REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1066 of 2004

JAGDISH ACHEDA .....APPELLANT

VERSUS

HENKEL CHEMICALS (E.A.) LIMITED .....1ST RESPONDENT

GEOFREY MAKOSI NYANJA .....2ND RESPONDENT

JUDGMENT

The Plaintiff/Appellant filed the Plaint dated 18th February, 1999, filed on 19th February, 1999. The cause of action is to the effect that the first defendant was the registered owner of motor vehicle registration number KAD 197 Q driven and controlled by the 2nd defendant as an agent and/or driver of the first defendant at the time it knocked the Plaintiff who was lawfully walking along wood avenue. It is the Plaintiff's stand that the said accident occurred as a result of negligence particularized in paragraph 5 of the Plaint and attributed to the 2nd defendant for which the first defendant was vicariously liable. In consequence of the said collision the Plaintiff/Appellant suffered injuries particularized in the same paragraph 5 of the plaint for which he incurred expenses particularized in paragraph 6 of the plaint. As a result of the matters afore said the plaintiff/appellant sought judgment from the lower Court for special damages in the sum of Kshs.201,067.00, general damages for pain and suffering, costs of the suit, interest on (a) and (c) above and any other relief that this Court deems fit to grant.

The joint defence and the summary of the same is that save that an accident occurred on the material date, they deny that the same was caused by the negligence of the 2nd defendant. Instead they contend that the same was caused by the negligence of the plaintiff/applicant and gave particulars attributed to him particularized in paragraph 5 of the defence denied particulars of the injuries and special damage alleged to have been suffered and prayed that the suit be dismissed with costs to them.

A perusal of the appeal record reveals that a statement of agreed issues dated l9th May 1999 was filed on 7th May 2003, an application by way of notice of motion filed on 9th May 2003 seeking orders to have the file transferred from the High Court to the lower Court at Milimani for hearing and disposal. The orders were granted and the file reached Milimani CMS Court on 4th May 2003.

On 29.06.04 the matter came up before C.W. Meoli (Mrs) SPM. The Court Clerk is noted as Arnold. A Mr. Ngoge was recorded as holding brief for Miss Ombajo for Plaintiff and Miss Mwangi was recorded as holding brief for the defendant. The record is clear that Miss Ngoge

informed the Court that there was a consent being filed to take out the matter as parties were negotiating and they were asking for a mention in a months time. Then a Miss Mwangi also informed the Court that parties were negotiating and they had agreed to mark matter stood over generally. Despite those representations the Court went ahead and made remarks.

"***Court: the plaintiff is absent. Parties not even seeking adjournment. This is a 1999 matter. The plaintiff is not serious with this suit. It is dismissed with costs for want of prosecution".***

The appellant went back to the same Court vide an application by way of chamber summons brought under Order 1XB rule 8 of the Civil Procedure Rules, Section 3 A of the Civil Procedure Act Cap.21 Laws of Kenya and all other enabling provisions of the Law. The orders sought were:-

(1) The honourable Court may be pleased to set aside and review the order made on the 29th June 2004 dismissing the suit.

(2) That the Plaintiff's failure to attend Court was on the advise of his advocate M/S Miller & Company advocates due to the fact that the matter was being taken out of the hearing list.

(3) That both the Plaintiffs Advocates and the defendants Advocates were at an advanced stage of negotiations. That application came up for hearing before the same magistrate who had made the dismissal orders on 25.10.2004. Time for hearing was allocated to be at 10.45 a.m. At 11.50 a.m. on the same Court a Miss Ombajo informed the court that the defendant had been served but was not in Court. The Counsel sought to set aside the orders of 29.6.004 dismissing the suit. The respondents were said to have been served, they were neither present and neither had they filed any papers in opposition to that application. Counsel said that she relies on the papers in support. The main reason for seeking an adjournment was advanced negotiations and both parties had agreed to take out the matter. That the she was out and Counsel then holding her brief did not explain the matter to the Court clearly. That the Plaintiff was absent as they had instructed him not to attend as the matter was going to be taken out. Further that the defendant had not been prejudiced in any way.

The learned trial magistrate gave a ruling whose central theme is reproduced here under "*ground 2 and 3 in the application are a rehearse of what the Court was told on 29.6.2004. These are repeated in the supporting affidavit of Dorothy Ombao which also introduces the element of illness on her part. No evidence of this is tendered. But once more I can only read casualness and presumption on the part of Counsel for the Plaintiff in the said affidavit.*

The hands of the Court cannot be tied by the mere allegations of negotiations as was done on the morning of the hearing. Moreover the parties appear to have prescribed to have presumed that the Court had no choice but go along with the decision to take the matter out of the cause list on 29.6.2004. The Plaintiff was absent, no explanation was given. This is a 1999 matter which has just been crawling along without any seeming diligence on the part of the Plaintiff.

As I said on 29.6.2004 the Plaintiff does not appear serious. I cannot agree that reinstating this suit will not prejudice the defendants. Proceedings must come to an end. I note that the defendant did not file any papers or attend Court in opposition to the Plaintiffs application that notwithstanding the onus was on the plaintiff to show that his application has merit. In my view he has failed to discharge that onus and I accordingly dismiss his application filed on 10.08.2002"

Against that finding the appellant became aggrieved and filed a memo of appeal dated 9th December, 2004 and filed on 14th December, 2004. It contains 6 grounds of appeal which are that the learned magistrate erred both in law and in fact:-

(i) In failing to consider that the Plaintiffs/Applicants failure to attend Court was not deliberate but due to the fact that the parties had agreed that the matter was being taken out of the hearing list as negotiations were at an advanced stage.

(ii) In failing to consider that it was in the spirit of negotiations that parties agreed by consent to take out the matter from the hearing list.

(iii) In dismissing the suit on the grounds of causal representation by the parties and not the merits of the pending suit.

(iv) In failing to take into account the appellant's advocates submissions on points of law and subsisting facts and in particular that the appellant to suffer injustice by the dismissal thereof.

(v) In failing to consider that the appellant had suffered grievous injuries.

(vi) In failing to take into account the appellant's case had merits.

On the basis of the aforementioned grounds thereof the appellant asked this Court to allow the appeal set aside the lower Court's orders and reinstate the suit for hearing and determination.

In his oral submissions to Court, Counsel for the appellant reiterated the grounds of appeal and then stressed the following points:

1. That events evidenced by them which took place on the record demonstrate various positive steps taken by appellant to prosecute his suit. It is on record that on several occasions parties brought to the knowledge of the court that there were negotiations with a view to have the matter settled amicably.

2. It is not true that parties did not seek an adjournment as it is on record that parties sought to have the matter stood over generally because they were still negotiating.

3. There is nothing in the proceedings which demonstrate casual representation on the part of the appellant's Counsel.

4. They contend the court failed to consider the reasons advanced for seeking an adjournment but wrongly went ahead to determine the merits of the matter on the basis of the character of the appellants representation.

5. They contend that the learned trial magistrate exercised her discretion improperly.

6. The application for setting aside was filed promptly maintaining that there were negotiations which submissions were not mere allegations.

7. There is nothing in the proceedings of 29.6.04 which can show that parties had made a presumption of the role of the Court as parties do not fetter the discretion of the Court. The Court should have believed the representation that the appellant's Counsel had advised the Appellant to stay away.

In response Counsel for the Respondent opposed the appeal on the grounds that:-

(1). The Court was right in its action as the matter had been adjourned 4 times on allegations of negotiations which had taken long.

(2). They contend that the learned magistrate was right as the defendants are going to be prejudiced as the negotiations had taken long and there was a risk of witnesses dying. The Court is urged not to upset the dismissal order.

The Court has taken into consideration, the revelations of what transpired on the record leading to this appeal, the reasoning of the learned trial magistrate and submissions of both Counsels on appeal and the Court makes the following findings.

1. In this Court's own judicial wisdom, Courts of law do not own litigation. It is owned by the litigants. Courts merely facilitate the litigation. Where parties come to the Court and say that they are negotiating and that is why the appellant was not present in court the court had no business going behind that. If for any reason there was justification for the court to doubt the representation in view of the history of the matter the Court, was not precluded from using one of its most valued tools of giving the parties a last chance failing which they fix the matter for hearing an disposal. No justification has been shown for failing to use this tool more so when both Counsels had agreed to have the mater marked stood over generally. There is no last adjournment on the record that the court had granted previously. It therefore follows that the Plaintiff was unjustifiably punished by the court by dismissing his cause for non attendance when Counsel had advised him to stay away because the matter was going to be adjourned.

2. Turning to the ruling, mention that grounds 2 and 3 as well as the content of the affidavit in support of the application for setting aside was a rehearsal of what had transpired on 29.6.04 was not justified as the Counsel was expected to justify what they had told the Court before. The Curt should not have expected Counsel to advance reasons outside what they had in mind on that date.

3. Lack of proof of sickness on the part of Counsel should not have weighted heavier than the need to do justice to a litigant complaining that he has been wrongfully shut out of the seat of justice.

4. Mention of a reading of casualness and presumption on the part of Counsel in the affidavit finds no justification because Counsel was reiterating that the reason for seeking an adjournment was that negotiations were going on. Counsel went ahead to annex annextures evidencing that there had been negotiations going on and as at end of May 2004, the defence were willing to settle the claim at 800,000.000 all inclusive. These annextures if at all, they were perused by the learned trial magistrate should have gone along way to prove to the Court and remove doubt that indeed firm negotiations were going on and had been going on. They are expression of the seriousness that Counsels had been negotiating and were desirous of settling the matter. A party who has been told that the other side had offered 800,000.00 and they wish that to be raised had no business doubting his Counsels word to continue with the negotiations for a Higher award. The appellants reason for non attendance on that date was valid and justified.

5. Holding that the Court cannot be tied by the mere allegations of negotiations as was done on the morning of the hearing no longer stood to be a mere allegation on the day of the ruling as proof of negotiations leading to an offer of a figure had been proved by the bundle of the correspondences annexed.

6. On holding that parties appear to have presumed that the court had no choice but go along with their decision to take the matter out of the cause list was uncalled for as the business of the Court is to facilitate proceedings. In as much as it should be noted that Courts should be keen on ensuring that parties process their litigation speedily, the court should exercise restraint in moving to unduly punish litigants especially in cases where there is sufficient reason given for seeking an adjournment.

7. It is not true that the Plaintiff was absent without a reason as Counsel explained that he had bee advised to stay away because negations were still going on which negotiations were proved by annextures to the affidavit to be in existence.

8. On allegations of a crawling matter, the learned magistrate should have given allowance

for the possibility of the file having been a victim of a bloated judiciary. Proof was before her as the file was not reached until 10.30 a.m. Even then it had to hear it at 11.50 a.m. If the Court had all along been ready to proceed even on that day then it should have been disposed off at 9.00 a.m. promptly.

9. On prejudice to the defendant, there was no justification for this as Counsel appearing for the defence did not complain of prejudice on 29.6.2004. They did not oppose the application for setting aside. This being the case the court had no business to assume the role of baby sitting the defence and make itself its advocate. The Court should strive at all times to be neutral and fair to both sides and treat them equally. The Court had no business purporting to read the mind of the defence without any proof having been laid before it.

10. The defence submissions of prejudice to be suffered as per their submissions in Court holds no water as they have not complained anywhere on the record. It is just being hijacked because the learned magistrate mentioned it.

11. Indeed lack of opposition to a process does not entitle a litigant a clean bill of success. However where such a situation arises there should be a strong evidence to rebut the presumption of admission of the allegations put, by the defaulting party. Herein there was no evidence to rebut the presumption of acquiescence in the application for setting aside the grieving orders by the defence.

12. On the whole, it is this Court's opinion that the application for setting aside was merited. Denying the appellant success on his appeal will encourage a battering of one of the most valuable tools in the dispensation of justice with impunity namely out of court settlement.

It should be encouraged as it saves court's time and allow parties room to settle disputes on agreed terms as opposed to imposition of terms by Court.

For the reasons given the appeal is allowed in its entirety. The lower Court orders of 25.11.2004 be and are hereby quashed and set aside with costs both on appeal and the court below being awarded to the appellant.

DATED, READ AND DELIVERED ON THE 22ND DAY OF FEBRUARY 2008.

R.N. NAMBUYE

JUDGE