REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 27 OF 2019

MULTIPLE HAULIERS (EA) LTD.....1ST APPELLANT

PETER MUTETI .....2ND APPELLANT

VERSUS

GEORGE ODHIAMBO ADUWO.....1ST RESPONDENT

GIDEON KANYORE.....2ND RESPONDENT

BENARD MBAKA .....3RD RESPONDENT

[Being an appeal from the Ruling of the Hon. Olengo Principal Magistrate at Nyando Law Courts dated 18th October 2018 in the Nyando PMCC NO. 190 OF 2007]

JUDGMENT

The appeal before me arises from the Ruling which the trial court delivered on 18th October 2018.

1. The said Ruling was in relation to an application dated 16th July 2018, through which the Defendants had sought a review of the Judgment on liability so that it could be brought in line with the decision in **KISUMU CMCC NO. 274 OF 2007**, which was the Test Case.

2. The said application also sought an order to recall the Warrants of Attachment which had been issued for the purposes of the execution of the judgment.

3. The learned trial magistrate noted, in his Ruling, that the judgment which he was being requested to review, had held the Defendants jointly and severally liable.

4. As at the time the trial court was delivering the judgment, the Plaintiff, (**GEORGE ODHIAMBO ADUWO**) had withdrawn his case against the 3rd and 4th Defendants, (**GIDEON KANYORE** and **BERNARD MBAKA**).

5. Therefore, the learned trial magistrate made the following observation, in his Ruling;

> ***"However, unlike in the test case, the suit against the 3rd and 4th Defendants have been withdrawn by the plaintiff, so the liability herein is against the 1st and 2nd Defendants only."***

6. In the appeal before me, the Appellants asserted that the withdrawal of the suit against the 3rd and 4th Defendants was illegal. The reason why the Appellants deemed the withdrawal to be illegal is that, prior to the said withdrawal, the Court had ordered that there would be a stay of proceedings.

7. However, the Respondents submitted that they had every right to discontinue proceedings, by withdrawing their case against the 3rd and 4th Defendants. In that respect, the Respondent relied upon the following words of Ibrahim SCJ in **JOHN OCHANDA Vs TELCOM KENYA [2014] eKLR**;

> ***"I am also of the view that just like under the Civil Procedure Rules or Court of Appeal Rules, the right to withdraw or discontinue proceedings or withdraw a Notice of Appeal, respectively ought to be allowed as a matter of right subject to any issue of costs which can be claimed by the respondents, if any."***

8. The Appellants have not contested the Respondents' general right to withdraw the case against the 3rd and 4th Defendants.

9. The Appellants complaint is that the Respondents should not have taken that step when there was an order for stay of proceedings.

10. The Respondents have not said that the court did not stay further proceedings.

11. In my considered opinion, the filing of a Notice of Withdrawal of Suit is a step in the proceedings. By taking the said step when the court had stayed proceedings, the Respondents acted in defiance of the Court Order.

12. If the court were to give recognition to actions which had been taken in flagrant disobedience of express orders of the court, the court would be lending credence to something that was irregular.

13. I have perused the record of the proceedings before the trial court.

14. On 18th February 2009, the parties confirmed that there was a Test Case which was pending before the Chief Magistrate's Court, Kisumu.

15. On 22nd July 2009, the Defendants' advocate, Mr. Yogo informed the court as follows;

> ***"The matters were stayed pursuant to a Court Order, due to a test suit No. KSM CMCC 274/07, which is coming up for defence hearing next week. I believe the fixing of the matter was premature since we had served the firm of M/S Madialo with a stay order. We therefore pray that the case be S.O.G. awaiting the test suit."***

16. It is noteable that Mr. Olel, the learned advocate for the Plaintiffs conceded the prayer for adjournment, based on the circumstances outlined by the Defendants.

17. On 14th December 2011, it is the Plaintiffs' advocate who sought the adjournment of the case because;

> ***"There is a test suit pending for defence hearing at the Chief Magistrate's Court in respect of the same accident."***

18. He made it clear that it was desirable to fix another date for hearing, after the test case was determined.

19. On 1st October 2015, Mr. Madialo, the learned advocate for the Plaintiffs said;

> ***"The matter was stayed pending the outcome of a test case, which was determined."***

20. He went on to draw the attention of the court to the fact that;

> ***"We (were) allowed a stay in the proceedings by an order of a Magistrate of an equivalent jurisdiction."***

21. Thereafter, when the case came up in court on 15th October 2015, Mr. Madialo advocate said;

> ***"We have a consent to record. Judgement was entered 100% on liability against the defendants. What is remaining is for the determination on quantum."***

22. Finally, on 3rd March 2016, Mr. Madialo advocate told the court as follows;

> ***"The issue of liability has been determined in Kisumu CMCC 274/17, which was a test suit. What is remaining is a determination on quantum."***

23. In the judgment dated 6th March 2018, the learned trial magistrate started off by saying;

> ***"This case is one of the cases that the issue of liability has been determined vide a KISUMU CMCC NO. 274/2007, where the 1st and 2nd Defendants were held to be 100% liable for the accident.***
>
> ***Interlocutory judgement was entered against 3rd and 4th. This court is therefore called upon to only deal with the issue of quantum of damages."***

24. Clearly, the trial court recognized that the issue of liability had already been determined in the test case. It therefore follows that liability was not to be determined again, in this case.

25. If the trial court made any pronouncement that was not in sync with the determination on the issue of liability, as made in the test case,

that is an error.

26. A perusal of the judgment in the test case reveals that the trial court held all the **FOUR (4)** Defendants 100% liable.

27. If this court were to recognize the irregular withdrawal of the suit against the 3rd and 4th Defendants, I would, effectively, be re-writing the judgment in the test case.

28. Let me reiterate that the trial court found all the 4 Defendants liable. And the reason I so find is from the following words in the judgment;

> ***"On 6.8.2007 interlocutory judgement was entered against the 3rd and 4th defendants, who failed to enter appearance and a defence. The 1st and 2nd defendants filed a defence but did not adduce any evidence.***
>
> ***I find that with the interlocutory judgement against 3rd and 4th defendants, liability against them is proved. As to the 1st and 2nd defendants they did not adduce evidence to dispute liability. I find liability against the defendants at 100%."***

- Emphasis is mine.

29. The Respondents cannot be allowed to, on the one hand, accept to be bound by the judgment in the test case, whilst on the other hand vary the substance of the same judgment through the purported withdrawal of the suit against the 3rd and 4th Defendants.

30. Just as the trial court stated, its only function was to determine the quantum of damages. Therefore, if the court went beyond that scope, it definitely went beyond its mandate.

31. To the extent that the trial court appears to have delved into the issue of determining liability, I find that it erred. Therefore, such finding is hereby set aside.

32. Consequently, any Decree flowing from the flawed determination is hereby set aside.

33. And following the setting aside of the Decree, it follows that the process of execution, which was based upon the Decree in question lacked a sound legal foundation.

34. In a nutshell, the appeal is successful. The warrants of attachment which were issued in the trial court, are hereby recalled and cancelled.

35. Before concluding this judgment, I note that the trial court appears to have appreciated that its judgment was not in line with the judgment in the test case. For that reason, the trial court said;

> ***"The upshot of all this is that the application is partly allowed, in that this court reviews this judgement to be in line with the judgement in the test case."***

36. That would imply that the Decree which the Respondents had begun executing had been reviewed. Therefore, a new Decree ought to have been extracted, embodying the review.

37. But now that the appeal is successful, the review cannot remain in place.

38. Finally, the costs of the appeal are awarded to the Appellants.

DATED, SIGNED and **DELIVERED** at **KISUMU**

This **2nd** day of **February** 2021

FRED A. OCHIENG

JUDGE