REPUBLIC OF KENYA

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

Civil Appeal 811 of 2001

AUTOMOTIVES INDUSTRIAL BATTERY MANUFACTURERS…….....APPELLANT

VERSUS

ISAAC KIMANI NJUGUNA…….....……..…….....…RESPONDENT

J U D G M E N T

On 29/7/04, the Appellants herein, AUTOMOTIVE AND INDUSTRIAL BATTERY MANUFACTURERS(K) LIMITED moved to this court, by way of an appeal against the Ruling and order of the Chief Magistrate, Milimani Commercial Courts, in 'Civil case No. 705/01, on the following grounds:-

1. The Lower Court failed to appreciate and consider the arguments advanced on behalf of the applicant,

2. Lower court erred in holding that the appellant sought from the court an order directing the Respondent on how to conduct his case:

3. Learned Magistrate erred in addressing and giving effect to extraneous matters not connected to the merits of the application before her;

4. The lower court erred in failing to hold that the applicant had reasonably requested the Respondent to submit himself for medical re-examination and the Respondent had unreasonably refused to do so.

5. Lower Court erred in reaching a conclusion that was manifestly contrary to the evidence before her and the law.

Wherefore appellant prays that the appeal be allowed and lower court's ruling dated 23/10/01 be set aside; the appellants application dated 9/8/01 be allowed, as prayed, with costs to the appellant.

At the commencement of the hearing of the appeal, the parties, by consent, agreed to conduct the appeal by way of written submissions.

The genesis of the appeal is the dismissal of a Notice of Motion, by appellant, dated 9/8/01, by the Lower Court, in which the relief prayed for was stay of "**all further proceedings in the suit unless and until the Respondent (Plaintiff) submit himself to medical examination, on behalf of the Defendant (appellant) by a Dr. R.P. Shah……"**

The above application arose from the following facts:

On 6/2/01, the Respondent sued the Appellant for negligence and sought relief in the form of damages for personal injuries allegedly sustained as a result of the appellant's alleged breach of employment contract between the parties. The relief sought included damages for alleged injuries, loss and damage. The alleged injuries in the plaint included dislocation and fracture. The appellant did not admit the claim i.e. the injuries, loss and damage as alleged in the plaint.

In due course, the appellant's counsel requested the Respondent's advocate for their client (the Respondent) to be re-examined by a doctor, nominated by the Appellant. After prolonged exchange of correspondence, the Respondent refused to be re-examined, and that is what sparked the Notice of Motion, with the Appellant arguing that without such an examination it was impossible for the Appellant to prepare its defence, and no fair hearing could be expected.

In dismissing the stay application, the Learned Magistrate, stated in part that "**it is for the Plaintiff to prove his case, the court cannot direct him on what evidence to adduce. The court cannot force him to go for the medical examination requested, all that the court does note is that he has been requested by the other party to do so and he has refused and it remains to the court to speculate on why he has refused to do so."**

Having perused the submissions and authorities cited and relied upon by Learned counsel for both sides, I have reached the following findings and conclusions.

The counsel for the appellant seems to have made undue farce about the lower court's use of the word **speculate**, by implying that the court would base its decision on guesswork, as opposed to evidence before the court. I get a different perspective of what the lower court, on the basis of the facts before the Learned Magistrate, might have wanted to say. The correct words would have "**draw inference"** rather than speculate.

Be that as it may, the gist of the appeal is whether the appellant's request for re-examination of the Respondent, was reasonable or not, under the circumstances. To answer that question, I have to state that ours is an adversarial system, in which at the commencement of the hearing there has to be discovery and exchange of list of documents for fairness and justice to be done. This is buttressed by the provisions of Section 22 of the Civil Procedure Act, Cap. 21, Laws of Kenya

h stipulates:

"Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogations, the admission of documents and facts and the discovery inspection, production, impounding and return of documents or other material objects producible as evidence……."

In my view, all the above is meant to ensure that parties do not ambush one another, and that all the relevant materials are before the court in the course of the proceedings, for fairness and justice to be done.

The issue is not forcing any party to adopt any particular method of conducting its case. As a matter of fact the provision is not mandatory – it is discretionary on the court, and that is clear from the use of the word MAY. But in exercising that discretion the court should, and is always guided by the principles of fairness and what is promotive of justice.

The two English cases cited and relied upon by the Counsel for both sides, i.e. STARR V. NATIONAL COALBOARD [1977] 1 All E.R. 243 CA, and PICKET VS. BRISTOL AEROPLANE CO. LIMITED are only of persuasive authority. But they raise and state the concerns and the correct position, which has been statutorily provided for in our Civil Procedure Act, Cap. 21, Laws of Kenya.

Thus, in the STARR case, at P.247, the court stated, in part, as under:

"…….it is accepted that where a Plaintiff refuses to undergo a medical examination requested by a Defendant, the court does have an inherent jurisdiction to grant a stay until such time as he submits to such examination when it is just and reasonable to so do."

The foregoing are the same principles and sentiments captured by S.3A of our Cap. 21, Laws of Kenya, as follows:

"…..**Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."**

In light of all the foregoing, I do not consider the request for medical examination of the Respondent by the appellant, to be unreasonable. There is no evidence in the material submitted before me that the Respondent was opposed to the particular Doctor nominated by the appellant. Rather, the Respondent refused to be examined, and by inference, by any Doctor. That to me is unreasonable and the court should not condone it on the argument that it is for the Appellant to prove his case or such an order would interfere with the Respondent's freedom of choice. To submit to such an argument would subvert the whole notion of discovery and exchange of documents (evidence) and usher in injustice [SS 3A and 22 of Cap. 21, Laws of Kenya]

All in all, the appeal herein succeeds and I rule as under:

(a) I allow the appeal and set aside the lower court's ruling, dated 23/10/01, in CMCC No. 705 of 2001.

(b) I allow the Appellant's application dated 9/8/2001, as prayed.

(c) I order that the Respondent do pay the costs of both this Appeal and the application below.

DATED and delivered in Nairobi, this 28th Day of May, 2007.

O.K. MUTUNGI

JUDGE