



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 430 OF 2000

PROBATE AND ADMINISTRATION

BENJAMIN MAILO KIZENGA & ANOTHER.....APPELLANTS

VERSUS

CHRISTOPHER KARUMBA

(a minor suing thro' her mother and next friend

ALICE NJERI WAWERURESPONDENT

J U D G M E N T

On 17th April, 1996, the respondent Christopher Karumba, a minor, sued the appellant, through his mother as the next friend claiming from the latter general and special damages arising from a road traffic accident which occurred along Argwings Kodhek Road Nairobi, on 20th November 1995, and in which the said respondent sustained injuries.

The appellant's driver and/or agent was blamed in this accident for negligent driving or control of the motor vehicle registration number KAB 627P which knocked down the respondent.

After appearance and defence were filed in the case by Messrs. Kirundi & Co. advocates, the case was fixed for hearing of a preliminary objection on 12th June 1998.

The objection was on lack of geographical jurisdiction by the Kiambu Principal Magistrates Court where the suit had been filed when the accident had occurred in Nairobi.

The preliminary objection was argued and the magistrate stayed the proceedings pending an application to have the case transferred to the court of competent jurisdiction.

None of the parties made the requisite application for transfer but instead the following consent order was made in the court file on 27th August, 1999.

"Upon reading a consent letter No. B.W.K./Acc/ANW/08/96 dated 26/8/99

signed by advocates of both parties, the following orders are recorded .

ORDER BY CONSENT

1. Judgment be and is hereby entered on the issue of liability and apportioned as followed: - (a)

Against the defendant jointly and severally at 50%. (b) Against the plaintiff at 50%.

2. Parties to tender written submissions on quantum upon which the court will deliver judgment and this matter be mentioned on 15/9/99 for purposes of taking a judgment date.

The record shows the plaintiff's counsel put in written submissions dated 14th September, 1999 while the defence filed its submissions on 24th September 1999 and a brief judgment by the magistrate (P.N. Morigori) was delivered on 2nd March 2000 wherein an award of Kshs.90,000/= was made in general damages with costs of Kshs.18,000/= to the plaintiff.

After this judgment, the respondent set about to execute it after the decree was drawn. In fact this judgment was executed and thereafter the appellant filed an application in the same court on 26th May 2000 to stay execution of the judgment, to review and/or set the said judgment aside.

The grounds upon which this application was based were that the court had no jurisdiction to entertain the suit, that the judgment was irregularly and unprocedurally entered notwithstanding that there was an order to stay proceedings pending transfer of the suit to a court with competent jurisdiction and that the judgment was obtained without notice to the defendants and/or their advocates.

The supporting affidavit was in similar manner as the grounds on the body thereof.

And after a replying affidavit was filed to this application on 9th June 2000, it was heard on the same day, 9th June, 2000, and dismissed with costs because it had no merit.

The appellant then lodged the appeal against the judgment dated 2nd March 2000 in a memorandum of appeal filed in court on 5th August 2000 and which listed 8 grounds of appeal.

The grounds of appeal faulted the learned magistrate for making an order to award damages in the case which had been stayed for lack of jurisdiction; that he assessed damages without giving the basis, that the magistrate did not indicate whether he took into account the contribution agreed upon by the parties.

That the magistrate did not give a concise statement of the case and reasons for making the award of Kshs.90,000/= as general damages, that he erred in delivering the judgment in absence of the appellants and/or counsel, when in particular no notice for it had been issued.

That the learned magistrate erred in not taking into account the submissions made by the appellant in respect to lack of jurisdiction and that he erred in awarding the respondent Kshs.90,000/= against the weight of evidence.

Counsel for the parties appeared before this court on 22/7/2002 to either urge or oppose the appeal.

Counsel for the appellant submitted that the judgment was delivered without notice and that the Kshs.90,000/= awarded as general damages did not take into account contribution agreed upon earlier. Counsel for the respondent opposed the appeal and said it was an afterthought.

These are submissions made herein for consideration and decision.

In the first place, it has been said time and again that there are no provisions under the Civil Procedure Rules for filing of written submissions in proceedings before court and that doing so is denying parties an opportunity to be heard in such submissions which should be done orally.

In any case, I do not understand how in a case such as one subject to this appeal, there can be either oral or written submissions when parties have not testified, as in this case for the respondent to show the extent of his injuries.

In the second place, once the learned magistrate made an order staying proceedings pending an application for the transfer of the case to an appropriate court with the requisite jurisdiction it was incumbent on either of the parties, notably the appellant, to make the requisite application for transfer, though I am not persuaded that the Kiambu Principal Magistrate's court had no jurisdiction to entertain the case.

It was, therefore, misleading to the court for counsel for the parties to sign consent letter on liability and to file the same in that court without first doing something about the stay order still on the file..

Thirdly the appellants were equally to blame for knowing of the order of the court on the stay of proceedings and yet going ahead to sign a letter to consent to the case being heard by the Kiambu Court when it was their counsel who had raised the preliminary objection to the court's jurisdiction.

Fourthly the magistrate's judgment was too brief that it did not comply with Order Xx Rule 4 of the Civil Procedure Rules.

Fifthly, without the appellants doing something about the order of the court which dismissed their application for review and/or setting aside the judgment, I am not sure of the effect of this appeal against the main judgment.

On these lapses committed by both parties and the court, I feel inclined to allow the appeal and set aside the lower court order and that in the circumstances of the case I would order retrial of the same case from stage of the order of stay.

And as the appellant was partly to blame for what transpired, each party should bear his/their own costs of this appeal and the case below.

Delivered this 24th September, 2002.

D.K.S. AGANYANYA

JUDGE