



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. 6 OF 2016

VISION BUILDERS LTD.....APPELLANT

Versus

ALEXANDER MUTEI WAMBUA.....RESPONDENT

(Being an Appeal from the order and ruling of the Chief Magistrate Court CMCC No. 26 of 2006 delivered on 25/2/2016 by Hon. Ochieng – SRM)

JUDGEMENT

This appeal by Vision Builders Ltd hereinafter referred as the appellant raises interesting questions both of a procedure and substantive law. The brief facts of the case as deduced from the record are as follows:

The respondent/plaintiff filed a claim vide plaint dated 1/2/2006 against the appellant as 1st defendant and another referred as the Dhurpa Enterprises as the second defendant seeking judgement on both general and special damages arising out of injuries sustained while working as an employee of the 1st defendant, appellant in this appeal.

The defendants including the appellant filed defence and denied liability and in the alternative pleaded contributory negligence. The injuries and damages were also in issue before the trial court. The respondent/plaintiff case was set down for hearing on 14/8/2013 when he testified to prove his case on a balance of probabilities. The respondent case was interalia that prior to the accident he worked as a machine operator with the 2nd defendant/Dhurpa Enterprises. He further stated that the machine held his overdue, which annotation resulted in a fail and injuries sustained on his left leg. He blamed the company for not providing safe machinery, and safe working environment. The medical reports by Dr. Ngugi and Dr. Madhiwala depicting the nature of injuries and their opinion as degree of harm or whether any permanent incapability was occasioned by the injuries were admitted by consent in support of the respondent's claim.

The defendant in answer to the claimant's claim called one witnesses DW1 who testified that in 2005 he worked as a foreman with the appellant (read – Vision Builders Ltd). The witness admitted that the respondent was an employee with the appellant when in the course of employment he sustained injuries to his left leg. DW1 asserted that he was the one who took him to hospital at Kitengela for examination and treatment.

In the light of this and other evidence adduced before the trial court the learned magistrate found the 1st defendant guilty of negligence and apportioned it at a ratio of 90%:10% in favour of the respondent. The suit against the 2nd defendant was dismissed.

As to the issue of question the learned trial magistrate awarded a sum of Ksh.300,000 as general damages less 10% contributory negligence resulting in net award of 270,000. The appellant on being served with the judgement and decree filed a notice of motion dated 5/3/2015 under Order 45 rules 1 and section 63 (e) of the Civil Procedure Act and Rules 2010. Seeking that the judgement of the court delivered on 11/11/2013 be reviewed and or varied. The appellant sought review of the judgement on one key ground that prior to the commencement of the hearing a consent was reached as between the parties dated 4/6/2008 and filed in court on 17/6/2008 with the term of the suit against the appellant herein, 1st defendant in the court in quo be marked as withdrawn.

The learned magistrate heard the application interpartes and decisively made the following finding:

“After deliberating on this issue I arrive at a finding that the said consent was not adopted or filed in court. I went ahead to find that the suit against the 1st defendant was not withdrawn by the court. I thus proceed to analyze the entire evidence on record and arrived at a finding on liability and quantum.”

The application for review was therefore declined by the learned magistrate as lacking merit. That dismissal of the application for review aggrieved the applicant who in his memorandum of appeal relied on the following grounds:

- (1) The learned trial magistrate erred in law and in fact in not finding that the parties had agreed by consent to withdraw the suit against the appellant.
- (2) The learned trial magistrate erred in law and fact in not finding that a party can pay court fees for the filed consent and or document once the court calls for court fees.
- (3) The learned trial magistrate erred in law in not considering the application for review as presented to the court.
- (4) The learned trial magistrate erred in law in not considering the submissions of the appellant hence arriving at a wrong decision.
- (5) That the learned trial magistrate erred in law and fact in holding that the appellant should have participated in the proceedings which was very clear to the parties that the appellant’s case had been withdrawn.
- (6) That the trial magistrate erred in law in not delivering the ruling in good time as required by law.
- (7) The learned trial magistrate erred in law in dismissing the application which was before court.

The appeal was canvassed before me by way of written submissions with highlights on the key issues. Ms Atusumirie counsel for appellant complained that the notice of motion seeking review of judgement was never properly dealt with by the learned trial magistrate. She referred the court to the evidence deponed by way of an affidavit to demonstrate that the case against the 1st defendant, appellant herein was withdrawn by consent duly filed in court on 17/6/2008.

Ms Atusumirie submitted that the non-payment of court fees allowed to by the learned trial magistrate in her judgement as the reason for not recognizing the legality of the consent as a misdirection in law. Learned counsel referred this court to the provisions section 96 of the Civil Procedure Act in which it is specifically stated that;

“Where the whole or any part of any fees prescribed for any document by the law for the time in force relating to court fees has not been paid, the court may in its discretion, at any stage, allow the person by whom such fees is payable to pay the whole or part, at the case may be; of the fees, and upon such payment the document in respect of which such fee is payable

shall have the same force and effect as if such fee had been paid in the first instance.”

Learned counsel further submitted and cited in support of this proposition the provisions under section 1A and 1B of the Civil Procedure Act on the doctrine of overriding objective in the administration of civil justice. She has urged the court not to penalize the appellant for the mistake of the respondent counsel.

Ms Atusumirie further submitted that the endorsement of the consent is not the duty of the litigant but of the court. The consent according to Mr. Atusumirie was forwarded to the court, as required signed by both parties. The filing of the consent therefore bestowed jurisdiction on the court to adopt it as a court order. Learned counsel referred to Order 49 rule 3 of the Civil Procedure Rules as to the entry and adoption of the consent of the parties evidence in writing to be adopted by the court or authorized officer of the court by the Chief Justice.

In a nutshell learned counsel submitted that the appellant never defended the proceedings at the trial court in view of the consent order of withdrawal. It transpired therefore that any judgement or decree against appellant was in error on the face of the record. Learned counsel urged this court to review and set aside. Learned counsel relied on the cases of *Jane Guadencia Achieng Kinda v Charles Mageto & 2 Others, Benjoh Amalgamated Ltd & Another v Kenya Commercial Bank Ltd [2004] eKLR*

In the circumstances read counsel argued that the appeal should be allowed with costs to the respondent.

Mr. Wainaina reply to the appellant's submission was that the consent order referred to in CMCC No. 26 of 2006 was never adopted by the court and there is absence of payment of court fees. Learned counsel took the court through some details which decide the proposition of a consent order being adopted by the court. *Peter Kanoi v 5 Others v Coffee Board of Kenya (Industrial Case No. 1314 of 2011), A Craft Management Service Limited v Agricultural Finance Corporation & 5 Others, Bishop Rev. Joseph Memba Syuma & 5 Others v DarA Investment Limited [2012] eKLR.*

Mr. Wainaina further contended that the appellants were not entitled to review of the judgement by the learned trial magistrate. Learned counsel argued that the appellant did not meet the legal threshold outlined under Order 45 of the Civil Procedure Rules on the discretely of new and important evidence which after the exercise of due diligence could not be produced at the time when the order was made, the existence of some mistake or error on the face of the record or for any sufficient reason. Learned counsel for the respondent placed reliance in the case of Samson Kisomo Pius (t/a Sam Mami Supermarket v Ramesh Chandran Shah Civil Appeal No. 660 of 2012 for the proposition what an applicant has to establish before grant of review of orders.

ANALYSIS AND RESOLUTION:

The consent order was formally filled in court. The failure to formally adopt it should not vitiate its legality. On our consideration the learned trial magistrate was being asked to set aside or review the judgement made affecting the 1st respondent who did not participate in the trial. The application was made by a party who participated in the trial. The judgement contains substantive orders against the appellant who alleges that he has not been heard. The appellant alleges that vide a letter of consent between two parties a suit against it was withdrawn.

There are two defendants to the suit filed by the respondent. There was need for the court to turn out any dispute as the two parties at the pretrial conference. The evidence is not clear how the case against eh 2nd defendant was dismissed and yet it was joined as a party to the claimant's claim.

In my view the parties' intention by the letter dated 4/6/2008 and duly filed in court on 11/8/2008. The duty to adopt the written consent is case upon the court. The court did not endorse the withdrawal consent to give effect to the intention of the parties in the adjudication process in our courts. The learned trial magistrate instead entered judgement against the 1st defendant and dismissed the suit against the 2nd defendant.

The submissions by both counsels are clear that the suit against the appellant stood withdrawn as between the plaintiff and the appellant. The application for review was an opportunity presented to the trial court to rectify the error on the face of the record and actualize the intentions of withdrawal the of suit. Order 24 of the Old Civil Procedure Rules now Order 25 provides:

“At any time before the setting down of the suit for hearing the plaintiff may by notice in writing which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim and such discontinuance or withdrawal shall be a defence to any subsequent action. Where a suit has been set down for hearing it may be discontinued or any part of the claim withdrawn upon the filing of a written consent signed by all parties.”

From the record the suit before court was between the respondent and the 2nd defendant. **Theruji Dry Cleaners Ltd v Muchiri & 3 Others [2002] KLR** (A notice of withdrawal sent did not take effect from the date of its filing but from the date it is adopted as an order of the court, when it is endorsed by the Deputy Registrar or Executive Officer. **Church Road Development Company Ltd v Barclays Bank of Kenya Ltd & 2 Others [2006] eKLR** the duty of the court is well set out in section 1B of the Civil Procedure Act. The duty of the court shall to further the overriding objective by doing the following:

- “(1) The just determination of the proceedings.**
- (2) The efficient disposal of the business of the court.**
- (3) The efficient use of the available judicial and administrative resources.**
- (4) The timely disposal of the proceedings and all other proceedings in the court at a cost affordable by the respective parties.”**

In **Muradula Suresh Kaptarea & Suresh National Kaptare Civil Appeal No. 277 of 2005** the court observed:

“In this regard we believe one of the principal purposes of the double oo principles to enable the court to take case management principles to the centre of the court process in each case coming before it so as to conduct the proceedings in a manner which makes the attainment of justice fair, quick and cheap - dispensation of justice – emphasis mine.”

In this case the parties had indicated the court that the suit against the appellant was to be withdrawn, the letter indicative of that order filed in court. The non-payment of fees or receipting of the document is the work of the registry and not litigants or parties to the suit. The mistakes or blunders made by the registry staff should not be visited on a litigant. The duty to manage the cases to attain fair administration of justice is in the hands of the magistrates. The letter exhibited dated 4/6/2008 cannot be ignored by the court on grounds that an official receipt was not attached.

As a general proposition the right of a party to discontinue or withdraw part of the claim should not be questioned by the court. A party’s right to withdraw a matter before the court cannot be taken away. A court cannot bar a party from withdrawing his claim. The review application was yet another opportunity for learned trial magistrate to exercise discretion and correct the error apparent on the face of the record. It cannot be said that the consent was not signed by both advocates hence the reason for its legality. The learned trial magistrate would have made an inquiry as to the issue of signature.

What happened in his case was therefore a mistrial during the pretrial conference. Such issues as to the locus standi of the defendants should have been sorted out. It could not have waited until the final judgement of the court to issue orders against a party who was not supposed to be a party to the suit or even participated in the trial. The appeal is hereby allowed and the following orders abide:

- (1) That the judgement of the lower court subject matter of the review is hereby set aside.**

(2) That the retrial do proceed with speed before another magistrate to be allocated the case by the Chief Magistrate.

(3) That the same be heard and determined within 60 days from today's date.

(4) Costs of this application/appeal to abide the outcome of the main suit in the lower court.

Dated, delivered and signed in open court at Kajiado on 19th day of December, 2016.

.....

R. NYAKUNDI

JUDGE

Representation:

Mr. Nyangau for Omwenga for the appellant present

Mr. Wainanina for defendant/respondent absent

Mr. Mateli Court Assistant present