REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. 9 OF 2014

STANLEY NTIRITU KIAMBATI ………………. APPELLANT

VERSUS

JOLIE NGOY MWAMBA Alias JOLLY MWAMBA WAMBUA.........1ST RESPONDENT

GEOFFREY MWAI GITURA ………….…….2ND RESPONDENT

(Appeal from the judgment in Civil Case Number 132 of 2012 in the Principal Magistrate's Court at Wang'uru – HON. S. NGII (RM)

JUDGMENT

1. The appellant STANLEY NTIRITU KIAMBATI was the 1st defendant in Wang'uru PMCC No. 132 of 2012 where he was sued by JOLIE NGOY MWAMBA Alias JOLLY MWAMBA WAMBUA, the 1st respondent herein who had sued him together with GEOFFREY MWAI GITURA the 2nd respondent in this appeal. The 1st respondent brought a suit against the two owing to a road traffic accident involving motor vehicle registration No. KBK 093 S belonging to the appellant and motor vehicle registration No. KAZ 852 W belonging to the 2nd respondent in this appeal.
2. In the suit before the lower Court, the 1st respondent had pleaded negligence on the part of the appellant's driver in the manner he drove motor vehicle registration number KBK 093 S a vehicle in which the 1st respondent was travelling in as a fare paying passenger. She also attributed some negligence on the part of driver of motor vehicle registration No. KAZ 852 W that collided with motor vehicle registration No. KBK 093 S resulting to some injuries she suffered.
3. It does appear from the proceedings in the lower Court that at some stage after the close of the plaintiff's case, the 1st respondent herein reached some compromise and entered into some consent with the 2nd respondent in this appeal where she was compensated by the 2nd respondent. The 1st respondent however never involved the appellant herein in the deal and chose to proceed against him in her claim for compensation for the injuries suffered. The appellant was aggrieved with the arrangements arguing before the trial Court that the 1st respondent claim was against him and 2nd respondent jointly and severally and no apportionment of liability had been agreed and or decided. The trial Court however overruled him and proceeded to set down the case for defence hearing as the plaintiff's case had been closed. On the date scheduled for defence hearing, the appellant was absent and the trial Court proceeded to dismiss his defence and fixed the matter for submissions whereupon judgment was entered against the appellant at 100% liability and awarded the 1st respondent Ksh. 259,580 plus costs and interests.
4. The appellant was aggrieved and filed this appeal. In his memorandum of appeal, the appellant raised the following grounds:-

a. ***That the learned trial magistrate lack jurisdiction to enter any further judgment after the judgment on the record as per the consent dated 24th May, 2013 and filed in Court on the 18th July 2013.***
b. ***That the learned trial magistrate proceed with hearing of the suit against the appellant as if it was an independent suit from that of the 2nd respondent and as such fell into error.***
c. ***That in the absence of apportionment of liability the judgment against the 2nd defendant compromised the entire suit and no further proceedings were to be entertained at all.***
d. ***That the trial Court failed to appreciate that it will be unjust enrichment to enter two independent judgments for the plaintiff in one cause or in the same cause of action albeit against different parties.***
e. ***That the learned magistrate failed to appreciate that the bulk of the evidence in the suit was against the 2nd defendant and it was impossible to proceed with the suit without first apportioning liability.***
f. ***That the finding of liability against the 1st defendant at 100% by the Court was against the weight of evidence.***
g. ***That the learned trial magistrate erred in entertaining the finding that a police abstract was sufficient evidence of ownership of a motor vehicle.***
h. ***That the 1st defendant had in his defence denied ownership and the finding that the 1st defendant needed to do rebuttal of the information in the Police Abstract is indeed an error on the part of the Court and contrary to known principles of evidence.***
i. ***That the learned magistrate failed to appreciate that this was a single cause of action and unless and until liability was determined the secret consent judgment compromised the entire claim.***
j. ***That the learned magistrate misdirected himself in his appreciation of the nature of the cause of action and as to whether it was severable as between the defendants and as against each of the defendants.***
k. ***That the learned magistrate is failure to make any finding against the 2nd defendant/respondent constitutes a misdirection on the part of the Court and confirms the Court had a predetermined on the liability issue.***
l. ***That the learned magistrate misdirected himself on the assessment of quantum on general damages and failed to take into account the amount already awarded to the plaintiff and which now became deducted.***
m. ***That the trial Court failed to appreciate the principle that future medical expenses is a special damage which must specifically pleaded and strictly proved as such fell into error.***

5. The appellant through his advocate Mr. Kerongo made oral submissions before this Court in support of the above grounds in his petition and in the submissions, Mr. Kerongo summarized, lumped together some of the grounds which I will highlight here below as presented.
6. On ground 15 of the memorandum of appeal, the appellant contended that the trial Court failed to appreciate that a future medical expenses is a special damages claim which must be specifically pleaded and proved. He submitted that the Court fell into error when it awarded the 1st respondent Ksh. 49,000/= when the plaint was silent on the said amount. The appellant contended that parties are bound by their pleadings and there was no basis in law for the trial Court to award the said amount.
7. The appellant argued ground 7 & 8 of the memorandum of appeal together contending that the learned trial magistrate erred by holding that Police Abstract was sufficient evidence to establish ownership of motor vehicle registration No. KBK 093 S. The appellant's contention is that he had denied ownership of the said motor vehicle in his defence and that owing to the denial, the 1st respondent was under an obligation in law to prove that fact. He faulted the learned trial magistrate for relying on a Police Abstract to establish that he was the owner of the said motor vehicle submitting that a Police Abstract in his view could not be evidence of ownership as the information on a Police Abstract cannot be verified. In support of this contention, the appellant cited the authority in the case of ***WIGOT CONSTRUCTION CO. LTD VS ERIC ODUOR OYIO*** where the High Court in Kisumu held that without an official search from Registrar of motor vehicle, ownership could not be proved to the required standard in law.

8. The appellant further quoted the authority in Court of Appeal in the case of ***THURANIRA KARAURI VS AGNES NGECHE (CIVIL APPEAL NO. 192 OF 1996 (V.R)*** where the Court held inter alia that a Police Abstract cannot be sufficient proof of ownership of a motor vehicle which position was also held in the case cited by the ***appellant JOHN WARUTUMU GACHUGU VS JOHNSON NDUNGU MUCHIRI (2005) e K.L.R.***
9. The appellant also faulted the trial magistrate for dismissing his defence his absence notwithstanding and opined that the trial Court's mind was clouded as a result of this erroneous action. And this, according to him led the trial Court to shift the burden of proof of the motor vehicle from the plaintiff to the defendant and in the process overturned a legal doctrine that whoever alleges must proof. He relied on the authority in the cited case of ***JOHN MWENDA MBAABU VS ARCADE STATIONERS LTD & ANOR. (2005) e K.L.R*** where the Hon. Justice Visram, (as he then was) sitting at the High Court in Nairobi, held that the onus is always on the plaintiff to prove his case on a balance of probabilities.
10. Mr. Kerongo combined grounds 1 to four of the memorandum of appeal and argued them contemporaneously with grounds 9, 10 and 11. Basically the appellant opined that the consent entered between the 1st and 2nd respondent in subordinate Court compromised the entire suit and in his view, he should have been left off the hook. He faulted the learned trial magistrate for proceeding in the case as if the 2nd respondent was no longer in the case. In his view, the trial Court ought to have established the issue of liability as between the appellant and the 2nd respondent herein in order to factor in the settlement already entered between the 1st and 2nd respondent by the time judgment was delivered. The appellant contended that the award made to the 1st respondent against him made the 1st respondent to benefit twice from the same cause of action which was an error and urged this Court to allow this appeal to correct the error.
11. Mr. Kiama appearing for the 1st respondent in this appeal opposed the appeal.

In his view, the consent entered was not valid and the Court never adopted it. He contended furthermore that the appellant had made a formal application over the same issue and lost the application. He submitted that the appellant did not appeal against the trial Court's ruling and therefore it was belated for him to revive the challenge at this stage. Mr. Kiama further opined that the consent did not affect the rights of the 1st respondent as a party in the proceedings in the lower Court and was in order to pursue the appellant to get her rights to be compensated for the injuries sustained.

12. On the question of ownership of motor vehicle registration No. KBK 093 S, the 1st respondent response to the appellant's contention that the same was not proved, is that the appellant was sued by her as the lawful owner of the said motor vehicle and that the Police Abstract produced during trial by the Base Commander was sufficient proof. Mr. Kiama argued that the Police officer (PW2) testified in Court and named the appellant as the insurer of the motor vehicle and that the evidence was not challenged or controverted by the appellant.
13. On quantum, the 1st respondent contended that the trial Court must have considered the consent when giving the award in view of the serious nature of injuries sustained by the 1st respondent.
    In her view, she asked the trial Court to be guided by the legal authorities cited and award her between 400,000/= to 7000,000/=. In her view, the award of Ksh. 150,000/= was excessively low and the learned magistrate must have considered and factored in the consent or the compromise earlier reached between her and the 2nd respondent herein.
14. On the issue of liability, the 1st respondent was emphatic that the appellant was to blame for the accident as he tendered no evidence to controvert the evidence adduced by her at the trial. She therefore supported the trial Court's finding that the appellant was wholly to blame for the accident.
15. The 1st respondent's contention on the issue of future medical expenses is that the same did not fall under a special claim though she admitted that the law requires the same to be pleaded and proved. Mr. Kiama however contended that the same was pleaded under paragraph 9 of the plaint and the Medical officer who was called to testify during the trial simply gave an assessment to what had already been pleaded. In her opinion, the claim on future medical expenses was properly pleaded and proved and the trial Court was correct to give the award of Ksh. 49,000/= in that

respect. The 1st respondent therefore asked this Court not to find any merit in the appeal and dismiss it.

16. This Court has considered the appeal, the submissions made and the authorities cited by the appellant. I have also considered the opposing sentiments expressed by the 1st respondent.

17. I will begin with the issue of future medical expenses and determine whether the same was properly pleaded and proved as required by the law. This Court has looked at the pleadings filed before the subordinate Court and notes that under paragraph 9 of the plaint, the 1st respondent had made a general claim of future medical expenses. There was no mention of any specific amount. In his defence, the appellant under paragraph 3 of the defence filed did deny the claim and put the 1st respondent to strict proof.

18. At the trial, the 1st respondent adduced evidence vide a doctor who testified as PW1 and gave evidence giving assessment of future medical expenses (i.e. removal of K-nail which had been inserted on the leg of the 1st respondent) as Ksh. 49,000/=. The 1st respondent contended that this was not a special claim but that contention is incorrect. The trial Court clearly and correctly made the award under the heading of special damages in his judgment. That being the case the next question is if it is a special claim, what does the law say about the same. The law requires that claims of special nature be specifically pleaded to put the opposing party on notice on what nature of claim a plaintiff has. Under the provisions of ***Order 2 Rule 4(b) of Civil Procedure Rules*** such issues must be pleaded to prevent an ambush on the opposite side and for it to stand in law, the same must be specifically proved to the required standard in Civil law. This Court finds that the 1st respondent's claim on future medical expenses was too general and not specific as required by law and though the 1st respondent made attempts to prove the same during trial, the same was improper as sufficient notice had not been given to the appellant and his co-defendant at the trial. It is important to note that the rules of procedure now requires under ***Order 3 Rule 2 Civil Procedure Rules*** that the plaintiff should infact supply documents in support of the claim in the plaint to the defendant(s) in a suit and the main objective is to alert the defendant on the magnitude of the claim he/she will face at the trial. It would have been a travesty of justice if a party was to be allowed to make a general claim in his pleadings then at the trial he makes a huge specific claim of say a million shillings. Obviously that would be unjust and an ambush which is inacceptable in law. I do find that the learned magistrate notwithstanding that he had dismissed the appellant's defence for absence, misdirected himself on the above point of law. Future medical expenses is a special claim that requires to be specifically pleaded and proved. The 1st respondent's claim failed the standard and the award in that regard should not have been awarded.

19. Perhaps I should also observe briefly here that the Court fell into error when it dismissed the defence filed owing to the absence of the appellant when the case was scheduled for defence hearing. It is true of course that at times a defendant can fail to turn up in Court for hearing either deliberately or for some other reasons. In such instances, the rules of procedure under ***Order 12 Rule 5 (Civil Procedure Rules***) allows a Court to proceed with the case. If the defendant is called out and he is absent together with his counsel, then the Court should assume that the defendant has no evidence to offer and proceed to give judgment as it is just and as per the evidence tendered. There are many instances where a defendant can even come to Court or through counsel and informs the Court that they are offering no evidence and the Court cannot force them to offer evidence neither can it proceed to dismiss the defence on record. A defendant is not obligated to offer evidence at the close of a plaintiff's case. A defendant can choose depending on the strength of the plaintiff's case to make submissions based on defence filed and the trial Court is then required to determine the case based on the evidence tendered and submissions made. In my view, the trial Court fell into error when it prematurely dismissed the appellant's defence before analyzing the plaintiff's case.

20. On the issue of ownership of the motor vehicle registration No. KBK 093 S, it is important to note that the standard required to prove a fact in a Civil case is on a balance of probabilities. When ownership of a vehicle is denied as was in this appeal, it was upon the 1st respondent to discharge the burden. The provisions of ***Section 107 (1) of the Evidence Act (Cap 80***) is clear and states:-

> ***"Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts must prove that those facts***

exists"

21. The appellant has submitted that the production of Police Abstract was insufficient to discharge the burden while the 1st respondent supports the learned magistrate's holding that the Police Abstract was sufficient. I have looked at the authorities cited by the appellant and the position in those authorities. The authority in ***Thuranira case*** (supra) and ***Wigots*** case (supra) both held that for Police Abstracts were not sufficient proof and that for a party to establish ownership, a certificate or official search from Registrar of motor vehicles needed to be produced to prove ownership of a motor vehicle. However, that position has since changed with a number of decisions that has since been made. An example is a decision made in Court of Appeal sitting in Kisumu in the case as of ***JOEL MUGA OPINJA VS EAST AFRICA SEA FOOD LTD (2013) e K.L.R*** where the Court made the following observations:-

> ***"We agree that the best way to prove ownership would be to produce to the Court a document from Registrar of motor vehicles showing who the registered owner is but when the abstract is not challenged and is produced in Court without any objection, the contents cannot later be denied"***

I have looked at the proceedings in the trial Court and noted that the Police Abstract was produced as an exhibit (P Exhibit 2) by PW2. The exhibit clearly indicates that the owner of motor vehicle KBK 093 S is the appellant herein. The appellant's counsel was present in Court and never challenged the witness on the contents of the Abstract in so far as the issue of ownership is concerned. His cross-examination mainly dealt on the issue of liability. He also did not object to the production of the Police abstract. But perhaps more important is the fact that the appellant chose to be away when he had the chance to go before the trial Court and disprove the 1st respondent's claims on ownership. I find that no sufficient reasons were given as to why the appellant chose not to offer any evidence to contest the plaintiff's claim and it is rather late in the day at this stage to some and tell this Court that ownership of the said motor vehicle was disputed and not proved. This position is supported by the decision in the case of ***SUPERFORM LTD & ANOR. VS GLADYS NCHORORO MBERO (2014) e K.L.R*** where the Court while relying on the Court of Appeal judgment of ***WELLINGTON NGANGA MUTHIORA VS AKAMBA PUBLIC ROAD SERVICES & ANOR. C.A. NO. 260 OF 2004 (2010) e K.L.R*** made similar observations as follows:-

> ***"Where Police Abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the Police Abstrat being a prima facie evidence not rebutted could be relied on as a proof of ownership in the absence of anything else a proof in civil cases was within the standard of probability and not beyond reasonable doubt as in criminal cases. However where it was challenged by evidence or in cross-examination, the plaintiff would need to produce certificate from Registrar or any other proof ----"***

The Court in the case of ***RUTH WANJIKU MUTHAE VS KENYA SUGAR BOARD (2014) e K.L.R*** made similar observations though made a distinction on when the issue of ownership is controverted by evidence adduced.

22. In the light of above cited authorities and the position in law the ground advanced by the appellant that the learned trial magistrate erred by relying on Police Abstract to establish ownership of the said motor vehicle cannot be sustained. The learned magistrate in the circumstances prevailing and the evidence tendered was correct to make the finding he did on the issue of ownership. In my view, the 1st respondent discharged her burden of proof by demonstrating to the trial Court that the appellant was the owner of motor vehicle registration No. KBK 093 S.
23. On the issue of consent entered between the 1st respondent and the 2nd respondent, it is true that the learned magistrate was silent about the same in his judgment. I am not persuaded by the 1st respondent's contention that the same was not valid. I have looked at the record of proceedings at the trial Court and noted that the consent was dated 24th May 2013 and filed in Court on 18th July

2013. Infact the requisite Court fees for the consent was paid for vide receipt Nos. 5227816 and 5227817 totaling Ksh. 450/= as assessed by the Court. The terms of the consent was as follows:-

> ***"By consent judgment be entered for the plaintiff against the 2nd defendant for Ksh. 292,000/= are inclusive –-- and the matter be marked as fully settled after payment as against the 2nd defendant"***

I also noted that on 18th July 2013 Mr. Kiama appearing for the 1st respondent (then the plaintiff) told the Court that there was settlement between the 1st respondent and the 2nd respondent (2nd defendant then). I do find Mr. Kiama's contention in this appeal that the consent was not valid a bit odd in the light of representation made to the trial Court on 11th December 2013 by the 2nd respondent's counsel who told the learned trial magistrate that:-

"The 2nd defendant has settled the plaintiff's claim already".

Mr. Kiama was present in Court when the 2nd respondent made the representation when the matter was coming up for defence hearing. The trial magistrate then proceeded to dismiss the appellant's defence owing to his absence and fixed the case for mention for purposes of submissions. This as I have indicated was erroneous. The trial Court ought not to have dismissed the appellant's defence.

24. I also find that the trial Court ought not to have disregarded the consent when he was delivering the judgment. There was a valid consent on record and the 1st respondent had been compensated at least to some extent by the 2nd respondent and that fact could not be ignored. The 1st respondent has however made a valid point by faulting the appellant herein for not appealing on the interlocutory ruling made by the learned magistrate on application dated 8th August 2013 which the appellant made. I took time to reflect on this issue and though I noted that the appellant offered no reasons why he chose not to appeal against the decision, I came to conclusion that the demands for substantial justice as envisaged under ***Article 159 of the Constitution*** in addition to inherent powers bestowed upon Court under ***Section 3A of Civil Procedure Act*** does allow this Court to make a determination that meet the ends of justice without undue regard to technicalities. This is informed by the fact that indeed the learned trial magistrate at the trial needed to or ought to have in compliance with the provisions of ***Order 7 Rule 14 of the Civil Procedure Rules*** made a finding about the consent filed or compromised reached and give judgment for the balance if any factoring in the amount already paid out to the 1st respondent. The Court ought to have made a finding on the respective liabilities of the defendants in view of the consent or compromised reached pursuant to the provisions of ***Order 1 Rule 4(b) Civil Procedure Rules***. I also find that the provisions of ***Order 25 Rule 5 of the Civil Procedure Rules*** was erroneously disregarded by the learned magistrate and this Court is persuaded by the appellant's submissions that the judgment delivered appeared to have the effect of compensating the 1st respondent twice for the same cause of action. I am not persuaded by the 1st respondent's contention that the learned trial magistrate took into account the amount that had already been paid to him in making the award on quantum against the appellant. The judgment delivered shows that the trial Court took into account similar awards made in other cases when deciding that the 1st respondent was entitled to an award of

Ksh. 150,000/= in general damages. The 1st respondent contended that the award is conservative or low but did not cross appeal for an enhancement. I am therefore unable to fault the learned magistrate in that regard.

25. The sum total of the above is that the appeal partly succeeds. The award on future medical expenses (Ksh. 49,000) by the learned magistrate is set aside for the reasons aforesaid. The award of special damages proved of Ksh. 60,580/= and General damages of Ksh. 150,000/= plus costs and interests in the lower Court shall stand. The appellant herein shall pay the 1st respondent the

balance if any after deduction of Ksh. 292,000/= already paid by the 2nd respondent herein. Each party shall pay own costs in this appeal.

It is so ordered.

R.K. LIMO

JUDGE

21/5/2015

21/5/2015

Before

Hon. Justice R.K. Limo

CC – Willy

Maina holding brief for Kiama for Respondent present

Ngigi holding brief for Kerongo for Appellant.

COURT: Judgment signed, dated and delivered in the open Court in the presence of Ngigi holding brief for Kerongo for Appellant and Maina holding brief for Kiama for Respondent.

R.K. RIMO

JUDGE

21/5/2015