



REPUBLIC OF KENYA



JGM v VWM (Civil Appeal E011 of 2020) [2024] KEHC 10890 (KLR) (18 July 2024) (Judgment)

Neutral citation: [2024] KEHC 10890 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E011 OF 2020
BK NJOROGE, J
JULY 18, 2024**

BETWEEN

JGM APPELLANT

AND

VWM RESPONDENT

((Karatina) CMCC No. 69 of 2013. JGM –vs- VWM. It is an Appeal against the decision of Hon. A. Mwangi (P.M) delivered on 19/11/2020.)

JUDGMENT

1. This Appeal arises out of an interlocutory application in (Karatina) CMCC No. 69 of 2013. JGM – vs- VWM. It is an Appeal against the decision of Hon. A. Mwangi (P.M) delivered on 19/11/2020.
2. The Court dismissed the Appellant’s Notice of Motion dated 31st August 2020. In that Motion the Appellant (the Defendant in the Suit) had sought the following orders:
 - a. Spent
 - b. That the Honourable Court do set aside the Court order issued on 8/8/2019, denying the Defendant’s Applicant’s request to have the Plaintiff undergo a second further medical examination.
 - c. That the Honourable Court do set aside the Court order issued on 6th August, 2020 expunging from the Court’s records, the second further Medical Report dated 28th February 2020 and filed by the Defendant Applicant in Court on 3rd March 2020.
 - d. That the Defendant/Applicant be allowed to file the second further medical report and the same be relied on by the Defendant/Applicant as evidence in support of the defense case.
 - e. That costs for this application be provided for.



3. In essence the Applicant had approached the Court to be allowed to produce further evidence or introduce further evidence after close of Pre-trials and after the commencement of the hearing. The evidence sought to be introduced is a 2nd Medical Report. It is that refusal that triggered this Appeal.

Background facts

4. The Respondent (The Plaintiff in the Lower Court file) filed Suit on 24/6/2013 against the Defendant in the year 2013. This is in respect to a Road Traffic Accident. The Respondent sought compensation for personal injuries. The Defendant filed a statement of defence. He denied the accident and pleaded in the alternative that it was inevitable. The Defendant also denied the injuries. In essence issues were joined for trial in this running down claim. The Plaintiff filed a Medical Report by Doctor Kane Maina dated 13/8/2016 with the Plaintiff's supporting documents dated 7/6/2017.
5. The Respondent filed an application to amend her plaint to plead further injuries, as a result of the Medical Report dated 13/8/2016. The Plaint was amended after the leave was granted Appellant
6. The Defendant in turn had the Respondent examined and a 2nd Medical Report was filed. It is dated 22/2/2019. It was filed alongside the Defendant's further list of documents dated 25/2/2019.
7. The Appellant also filed a Defendant's further list of documents. He referred to a Medical Report by Doctor P. M. Wambugu dated 28/2/2020. It was attached to the said list of documents.
8. The Appellant took the steps of filing the application by way of Notice of Motion dated 31/8/2020 seeking the orders referred to earlier.
9. During the course of the proceedings, it transpired that the trial Court had made certain orders on 8th August, 2019 and 6th August, 2020. The orders sought in the motion were to set aside the said orders, so as to facilitate the further introduction of the Medical Report dated 28/2/2020 into evidence. We will refer to the orders of 8th August, 2019 and 6th August, 2020 in the body of this Judgement.

Issues for Determination

10. The Court has perused the Memorandum of Appeal filed herein which raises for (4) grounds. To this Court, the Appeal forms a single question.

(i) Whether the trial Court ought to have allowed the Respondent to introduce the Medical Report?

11. The Court therefore frames the following issues for determination.
 - a. Whether the Notice of Motion dated 3/8/2020 was merited?
 - b. What orders lie from this Appeal?
12. This matter was flagged for the Rapid Results Initiative (RRI) for the month of June, 2024. The parties Advocates confirmed filing of their respective submissions on 4/7/2022. The Court has perused the Appellant's submissions dated 5th May, 2022 with the authorities attached. The Respondent has equally filed the written submissions dated 6th June 2022 with an authority attached.
13. The Court proceeds to consider the issues for determination in seriatim as follows.

a. Whether the Notice of Motion dated 3/8/2020 was merited?

14. As happens with some interlocutory Appeals, this decision will not resolve the main controversy between the parties. Meaning that whichever way the Court rules, the parties will have to go back to the



trial Court, to have their matter heard and resolved with finality. The Court notes that the proceedings before the trial Court have been stayed since 24/1/2022.

15. The Appellant also sought and obtained leave to file this interlocutory Appeal by an order given on 1/12/2020. The leave is also not challenged in this Appeal and hence no issue turns on this.
16. The Court notes certain key events that took place that will assist the Court make a determination herein.
17. When the Respondent filed Suit herein on 24/1/2013, he did not attach a Medical Report as her evidence. The Medical Report was obtained much later dated 13/8/2016 and filed in Court as an attachment to the Plaintiff's supporting list of documents dated 7/6/2017.
18. This necessitate the Respondent to seek to amend her plant to introduce the further injuries revealed by this Medical Report. The injuries now noted were fracture of the left hip joint and soft tissue injuries on the head, chest and both legs. An application to amend dated 4/8/2017 was filed.
19. This Application was allowed by consent dated 27th October 2017 and filed in Court on 17/1/2018. The Respondent proceeded to file an amended defence dated 27/10/2017 in terms with the consent.
20. The matter came up for pre-trials on 15/2/2012 when the Respondent's Advocate in absence of the Appellant's Advocate confirmed that Order 11 (dealing with pre-trials) had been complied with.
21. The matter proceeded for hearing on 26/4/2018 before Hon. F. W. Macharia (as she then was) in the presence of both parties Advocates. Only the Plaintiff testified on that date. The Respondent's Counsel applied for and adjournment to summon the Base Commander Karatina Traffic Base. He also applied to amend the Applicant's name appearing on the amended plaint from M to M. This was not opposed by the Appellant. The Plaintiff's Medical Report has also been admitted as P.Exh 4.
22. On 7/2/2019 Counsels for the parties took out the matter from the hearing list. They agreed to have the matter taken out so that the Plaintiff can attend a 2nd Medical examination. The matter was adjourned.
23. On 8/8/2019 the matter came up for further hearing before Hon. A. Mwangi. Hon. F. W. Macharia had been transferred. The matter was a part-heard. The Respondent's Advocate did not have his witness, the Base Commander Karatina. He had not summoned him/her, though he had previously indicated he was to do so. He sought another date.
24. The Appellant's Advocate on the other hand sought that the matter start denovo before the new Magistrate. He also sought that he Respondent be compelled to attend a 2nd Medical Examination. The reason given was that when the Respondent attended an earlier Medical examination she allegedly did not carry her X-ray results. The Appellant sought that she be compelled to attend the said examination with her X-ray results. This was opposed by the Respondent's Advocate who informed the Court that he Respondent had attended before Doctor Wambugu P. M. for a Medical Report filed in Court on 27/2/2019. This was part of the documents filed by the Appellant.
25. The Court declined to allow the prayer for a 2nd further Medical Examination. To the Court, the Appellant's Doctor should have fully examined the Respondent when she appeared before him.
26. The Court did order that the Plaintiff be recalled for a fresh hearing.
27. On 17/10/2019, the parties appeared before the Court for a hearing but confirmed they were negotiating.



28. On 26/8/2020, the matter did not proceed either. The Respondent Advocate sought for the expunging of the document dated 2/2/2020 which sought to introduce a fresh Medical Report by Doctor Wambugu P. M. dated 28/2/2020.
29. From the submissions made, the parties had off the record met and agreed to have the Respondent examined again and indeed she was examined by Doctor Wambugu P. M. There was an agreement to settle the matter. It failed. The Appellant proceeded to file this Medical Report of 28/2/2020. The Respondent's Advocate felt that they had been taken for a ride. They vehemently now opposed the introduction of this fresh Medical Report.
30. The Court relied on its earlier orders of 8/8/2019 and expunged the Medical Report dated 28/2/2020. The Respondent requested for the release of the exhibits, hence framing the matter for a fresh trial. A fresh hearing date was given.
31. The Appellant took the opportunity to file the motion dated 31/8/2020, which after a full hearing was declined.
32. This is a first Appeal. The Court is reminded of its duty to relook, re-analyze and re-evaluate the evidence afresh and arrive at its own independent decision. The case of *Selle & Another –vs- Associated Motor Boat Co. Limited* [1968] E.A. 123 applies.
33. The decision of the trial Court called for exercise of discretion. The Court reminds itself that it should not interfere with the exercise of the discretion of the trial Court. This is unless the exercise of the discretion is clearly wrong because the trial Court has misdirected itself and acted on matters which it should not have acted upon, or took into consideration matters that ought not to have been taken into consideration and in doing so arrived at a wrong conclusion. See *Mbogo & Another –vs- Shah* [1968] E.A 93.
34. Section 1A of the *Civil Procedure Act* sets out the overriding objectives of the Court. The Court under Section 1B has a duty to expedite the delivery of justice at an affordable cost. Hear the cases expeditiously and deliver decisions that resolve or at least provide answers to the parties disputes.
35. The Suit was filed before the trial Court 24/6/2013. The Respondent first testified on 26/4/2018, after a passage of close to five years. As matters stand, the case is to start afresh. Eleven years later and still counting, the Plaintiff is yet to be heard. The trial is yet to be concluded. Yet this is a running down claim.
36. The trial Court correctly noted that the Notice of Motion was seeking to have the Court review its earlier orders of 8/8/2019 and 6/8/2020. The trial Court correctly noted that such an application could properly be made before it under Order 45 (1) of the Civil Procedure Rules, 2010 which provides for review. It proceeded to isolate the grounds as, discovery of new and important matter or evidence, mistake on account of error apparent on the face of the record, or any sufficient reason.
37. We agree with the Court that there was no new or important matter or evidence and certainly there was no mistake on account of or error on the face of the record.

What about any sufficient reason?

38. The trial Court failed to delve into the overriding objective of the Court to do justice. In doing so the trial Court would have considered that, the parties had agreed (outside the Courts intervention) to have the Respondent examined by a Doctor. Such a Medical examination had already taken place. A Medical Report dated 28/2/2020 had been prepared by Doctor Wambugu P. M. at the behest of the Appellant.



39. The Court has looked at three decisions on how Courts of record have dealt with the issue of introduction of fresh evidence at trial. In *Johana Kipkemei Too –vs- Hellen Turi* [2004] eKLR, an application to introduce evidence after close of the Plaintiff’s case was declined. This is bearing in mind the prejudice a party would bear, as the Plaintiff proceeded on the basis of a case and set of evidence placed before the Court. Production of fresh evidence would lock out the Plaintiff from challenging it. Nevertheless Hon. Justice Munyao Sila stated the following and I agree;

“This is however not to say that the Court can never under any circumstance, permit a party to adduce additional evidence that was not furnished to the other party as provided under the rules. The Court as a shrine of justice, has a mandate to do justice to all parties and not to be strictly bound by procedural technicalities. This flows from Article 159 (2) of *the Constitution*, where evidence can be adduced, without causing undue prejudice to the other party, the Court ought to allow the application so as to allow such party, the opportunity to present his case in full. The Court may consider various factors including but not restricted to, the earlier availability of the witnesses, the discovery of a new document and the stage of the proceedings at which the additional evidence is sought to be adduced if for example the trial has not started, little prejudice may be caused to either party if she is permitted to introduce additional evidence. The prejudice to the other party increases as the trial progresses. But it is upto each Court to weigh the surrounding circumstances of each case and determine whether it will be in the intents of justice to allow such evidence to be tendered though outside the time frame provided by the Rules. (Underlined emphasis added).”

40. This Court notes that the trial before the trial Court is still a fresh one. The Plaintiff’s exhibits were returned to her Advocate. The matter is yet to be heard. The Medical Report was obtained willingly. At least the Respondent attended before Doctor Wambugu P. M. and was examined.

41. The Court did not address the prejudice that the Respondent would suffer. The trial Court did not address itself to the overriding objective. Failure to consider these two important factors means that to this Court, the exercise of discretion was wrong. The trial Court failed to apply important consideration or matters and hence arrived at a wrong decision.

42. Allowing the Medical Report at that stage as part of the Defendant’s list of documents would not mean that it would be part of the evidence. What if the Appellant failed to call any evidence or to produce it? Even if it was produced it would still remain an opinion. There was also a Medical Report prepared at the behest of the Respondent. The final decision on which Medical Report to follow will fall upon the trial Court. This would only happen once the trial has been concluded and the trial Court retires to consider its decision.

43. Parties would have benefitted from a thorough pre-trial or at least a more guided approach by the trial Court. By a guided approach, the Court means the trial Court should have moved the parties ever forward towards a merit based resolution.

44. It may have intended to do so, move the parties forward, but by locking out the Medical Report this matter took a different tangent.

45. This Court should not be seen to condone litigation by instalments and adducing of evidence in incremental bits or stages. The trial Court should keep an eye on the prejudice and the overriding objectives of the *Civil Procedure Act* Cap 2 of the Laws of Kenya.



46. Suffice to say that the Court is minded to interfere and does interfere with the exercise of discretion of lower Court. The application ought to have been allowed. The Application was merited.

b. What Orders lie from the Appeal?

47. There is need to fast track the hearing of the lower Court file. To do so the proper order would be that the prayers sought in the Notice of Motion dated 31/8/2020 be allowed.

Determination

48. Costs are awarded at the discretion of the court. In as much as the Appellant has succeeded, there was delay on his part in getting the Medical Report. The Appellant is awarded half the costs of the Appeal.

Determination

49. The Appeal is allowed and the orders made on 19/11/2020 dismissing the Appellant's Notice of Motion dated 31/8/2020 are set aside and replaced with orders:

- a. Reinstating the Defendant's further list of Documents dated 2/3/2020 and the attached Medical Report by Doctor Wambugu P.M. dated 28/2/2020.
- b. As this is an old matter the same be placed before the trial Court for directions that will expedite the hearing on a priority basis. In the event the trial court has been transferred, it can be placed before any other Court and heard afresh in terms of the Orders of 8/8/2019 in the trial Court file.
- c. The Appellant is awarded the cost of the Appeal. The costs of the Notice of Motion dated 31/8/2020 before the trial Court be costs in the cause.

50. It is so ordered.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 18TH DAY OF JULY, 2024.

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NJOROGE BENJAMIN K.

JUDGE

In the presence of:

No appearance for G. W. Mugo for the Appellant

Mr. Kamwangi for the Respondent

Court Assistant: Luyai.

