APPELLANT

VERSUS

ALFRED MUMO NTHENGERESPONDENT

(Being an appeal from the Ruling and Decree of the Chief Magistrate's Court

at Machakos by Hon. P.N. Gesora (SPM) in

Civil Case No. 16 of 2013 dated 6th June, 2014)

JUDGMENT OF THE COURT

1. The appeal herein was commenced by the appellants vide a Memorandum of Appeal dated 16th June, 2014.
2. The appellants raised five (5) grounds of appeal on the face of the record. The appellants also prepared the Record of Appeal filed herein on 26th March, 2015. Parties took directions that the appeal was to be canvassed by way of written submission, and the said submissions were to be filed in time for a mention of the matter on 24th October, 2016. However, the appellant's never filed their submissions, while the respondent filed their submissions on 19th October, 2016. On 24th October, 2016 when the matter came up for mention, the appellant's counsel were not in court. The respondent asked for a date for judgment which the court reserved for 30th November, 2016.
3. It is therefore clear that save for the Memorandum of Appeal, there is very little or no other material this court can use in favour of the appellants, and that the background information has all been provided by the respondent.
4. The brief history of the appeal is that the respondent by a plaint dated 14th January, 2013 and filed in court on 14th January, 2013 sought for Special Damages and General Damages in respect of a Road Traffic Accident that occurred on 23rd March, 2011 involving the appellants' motor vehicle registration No. KBM 663Q and respondent's motor vehicle registration no. KBH 910Q. A memorandum of appearance and defence were filed on 15th February, 2013 respectively and the respondent filed a reply to defence on 18th February, 2013. On 22nd March, 2013 pretrial directions were taken and the appellant

was given 30 days to comply with **Order II** of the **Civil Procedure Rules** and the matter was fixed for hearing on 24th May, 2013. On 24th May, 2013, the case came for hearing and counsel for the appellant send an advocate to hold brief and adjourn the case and the appellant was condemned to pay Kshs. 3,000/= adjournment costs and the case was fixed for hearing on 2nd July, 2013 when the court was not sitting. On 13th August, 2013, the case came for hearing and counsel for the appellant sent an advocate to hold brief and adjourn the case and the adjournment was rejected and respondent's witness numbers one (1) and two(2) were heard and case closed and case fixed for mention on 16th August, 2013 to confirm filing of submissions.

5. On 15th August, 2013, the appellant filed a notice of motion dated 15th August, 2013 for setting aside *ex parte* proceedings and the same was compromised on 16th August, 2013 on the following terms;

- i. Respondent's case be re-opened.
- ii. Respondent be recalled for cross examination only.
- iii. Costs of Kshs. 4,000/= be paid before the next hearing date.
- iv. Appellant given last adjournment.
- v. Matter was fixed for hearing on 4th October, 2013

6. On 4th October, 2013, counsel for the appellant never attended court and the respondent's case was closed again and the defence deemed as closed and judgment date was reserved for 18th October, 2013 and the same was adjourned to 1st November, 2013 when it was read in the following terms:-

- i. Liability100%
- ii. Special Damages Kshs. 7,200/-
- iii. General damages..... Kshs. 480,000/-
- iv. Costs and interest

7. On 14th November, 2013 another application dated 14th November, 2013 was filed under certificate of urgency to stay proceedings and set aside the whole of the proceedings and the same was conversed by way of written submissions and on 6th May, 2014 the said Notice of Motion was dismissed prompting the present appeal.

8. There appears to be only two main grounds of appeal, and I will deal with them as follows:

Whether the trial magistrate was right when he held the application the subject of this appeal as *res judicata*.

Section 7 of the **Civil Procedure Act** provides:

“No court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such in which such issue has been subsequently raised and has been heard and finally decided by such court”

The appellant in this appeal filed an application dated 15th August 2013 on 15th August, 2013 seeking for two main prayers:-

- i. Court do set aside order made on 13th August, 2013 allowing matter to proceed exparte.
- ii. Court do set aside proceedings of 13th August 2013 and the appellant be allowed to participate in the proceedings.

When the appellant failed to attend proceedings on 4th October, 2013 after the application was comprised by consent recorded on 16th August, 2013, a similar application was filed on 14th November, 2013, the main prayers were:-

- i. The court do pleased set aside the whole of the proceedings in this matter and the case do start *de novo*.
- ii. The defendant (appellant) be allowed to participate in this matter.

9. The respondent submitted correctly, that the second application filed on 14th November, 2013 was a complete replica of the one filed on 15th August, 2013 and the prayers were the same. The court having dealt with a similar application which was comprised by consent of the parties, was right to hold that the 2nd application was *res judicata*, since the two applications were between the same parties litigating on the same issues for which a decision was reached through a consent of the parties. The applicants should have either sought a review of the Order or appeal against the decision that was reached by consent.

10. The appellant contents that the trial magistrate did not consider the principles of setting aside an exparte judgment. However, the respondent submitted, again correctly that the provisions upon which the application the subject of this appeal was brought are **Order 12 rule 7** of the **Civil Procedure Rules**. The same provides:-

“Where under this order judgment has been entered or the suit has been dismissed, the court on an application, may set aside or vary the judgment or order upon such terms as may be just.”

The provisions of **Order 12 rule 7** of the **Civil Procedure Rules** are not mandatory but discretionary, the word used is **MAY**. This discretionary power should be exercised judiciously. And applying the principle that the courts discretion to set aside an exparte judgment is intended to be exercised to avoid ***injustice, hardship resulting from accident, inadvertence, or excusable mistake or error but not to assist a person who had deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.*** The appellant in this appeal was accorded all the opportunity by the court to present its case. On 22nd March, 2013, the appellant was given 30 days to comply with **Order 11** of the **Civil Procedure Rules** and it refused so to do. On 24th May, 2013 and 13th August, 2013 the appellant through Gichuki advocate and Amalla advocate holding brief for the advocate for the appellant sought for adjournment. On 16th August, 2013, an application to set as exparte proceedings was compromised by consent. The appellant is a party that was not complying with court orders even after last adjournment was granted by consent. The conduct of the appellant amounted to obstruction and/or delay of the cause of justice to the detriment of the respondent who had even closed his case on one time and allowed it to be re-opened. It is correctly submitted that the court considered all the principles of setting aside exparte judgment and given the history of the matter whereby the counsel for the appellant was adjourning the case through other advocates and failure of the appellant himself to attend court, the magistrate was justified to arrive at the decision.

11. The judgment of this court was entered on 1st November, 2013 in the following terms:-

- i) Liability100%
- ii) General damages.....Kshs. 480,000/-
- iii) Special damages..... Kshs. 7,200/-

Total

Kshs. 487,200/-

12. The judgment of the court is still holding. No appeal has been filed against the same and the decree has not been satisfied. It is the principal of law that justice delayed is justice denied. Litigation is to come to an end one way or another. This is a case that was filed in court in the year 2013 and today it has not been finalized due to the conduct of the appellant.

13. From the foregoing the inescapable verdict is that the appeal lacks merit and fails. Costs of the appeal shall be for the respondent.

THAT is the judgment of the court.

DATED AND DELIVERED AT MACHAKOS THIS 30TH DAY OF NOVEMBER, 2016.

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E. OGOLA

JUDGE

In the presence of;

Mr. Mutua for Respondent

Absent for appellant

Court Assistant – Mr. Munyaio