



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 101 OF 2019

GATEWAY INSURANCE COMPANY LTD..... APPELLANT

VERSUS

JAMES OGEMBO NYABONGOYE RESPONDENT

(Being an appeal from the Ruling and Order of Hon. N.S. Lutta (C.M.) dated and

delivered on 21st August 2019 in Kisii CMCC No. 70 of 2018)

JUDGMENT

INTRODUCTION

1. The respondent filed Civil Suit No. 106 of 2010, a personal injury claim for damages following a road traffic accident that occurred along Kisii- Kilgoris road on 30th October 2009. He was awarded a sum of Kshs. 620,000/= together with costs and interest. He later filed the suit before the trial court to compel the appellant to satisfy the decree in Civil Suit No. 106 of 2010 on the grounds that the appellant was the insurer of motor vehicle KAW 604 E which had caused the accident.

2. The suit was set down for hearing before the trial court on 3rd July 2019 when the plaintiff testified. The appellant's advocate was however not ready to proceed and sought an adjournment to file the defence witness statements. The respondent's advocate opposed the application on the grounds that the hearing date had been taken by consent and the appellants had been given ample time to file their witness statements. The trial court agreed with the respondent's advocate. In a ruling dated 21st August 2019, the trial court disallowed the application by the defendant for leave to file their list of witnesses on the grounds that it would prejudice the respondent. Being aggrieved by that decision, the appellant filed the present appeal.

3. Subsequently, the appellant filed an application for stay of proceedings pending the determination of the appeal. The application for stay was dismissed in a ruling dated 29th January 2020. Undeterred, the appellant moved this court vide an application dated 6th March 2020 seeking among other orders, a stay of the proceedings before the trial court, pending the hearing and determination of this appeal. In due course, the appellant abandoned the application dated 6th March 2020 and the parties took directions to canvass the appeal by way of submissions.

SUBMISSIONS

4. The appellant's counsel began by submitting **Section 3A, Section 95** of the Civil Procedure Act and **Order 50 Rule 6** of the **Civil Procedure Rules** gave the court had unfettered discretion to enlarge the time within which witness statements could be filed. He argued that the constitutional imperative of fair hearing included affording parties ample opportunity to adduce and challenge evidence. The cases of ***Pinnacle Projects Limited vs Presbyterian Church of East Africa, Ngong' Parish & Another [2019] eKLR*** and ***Chairman, Secretary & Treasurer suing as the officials/on behalf of House of Hope vs Wotta – House Limited [2018] eKLR*** were cited in support of the submissions that a party could be granted leave to file witness statements and call further witnesses even after the plaintiff's case had been closed where the dictates of justice demanded it.

5. Counsel argued that it was the duty of the court to do justice to all parties and not to be strictly bound by procedural technicalities. It was submitted that the respondent would not suffer any prejudice if the appellant was granted leave to file its witness statements out of time and call witnesses to testify as the plaintiff would have the right to recall his witnesses to counter the defence evidence pursuant to **Section 146** of the **Evidence Act** as read with **Order 18 Rule 10** of the **Civil Procedure Rules**.

6. Counsel identified the issue of service of statutory notice, judgment notice and validity of the alleged insurance policy cover as some of the triable issues raised in the defence. The trial court was faulted for failing to consider the fact that the case before him was a declaratory suit compelling the Appellant to settle decretal sums from the primary suit which had proceeded *ex parte* and that the Appellant should be

allowed to have its day in court. If the proceedings before the trial court were concluded unchallenged, the appellant's right to fair hearing would be curtailed thus occasioning a miscarriage of justice.

7. Counsel argued that whereas a successful party should be allowed to enjoy the fruits of their judgment, the corresponding competing interest of the other party to the suit of adducing and challenging evidence should be jealously safeguarded. This court was urged to do justice for the parties by making a finding that there were triable issues in the statement of defence filed by the Respondent thus the need for it to be afforded an opportunity to adduce and challenge evidence.

8. The respondent's counsel on the other hand emphasized that **Order 7 Rule 5 of the Civil Procedure Rules** was very clear that the defence had to be accompanied by a list of witnesses, written statements and copies of the documents to be relied on during the trial. He argued that the use of the word "shall" in the rule meant that the defendant had to file the documents as specified under the rule. This court's attention was drawn to the numerous times the appellant had sought leave to comply with Order 11 but failed to do so. It was submitted that the trial court had no option but to proceed with the suit in consideration of Sections 1A and 1B of the Civil Procedure Act which required expeditious determination of disputes. Counsel relied on the cases of *Kahumbu vs National Bank of Kenya (2003) 2 E.A.475*, *Stephen Boro Githa vs Family Finance Building Society & 3 others Civil Application no. NAI 263 of 2009* and *Yatin Vinijbhai Kotak vs Tucha Adventures & Another [2000] eKLR* in support of the submissions that the failure by parties to comply with orders and practices that delayed the resolution of disputes would be met with sanctions.

9. In this case, the appellant had not given reasons for why the list of witnesses and documents had not been prepared. Counsel was of the view that the Appellant's intention for failure to comply with order 11 was to delay the matter. This court was thus urged to dismiss the appeal and order the trial court to proceed with the suit from where it had reached.

ANALYSIS AND DETERMINATION

10. Having considered the grounds of appeal, the submissions, the proceedings before the trial court and the decision challenged in this appeal, I find that the main issue arising for determination in this appeal is essentially whether the trial court erred in disallowing the appellant's application for leave to file its list witnesses outside the stipulated time and to subsequently to call witnesses to testify in support of its case.

11. The appellant's counsel made the application which led to the impugned ruling orally before the trial court. At the close of the plaintiff's case, the appellant's advocate prayed for another date for defence hearing and sought leave to file the defence witness statements. The respondent's counsel opposed the application, pointing out that the hearing date had been taken by consent. He added that the suit had been filed in February 2019 and service done hence the appellant had ample time to file their statements. The respondent's counsel listed the numerous times the matter had been adjourned and submitted that the respondent was merely buying time as they had no witnesses. In response, the appellant's counsel explained that they had been having problems with witnesses as some of them had already left employment. She submitted that the respondent would not be prejudiced if the application was allowed.

12. The trial court, in the decision giving rise to this appeal, held that it was trite law that a party had to file his pleadings together with a list of documents and list of witnesses and serve them on the adverse party. The court observed that although the court had discretionary powers to grant leave for a party to comply with Order 11 of the Civil Procedure Rules, in this case, the plaintiff had already closed its case and therefore granting leave to the defendant at that point had the likelihood of prejudicing the plaintiff. The court thus dismissed the respondent's application for leave to file their list of witnesses.

13. **Order 7 Rule 5 of the Civil Procedure Rules** lists the documents that should accompany a defence. It provides;

The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—

(a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;

(b) a list of witnesses to be called at the trial;

(c) written statements signed by the witnesses except expert witnesses; and

(d) copies of documents to be relied on at the trial.

Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11.

14. The appellant entered appearance and filed its statement of defense but did not file the documents listed under Order 7 Rule 5 above. The trial court properly held that it had the discretion to extend time to file the documents enumerated in the above rule.

15. The court's wide discretion to enlarge time is derived from **Section 95 of the Civil Procedure Act** and **Order 50 Rule 6 of the Civil Procedure Rules** as follows;

95. Enlargement of time

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

Power to enlarge time [Order 50, rule 6.]

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

16. In this case, the trial court declined to exercise its discretion to extend time for filing of witness statements. On appeal, a court can only interfere with the judicial discretion of the trial court if it is convinced that the trial court misdirected itself on law; or misapprehended the facts; or took account of considerations of which it ought not to have taken into account; or failed to take account of consideration of which it ought to have taken into account; or its decision, albeit a discretionary one, was plainly wrong. (see ***Mrao Ltd v First American Bank of Kenya Ltd & 2 others CA MSA Civil Appeal No 39 of 2002 [2003] eKLR***)

17. When it was first called upon to consider the principles for extension of time the Supreme Court in ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others APPLICATION NO. 16 OF 2014 [2014] eKLR*** held that a court exercising its discretion to extend time had to consider the following factors;

- a. *Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;*
- b. *A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;*
- c. *Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;*
- d. *Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
- e. *Whether there will be any prejudice suffered by the respondents if the extension is granted;*
- f. *Whether the application has been brought without undue delay; and*
- g. *Whether in certain cases, like election petitions, public interest should be a consideration for extending time.*

18. The explanation given by counsel for seeking an extension of time to file witness statements was that some of the witnesses had already left employment hence the application to file defence witness statements. The trial court did not examine whether the basis for seeking an extension of time was satisfactory. It thus failed to taken into account an important aspect in the exercise of its discretion to extend time.

19. The proceedings show that after close of pleadings, the matter was set down for pre-trial conference on 20th June 2018. Both parties were absent on that day. The trial court proceeded to fix a hearing date for 26th September 2018. The matter came up a day earlier, on 25th September 2019 when the appellant's counsel informed the court that pretrial had not been concluded. The matter was set for further mention on 24th October 2018 but the appellant's counsel was indisposed. The court set a date for hearing on 6th February 2019 but the matter did not proceed on that day as the trial court was out on official duties. The matter was therefore adjourned to 2nd April 2019. However, on that day, the appellant's counsel was on maternity leave and the matter was rescheduled to 3rd July 2019. The respondent gave his evidence when the matter came up for hearing on 3rd July 2019 but the appellant's counsel was not ready to proceed and sought the adjournment which led to the impugned ruling of the court.

20. **Order 11 Rule 3(1) (a)** of the Civil Procedure Rules provides that with a view to furthering expeditious disposal of cases and case management the court is required to convene a Case Conference to, among other things, consider compliance with Order 3 rule 2 and Order 7 rule 5. However, from the summary of the proceedings given above it is evident that by the time the matter came up for hearing, there was no confirmation that the appellant had complied with Order 7 rule 5. When the appellant's counsel was supposed to confirm compliance with Order 7 Rule 5, she was not present in court, and for good reason. The appellant was also not entirely to blame for the few times the matter was adjourned before hearing as seen from the proceedings summarized above. It was therefore plausible that some of the witnesses were no longer in the appellant's employment by the time the matter came up for hearing, considering the time it had taken from the institution of the suit on 1st February 2018 to the time the plaintiff gave his evidence on 3rd July 2019.

21. I agree with the respondent's argument that the appellant ought to have filed its statements together with the defence and that its failure to do so casts doubt as to the sincerity of its intentions. Its actions also went against the Oxygen Principles which call for efficient, timely and cost effective disposal of suits. It has however not been shown that the appellant's failure to comply with the rules was deliberate and motivated by bad faith. Consequently, the appellant's failure to comply with the rules on time should not bar it from having its case heard and determined on merit.

22. This position finds support in the case of ***CMC Holdings Ltd v James Mumo Nzioki Civil Appeal No. 329 of 2001 [2004] eKLR*** where the Court of Appeal held;

"It would in our mind not be a proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle... the

answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned magistrate did here. In our view, in doing so, she drove the appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate.”

23. Similarly, Apaloo JA in the case of **Philip Keipto Chemwolo & Another v Augustine Kubende Civil Appeal 103 of 1984 [1986] eKLR** held;

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit ... the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

24. The trial court was required to balance the respondent’s right to timely disposal of his suit against the appellant’s right to be heard. The right to be heard is a non-derogable right that demands that one be heard before any adverse action is taken against him.

25. Costs could have adequately compensated the respondent for any prejudice he may have suffered had the hearing of the matter been adjourned. He would also have had the opportunity to challenge the evidence tendered by the appellant as held in the persuasive case of **Pinnacle Projects Limited vs Presbyterian Church of East Africa, Ngong’ Parish & Another [2019]eKLR** where the court expressed itself thus;

“It seems to me that a reading of the above cases the principles elaborated upon is that the discretion of the court is not fettered on admission of additional evidence after the trial has commenced and the plaintiff case has been heard fully.

When considering the additional evidence in my view a careful inquiry by the court ought to be made into the nature of the evidence as to its relevance, materiality facts in issue, admissibility and the strength of the evidence sought to be introduced within the trial. Merely because the witness statement was not served during pre-trial conference and discovery period does not prevent the trial court to allow such further additional evidence to be taken on record and allowed to be challenged in accordance with law.”

26. I also concur with the finding of the court in **Chairman, Secretary & Treasurer suing as the officials/on behalf of House of Hope vs Wotta – House Limited [2018] eKLR** where it was held;

“Even after the Pre-trial conference, the court has the power to allow the parties to call further witnesses or produce further documents. This power, encapsulated in the provisions of Order 18 rule 10 of the Rules and section 146 of the Evidence Act, is intended to ensure that each party is afforded a fair trial guaranteed under Article 50 (1) of the Constitution. But a fair trial does not exist in a vacuum, it is governed by rules which by themselves ensure that each party is given the opportunity to present or defend his case fairly. What these rules must not do is to become an end in themselves and impede a fair trial and that is why Article 159(2)(b) of the Constitution provides that justice shall be administered without undue regard to technicalities. The constitutional imperatives are further supplemented by the overriding objective enacted in sections 1A and 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya).

27. The appellant has raised several triable issues in its statement of defense including its contention that it was not notified of the accident and that it was not obliged to satisfy the decree among other issues which ought to go to trial for adjudication. Justice would be better served if the appellant is allowed to adduce evidence in support of its pleadings. Accordingly, the appeal is hereby allowed. The ruling and order of the trial court dated 21st August 2019 is hereby set aside and substituted with an order allowing the appellant to file its list of witnesses and statement within 21 days from the date of this judgment. The matter will be mentioned before the trial court for further directions within 21 days.

28. For reasons given above, the appellant shall bear the costs of this appeal.

DATED, SIGNED AND DELIVERED AT KISII THIS 14TH DAY OF JULY 2021.

R.E. OUGO

JUDGE

In the presence of:

Miss Wanjohi **For the Appellant**

Mr. Okemwa h/b Mr. Okemwa Elijah **For the Respondent**

Mr. Orwasa **Court Assistant**