Off Trek Safaris Limited v Mwabora (Civil Appeal E021 of 2022)
[2023] KEHC 3410 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3410 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CIVIL APPEAL E021 OF 2022

WA OKWANY, J

APRIL 20, 2023

BETWEEN

OFF TREK SAFARIS LIMITED ..... APPELLANT

AND

FRED OKARI MWABORA ..... RESPONDENT

(Being an Appeal against the Ruling of Hon. M. C. Nyigei – PM Nyamira dated and delivered at Nyamira on the 4th day of May 2022 in the original Nyamira Chief Magistrate's Court Civil Case No. 172A of 2016)

JUDGMENT

Introduction

1. The respondent herein, Fred Okari Mwabora, sued the appellant before the lower court through the plaint dated June 27, 2016 seeking inter alia: damages for injuries arising out of a road traffic accident that occurred on May 17, 2016.

2. A summary of the respondent's case was that he was on May 17, 2016 waiting to cross the road along Ekerenyo – Ikonge Road near Tombe area when the defendant's driver drove motor vehicle registration No KAT 616Z negligently and at a high speed thereby causing to veer off the road and hit him thereby occasioning him serious injuries.

3. On February 16, 2017, interlocutory judgment was entered against the defendants for default in entering appearance and filing a defence.

4. The respondents case proceeded for formal proof on May 31, 2017 and thereafter, judgement was entered in favour of the respondent for damages of Kshs 1,864,309/= on August 16, 2017. The said judgment was however set aside, by consent, on October 24, 2018 and the appellant granted time to file their defence.

5. The case then proceeded for the hearing of the plaintiff/respondent's case on diverse dates between August 7, 2019 and October 9, 2019 when the respondent presented the evidence of 3 witnesses before closing his case.

6. The appellants did not proceed with the hearing of their case despite numerous adjournments and on August 25, 2020, the appellants advocate then on record, Mr Otieno, informed the court of his intention to cease from acting for the appellant citing challenges in reaching his client. The appellant's advocates' application to cease acting was allowed on December 9, 2020 after which the case was listed for hearing on December 9, 2020.

7. The appellants did not proceed with the hearing of their case thereby leading to at least three adjournments and through an application dated November 11, 2021, the appellants/defendants sought leave to file a supplementary list of witness statement and list and bundle of documents.

8. Through a ruling delivered on May 4, 2022, the lower court however dismissed the said application dated November 11, 2021 thereby precipitating the filing of the appeal that is the subject of this judgment.

Appeal

9. Through the memorandum of appeal dated May 16, 2022, the appellant challenges the entire ruling of the lower court rendered on May 4, 2022 on the following grounds: -

    1. The learned trial magistrate erred both in fact and in law in failing to consider the appellant's submissions on article 25 (c) and 50 of the *Constitution* of Kenya, 2010 on the right to fair trial thus occasioning a miscarriage of justice, substantial loss and violation of the appellants right to fair hearing.

    2. The learned trial magistrate erred in law and in fact in failing to consider that article 159 of the *Constitution* and overriding objective of this court enjoins the court to determine a dispute on merit without undue regard to technicalities thus misdirecting herself on the matters before hear and arriving at a wrong conclusion and erroneous decision.

    3. The learned trial magistrate erred in law and fact by visiting the mistakes of the appellant's erstwhile advocates on the appellant thus arriving at a wrong conclusion.

    4. The learned magistrate erred in law and fact by failing to appreciate that the amended statement of defence dated November 6, 2018 and filed on November 8, 2018 was consistent with the documents and comprehensive witness statement that the appellant sought to file and adduce through the application dated November 11, 2021 thus arriving at a wrong conclusion and decision.

    5. The learned trial magistrate erred in law and fact by failing to appreciate that section 146 (4) of the *Evidence Act* chapter 80 Laws of Kenya allows the court to permit a witness to be recalled either for further examination in chief or further cross-examination and if it does so parties have the right of further examination and cross-examination respectively thus arriving at a wrong conclusion and decision.

    6. The learned magistrate erred in law and fact by failing to appreciate that order 18 rule 10 of the *Civil Procedure Rules* provides that a court may recall any witness who has been examined and may subject to the law of evidence for the time being in force, put such questions to him as it thinks fit thus arriving at a wrong conclusion and decision.

7. The learned magistrate erred in law and in fact by failing to appreciate that a hearing and determination of a suit should not be conducted as a matter of formality but that the court should be placed at all angles of the suit through production of all evidence in possession of all parties allowed, thoroughly dissect and understand the dispute at hand, narrow down the issues at hand and finally give a just decision on merits thus arriving at a wrong conclusion and decision.

10. The appeal was canvassed by way of written submissions which I have considered. The appellant attributed the failure to file its bundle of documents and a comprehensive witness statement to the fault of its former lawyers. The appellant argued that its current advocates on record discovered that its documents were not filed by the former advocates. It was the appellant's case that the mistakes of its former advocates should not be visited on it. Reference was made to the decision in *Gedion Mose Onchati v Kenya Oil Co Ltd & another* [2017] eKLR.

11. It was further the appellant's case that denying it the opportunity to file its list of documents and witness statements would be tantamount to denying it the right to fair hearing as enshrined under articles 25 (c) and 50 of the *Constitution*.

12. The appellant faulted the lower court for failing to appreciate that the respondent will not be prejudiced if its application was allowed as section 146 (4) of the *Evidence Act* and order 18 rule 10 of the *Civil Procedure Rules* (CPR) allow the court to recall any witness who has been examined. For this argument, the appellant cited the decision in *Rhoda S. Kilu v Jianxi Water and Hydropower Construction Kenya Ltd* [2022] eKLR where it was held: -

> " The court under section 146 (4) of the *Evidence Act* as read together with order 18 rule 10 *Civil Procedure Rules* has made powers to allow for the re-opening of a case and for recall of witnesses notwithstanding that the evidence was not furnished to the other side on time or at all so long as the evidence is relevant, crucial, controvertible, the application is brought within reasonable time, or, if outside timelines the delay is explained and that the inclusion shall not unduly prejudice the opposite party or interfere with the ends of justice."

13. The appellant further argued that no prejudice will be suffered by the respondent if the appeal is allowed as it will grant the parties an opportunity to properly ventilate all the issues and allow the court to ensure a fair hearing. Reference was made to the decision in *Mohamed Abdi Mohamed v Ahmed Abdulahi Mohamed & others* [2018] eKLR where it was held: -

> " The jurisdiction to re-open a case and receive additional evidence in a trial court is a discretionary one and is to be exercised judiciously. In exercising that discretion, the court is duty-bound to ensure that the proposed re-opening of a party's case does not embarrass or prejudice the opposite party. Secondly, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. The plea for re-opening of a case will also be rejected if there is inordinate and unexplained delay on the part of the applicant in bringing the application."

14. The respondent, on his part, urged this court to dismiss the appeal while arguing that the appellant is merely hiding behind the judicial principle that an advocate's mistakes should not be visited on his client. It was submitted that the appellant's witness had ample time between on November 6, 2018 when he filed his initial statement and November 10, 2021 when he filed the intended supplementary statement, to consider if all the facts were correct. It was submitted that the delay in filing the application to file further documents is a testament that the documents did not exist at the time the

defence was filed and were belatedly, fraudulently manufactured by the appellant in a bid to escape liability after the respondent had closed his case.

15. The respondent poked holes on the veracity of the documents that the appellant intended to introduce through the application that the lower court rejected. He noted that in the said documents the appellant seems to suggest that the motor vehicle that caused the accident did not belong to it as it had been sold to third party yet a search conducted on the ownership of the said vehicle prior to the filing of the suit revealed that it belonged to the appellant.

16. The respondent submitted that the right to a fair trial is not the preserve of the appellant alone as he was equally entitled to be heard in a fair and expeditious manner. The respondent emphasized that pre-trial proceedings were put in place to ensure fair trial through full disclosure of all the statements and documents that a party intends to rely on at the hearing. He observed that having participated in the pre-trial proceedings, the appellant could not turn around and seek to introduce documents that would alter the entire architecture of the case. For this argument, the respondent cited the decision in *P. H Ogola Onyango t/a Pitts Consult Consulting Engineers v Daniel Githegi Quantalysis* [2002] eKLR where it was held: -

> " ... to allow a party to introduce a document or documents once the opposing party has closed its case. ..... To allow him to introduce documents after the plaintiff has closed his case will occasion the plaintiff serious prejudice that cannot be cured by cross-examination. In civil litigation there must be a level playing field. That field cannot be level were one party permitted to introduce documents in the trial after the opposite party has closed his case, and many years after pleadings closed."

17. For the definition of a level playing field, the respondent cited the decision in *Alois Oceano D'sumba v Rajnikant Narshi Shah & another* [2017] eKLR where it was stated that: -

> " The provisions [of order 7 rule 5] are clear on the requirement for parties to file documents within certain parameters. If documents are not available as at the time of filing pleadings, a party should seek leave of the court to file the said documents before the hearing of the case commences. That is one of the purposes for the directions that a court gives under the provisions of order 11 of the Civil Procedure Rules. any party wishing to introduce new or additional evidence must in similar light seek leave of the court to file such statements and/ or documents before the hearing of the respondent's case."

18. The respondent faulted the appellant for asking the court to allow the introduction of documents two years after the close of pleadings and the respondent's case.

19. On the re-opening of the case, the respondent argued that same is discretionary by dint of section 164 (4) of the *Evidence Act* and order 18 rule 10 of the *Civil Procedure Rules*.

20. The respondent submitted that the lower court was justified in rejecting the appellant's application to re-open the case as doing so would unduly prejudice the respondent owing to the delay in filing the application and the lack of plausible explanation for the delay. Reference was made to the case of *Rhoda S Kilu v Jianxi Water and Hydropower Construction* (supra) where it was held: -

> The court under section 146 (4) of the *Evidence Act* as read together with order 18 rule 10 *Civil Procedure Rules* has made powers to allow for the re-opening of a case and for recall of witnesses notwithstanding that the evidence was not furnished to the other side on time or at all so long as the evidence is relevant, crucial, controvertible, the application is brought

within reasonable time, or, if outside timelines the delay is explained and that the inclusion shall not unduly prejudice the opposite party or interfere with the ends of justice."

21. The respondent submitted that he will be greatly prejudiced if the case is re-opened as doing so would introduce an alleged owner of the suit motor vehicle more than seven years after the occurrence of the accident in question thereby rendering any suit against the said owner time barred despite the fact that he sustained serious injuries in the said accident. The respondent cited the decision in *Susan Wavinga Mutavi v Isaac Njoroge & another* [2020] eKLR where it was held: -

> " In exercising that discretion, the court is duty-bound to ensure that the proposed re-opening of a party's case does not embarrass or prejudice the opposite party. Second, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. Third, the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on the part of the applicant. Fourth, the applicant is required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case. Fifth, the evidence must be such that, if admitted, it would probably have an important influence on the result of the case, though it need not be decisive. Lastly, the evidence must be apparently credible, though it need not be incontrovertible."

22. After carefully considering the record of appeal and the parties' submissions, I find that the main issue for determination is whether the trial court arrived at the correct finding in dismissing the appellant's application for leave to file supplementary witness statement and bundle of documents.

23. In considering the appeal, I am reminded of the duty of the first appellate court to re-consider and re-analyze the evidence presented before the trial court in order to arrive at its own conclusions.

24. As I have already stated in this judgment, the respondent closed its case on October 9, 2019 and the appellant filed the application for leave to file the list of documents and witness statement more than two years later on November 11, 2021. The trial magistrate rendered herself as follows:-

> " I have considered the fact that the parties had been given the full opportunity to file their documents before the hearing commenced. When the plaintiff testified and was cross examined, there was no indication that the defendant had other documents it intended to rely on. The trial has reached such an advanced stage where allowing the defendant to produce further documents would amount to allowing the defendant to make up its case at the very end of the trial.
>
> It is therefore my considered view that this court would be perpetrating injustice and would prejudice the plaintiff's case if it were to allow the application at this point in time. Allowing the application at this late stage of the proceedings would fundamentally alter the course of the trial and substantially prejudice the plaintiff.

25. The question that this court has to grapple with is whether the trial court exercised its discretion judiciously in rejecting the applicant's application.

26. Section 146 (4) of the *Evidence Act* and order 18 rule 10 of the *Civil Procedure Rules* stipulates as follows: -

146.

(4) The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.

18

(10) The court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force; put such questions to him as the court thinks fit.

27. In the present case it was not disputed that the application that gave rise to this appeal was filed on August 11, 2021 over two years after the close of pleadings and the close of the respondent's case. A perusal of the record of appeal reveals that the documents that the appellant sought to introduce, through the application for leave to file the bundle of documents will, taken in totality, have the effect of introducing a third party as the owner of the suit motor vehicle more than seven years after the filing of the suit and at least four years after the lapse of the period within which the respondent would have sued the said third party.

28. It is my finding that the documents to be introduced by the appellant will totally change the course of the case long after the respondent had closed his case thereby causing him grave prejudice considering that he will not be able to restart the case against the third party long after the lapse of the three years limitation period allowed for the claims for tort of negligence.

29. My further finding is that if indeed the appellant's defence before the trial court was that it is not the owner of the suit motor vehicle, then nothing would have been easier that for it to present such a defence and evidence at the very onset of the case. To my mind, the late attempt to introduce an alleged third party as the alleged owner of the suit motor vehicle lends credence to the respondent's argument that it is a belated attempt to evade liability for the accident long after he had closed his case. I find that the delay if filing the application that gave rise to this appeal was inordinate and inexcusable.

30. I further note that the appellant did not tender any reasonable explanation for the apparent delay in filing the application apart from blaming his previous advocates on record for not presenting the alleged documents.

31. It is noteworthy that in as much as the appellant blamed his previous lawyers for not filing the documents, a perusal of the proceedings shows that the said lawyers complained of challenges in reaching their client, a fact that left them with no option but to cease acting in the matter when the defence case failed to take off after numerous adjournments.

32. The scenario presented by the appellant in this case is that of a client who completely abandoned its case with the advocate and did not make any follow ups at all, only to wake up, many years after the respondent had closed his case and seek to re-open the same with a completely new line of defence that the respondent did not know about.

33. My finding is even though the general rule is that mistakes by counsel should not be visited on the client, courts have also held that the client is under an obligation to follow up its case with the advocate.

34. In the present case, I am not satisfied that the appellant kept tabs of its case going by the many adjournments that were sought by its counsel on account of the absence of its witness.

35. Having regard to the findings and observations that I have made in this judgement, I find that the instant appeal is not merited and I therefore dismiss it with costs to the respondent.

36. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 20TH DAY OF APRIL 2023.

W. A. OKWANY

JUDGE