



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 15 OF 2019

BEATRICE GICHUKI.....APPELLANT

VERSUS

JULIUS MUTURI GITAHU.....RESPONDENT

JUDGMENT

1. This is an appeal arising from the ruling and subsequent Order of Hon. W. Kagendo (CM) delivered on 28/02/2019 in Nyeri CMCC No.421 of 2013.

2. The cause of action arose out of a road traffic accident that occurred on 3/01/2010. The suit was filed by the respondent against the appellant in which he sought the following reliefs:

- (i) General damages for pain and suffering
- (ii) Loss of earnings/earning capacity
- (iii) Special damages
- (iv) Costs of the suit and interest thereon.

3. A Consent was entered between the parties on the issue of liability in the ratio of 75:25 with the greater portion made in against the appellant; subsequently after hearing evidence and submissions on the issue of general and special damages the trial court entered judgment in favour of the respondent in the sum of Kshs 5,852,800/- plus costs and interest;

4. The firm of Nganga Munene & Co Advocates came on record in place of the previous advocates and had applied for a temporary stay of execution pending the hearing and determination of the application to have the judgment set aside; On 28/02/2019 the trial court dismissed the application and the appellant being aggrieved by the decision instituted this Appeal and cited four (4) grounds of appeal which are summarized hereunder:

- (i) The trial court failed to find that the applicant had met the conditions for setting aside a consent judgment; and
- (ii) The learned magistrate erred in failing to find that the appellant was denied the right to be heard thus occasioning miscarriage of justice;

5. The parties were directed to dispose of the appeal by filing and exchanging written submissions which are summarized as set out hereunder:

APPELLANTS' SUBMISSIONS

6. The appellant's submission was that the application was served on the firms of Patrick Law Associates and Munene Wambugu & Kiplagat Advocates and that there was evidence of service; No objection was raised by the two firms and therefore the trial court was obliged to allow the first prayer and ought to have proceeded to hear the submissions on the other prayers;

7. The appellant contends that every party to a dispute has a constitutional right to be heard and be represented by an advocate; the appellant relied on Articles 25(c) 27(1) and 50(2)(g) and (k) of the Constitution 2010; the applicant further contends that she was entitled to change her

advocates and that the firm had followed the right procedure by seeking permission to come on record as laid out in Order 9 Rule 9 of the Civil Procedure Rules;

8. The trial court proceeded to dismiss the appellant's application and failed to consider the other prayers in particular that of setting aside the judgment on record; that the judgment on liability was entered by consent without involving the appellant; the trial court ought to have allowed the appellant to choose to be represented by counsel of her choice and it made the presupposition that having been represented by a firm of advocates appointed by the insurers that the appellant then had no right to be represented by a firm of advocates of her choice during the subsistence of the proceedings;

9. She relied on the provisions of Articles 50(2)(k) and 159(1)(d) and (e) of the Constitution 2010 and submitted that a party had the right to adduce and challenge the evidence against her; that the principles of the Constitution cannot be promoted where one party was completely shut out from the proceedings;

10. It was her submission that at the time of making the application she was in danger of being committed to civil jail for failing to pay the sum of Kshs,4,442,847/- therefore the trial court ought to have given her a chance to ventilate whether the amount was lawful or not; the appellant had also sought to rely on the case of **Justice Mutiga & Others vs Law Society of Kenya & Another CA No.141 of 2016** where it was held that the amendment done to the **Insurance (Motor Vehicle Third Party Risks) Act** capping payments for general damages was declared unconstitutional; and thus the insurer having paid Kshs.3,000,000/- and the act of payment of remainder by the appellant was therefore unconstitutional and unlawful;

11. The appellant prayed that the appeal be allowed with costs.

RESPONDENT'S SUBMISSIONS

12. In response the respondent opposed the application and submitted that all the issues raised by the appellant in her application dated 29/11/2018 were taken into consideration and that the application was rightfully dismissed the appellant and her co-defendant were represented by the firm of Munene Wambugu & Kiplagat Advocates; judgment was entered against the appellant in the sum of Kshs.5,852,800/- and part payment of Kshs.3,000,000/- was paid by the Insurance Company and the respondent proceeded to recover the balance from the appellant; this action led the appellant to file the application dated 28/11/2018 seeking to set aside the decree and judgment and contended that she was never served with summons and never gave instructions on the consent on liability;

13. The application of 28/11/2018 was dismissed on the sole ground that the firm of Nganga Munene & Company Advocates was irregularly on record; the position on representation was thereafter regularized and the appellant filed another application based on the same grounds as the earlier application and it too was dismissed on the grounds that the appellant had not met the conditions set for setting aside a consent order;

14. The court's attention was drawn to the fact that the appellant made reference to the wrong ruling which was delivered on 20/11/2019 instead of the ruling delivered on 27/02/2019; the respondent reiterates that the trial court considered all the issues and rightfully held that the appellant was rightfully served with the summons and the firm of Munene Wambugu & Kiplagat Advocates filed a Statement of Defence on 18/10/2012 on behalf of the appellant and her co-defendant;

15. On the right to be heard the respondent submitted that the trial court was right in finding that the appellant was not denied this right as she was represented by the firm of Munene Wambugu & Kiplagat Advocates; the trial court did not dwell on procedural technicalities as contended by the appellant as it considered the substantive issues and made a sound determination; the trial court based its findings on evidence and the appellant has not demonstrated the wrong principles applied by the trial court in reaching the findings; as such the appeal lacks merit and ought to be dismissed with costs to the respondent.

ISSUES FOR DETERMINATION

16. After reading the respective rival written submissions this court has framed the following issues for determination:

- (i) Whether there was any miscarriage of justice;
- (ii) Whether to set aside the Consent entered on liability;

ANALYSIS

17. Being a first appeal this court is obligated to re-evaluate the evidence on record and arrive at its own independent conclusion; this principle is set out in the case of **Arrow Cars Limited V. Bimomo & 2 Others**, C.A. No. 344 OF 2004 which held;

'...this 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, this court is not bound necessarily to follow the trial courts findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.'

Whether there was any miscarriage of justice;

18. The court record reflects that the appellant herein filed an application dated 19/11/2018 which was dismissed on the sole ground that the

firm of Nganga Munene & Company were not properly on record;

19. The applicable law is found at Order 9(9) of the Civil Procedure Rules which reads as follows;

‘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:-

(i) Upon an application with notice to all parties; or

(ii) 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.’

20. The appellant’s contentions are twofold; the first being denial of representation and secondly the denial occasioned a miscarriage of justice as she was not able to ventilate her case;

21. It is this court’s considered view that the line adopted by the appellant that the trial court made the presupposition that having been represented by a firm of advocates appointed by the insurers during the subsistence of the proceedings she then had no right to be represented by a firm of advocates of her choice; this line of argument has no basis and is mute as the firm of advocates of her choice was eventually allowed to come on record once the firm had regularized its position;

22. The second limb, was the appellant denied her right to be heard and to ventilate her defence in the trial court? It was her submission that at the time of making the application she was in danger of being committed to civil jail for failing to pay the sum of Kshs,4,442,847/- therefore the trial court ought to have given her a chance to ventilate whether the amount was lawful or not; the appellant relied on the case of **Justice Mutiga & Others vs Law Society of Kenya & Another CA No.141 of 2016** where she contends that it was held that the amendment done to the **Insurance (Motor Vehicle Third Party Risks) Act** capping payments for general damages was declared unconstitutional; and thus the insurer having paid Kshs.3,000,000/- the act of payment of remainder by the appellant was therefore unconstitutional and unlawful;

23. It is this court’s considered view that this authority when read in full does not in any way assist the applicant as the Court of Appeal upheld the decision of Hon. Justice Onguto (as he then was) when he made the following finding;

‘75. I consequently find nothing unconstitutional with the provisions of Section 5(b) of the Insurance (Motor Vehicles and Third Party Risks) Act (Cap.405).

.....

85. In the end, I hold the view that the Principal Act does not exclude compensation to affect proprietary rights; It only limits who pays how much by apportioning a maximum of Kshs.3,000,000/- to be paid by the insurer and the additional if any by the insured.’

24. Section 5(b) indeed limits payment by the insurer to Kshs.3,000,000/- and this provision though it may be unfair to a party who has a valid insurance policy was found not to be unconstitutional by the High Court and by the Court of Appeal;

25. The court record reflects that the appellant was represented by the firm of Munene Wambugu & Kiplagat Advocates; the firm entered appearance and filed a statement of defence on her behalf; it also filed a witness statement made by the appellant’s driver one Wilson Matheri Njuguna and executed by him on the 27/08/2014; any challenge to the appointment and representation by this firm ought to have been made by the appellant at the earliest onset; as early as when her co-defendant executed the witness statement;

26. In the absence of such challenge this court is satisfied that the appellant was properly represented by counsel throughout the trial and at the subsequent proceedings and was not denied a right to be heard and was allowed to ventilate her case and finds that no miscarriage of justice was occasioned to the appellant;

27. This court is satisfied that there was no miscarriage of justice occasioned to the appellant; the trial magistrate did not dwell on procedural technicalities as submitted by the appellant but instead considered the substantive issues and made a sound determination and this court finds no reason to interfere with the trial courts findings;

28. This ground of appeal is found lacking in merit and is disallowed.

Whether to set aside the Consent entered on liability:

29. It is the appellant’s contention that the firm of Munene Wambugu & Kiplagat Advocates entered into a consent judgment on liability with the respondent knowing fully well that they were not authorized to do so by the appellant.

30. The record reflects that upon receipt of the Summons to Enter Appearance the services of the firm of Munene Wambugu & Kiplagat Advocates were engaged and the firm proceeded to enter appearance and file a statement of defence on behalf of the appellant; a witness statement for her co-defendant was also filed by this firm;

31. This court reiterates that during the pendency of the suit the appellant never questioned this firm's representation neither did she withdraw their services for the period they were on record; after perusing the court record at length this court finds nothing on the court record in the form of applications or affidavits filed by the appellant contesting this fact of representation by the firm of Munene Wambugu & Kiplagat Advocates; therefore a presumption can be safely made that the firm of advocates were properly on record acting for and on behalf the appellant;

32. It was trite law that consent orders entered into by counsel are binding to all the parties to the proceedings and can only be set aside where the consent was given without material facts; ignorance of such facts or there was misrepresentation, fraud or coercion. The case law this court relies on is the case of **S.M.N vs Z.M.S & 3 Others [2017]Eklr** this case summarizes the grounds upon which a consent order may be varied or set aside.

33. The appellant has not laid out any facts or evidence in the submissions before this court that demonstrates that the Consent Order on liability was procured through fraud, collusion, concealment or non-disclosure of material facts or mistake on the part of the firm of Munene Wambugu & Kiplagat Advocates when handling the matter;

34. The appellant has not met the conditions set down for the setting aside a consent order; the appeal bears the hall marks of vexatious litigation as there are no good grounds found that would justify the varying or the setting aside of the consent judgment on liability;

35. This ground of appeal is found lacking in merit and it is hereby disallowed;

FINDINGS & DETERMINATION

36. From the foregoing reasons this court makes the following findings and determinations;

- (i) This court finds that there was no miscarriage of justice occasioned to the appellant;
- (ii) This court finds no grounds that justify the varying or setting aside of the consent order on liability;
- (iii) The appeal is found lacking in merit in its entirety and it is hereby dismissed.
- (iv) The appellant shall bear the costs of the appeal.

Orders Accordingly.

Dated, Signed and Delivered Electronically at Nyeri this 17th day of June, 2021.

HON.A.MSHILA

JUDGE