



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL CASE NO. 617 OF 2012

NICHOLAS NZIOKA MWASA.....APPELLANT

VERSUS

PETER MAINA KERU.....RESPONDENT

JUDGMENT

The appeal herein arises from the Ruling delivered on 21/10/12 by the Honourable Mr. T.S. Nchoe Resident Magistrate at Nairobi Milimani Commercial Courts in Civil Case no. 1062 of 2003.

Brief facts of the case in the court below are that the appellant herein, who was also the plaintiff in the lower court. Nicholas Mwasia sued the Respondents/ Defendant Peter Maina Keru by a plaint filed on 06/02/2003 and dated 28th January 2003 claiming for general damages and special damages arising from an alleged road traffic accident involving the plaintiff as a pedestrian along Juja road and the defendant's motor vehicle Registration no. KAM 380W. The plaintiff blamed the Defendant, his, driver/agent in the manner he allegedly drove/managed/controlled the said motor vehicle causing it to lose control and violently knock down the appellant who allegedly sustained a fracture dislocation of right ankle.

On 15/3/2004 by an amended plaint dated 8th March 2004, the appellant filed an amended plaint introducing the second Defendant Johnstone Njagi Kithaka and describing him as the registered owner of the accident motor vehicle whereas the 1st Defendant was described as the authorized driver of the 2nd Defendant. The amended plaint also introduced more injuries which are

1. Compound fracture dislocation of right ankle
2. Head injury (Cerebral concussion)
3. Soft tissue injury to the right thigh.

He also introduced the principle of vicarious liability against the 2nd Defendant.

The 2nd Defendant entered appearance on 20th July 2005 and filed defence to the claim the same date denying the plaintiff's claim and pleading contributory negligence against the appellant/plaintiff.

The plaintiff filed reply to defence dated 29th July 2005 on 2nd August, 2005.

The original court file appear to have gone missing for quite a while and in 2010, the plaintiff was authorized by the court vide a letter dated 19th October 2010 to apply for reconstruction of the new court file to enable the matter proceed for hearing and final determination. The second Defendant did apply on

16/8/2005 leave of court to take out third party Notice against Samuel Njuguna Thuku and Paul Mwangi Thuku being joint owners of motor vehicle Registration no. KAM 380W and the court did issue such third party notice on 28/9/2005.

The suit was then set down for hearing and adjourned severally with Hon. Mokaya granting the last adjournment on 7/1/2009, nonetheless the matter was again adjourned on 3/11/2009.

Meanwhile, the third party Notice was served upon the cited third parties as shown by the affidavit of service sworn by George Muraya on 19th January 2006 and filed in court on 29/6/2009; and the other sworn by Lijoodi Shisiali on 24/6/2009 filed in court on 29/9/2009.

On 7/10/2011, vide an application dated the same day, the plaintiff filed an application under Order 8 Rule 3 (1) and 5 (1) of the Civil Procedure Rules seeking leave of court to amend the amended plaint to clarify further the injuries suffered by himself, plead cost of future medical care and further medical expenses. The said application was supported by the affidavit of Benson Wainaina Kamunge advocate on authority from the plaintiff to swear the affidavit to the effect that the plaintiff had been advised by his doctor that the injuries sustained were now more serious requiring an amendment to the plaint to plead those further injuries and further costs of operation and removal of the metal plate from the injured site. The medical report attached to the affidavit is dated 16th June 2003 by Dr.N.H. Bhanji and it sets out injuries which were included in the draft amended plaint dated 31st October, 2011.

The defendant opposed the plaintiff's application on the grounds, that it was an abuse of the court process and that what was sought to be introduced was not new.

The court by a ruling delivered on 31st October, 2011 allowed the amendments sought invoking order 8 Rule 3(1) and (5) of the Civil Procedure Rules. The plaintiff was given 14 days to amend and serve the amended amended plaint from 31/10/2011. When the suit came up for hearing on 14/2/2012, the plaintiff's advocate Mr. Mwangi informed the court that he was unable to proceed with the hearing as he had just discovered that they had not filed the further amended plaint in time as per the order of 31st October 2011. Further, that his client was unable to pay further court fees of shs. 13,255 in time, which sum they only managed to pay on 13/2/2012. He submitted that he was not aware of the time limit given by the court and asked for seven (7) days to put things in order.

The defendant's counsel Miss Kangethe objected to an oral application and sought to have the further amended plaint filed out of time struck out.

The court delivered a ruling on the same day and exercised its discretion in favour of the plaintiff granting them leave to file an application for leave to file a further amended plaint out of time.

The plaintiff then filed an application for enlargement of time to file an amended plaint pursuant to the order of 31/10/2011 pursuant to order 50 rule 6, Order 51 Rule 1 of the Civil Procedure Rules. The parties filed and relied on written submissions to dispose of the said application dated 31st August 2012 and filed in court on 3/9/2012.

By a ruling dated 22nd October 2012, Mr. Hon. Nchoe T.S Resident Magistrate, dismissed the application for enlargement of time on the ground that there was inordinate delay of 7 months which was not convincing. It is that ruling of 22nd October 2012 that provoked this appeal.

The appellant's Memorandum of Appeal filed on 19th November and dated 13th November 2012 raises three (3) grounds of Appeal challenging Hon. T.S. Nchoe ruling dated 22/10/2012

The grounds are that:

1. The learned Senior Resident Magistrate erred in Law and fact in dismissing the

- plaintiffs/appellant's application dated 31st August 2012 without giving regard to the legal essence of amendment to pleadings.
2. That the learned Senior Resident Magistrate erred in Law and fact in failing to give any consideration to the weighty issues raised in the appellant's supporting affidavit and submission to the application.
 3. That the learned Senior Resident Magistrate erred in Law and fact in failing to have any regard to the principle of substantive justice when dealing with the application.

He prayed that the appeal be allowed, setting aside the ruling dated 22nd October 2012 and the suit be heard by another Magistrate.

The appeal herein was admitted to hearing on 26/5/2014 and on 21/7/2014 directions were given by Hon. Justice C.K Mutungi directing parties to file written submissions to dispose of the appeal.

The appellant filed their written submission on 11/9/2014 whereas the Respondents filed theirs on 2/10/2014.

I have carefully considered the record as exposed above, and examined the rival submissions in Support of and against the appeal herein.

This being the first appeal, my duty as provided for under Section 78 of the Civil Procedure Act is to perform as nearly as possible the duties as are conferred and imposed by the Act on courts of original jurisdiction by evaluating and analyzing the evidence on record and in so doing come to my own conclusion, giving an allowance to the fact that I neither saw nor heard the witnesses.

However, as the appeal herein is from an order, I rely on the record as presented noting that no witness testified hence, the issue of credibility of witnesses does not arise.

What this appeal is urging this court to do, is to interfere with the discretion exercised by the trial Magistrate in declining to enlarge time within which the ammended ammended plaint ought to have been filed upon such leave to file the same being granted and lapsing.

The applicable Law for enlargement of time is Order 50 Rule 6 of Civil Procedure Rules and Section 95 of the Civil Procedure Act.

Under Section 95 of the Civil Procedure Act Cap 21 Laws of Kenya;

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired”.

The handmaiden to the above Section 95 is Order 50 Rule 6 of the Civil Procedure Rules which provides that **“6 where a hunted time has been fixed for doing any act or taking any proceedings under these Rules, or by Summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed, provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise”.**

As I have stated above, in dismissing the appellant's application seeking for enlargement of time within which to file a further or amended, amended plaint, it is obvious that the trial magistrate was exercising judicial discretion as granted under Section 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules. It is an established principle and as set out in the case of **Mbogo & Another Vs**

Shah (1968) EA LR 13 that

“an appellate court will not interfere with the exercise of the trial judge’s discretion unless it is satisfied that the judge, in exercising his discretion misdirected himself in some matters and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice”.

I subscribe to those principles which go further to establish that the court’s discretion to set aside an *ex parte* judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of Justice.

Having evaluated and examined the record and the history of the matters giving rise to this appeal, and considered the appellant’s reasons offered regarding failure to file the amended amended plaintiff within 14 days from the 31/10/2011 and his advocates’s subsequent failure to file an application for enlargement of time within reasonable time from 14/2/12 with an anxious mind, I have asked myself whether such failure on both occasions constituted an excusable mistake, an error of judgment especially regarding the time frame within which the enlargement of time ought to have been sought or was it meant to deliberately delay the course of justice.

The plaintiff/ appellant’s advocate consistently swore affidavit on behalf of his client owning up to his mistake or error of judgment first, in failing to note the 14 days limited for filing of the amended amended plaintiff and second, that he was not aware that on 14/2/2012, when Hon Oganyo gave him 7 days within which to file an application for enlargement of time, which application he instead filed on 3rd September 2012. In the written skeletal submissions filed in the court below on 12th October 2012, the said advocate Mr. Benson Wainaina Kamunge humbly pleaded with the court **“to consider the plaintiff’s prayer rather sympathetically and to find a fact that the second defendant will not suffer such prejudice as cannot be compensated by way of costs and was willing to file the said pleading within a day or two and take an early hearing date in court”.**

From the underlined paragraph, it is clear that the advocate was profusely apologizing for his errors and beseeching the court not to punish his client for errors committed by his advocate.

What Mr. Kamunge forgot to depose to and submit before the court, is an explanation as to why it took his law firm another 7 months from 14/2/2012 to 3/9/2012 to file an application for enlargement of time under Order 50 Rule 6 of the Civil Procedure rules.

It is this delay that the trial magistrate found inordinate and not explained that prompted the dismissal of the plaintiff’s application for enlargement of time.

Regrettably, the plaintiff’s advocates’ submissions in support of this appeal makes a scathing attack on the learned trial Magistrate at its page 2 paragraph 8 that

“with profound respect to the Hon. Magistrate’s finding above, we hasten to humbly submit that the said ruling was made in ignorance of the provisions of Order 50 Rule 6 and Order 8 Rule 6 of the Civil Procedure Rules”.

With utmost respect to the learned counsel for the plaintiff, such an attack is totally unjustified as my perusal of the said finding and record reveals that indeed the appellant’s advocate filed the application for enlargement of time 7 months after the ruling of 14/2/2012 and no attempt was made to explain the delay to the court whether by way of an affidavit in support thereof or in the submissions.

Enlargement of time being in the sole discretion of the trial magistrate, I find no misdirection and neither do I find that the trial magistrate arrived at a wrong decision.

Furthermore, Order 8 Rule 6 of the Civil Procedure Rules is clear that if a party fails to amend a pleading within the time specified by the court after obtaining leave to so amend, then the order given ceases to have effect unless extended by the court hence the provisions of Order 50 Rule 6 for enlargement of time.

In my view, the learned counsel for the plaintiff was no doubt abusing the discretion exercised by the court when it was clear that it was him who had misapprehend the ruling which granted him 14 days to file the further amended plaint by first claiming that there was no such time frame given when the suit came up for hearing on 14/2/2012 and that if at all there was such time frame then he was not aware of it as he did not minute it!.

Albeit the ruling of 14/2/2012 by Hon. Oganyo did not give a time frame for filing a formal application for enlargement of time, the record shows that counsel asked for 7 days and said this “**if that be the case I will pray for 7 days within which to put things in order on my part. I was not aware of that time limit, if at all**”. This was a demonstration that counsel for the plaintiff was not ready and willing to own up to his own mistake of not filing the pleadings within the time frame assigned and even after the court granted him leave to file a formal application for enlargement of time, to him, it seemed like an indefinite period that is why he filed it 7 months later and todate, there is no remorse for filing the said application 7 months after they were ordered to file, just because there was no time frame given.

It is this court’s view that the plaintiff’s advocates having asked for 7 days, whether or not the court specified the period in the ruling, they were under a duty to honour their own undertaking and file the pleading within that period or within such other period that could be considered to be reasonable in the circumstances, now that the plaintiff had raised further court fees and paid on 13/2/2012 4 months after leave to amend the amended plaint was granted. To expect otherwise would be futile exercise as no discretionary orders can be issued in perpetuity.

Having said all that, I find that it was the plaintiff/appellant’s counsel who indeed, did not show any seriousness in prosecuting the clients’ case. The record shows that the client was in court all that time that the court made rulings, giving consideration or sympathizing with his situation while the advocate, the moment he got the orders and walked out of the court room, never remembered to abide by the said court orders which he had passionately sought.

Court of Law must jealously guard the authority and power bestowed upon them to avoid issuing orders in vain.

Nonetheless, the part of the plaint that the plaintiff seeks to amend regards the injuries that the plaintiff sustained; that it is a very important component of the claim for damages. It is the plaintiff who suffered those injuries as shown by the attached medical report of Dr. N.H. Bhanji dated 16/6/2003. The injuries appear serious. The cause of action herein accrued on 10th August 2002, 12 years ago. All this while, the plaintiff/ appellant has waited for justice from the courts, and it seems like he will never get it unless his hopes are resuscitated by this court interfering with the discretion of the trial magistrate. As I have stated, there was no error of judgment or mistake or misdirection by the trial magistrate therefore, what else would this court be looking at to persuade it to interfere with that correct discretion?

This court takes note of the inconvenience caused to the appellant by his own advocate’s lack of diligence and alacity in abiding by court orders issued in the court below. It also takes note of the inconvenience occasioned to the defendants whose justice and legitimate expectation that the claim against them should be determined expeditiously.

Tampering justice with Mercy, and in the Spirit of the provisions of Articles 48 of the Constitution of Kenya 2010 that

“The state shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice”.

Noting that from the record, the plaintiff was seriously injured and the mistakes on record were

occasioned by his advocates, and cognizant of the principle enshrined in Article 50(1) of the Constitution on the right to have any dispute that can be resolved by the application of Law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body as being the cornerstone of the rule of law and the overriding objectives as contained in Section 1A and 1B of the Civil Procedure Act; that the court should strive to give effect to the said oxygen principle of facilitating the just, expeditious, proportionate and affordable resolution of the disputes governed by the Act and conscious of the fact that the appellants advocate's mistake which is inexcusable is the cause of all the delay complained of, I am inclined to allow this appeal. The circumstances obtaining would, if the appellant is denied the opportunity to amend his pleadings to include all the injuries he sustained, would occasion him an injustice. I am fortified on this point by the decision of the Court of Appeal in the case of **Belinda Murai & Others Vs Amoi Wainaina (1978) KLR 272** Per Madan J A cited with approval in **CA 18/2013 Richard Ncharpi Leiyagu Vs IEBC, Ismael Hashimi & Mathew Kiperne Lempurkel per Visram, Koome & Odek JJ.A** describing what constitutes a mistake as

“A mistake is a mistake. It is no less a mistake because it is unfortunate slip it is no less pardonable because it is committed by Senior counsel. Though in the case of Junior Counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate it is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes over rule....”.

I am of the view that the learned trial magistrate should in the interest of justice have considered that the mistake in filing the pleading out of time was occasioned by counsel for the appellant who even though the further court fees was delayed, should, in the first place have sought enlargement of time before filing. Secondly for filing an application for enlargement of time 7 months after seeking only 7 days to do so. The interests of justice in this case dictated so.

In the case of **Philip Chemwolo & Another Vs Augustine Kubede (1982 – 1988) KAR 103** at page 1040, Apallo J.A (as he then was) posted as follows:

“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 merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error of default that cannot be put right by payment of costs.

The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline”.

In this case, all the inconveniences caused by the appellant and his counsel to the Respondent could have been compensated with costs. By dismissing the application for enlargement of time, without taking into account the overriding objective in the administration of justice, did not save time for either of the parties who now have had to wait for justice for another 2 years. This is also a good case where I would invoke the provisions of Article 159 of the Constitution of Kenya that justice shall be done to all, irrespective of status and without undue regard to procedural technicalities.

It is on record that the appellant is not a man of means and perhaps the reasons why his advocate was not keen on having this matter prosecuted as it ought to.

He should not be punished for being impecunious.

Accordingly, and in the exercise of powers granted under Section 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules, I allow the appeal herein for the reasons given, set aside the

ruling dated 22/10/2012 and substitute thereto with an order allowing the Notice of Motion dated 31st August 2012 and filed on 3/9/2012 in terms of prayer No. 1 and direct that the plaintiff's advocates do file a further amended plaint and serve the same upon the Respondent's advocates within 14 days from the date of this ruling failure to which this order lapses.

I further direct that the Milimani CMCC 1062/2013 be heard on priority basis before any Magistrate with the necessary pecuniary jurisdiction to hear and determine the same.

I award costs of the application in the Lower court dated 31st August 2012 and the costs of this appeal to the 2nd Respondents to be paid in any event in the suit before the subordinate court.

Dated, signed and delivered at Nairobi this 17th day of December, 2014.

R.E. ABURILI

JUDGE