REPUBLIC OF KENYA

High Court at Eldoret

Civil Appeal 195 of 2011

ABRAHAM KIPKEMBOI BORE …..... APPELLANT

VERSUS

SAMUEL MUGLO MAINA …..... 1ST RESPONDENT

JOSEPH NYACHOTI …..... 2ND RESPONDENT

(Being an appeal from the Judgement of Honourable Resident Magistrate G. M. Mutiso in Kapsabet PMCC. No. 53 of 2009 delivered on 14th October 2010)

JUDGEMENT

This is an appeal from Judgment of Kapsabet Principal Magistrate's Court Civil Case No. 53 of 2009 between Abraham Kipkemboi Bore as the Plaintiff and Samuel Mugo Maina and Joseph Nyachoti as the 1st and 2nd Defendants respectively delivered on 14th October 2010.

In the suit before the lower court, the Plaintiff prayed for Judgement against the Defendants jointly and severally for:-

(a) General damages for pain and suffering.

(b) General damages for loss of opportunity, and future earning prospects.

(c) Special damages of Kshs. 27,616/=.

(d) Costs of this suit.

(e) Interest on (a), (b), (c) and (d) above at court rates.

(f) Any other relief this honourable court deems fit and just to grant.

The Appellant who was the Plaintiff alleged that he was travelling in motor vehicle Reg. No. KSM 682 owned by the 1st Respondent and driver by the 2nd Respondent when it was involved in an accident as a result of which he sustained injuries, hence the claim.

Records show that the Defendants (Respondents) did not enter appearance and interlocutory Judgement was entered against them on 12th August 2009.

Subsequently, the law firm of M/s. Nyakundi & Co. Advocates filed a Memorandum of

Appearance and a Notice of Appointment on 1st July 2010 and on 19th May 2010 respectively. However, they did not move the Court to set aside the interlocutory Judgement and the hearing thus proceeded by way of formal proof.

According to the Appellant, the lower court suit was dismissed on the basis of a technicality. The Memorandum of Appeal dated 22nd November, 2011 was filed in Court on 25th November, 2011 outlining the grounds of Appeal as:-

1. THAT the learned trial magistrate erred in law and fact in failing to take into consideration the appellant's oral and documentary evidence on record.

2. THAT the learned trial magistrate erred in the law and fact in failing to take into consideration the basis and or merit of the suit filed against the respondent herein by the appellant.

3. THAT the learned trial magistrate erred in the law and fact by basing his judgment on a minor technicality.

4. THAT the learned trial Magistrate erred in law and fact in finding that the inconsistency in paragraph 8 of the appellant's plaint dated 27/2/2009 was fatal.

5. THAT the learned magistrate erred in law and fact in dismissing the plaintiff's suit.

In submissions, Counsel for the Appellant laid emphasis on ground for dismissal of the suit by the Magistrate as the technicality he found in paragraph eight of the Plaint.

In paragraph three (3) of the Judgement, the Magistrate notes:-

"The Plaint as filed is self contradictory given that at paragraph 2, it states that the first defendant was the driver of the vehicle. In pragraph 3, the plaintiff avers that the second defendant was the owner of the vehicle. In paragraph 4, the Plaint states that the 1st Defendant was the employee of the second Defendant."

In paragraph four (4), he adds:-

"At paragraph eight (8), the Plaintiff drastically changes the Plaint by stating that the second defendant was the first defendant's driver, servant or agent. This inconsistency makes the Plaint unsustainable in law as it confused the Court as to the nature of the court."

And the last sentence of the Judgement reads:-

"But since the plaint is self contradictory as cited above, this suit is dismissed."

It is therefore in black and white that the suit was dismissed because of the inconsistency in paragraph 2, 3 and 8 indicating in what capacity the 1st and 2nd Defendants were sued. According to the trial Court, this inconsistency caused confusion as to the nature of the suit.

In my considered view, that is not true. The nature of the suit is well spelt in paragraphs five (5) onwards of the Plaint. I have however noted that the numbering of paragraph 6 has been done twice. Besides, the prayers sought by the Appellant in the Plaint are obvious. My mind is thus not clear what confusion the trial court was referring to.

It is true that the description of the 1st and 2nd Respondents in paragraphs 2 and 3 of the Plaint is different from that in paragraph 8. However, this does not and should not occasion any injustice or cause the dismissal of a suit. Both Respondents are sued jointly and severally and so any Judgement entered applies equally to both of them. What the Court ought to have addressed itself to is whether the evidence

adduced before it occasioned liability against the Respondents notwithstanding who, between them was driving or was the owner of the subject motor vehicle. Instead, the trial Court, having noted the technicality did not give regard to evidence laid before it as to whether liability had been proved against either or both Respondents. The trial Court concentrated on the formating of the pleading as opposed to the merits of the evidence adduced before it. Accordingly, the suit was dismissed for want of form of the Plaint.

At the time the suit was heard and Judgement delivered, such a technicality was cautioned by Order 2 Rule 14 of the Civil Procedure Rules which provides:-

"No technical objection may be raised to any pleading on the ground of any want of form"

Although the dismissal of the suit did not arise out of an objection to the format, the rule would nonetheless have applied had the trial Court been keen.

Further, Sections 1A and 1B of the Civil Procedure Act were also operational. In particular, Section 1A (1) provides that overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. Hence dismissing a suit on grounds of a technicality defeats the stated overriding objective.

Further, the provisions of the Constitution must also be applied so as to give meaning and effect to other laws. It is provided under Article 159 (2) (d) that justice shall be administered without due regard to procedural technicalities. The error in paragraph 8 of the Plaint in the lower Court suit is an obvious procedural technicality which Court should have overlooked.

In the upshot I find that the appeal is meritorious and I allow it in its entirety. I further order that Kapsabet Principal Magistrate's Court Civil Case No. 53 of 2009 be heard afresh by another trial Magistrate of competent jurisdiction and be determined on merit of evidence to be adduced thereof.

Noting that the appeal was not contested, I give no orders as to costs of this appeal.

DATED and **DELIVERED** at **ELDORET** this 13th day of November, 2012.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

M/s. Kiptumo for the Appelant