Isuzu East Africa Limited (Formerly General Motors East Africa Limited) v RAA (Minor suing through her father and next friend AA) & 2 others (Civil Appeal 450 of 2019) [2023] KEHC 20079 (KLR) (Civ) (4 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20079 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 450 OF 2019

DO CHEPKWONY, J

JULY 4, 2023

BETWEEN

ISUZU EAST AFRICA LIMITED (FORMERLY GENERAL MOTORS EAST AFRICA LIMITED) .... APPELLANT

AND

RAA (MINOR SUING THROUGH HER FATHER AND NEXT FRIEND AA) .... 1ST RESPONDENT

MOSES NDIRANGU .... 2ND RESPONDENT

NGAYWA NGIGI AND KIBET ADVOCATES .... 3RD RESPONDENT

(Being an Appeal from the ruling of Hon. D.A. Ocharo (Mr.) delivered on 5th July 2019 in Milimani CMCC No.8957 of 2016)

JUDGMENT

Background

1. The Plaintiff/1st Respondent instituted this suit by way of a Plaint dated 28th December, 2016, and filed in court on 30th December, 2016, seeking the following prayers against the Appellant and the 2nd Defendant/Respondent as follows;

    a. General damages.

    b. Special damages of Kshs.3,000/=

    c. Costs of this suit and interest.

d. Any other relief that the Honourable Court will deem fit to grant.

2. In her Plaint, the 1st Respondent pleaded that on 28th January, 2016, the Plaintiff was a pedestrian along Haile Sellasie –Moi avenue round about when the driver of Motor Vehicle KBQ 970P carelessly drove and managed the said vehicle causing it to knock down the Plaintiff, a result of which the Plaintiff sustained serious injuries and suffered loss and damages.

3. The 1st Respondent pleaded particulars of negligence on the part of the 2nd Defendant/Respondent as follows:-

   a. Driving the said Motor Vehicle Registration No. KBQ 970 P at an excessively high speed in the circumstances.

   b. Failing to exercise and or maintain any proper or effective control of the said motor vehicle.

   c. Failing to keep any proper look out for other road users especially the pedestrian.

   d. Failing to stop, slow down, swerve or in any other way control or steer the said motor vehicle to avoid the said accident.

   e. Driving a motor vehicle without due care and attention thereby causing the accident.

4. As a result of the said accident, the 1st Respondent sustained serious bodily injuries of bleeding over the inner membrane of the brain, blunt injuries of the scalp and loss of consciousness and therefore filed the suit for general damages.

5. In objection to the prayers sought by the 1st Respondent in her Plaint, the Appellant and 2nd Respondent filed a joint Memorandum of Appearance together with a statement of defence both dated 2nd February, 2017, and filed in court on 6th February, 2017. The Appellant denied the contents of the Plaint as alleged.

6. Further, the Appellant stated that in the alternative and without prejudice, if the alleged accident occurred, which allegation is denied, the same was not due to the negligence of the Appellant and the 2nd Respondent. They averred that the same was caused by or substantially contributed to by the negligence of the 1st Respondent. They denied the applicability of the doctrine of Res ispa loquitor and relied on the doctrine of volenti non fit injuria.

7. The matter proceeded for hearing before the trial Court on 23rd August, 2017, whereby and the 1st Respondent called two witnesses to testify in support of her case while the Appellant and the 2nd Respondent closed their case without calling any evidence. Upon consideration of the evidence on record, the trial court delivered its Judgment on 1st February, 2018. Wherein the 1st Respondent was awarded a sum of Kshs.400,000/= as general damages and Kshs.3,000/= as special damages. The court also awarded costs and interest.

8. Being dissatisfied with the Judgment of the trial Court delivered on 1st February, 2018, the Appellant filed an application by way of a Notice of Motion dated 15th March, 2019 before the court seeking the following reliefs;

   a. Spent;

b. Spent;

c. THAT this Honourable Court be pleased to order a stay of execution of the decree in this matter issued on 1st February, 2018 pending hearing and determination of this application.

d. THAT this Honourable Court be pleased to set aside the exparte Judgment entered in this manner.

e. THAT this Honourable Court be pleased to re-open the matter and allow the 2nd Defendant to file its defence.

f. THAT this Honourable Court be pleased to order the Plaintiff to serve upon the 2nd Defendant all its pleadings in the matter.

g. THAT costs of this application be in the cause.

9. The application was supported by the grounds on its face and supported by the affidavit of Anthony Musyoki sworn on 15th March, 2019.

10. The application was canvassed by way of written submissions and upon considering the submissions, the trial Court delivered its ruling on 5th July, 2019 wherein it held that it was evident that besides lacking merit, the application had been filed by an advocate who was a stranger to the proceedings and the same was dismissed with costs. The Appellant was dissatisfied and aggrieved by the ruling of the Trial Court that he preferred the appeal before this Court.

The Appeal

11. By a Memorandum of Appeal dated 2nd August, 2019, the Appellant raises the following grounds in support of its appeal:-

a. The learned trial Magistrate failed to consider the Appellant's written submissions and thereby failed to arrive at a just and proper decision.

b. The learned trial Magistrate erred in law and in fact by ignoring the fact that the 3rd Respondent lacked requisite instructions to represent the Appellant.

c. The learned trial Magistrate erred in law and in fact by failing to see that the Appellant's right to fair hearing had been infringed upon on account of erroneous representation by the 3rd Respondent.

d. The learned trial Magistrate erred in law and in fact by overlooking the glaring fact that, until execution, the Appellant had no notice of the suit whether by service of a demand letter or summons to enter appearance.

e. The learned trial Magistrate erred in law and in fact by failing to set aside its irregular Judgment rendered on 1st February, 2018, in light of the foregoing discrepancies and afford the Appellant an opportunity to defend itself.

f. The learned trial Magistrate erred in law and in fact by employing a restrictive interpretation of Order 9 rule 9 of the Civil Procedure Rules, 2010 to the detriment of substantive justice.

12. The Appellant prays for the following reliefs:-

    a. The appeal be allowed as a consequence thereof and the ruling made by the learned magistrate on 5th July, 2019 be set aside and substituted with a ruling allowing the Notice of Motion application dated 15th March, 2019; and

    b. The costs of the appeal be in the cause.

13. This appeal was canvassed by way of written submissions. The Appellant complied and filed its submissions dated 4th July, 2022. The 1st Respondent filed her submissions dated 31st May, 2022. This court will proceed to consider the submissions in determination of the grounds of appeal.

Analysis and Determination

14. I have considered the grounds of appeal, submissions in support and in opposition to the appeal alongside the authorities relied upon. I will adopt the issues as raised by the Respondent in my determination:-

    a. Whether the learned trial Magistrate erred in interpretation of Order 9 Rule 9 of the Civil Procedure Rules?

    b. Whether the Judgment rendered by the trial Magistrate was irregular and should be set aside?

    c. Whether the learned trial Magistrate erred in finding that the Appellant was properly represented during the court proceedings?

15. Before delving into the determination of the issues, an observation that the Appellant is referred to as the 1st Defendant in the Plaint and 2nd Defendant in the Notice of Motion application dated 15th March, 2019 whose ruling is the subject of this appeal must be made.

16. Now turning to the first issue, it is important that the relevant provision on change of advocate after delivery of Judgment be reproduced. Order 9 rule 9 of the Civil Procedure Rules provides that:-

> "When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-
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> a. Upon an application with notice to all the parties; or
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> b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

17. This Court's interpretation of the above-mentioned provision is that an advocate will only come on record after delivery of Judgment by making an application to seek leave of the court or by consent from the outgoing advocate. In this Court's view, the provision of Order 9 Rule 9 of the Civil Procedure Rules is couched in mandatory terms and unless it is complied with, everything else done in disregard to the provision becomes irregular.

18. In the case of Florence Hare Mkaha –vs- Pwani Tawakal Mini Coach & Another [2014]eKLR, the Court held that:-

> " Once Judgment was entered the provisions of Order 9 Rule 9 had to be complied with if the Plaintiff required to change the advocates representing her. This was not the case. She was variously represented by Shikely Advocate, who filed the submissions in support of the Plaintiff's Bill of Costs, and was represented by Kinyua Njagi & Co. Advocates through the execution of the decree stage. In both those occasions the two advocates did not obtain an order of the court to take over the conduct of Plaintiff's case. Much more Shikely Advocate was not property on record to enable him consent for Kinyua Njagi & Co. Advocates to conduct the Plaintiff's case. In this regard I am in agreement with finding of the Court in the case John Langat –Vs- Kipkemoi Terer & 2 Others (2013)eKLR where Justice A. O. Muchelule faced with similar circumstances stated-
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> "There was no application made to change advocates. In the Replying Affidavit, the Appellant swore that there was a consent entered into between his previous advocates and his present advocate to effect change. This was done following the judgment. He annexed the said consent. There is no evidence that the respondents were put in the picture. But more important, the consent could not effect the change of advocates "without an order of the court." No such order was sought or obtained. It follows, and I agree with Mr. Theuri and Mr. Nyamweya, that Anyoka & Associates are not properly on record for the Appellant, and therefore the appeal and the application are incompetent."

19. Consequently, it is this Court's considered view that the trial Court made a correct finding in its ruling on this issue as the aforementioned provision is couched in mandatory terms and has to be adhered to by an incoming counsel after Judgment. Therefore, the Appellant's counsel was not properly on record as he failed to comply with Order 9 Rule 9 of the Civil Procedure Rules as required.

20. In conclusion, this Court is persuaded by the finding in the case of James Ndonyu Njogu –vs- Muriuki Macharia [2020]eKLR where the Court in buttressing the position regarding Order 9 Rule 9 of the Civil Procedure Rules, held as follows:-

> " Although the Applicant has a Constitutional right to be represented, yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under Order 9 Rule 9 above is mandatory and thus cannot be termed as a mere technicality.
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> Having found that these procedure was not followed by M/S Nyiha, Mukoma & Company Advocates, the said firm is not properly on record, and has no legal standing to move the Court on behalf of the Applicant and therefore all pleadings filed by it ought to be struck out.
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> Consequently, and in the absence of such leave of court as provided by the law, the application by Notice of motion under certificate of urgency dated the 13th December 2019 filed by the firm of M/S Nyiha, Mukoma & Company Advocates is hereby struck out with costs to the Respondent."

21. On the second issue of whether the Judgment is irregular and should be set aside. As far as setting aside Judgments is concerned, Order 10 of the Civil Procedure Rules provides for consequence of non-appearance, default of defence and failure to serve.

Order 10 Rule 6 provides that:-

> “ Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request enter interlocutory Judgment against such Defendant, and the Plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.”

Order 10 Rule 11 thereof reads as follows:-

> “ Where Judgment has been entered under this order the court may set aside or vary such Judgment and any consequential decree or order upon such terms as are just.”

22. The courts have on several occasions pronounced themselves on this issue. For instance one of such decisions is by the Court of Appeal in the case of James Kanyiita Nderitu & Another –vs- Marios Philotas Ghikas & Another [2016]eKLR, where it stated that:-

> “ From the outset, it cannot be gainsaid that a distinction has always existed between a default Judgment that is regularly entered and one, which is irregularly entered. In a regular default Judgment, the Defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default Judgment. Such a Defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default Judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default Judgment, and will take into account such factors as the reason for the failure of the Defendant to file his Memorandum of Appearance or defence, as the case may be; the length of time that has elapsed since the default Judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default Judgment, among other. See Mbogo & Another –vs- Shah (supra), Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173).
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> In an irregular default Judgment, on the other hand, Judgment will have been entered against a Defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default Judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the Judgment is irregular; it can set aside the default Judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular
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> Judgment. The reason why such Judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations.

23. What needs to be put to rest is question of whether the judgment of the lower court falls within the definition of an irregular Judgment as clearly put by the Court of appeal in the aforementioned authority.

24. In this Court's view, the answer to that question is in the negative for the reason that from the record, the Appellant alongside the 2nd Respondent were served and the insurance appointed the Firm of M/S Ngaywa Ngigi and Kibet advocates to represent them. The Appellant and the 2nd Respondent entered appearance and filed a joint statement defence dated 2nd February, 2017. The matter proceeded on to full trial and after a consideration of the evidence on record, the trial Court delivered its Judgment which this Court finds regular and not amenable to setting aside under Order 10 rule 11 of the Civil Procedure Rules.

25. Turning to the last issue of whether the learned trial magistrate erred in finding that the Appellant was properly represented during the court proceedings. A perusal of the record shows that the Appellant and the 2nd Respondent were represented by the Firm of M/S Ngaywa Ngigi and Kibet advocates. The said firm of advocates entered appearance and filed a statement of defence both dated 2nd February, 2017 and filed in court on 6th February, 2017. A representative from the said firm was present at the hearing and had the opportunity to cross examine the witnesses in the lower court. This Court has also seen several communications in form of letters from the insurance and the advocate who represented the Appellant in this matter.

26. *The Constitution* under Article 50 (1) provides for the right to fair hearing with regard to any dispute that has to be resolved in accordance with the law. It provides as follows;

> " 50.
>
> (1) 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."

27. This Court holds the considered view that the Appellant was given the opportunity in line with the Constitutional provision and what it is seeking is to reopen the case by unprecedented means.

28. It is worth noting that the Firm of M/S Ngaywa Ngigi and Kibet advocates has been joined in these proceedings as the 3rd Respondent. The said firm was acting on instructions from the client to represent them before the trial court and therefore it cannot be faulted.

29. Having considered this appeal in its entirety, this Court has come to the conclusion that the trial Court made the correct finding in its ruling dismissing the Appellant's application. In the premises, the Appellant's appeal dated 2nd August, 2019 lacks merit and is hereby dismissed with costs to the Respondents.

    It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 4TH DAY OF JULY, 2023

D. O. CHEPKWONY

JUDGE

In the presence of:

Mrs. Olane for Appellant

Mr. Mulinge counsel for 1st Respondent

Court Assistant - Martin