



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL CASE NO. 42 OF 1995

PHILLIP SILA ::: 1ST PLAINTIFF

NICHOLAS MWANIA MUSAU ::::::::::::::::::::::::::::::::::::::: 2 ND PLAINTIFF

VERSUS

ELIUD KIOKO :::::: ::::::::::::::::::::::::::::::::::::::: 1 ST DEFENDANT

COMMERCIAL TRANSPORTERS CO. LTD. ::::::: 2 ND DEFENDANT

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Coram: J. W. Mwera J.

Gaya Advocate for Applicant – 2nd Defendant

Kamwedwa Advocate for Respondent/Plaintiff

C.C. Muli

RULING

Of the pertinent part remaining in the notice of motion dated 15.3.2001 and brought under O. 44 rr. 1, 2, 3, Civil Procedure Rules among others, the 2nd Defendant, M/s Commercial Transporters Limited asks this court to review the 20 consent judgement on liability that was recorded here on 18.11.98 because, so the court heard and the same was pleaded/deponed to, that Mr. L. M. Wambua who purported to have that compromise recorded had no authority to do so and accordingly there was a mistake/error which if left to remain will work injustice against the 2nd defendant. The court heard that on 18.11.98 a consent judgement was recorded to the effect that liability up to 15% would go to the 1st defendant while the balance went to the 2nd and 3rd defendants.

After that an exparte hearing proceeded and ended with a judgement of 16.12.98 – God knows where the signed fair copy thereof went to. It is not traced on the file. The awards in damages to the plaintiffs were ordered to be paid as per the apportionment of liability, a consent to which is under review now. Execution commenced; there were moves to settle and agree that the 1st and 3rd defendants alone shoulder the payment. The 2nd defendant intimated to the court that as at the time of 10 the accident, the 3rd defendant had the actual possession, control and use of the accident lorry reg. No. KNF 479. The 2nd defendant endeavoured to help the plaintiffs trace the 3rd defendant so that he would pay up. This failed and this application was filed.

Mr. Gaya urged this court to find and accept that Mr. L. Wambua had no authority to have the consent judgement on liability recorded on 18.11.98 for and on behalf of the 2nd defendant. Thus it was a mistake, which in essence could and should warrant the varying of that consent judgement as against the 2nd defendant. That it was M/s Shapley Barret and Company Advocates Nairobi who were the 2nd 20 defendant’s lawyers and they gave no brief to Mr. Wambua for consent/compromise orders of 18.11.98. That Mr. Wambua compromised only on behalf of the 1st and 3rd defendants. That the tenor, purpose,

and import of the pleadings the annexures appended to the affidavit in support sworn by one Peter Okumu on 15.3.2001 was to the effect which agreed with the fact that as at 17.1.94, the offending motor vehicle was in the possession of the 3rd defendant who should not only bear the 85% liability alone but should also pay the decretal sum to that proportion. That was the thrust of Mr. Gaya's argument. The rest is incorporated in the determination to follow below.

On the plaintiff's side Mrs. Mwangangi told the court that as at 18.11.98 the 1st defendant in this suit was represented by M/s Mungai and Gakuru Advocates Nairobi while the 2nd and 3rd Defendants were represented by M/s Kimani Michuki Advocates Nairobi. The pleadings closed and trial opened. She added that the 2nd defendant was the registered owner of the accident lorry as at 17.4.94 and so if at the same time the 3rd defendant was an "owner" of sorts, both were liable as per the 10 consent on liability.

Going over the pleadings as filed in the light of the proceedings on record may go along way to the determination herein. Indeed it is pointed out that save for the consent judgement on liability which the 2nd defendant attacks, the rest is not in dispute. The plaint was filed here on 10.2.95 by M/s Muoki and Company Advocates for the 3 plaintiffs against the two defendants Eliud Kioko, the 1st defendant and Commercial Transporters Limited – 2nd defendant. It was a claim in damages arising from the accident, aforesaid.

20 On 3.5.95 M/s Mungai and Gakuru Advocates entered appearance for the 1st defendant followed by a defence on 14.3.95. On 17.3.95 M/s Shapley Barret and Company Advocates filed a defence for the 2nd defendant. They had entered appearance earlier.

On the same date 17.3.2001 M/s Kimani and Michuki Advocates also appeared and filed a defence for the 2nd defendant. It needs no going over the fact that on 22.5.95 M/s Kimani and Michuki advocates filed a chamber summons to set aside the interlocutory judgement entered against the 2nd defendant on 14.3.95 so that their said defence could be filed. Since this matter did not feature in this application, it needs no further comment.

M/s Mwangangi and Company Advocates, Machakos were appointed by the 1st and 2nd plaintiffs on 22.8.95.

Earlier on 9.5.96 M/s Muoki and Company Advocates applied to amend the initial 10 plaint of 10.2.95 wherein the 3rd plaintiff Pastor Abednego Kyalo was the remaining claimant against one Zakayo Kimani. The 1st and 2nd plaintiffs were removed from the proceedings as was the 2nd defendant. The fate of that application is not readily known but on 17.10.96 M/s Mwangangi and Company Advocates filed an application to amend the plaint. All 3 plaintiffs remain as well as the two defendants. But the 3rd defendant Walter Kimi trading as Walza Enterprises was added. It was pleaded that the 1st and 2nd plaintiffs when travelling in the 1st defendant's motor vehicle No. KAA 223 Z were injured when it collided with motor vehicle KNF 479 owned by the 2nd and 3rd defendants.

The court heard that this application to amend was served on all the advocates M/s Muoki and Company for the 3rd plaintiff as well as on M/s Kimani and Michuki and Shapley Barret. The amendment apparently was allowed and on 7.4.97 M/s Kimani and Michuki filed a defence to the amended plaint. The amended defence was for and on behalf of the 2nd and 3rd defendants. It can be assumed that M/s Kimani and Michuki had added the 3rd defendant as their client to the 2nd defendant. The record does not show that M/s Shapley Barret, whose case Mr. Gaya is argued here either protested that the 2nd defendant was their sole client or filed a defence to the amended plaint aforesaid. The record shows that on 13.10.97 the 3rd plaintiff opted to act in person. He appointed M/s Mwangangi and Company Advocates on 24.12.97.

Then on that 24.12.97 M/s Mwangangi and Company Advocates sought to further amend the plaint and a copy dated 18.12.97 is on the file. Again this application was copied to M/s Mungai and Gakuru for 1st defendant, M/s Kimani and Michuki and M/s Shapley Barret. Still it was not said by the latter that the 2nd 10 defendant was their sole client. However on 9.1.98 M/s Shapley Barret told M/s Mwangangi that they had no objection to the further amendments only that they needed more time to amend their own

(pleadings - defence). It looks like neither defendant amended their pleadings further and a hearing notice to them all for 18.11.98 issued. The copy filed in court on 16.5.98 bears the rubber stamps of M/s Mangai and Gakuru, M/s Kimani and Michuki and M/s Shapley Barret.

On the side of proceedings the file shows that on 22.11.96 when the defendant's lawyers, duly served, did not appear the application by the 1st and 2nd plaintiffs presented by M/s Mwangangi as at that point, dated 11.10.96 was allowed. 20 As it shall be recalled it brought on record the amended plaint introducing the 3rd defendant as also the owner of M/s KNF 479. As noted above even as M/s Shapley Barret seemed to appear side by side with M/s Michuki and Kimani for the 2nd defendant, the latter firm filed a defence to the amended defence on behalf of the 2nd and 3rd defendant. M/s Shapley Barret did nothing. So when the initial hearing was set on 8.10.97, Mrs. Mwangangi appeared for the 1st and 2nd plaintiffs while Miss Nzioka was present for 3rd plaintiff. There was no appearance for 1st defendant or by M/s Kimani and Michuki for 2nd and 3rd defendants. The hearing did not take off because the plaintiffs' lawyers had a thing or two to sort out in the amended plaint, deemed duly filed by the orders of 22.11.96. By consent Mrs. Mwangangi was to amend the plaint further.

On 5.2.98 Mr. L. Wambua for Mungai and Gakuru, for 1st defendant did not oppose further amendment to the plaint. The court noted that there was an overlap of the 2nd defendant's representation as has been set out above. 2nd defendant was 10 supposed to be represented by M/s Kimani and Michuki, who also represented the 3rd defendant, as well as M/s Shapley Barret.

On the 18.11.98 the date of the contentious consent judgement on liability, the court recorded:

***“Mwangangi: The defendants’ lawyers M/s Kimani and Michuki for 2nd and 3rd defendants were served. M/s Mungai and Gakuru for 1st defendant. Also M/s Shapley Barret for 2nd defendant along with Kimani and Michuki were also served. But we want to record a 20 consent when Mr. Wambua for Kimani and Michuki (K&M) comes.*”**

Court

Bring up the matter at 11:30 A.M. when Mr. Wambua for Mungai and Gakuru shows up. 11:50 A.M.

Mr. Wambua for Mungai and Gakuru for 1st defendant and also 30 for Kimani and Michuki for 2nd and 3rd defendant appears.

Court:

By consent judgement on liability entered for the plaintiff against the defendants who take liability thus:

1st Defendant - 15%

2nd and 3rd Defendant - 85%

The plaintiff to proceed to set down case for assessment of damages without participation of the defendants. Medical reports to be tendered without calling makers.”

10 All the above was by consent and plaintiffs one after another testified. Judgement followed.

In the circumstances of all the above who between M/s Shapley Barret and Kimani and Michuki represented the 2nd Defendant ? M/s Shapley Barret filed appearance on 28.2.95 and filed defence on 17.3.95. One could be minded to think that M/s Shapley Barret who first appeared. But what followed does not lend itself to that because even as both law firms remained on the record and they were served with whatever went on, including the amending of the plaint, M/s Shapley Barret did not object to co-defending the 2nd defendant with M/s Kimani and Michuki. Indeed the 20 latter firm filed the defence to the amended plaint. The plaintiffs cannot thus be faulted for dealing with Kimani and Michuki as 2nd defendant's lawyers. M/s Shapley Barret seemed to go along, and did not clarify or oppose that kind of

thing. (see the correspondence annexure PO1) Neither did the 2nd defendant itself. Would it be wrong to say that whoever acted for the 2nd defendant at any time did so wrongly? This court does not think so – not in this particular case.

When Mr. Wambua appeared for M/s Kimani and Michuki for 2nd Defendant on 18.11.98 this court is minded to assume that he was duly instructed. At no time is it shown that M/s Kimani and Michuki acted at any time without instructions from the 30 2nd defendant. They filed an appearance and defence initially. They were addressed with subsequent pleadings and they filed a defence to the amended plaint – the last pleading before 18.11.98. On that day Mr. Wambua took a brief from Kimani and Michuki, whom it is not shown that did not have the 2nd defendant's instructions. There is no affidavit from either Mr. Wambua or Kimani and Michuki that they did anything in error or otherwise.

This court would like further to state that it is not denied that the 2nd defendant was the registered owner of the offending motor vehicle as at the time of the accident. The 2nd defendant thus is responsible for whatever that motor vehicle did when it was in the hands of the 3rd defendant. Why, the 2nd defendant can as well get indemnity from the 3rd defendant to whom, it was claimed, they had given by sale or otherwise motor vehicle Reg. Nom KNF 479.

For a consent order to be set aside the applicant ought to show that it was entered into on a misrepresentation, mistake etc. or by such other fact that would vitiate an ordinary contract otherwise the consent remains. When a counsel appears before a court it must be assumed that he has authority to do so. To impeach these two aspects the claiming party must show otherwise. This court is not satisfied that an error, mistake or other has been shown by the 2nd defendant here so as to grant the 20 orders of review or set aside the orders of 18.11.98. Neither has it been shown that the 2nd defendant never instructed (also) M/s Kimani and Michuki Advocates to act on its behalf either in the whole suit or on the proceedings of 18.11.98.

In sum this application is dismissed with costs.

Delivered on 26.9.2001.

J. W. MWERA

JUDGE