REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL APPEAL 15 OF 2003

KASSIM MBWANA.....APPLICANT

VERSUS

WILSONKAMANDE MAGUA.....RESPONDENT

Coram: Before Hon. Justice Mwera

Court clerk – Kazungu

JUDGEMENT

This appeal arose from the learned trial Magistrate's ruling of 30-1-03 following the respondent's (defendant in the lower court) notice of motion dated 27-11-2002. That application invoked O. 44 rr. 1(1), 4(4), O.50.55.1, 2 and SS. 3A, 63 (3) Civil Procedure Act.

The prayers which form the basis of this appeal were:

(1) That the lower court review the consent judgment entered with a view to setting it aside and

(2) That the defendant/respondent be allowed to call evidence to defend himself.

The suit in the lower court was to seek the relief in special and general damages. The general type appears on the copy of the plaint on the record of appeal as having been inserted by hand. That does not appear on the original plaint in the lower court file. There were also prayers for costs and interest. The plaint averred that due to negligent driving of the respondent, his motor vehicle registration number KYA 372 had hit the appellant leaving him injured.

M/s J. W. Kagwe & Co. Advocates, entered appearance for the respondent and filed a defence denying the claim and adding that the accident was either wholly or substantially caused by the appellant.

A trial followed on 27-10-98 and after the appellant testified and closed his case, Mr. Gitonga Advocate told the learned trial magistrate that if allowed an adjournment, he could secure his witness to testify – very likely the present respondent. The application to adjourn was refused. Mr. Gitonga (no doubt from M/s J. W. Kagwe & Co. Advocates) then said that he had no evidence to offer and the trial

closed. The court ordered that submissions would be taken on 11-11-98. This was not to be as the parties entered in negotiations to settle out of court. This went on for about 2 years and on 28-4-2000 the consent judgement, subject of the notice of motion dated 27-11-2002 was recorded.

"*By consent judgement is hereby entered against the defendant for ksh.350,000/- general damages, Kshs.4465/- special damages plus costs and interest. Liability is thereby entered 100% against the defendant in favour of the plaintiff. Payment within 45 days in default execution to issue.*"

The two advocates Mr. Juma for the present appellant and Mr. Gitonga for the respondent signed that onset judgement. It looks like payment did not issue for another 2 years and by 3-5-3003 a notice to show cause went to the respondent so that execution would proceed. The lower court observed that he had been served with that notice. He had not appeared in due obedience; an order to execute was granted. The appellant got to attach the respondent's property. He instructed M/s Ngombo & Company Advocates to sue for stay orders and more or less at the same time he got the same M/s J. W. Kagwe & Co. push for review. It was heard on 11-12-02 followed by the ruling of 30-1-2003. The learned trial magistrate granted the orders: The consent judgement of 28-4-2000 was set aside.

Mr. Juma who has always acted for the appellant told this court that the learned trial magistrate did not apply the correct law and principles applicable in setting aside a consent judgement and that the notice of motion dated 27-11-2002 was in fact brought under O.44 Civil Procedure Rules on review of orders/judgments, and not under the setting aside provisions. That the lower court failed to address the issues placed before it and instead went on to bring in irrelevant issues on which it decided the notice of motion. These, the court was told to note, included aspects like who instructs a lawyer in run nig-down cases: the insurer or the insured?

That the respondent had argued that his lawyer was coerced to enter the consent judgement while that was not the case. That a consent order/judgement assumes the character of a contract since the parties signing are deemed to have focused their minds closely to the parts forming that consent. And that being in the nature of a contract, to set it aside or otherwise make it unenforceable, the applicant to that end must convince the court that the consent order/judgment was entered into attended with a mistake, or fraud or coercion or undue influence or misrepresentation – the usual incidents that can vitiate a normal contract. That such evidence was not put before the learned trial magistrate and thus he was not justified to set aside the consent judgement. And that all in all the ruling of 30-1-2003 should be thrown out and the appeal allowed.

Mr. Muraya on his part told the court that the learned trial magistrate's ruling was based on sound appreciation of the circumstances obtaining in the case. That Mr. Gitonga had signed the consent judgment with the mistaken view that the respondent had given him authority to do that while he had not. That in such situation this court should leave the subject ruling in place, and particularly that the part of the consent judgment touching on special damages and costs should remain. These were pleaded in the lower court. But the part touching on general damages should go because that did not form part of the claim in the lower court. This court was invited to apply O.41 r.20 Civil Procedure Rules in the circumstances.

The determination of this appeal takes the following path: The learned trial magistrate said of O.44 Civil Procedure Rules under which the notice of motion was brought.

"*The application is grounded inter-alia on O.XLIV. Learned counsel for the applicant did not address me on how the application would succeed under the Order.*"

This court interpretes that to mean that the learned trial magistrate could not grant reliefs under O.44 rr. 1, 4, as stated in the heading of the notice of motion dated 27-11-02. That provision of law contains provisions for a party seeking a review of an order or decree where otherwise one would have appealed. On being satisfied as to the reasons advanced, the court may vary the end effect of the order or decree where otherwise one would have appealed. That is not what the respondent put forth in arguments. Basically he wanted the consent judgment set aside. Perhaps the learned trial magistrate applied the

import and effects of SS.3A 63 Civil Procedure Act to do justice by invoking his inherent jurisdiction in that case. But even to do so, he had to go by what material was placed before him. Garnered from the ruling under review the learned trial magistrate said in the last part thereof:

"*If Stallion Insurance Company paid the claim, the defendant would not be in problems. It was the insurance company that instructed M/s J W Kagwe & Co. Advocates to come on record for the defendant. The advocate derived authority to represent the defendant from the instructions given by the insurance company. I feel if the company cannot satisfy the claim and its (sic) failed to have the defendant testify, it is only fair to allow the defendant to do so ---- now that he is on his own-his insurance company being under liquidation.*"

With respect to the Learned Trial Magistrate who had correctly started off by remarking that a consent judgment may only be set aside for fraud, coercion or for any other reason which would enable the court to set aside an agreement, he fell in error to set aside the consent judgment on the basis of the insurance company having instructed M/S J. W. Kagwe & Co. Advocates (for the defendant). That was not the material argued before that court to "review and set aside" the consent judgment. Ms Olwande had briefly said that the consent judgment ought to be reviewed because it was entered through coercion. This the Learned Trial Magistrate had again properly rejected that because there was no affidavit from Mrs. Gitonga of M/S J. W. Kagwe & Co. Advocates that he had been coerced to sign the consent judgement.

The issue of the insurance company and not the respondent having given instructions to M/S J. W. Kagwe Advocate was not raised or convassed during the hearing of the subject notice of motion. That goes without argument that it was not the basis for the relief to set aside the consent judgment. Both sides were satisfied that the insurer had instructed M/S J. W. Kagwe & Co. Advocates to defend their insured (the respondent) and that firm had done just that. And where a lawyer appears to do anything for a party in any matter, it shall be taken that he has authority to do so. It is not for the court to go round that and ask of the nature, extent and validity of the instructions because as the learned trial magistrate quoted from DAVID ONGIRO SARE –VS- THE MUNICIPAL COUNCIL OF MOMBASA MBA HCCC 433/90;

"*Counsel would ordinarily have ostensible authority to compromise a suit as far as the opponent is concerned.*"

That is the correct position. That is how Mr. Gitonga appeared and compromised the suit by the consent judgment. It was not open to the learned trial magistrate on his own to go out of this and conclude that in fact it was not the respondent who instructed M/s J. W. Kagwe and so he should have leeway to be heard in his defence – by some reopened proceedings. That cannot be. The suit was compromised. If the insurer did not pay up and it went in liquidation, the respondent is the basic and primary party to pay the judgment sums. He may pursue the liquidator of his insurer for indemnity. But he cannot put the appellant again in the process of beginning the litigation afresh. That will not be justified, or warranted or even lawful in the circumstances.

To be precise even this court does not think that Mr. Muraya has any doubt about the validity of the consent judgment. He submitted that if the aspect of general damages was excluded from that judgement, be – cause to him it was not pleaded, then he could not have a quarrel with the special damages and costs as per that judgment. One cannot have it both ways. The consent judgement was properly and validly recorded. It has not been shown why it should be set aside despite the muddle in the provisions of law relied on in the notice of motion dated 27-11-02. There was no cross-appeal here and also the court did not see the need to apply O.41 r.20 Civil Procedure Rules.

In the sum the appeal is allowed with costs.

Judgement delivered on 3rd June 2005

J. W. MWERA

JUDGE