



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 51 OF 1999

(From the original Civil Suit No. 1470 of 1999 of Milimani at
Nairobi)

DIOCESE OF NYERIAPPELLANT

VERSUS

LYDIA KAARI BARINERESPONDENT

JUDGMENT

This appeal arises from the judgment and order of the Acting Principal Magistrate (Betty Rashid (Mrs) delivered on 6th March 1998 in which the appellant was ordered to pay to the respondent Kshs.100,000/= in general damages and Kshs.1250/= as special damages as compensation for the injuries the latter sustained in a road traffic accident along Karatina – Murang’a Road on 29th July 1993.

She said she was traveling as a passenger in motor vehicle registration number KYQ 639 Datsun pick-up owned by the respondent when it collided with a lorry from the opposite direction as a result of which the appellant sustained injuries.

Through counsel, she filed a suit in the court of the Principal Magistrate at Nairobi on 5th March 1996 to claim damages for the injuries sustained blaming the appellant’s servant’s and/or agent the negligence in the manner of driving.

When the case came up for hearing before the Senior Principal Magistrate (Okwengu (Mrs), counsel for the plaintiff revealed that there was High Court Civil Case Number 962 of 1995 file by the same plaintiff as in the case before the magistrates court seeking similar remedies against the defendant; saying this was duplicity of suits which he wanted to sort out before proceeding further in the matter.

There was no other order in this regard but on 16th January 1998 the case came up for hearing and in absence of the defendant and/or counsel it proceeded to hearing with the respondent testifying. After she closed her case submissions were fixed for 26th January 1998. However on 27th January 1998 the intended judgment was deferred pending hearing and determination of an application dated 22nd January 1998 for stay of proceedings in view of the pendency of High Court Civil Case No. 962 of 1995.

That application was heard on 10th February 1998 and a ruling thereon delivered on 18th February 1998 staying the proceedings pending either the prosecution of the High Court case or its withdrawal.

On the same deny the ruling was delivered, counsel for the respondent said this:-

“The High Court matter has since been withdrawn. I have served my learned friend with withdrawal documents.”

Counsel for the appellant is recorded as saying:

“I have no objection.”

He said nothing else and the court recorded

“Exparte proceedings proceed on 16 th January 1998. Written submissions on 20th February 1998 and judgment on 4 th March 1998 at 2.30 p.m.”

The judgment was delivered on 4th March 1998 and an application for stay of execution made on 11th March 1998. It was granted on 20th March 1998, then there is this appeal. The appeal was filed in this court on 17th February 1999 in a memorandum of appeal which listed 7 grounds of appeal.

The grounds were that the learned magistrate erred in reversing her decision to stay the proceedings in the suit before her pending the suit between the two parties in the High Court Civil Case No. 962 of 1995 which was filed earlier and in which the issues in dispute were directly and substantially the same to the issues in dispute before her in the absence of a formal application for review of her order; that she erred in failing to appreciate that the suit in the High Court was purportedly withdrawn in the period between completion of the hearing of the appellant’s application for stay of proceedings in the lower court and the date of delivery of her ruling and could not cure the illegality of the proceedings that had taken place on 16th January 1996, that she erred in proceeding to order that written submissions be filed on the basis of the irregular exparte proceedings and consequently entering judgment without hearing the appellant’s case; that she erred in ignoring the fact that the suit before her was sub-judice in light of the provisions of Section 6 of the Civil Procedure Act (Cap 21) a fact which was brought to the attention of the court through the written statement of defence and was admitted orally in court by the plaintiff’s advocate on 2nd May 1997.

Further grounds of appeal are that the magistrate erred in ignoring substantial matters of fact and of law which were clearly set out in the written statement of defence; that the magistrate erred in failing to notice the discrepancies in the police abstract, the respondent’s testimony as to the place of occurrence of the accident giving rise to the suit and other discrepancies and inconsistencies in the respondents testimony and that the learned magistrate erred in her judgment in completely ignoring the defendant’s submissions and being denied an opportunity to adduce evidence and to challenge the legality of the proceedings.

In court on 3rd March 2003, only counsel for the appellant appeared and stated though she had served counsel for the respondent with a hearing notice, the latter had not appeared. The court checked and confirmed that indeed counsel for the respondent had been served with the hearing notice on 15th January 2003. This being the case, the court allowed the appellant’s counsel to proceed and submit on the appeal exparte. Counsel referred to the two suits filed in the Resident Magistrate’s court and in the High Court and seeking similar reliefs.

That in the appellants defence notice of this was brought to the attention of the court. And though the case was fixed for hearing on 2nd May 1997 the respondent applied for an adjournment in order to sort out the question of the existence of the 2 suits. That inspite of an agreement between counsel for the parties not to proceed with any of the two suits until it was agreed as to which one would proceed, the respondent fixed the suit subject to this appeal for hearing on 16.1.98 when the High Court case was still pending.

Counsel submitted that under Section 6 of the Civil Procedure Act this was not proper because the suit subject to this appeal was sub-judice since the High Court case was filed first.

That since both counsel had agreed to sort out which of the two suits could proceed, counsel for the appellant did not attend court on 16.1.98. That after the suit was heard on 16.1.98 and the plaintiff had closed her case, the appellant filed an application for stay of proceedings on 22.1.98 which was allowed on 18.2.98. That the order made then was that the suit subject to this appeal would be stayed pending the

prosecution or withdrawal of the High Court Case. That thereafter there was new counsel for respondent in the High Court Case who presented notice of withdrawal of the said High Court Case and the learned magistrate reversed her decision to stay the magistrate's court case. According to counsel the magistrate erred in reversing her decision to stay hearing of the case before her because the application for withdrawal was mala gide, coming, as it did, soon after the application for stay had been allowed after substantial arguments. Counsel argued that the withdrawal was done to circumvent the law and that it was an abuse of the process of the court.

That the withdrawal could not cure the illegality of the lower court having heard the case when the High Court case was still pending. Counsel submitted that the magistrate erred in ordering written submissions when the case had proceeded irregularly exparte; hence judgment founded on these irregular proceedings could not stand. That she erred in refusing to give the appellant an opportunity and to hear its case inspite of an application by the appellant to present its case. That the magistrate wrongly apprehended the evidence of the respondent and that she should not have awarded the said respondent damages since she had not proved her case. That considering the place where the accident occurred, the magistrate's court at Nairobi had no territorial jurisdiction to hear the case subject to this appeal. She prayed for the appeal to be allowed with costs. That two suits were filed on the same matter, one at the High Court and the other at the magistrates court seeking similar reliefs, is not disputed. When the learned magistrate started hearing the case subject to this appeal, the High Court case was still pending, though it was filed in court earlier then the magistrates court's case.

Nevertheless, after the learned magistrate made a ruling on the appellant's application for stay of proceedings on 18th February 1998, there is this record by the counsel for the respondent:-

“The High Court matter has since been withdrawn. I have served my friend with withdrawal documents.”

The appellant's counsel replied

“I have no objection.”

There is no record that thereafter this counsel sought leave of the court to present its client's case, contrary to its counsel's submission on this appeal that she did so.

Even when the court recorded:

“Exparte proceedings proceeded on 16.1.1998. Written submissions on 20.2.1998 and judgment on 4.3.1998 at 2.30 p.m.” or “it's noteworthy that the plaintiff had instituted HCCC No. 962/95 in the High Court with another claimant but withdrew the case in the High Court and preferred to proceed with this case.”

there is no record by counsel for the applicant that his client had not testified and that it wanted to be given an opportunity to do so.

The only record perused thereafter is an application for an interim stay. Otherwise the appellant did not request for an opportunity to be heard in its defence.

In fact it appears counsel for the appellant did not intend to have her witness take the witness stand because when the learned magistrate ordered that parties do file written submissions the said appellant's counsel filed theirs on 20th February, 1998.

This shows the appellant was prepared to participate in the case inspite of the fact that it offered no defence.

However, the order of the magistrate of 18.2.98 was for the magistrate's court case to be stood over generally pending either the prosecution of the High Court case on its withdrawal. The High Court case

was filed by two plaintiffs Dinah Kainyu Rithaa and Lydia Kaari Barine.

The order of 18.2.98 was interpreted to mean the High Court case would be stood over generally in its entirety and not in relation to only one of the plaintiff, but it appears the counsel for the respondent in the case subject to this appeal only withdrew the claim by the respondent in this appeal leaving the High Court case in respect to the claim by Dinah still alive.

It was therefore a misrepresentation by the respondent's counsel to tell the lower court that the High Court case had been withdrawn when it was still pending in respect to the claim by Dinah Kainyu Rithaa against the appellant.

And in view of Section 7 of the Civil Procedure Act I cannot say for sure the Acting Principal Magistrate at Nairobi had the requisite territorial jurisdiction to hear and determine a case of an accident which occurred along Karatina – Muranga road. But this particular aspect would have been more clear if both parties were allowed to testify in the case before the lower court.

In view of all the foregoing the best order in this appeal would be to allow it and remit this matter to Milimani Commercial Court for the case to be heard denovo by another or different Principal Magistrate.

Costs of the appeal to abide the decision of the lower court. It is so ordered.

Delivered this 18th day of March 2003.

D.K.S. AGANYANYA

JUDGE