REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 86 OF 2007

JOEL MUTUA NDAMBUKI …… APPELLANT

VERSUS

1. **DANIEL KIMEU MUSAU**
2. **NYALI DYNAMIC SERVICES**
3. **NICHOLAS MUTUKU MWANGA ……..... RESPONDENTS**

(BEING AN APPEAL FROM THE RULING OF THE CHIEF MAGISTRATE'S COURT AT MACHAKOS OF HON MRS HELLEN OMONDI (C.M) CIVIL CASE NO. 749 OF 2001 DATED 12TH APRIL 2007)

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(BEFORE B. THURANIRA JADEN J)

J U D G M E N T

1. The Appellant, **Joel Mutua Ndambuki** had filed suit against the three Respondents before the lower court claiming damages for injuries sustained in a road traffic accident. The Respondents denied the claim and the case subsequently proceeded to a full hearing.
2. On 28/9/2006 when the case was fixed for hearing, the court called out the case but there was no attendance for the Appellant's side. The Counsel for the Respondents moved the court to dismiss the suit. The court proceeded to dismiss the suit with costs.
3. The Appellant subsequently applied to the court vide **Chamber Summons** dated 9/10/2006 for the reinstatement of the suit (and presumably the setting aside of the dismissal order). The said application was dismissed on 12/4/07 and thereby triggered the filing of this appeal.
4. The grounds of appeal can be summarized as follows:-

- **Whether the court exercised its discretion judiciously in the circumstances of this case.**
- **Whether it is the trial court, the counsel or the Appellant who is to be blamed for the Appellant's predicament.**

5. The appeal was canvassed by way of written submissions which I have duly considered.
6. This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its own findings. *See* for example **Selle –vs- Associated Boat Co. Ltd (1968) EA 123.**
7. The first broad ground of appeal is on whether the court exercised its discretion judiciously in the circumstances of this case. There is no dispute that the Appellant and his advocate were not in court when the case was called out. The reasons given for failure to attend court were that the Appellant was seated outside the courtroom waiting for his advocate who had gone to the High Court. That due to his injuries the Appellant could not push through the crowded door he

therefore sat at the bench outside the courtroom. The Appellant further averred that his case was not called out loudly outside the courtroom otherwise he could have heard and responded.

8. The appeal was objected on the grounds that the averments in the affidavit in support of the application that is the subject of this appeal were not truthfully and that there was unexplained delay in the making of the application for reinstatement of the suit.
9. The trial magistrate was not impressed by the averments by the Appellant and dismissed the application. However, although the Appellant and his counsel may have made their mistakes, the consequences of dismissing the application were drastic. The application was made within about a fortnight. In my view, the delay was not inordinate. The Appellant's side could have paid for their mistakes by way of costs instead of being barred from proceeding with their case. I would therefore agree with the arguement that the court's discretion was not exercised judiciously in the circumstances of this case.
10. Issues have arisen as to whether to blame the Applicant or his advocate or whether the trial court was to blame for not loudly calling out the case outside. **Order 12 rule 1** of the Civil Procedure Act provides for the suit to be called for hearing outside the court before the dismissal of the suit. A similar provision existed in the repealed Civil Procedure Act. The ruling of the trial magistrate poses the question why the court should go outside to call the Applicant. This makes it abundantly clear that the trial court did not comply with the aforestated provision of the law. On the other hand, the medical report dated 5/7/2001 that was exhibited by the Appellant talks of pain and discomfort and inability to carry out manual work. The dismissal of the Appellant's suit came about five years later. The medical report does not reflect a patient who is so handicapped as to be incapable of making his way into the courtroom. I would agree with the trial magistrate that no cause list from the High Court was attached to support the assertions that the Appellant's Advocate was to the High Court. There were in apparent blunders on the Appellants side also.
11. However, as stated in the case of **Philip Chemnolo & Another –vs- Augustine Kebende (1982 – 1988) KAR**;

    "Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits."

12. With the foregoing and without undue regard to technicalities of procedure, the ruling dated 12/4/07 is hereby set aside and the Appellant's/Plaintiff's suit reinstated for hearing and determination on merits. The Appellant to pay throw away costs and the costs of this appeal. The said costs to be assessed by the Deputy Registrar if not agreed upon.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **29th** day of **September** 20**14**.

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B. THURANIRA JADEN

JUDGE