



IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 55 OF 2006

KEPHA O MAOBE. APPELLANT

VERSUS

MICROPLAN (K) LIMITED. 1ST RESPONDENT

KEFALA MEHARI

T/S MEHARI AUTO GARAGE. 2ND RESPONDENT

(From the Ruling delivered by the Honourable Mrs. P Gichohi, SRM on 11th January, 2006)

J U D G M E N T

In this appeal the Appellant had in June, 2001, filed a suit at the lower court against the 1st and 2nd Respondent seeking special and general damages arising from a motor vehicle accident involving two other motor vehicles – KAK 495Z and KAK 631R and KAL 108J.

On the 20th June, 2001, the appellant and the 1st Respondent entered a consent judgment in favour of the appellant against the 1st Respondent, for Ksh.207,470/- special damages, all inclusive. The 2nd Respondent took no part in the said consent.

Later the 2nd Respondent filed a Notice of Motion application dated the 9th September, 2005 seeking dismissal of the suit as against him for lack of prosecution of the suit by the appellant. The lower trial court granted the said application with costs, thus dismissing the suit as against the 2nd Respondent on 12th January, 2006. The dismissal aggrieved the Appellant who filed this appeal. His main complaint against the lower court's ruling was that the suit had been fully settled when judgment had been entered against the 1st Respondent and that any costs arising therefrom should be payable only by the 1st Respondent who had lost the case with costs, that being the practice in courts of law in respect of cases where the lower also bears the incidence of costs.

The issue before this court in this appeal is whether the whole suit was settled in all its aspects and whether the finding of the trial court that the 2nd Respondent should bear the costs of the suit and the application to dismiss it, was proper.

It is not in doubt that the suit before the court below was against the 1st and 2nd Respondents jointly and severally. It is not in doubt also that the suit against the 1st Respondent was settled finally in favour of the Appellant against the 1st Respondent only. The Appellant did not aver or argue that the claim against

the 2nd Respondent was marked settled or was withdrawn when judgment by consent was entered against that 1st Respondent. The clear assumption accordingly was that the claim and suit against the 2nd Respondent, remained intact when that against the 1st Respondent was settled.

The 2nd Respondent realized the above situation and rightly filed the application to dismiss the outstanding suit against him for lack or want of prosecution. The lower court found that the suit was indeed pending as against the 2nd Respondent and dismissed it in his/her discretion, which was indeed within her power so to do.

I have examined the relevant principle of law involved. I find that she acted properly and within her discretion and power which the Appellant has not said she did not have. Indeed even if the suit against the 2nd Respondent would have been allowed to go to an independent hearing, it would not have succeeded since the appellant's original claim against both respondents had been fully granted and satisfied. That is to say, the claim against the 2nd Respondent was bound to finally fail. It was accordingly proper to dismiss it, notwithstanding that the reason eventually used to dismiss it was lack of prosecution.

I have also examined the Appellant's argument that the incidence of the bearing of costs lay with the party who lost in this case who was the 1st Respondent. I find that such argument has no basis. That is to say, that even if the suit against both Respondents had been compromised at the same time, the 1st Respondent would not stand to pay the 2nd Respondent's costs of the suit. All it meant was that the Plaintiff/Appellant was wrong or was not careful in enjoining the 2nd Respondent as a defendant in respect of an accident in which only the 1st Defendant was negligent and was to blame.

Finally, the Appellant who was the Plaintiff in this case, filed a case against the 2nd Defendant/Respondent which he failed to prosecute until it was dismissed. The Appellant in those circumstances, and not the 1st Respondent, stood to blame and was rightly adjudged to bear costs arising from his indiligent conduct. He cannot blame anybody else for his own conduct.

The result is that this appeal has no merit. It is hereby dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 16th day of June, 2014.

.....

D A ONYANCHA

JUDGE