Mwanzia v Africa Merchant Assurance Co. Ltd (Civil Appeal 155 of 2016) [2024] KEHC 16901 (KLR) (24 October 2024) (Ruling)

Neutral citation: [2024] KEHC 16901 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 155 OF 2016

F WANGARI, J

OCTOBER 24, 2024

BETWEEN

PILI KANINI MWANZIA ..... APPELLANT

AND

AFRICA MERCHANT ASSURANCE CO. LTD ..... RESPONDENT

RULING

1. This is a ruling in respect of the application dated 20th February, 2024 brought under the provisions of sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*, Order 42 Rule 21, Order 51 Rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law. It sought as hereunder: -

    a. That this Honourable Court be pleased to set aside the Order of 12th February, 2024 dismissing this appeal and re-admit the same for hearing and disposal;

    b. That costs of this application be in the cause.

2. The grounds in support of the application were summarized as follows: -

3. The appeal was dismissed on 12th February, 2024 in the absence of the Appellant. Failure to be present when the matter was called out was not deliberate but was occasioned by an excusable mistake on the part of Counsel for the Appellant who had already filed and served her Record of Appeal and her submissions for hearing of the appeal.

4. The subject matter of the appeal is dismissal of a case for damages for bodily injuries and death of the Appellant's child. Justice will be best served if the appeal is reinstated and determined on merits. Failure to attend court resulted from an excusable mistake on part of Counsel and that the application had been brought without unreasonable delay.

5. It was further supported by an affidavit sworn by one Kioko Maundu, the Applicant's Counsel. It restated more or less the grounds in support of the application and thus do not find it relevant to rehash

the same. On 19th June, 2024 when the matter came up for mention, Mr. Maundu Counsel for the Applicant informed the court that he had filed submissions and therefore, requested for a judgement date.

6. Having gone through the court's CTS portal, I note that the only submissions filed were in respect of the appeal and they are dated 14th July, 2023. Therefore, there are no submissions in respect of the application.

Analysis

7. This Court has carefully considered the application, the grounds in support, the supporting affidavit, the annexures thereto as well as the law and the issues that fall for this Court's determination is whether the application is merited and if so, what orders ought to issue. Corollary to the issues herein is the aspect of costs.

8. It is common knowledge that an appeal cannot be dismissed for want of prosecution if directions have not been taken. In *Njai Stephen v Christine Khatiala Andika* [2019] eKLR, the court observed as follows: -

> "...Order 42 Rule 35 of the *Civil Procedure Rules*, 2010 envisages two (2) scenarios for the dismissal of an appeal for want of prosecution. The first scenario is when an appellant fails to cause the matter to be listed for directions under Section 79B of the *Civil Procedure Act* as is envisaged in Order 42 Rule 11 of the *Civil Procedure Rules*. The second scenario is that if after service of Memorandum of Appeal, the appeal would not have been set down for hearing, the registrar shall on notice to the parties list the appeal before the judge for dismissal..."

9. In the present case, directions were issued on 7th October, 2022 and there was compliance on the part of the Appellant/Applicant as it had already filed her Record of Appeal on 24th June, 2022. I note that both the Appellant's and Respondent's Counsel were duly served with the court's directions on 27th October, 2022 and 18th October, 2022 respectively.

10. On 1st December, 2022, the matter came before the Honourable Deputy Registrar who directed parties to file submissions. The Appellant duly filed her submissions which are dated 14th July, 2023. Once directions are given under Order 42 Rule 13 of *Civil Procedure Rules* and the Appellant fails to fix the appeal for hearing, the Respondent may fix the same for hearing and/or seek dismissal of the same for want of prosecution under Order 42 Rule 35 (1) of the *Civil Procedure Rules* or the registrar lists the appeal before a judge for dismissal under Order 42 Rule 35 (2) of *Civil Procedure Rules*.

11. It is not in doubt that the appeal came for hearing on 6th February, 2023 when the Appellant sought for more time to serve the Respondent. This being the case, the relevant provision for dismissal is Order 42 Rule 35 (2) since the matter had already been listed for hearing. Order 42 Rule 35 (2) stipulates as follows: -

> "If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal..."

12. I note that on 12th November, 2023, this court made an order listing the matter for notice to show cause why it should not be dismissed on 12th February, 2024. Indeed, the matter was listed and there

being no attendance by the parties, an order dismissing the appeal for want of prosecution was made. This is the order that precipitated the application subject of this ruling.

13. Having perused the record, I do not find any evidence to show that there was compliance with the provisions of Order 42 Rule 35 (2) of the *Civil Procedure Rules*. There was need to confirm whether the Registrar had issued a notice to all the parties that indeed the appeal had been listed before a judge for dismissal. Without such evidence, I find that the dismissal on 12th February, 2024 was premature and on this limb alone, I find merit in the application.

14. Even if this was not the case, every person is entitled as envisaged under Article 50 of the *Constitution of Kenya* to have a fair trial. The said Article 50 of *Constitution of Kenya* provides as follows: -

> " Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

15. It therefore follows that every person ought not to be shut out from accessing court or having his day in court. Indeed, the right of a party to enjoy the fruits of his judgment must be weighed against the right of a party to access court to have his dispute heard and determined by a court or tribunal of competent jurisdiction. In conclusion on the first issue, I find the application merited and allow the same in terms of reinstating the appeal.

16. Having found as above, I do not think it is necessary to fix the same for hearing since that had been done. The Appellant had duly filed her submissions and there is evidence of service of the Respondent. I thus proceed to consider the appeal.

17. This being a first Appeal, the Court should with judicious alertness re-evaluate the evidence and consider arguments by parties and apply the law thereto, and, make its own determination of the issue or issues in controversy. Except however, that it should give due allowance to the fact that it neither saw nor heard the witnesses' testimonies.

18. This was aptly stated by the Court of Appeal in the case of *Selle & Another v. Associated Motor Board Company Ltd.* [1968] EA 123 as follows:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

19. I have perused the Memorandum of Appeal and the entire record of the Trial Court and I am alive to the fact that my task is to re-evaluate the evidence in order to establish whether or not the Trial Court erred in its findings.

20. It is not in dispute that the Appellant obtained judgement against the Respondent's insured on 4th February, 2009 for a sum of Kshs. 215,180/= in general damages and special damages, costs and interests. The Respondent being the insurer of the Defendant in the primary suit failed to settle the decretal sum and the Appellant thus filed a declaratory suit against it on 16th February, 2009.

21. On 1st November, 2016, the Trial Court (Hon. H. Nyakweba, SPM) delivered its judgment dismissing the Appellant's declaratory suit on the basis that statutory notice was not served upon the Respondent. This is what precipitated the present appeal. Having considered the three (3) grounds of appeal, I only discern one issue for determination which is whether the Trial Court's holding dismissing the Appellant's suit for want of service of statutory notice was well grounded.

22. Having obtained a regular judgement, the Respondent was mandated to settle the decretal sum as per section 10 (1) of *Insurance (Motor Vehicles Third Party Risks) Act*, Chapter 405 of the Laws of Kenya being what the Appellant's claim was hinged upon. It provides as follows: -

> 1. If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of Section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

23. Section 10 (2) of the same *Act* sets out circumstances that can entitle the insurer such as the Respondent herein not to pay the sum adjudged. Section 10 (2) (a) stipulates as follows: -

> 2. No sum shall be payable by an insurer under the foregoing provisions of this section –
>
> a. in respect of any judgment, unless before or within fourteen days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or

24. As was held in the case of *Daniel Opar Ouya v First Assurance Company Limited* [2018] eKLR, I have no doubt in my mind that there was a policy issued to the Defendant by the Respondent as per section 5 of the Act and which policy was in force on 20th October, 2008 when the accident the subject of the suit occurred. The police abstract and the certificate of insurance produced as exhibits by the Appellant were not rebutted.

25. Similarly, it is not in contention that judgement was entered against the policy holder, one Dan Gichuhi (Defendant before the Trial Court) on 4th February, 2009 for a sum of Kshs. 215,180/= in general damages and special damages, costs and interests. Therefore, the only issue is whether a notice under Section 10 (2) (a) of the *Act* had been issued within the timelines set.

26. Did the Respondent have notice of bringing of the proceedings subject of the judgement before or within fourteen (14) days after commencement of the said proceedings? In answering this question, an interpretation of the fourteen (14) days indicated in section 10 (2) (a) of the *Act* must be given. Having reviewed the Trial Court's ruling, I find that the court construed the said fourteen (14) days narrowly. The 14 days only applies once the proceedings have commenced and not before.

27. Having stated as above, a review of the Record of Appeal reveals that at pages 153 to 154, there is a letter addressed to Dan Gachuhi and Joseph Mwai Kabui. It is dated 25th May, 2007. On the face of it, it contains the following handwritten comments "Copy to AMACO INSCO sent by Registered Post. Indeed, the Respondent is copied and the same is indicated as follows: -

> " Take notice under Section 10 of *Cap 405* of the Laws of Kenya."

28. At page 157, there is a certificate of postage for various parcels posted on 26th May, 2007. At entry number 3 under parcel number 2xxxx0 is a parcel sent the Respondent's address 9xxx4, Mombasa. Service by registered post is a recognized mode of service. The Respondent did not deny that 9xxx4 is not their Mombasa registered postal number. In civil cases, prove is on a balance of probabilities and I am satisfied that indeed notice as envisaged under section 10 (2) (a) was effected.

29. The primary suit was filed in August, 2007 and therefore the fourteen (14) days after commencement was not applicable. Therefore, the relevant part was the part on before commencement. I think I have said enough to show that the appeal has merits and the same is allowed.

30. On costs, the same follows the event. Since the appeal has succeeded, I award the Appellant costs of this appeal and costs before the Trial Court.

31. The upshot of the foregoing is that the court renders itself as hereunder: -

    a. The Notice of Motion application dated 20th February, 2024 is allowed by setting aside the orders made on 12th February, 2024 and re-admitting the appeal for determination;

    b. The Appeal is hereby allowed as hereunder: -

        i. The judgement of the Lower Court dated 1st November, 2016 is hereby set aside and substituted with an order that a declaration that the Defendant (Respondent) is liable to pay the Plaintiff (Appellant) the amount as per the judgement in Mombasa CMCC 2208 of 2007 for a sum of Kshs. 215,180/= plus costs and interests at 12% from 4th February, 2009 till payment in full; and

    c. The Appellant shall have the costs of this appeal and costs of the court below.

    It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24TH DAY OF OCTOBER, 2024.

F. WANGARI

JUDGE

In the presence of;

Mr. Maundu Advocate for the Appellant;

N/A for the Respondent;

Ms. Salwa, Court Assistant