



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL CASE NO. 64 OF 2011

FUELOMAT (K) LTD.....APPELLANT

VERSUS

JOHN NYEKI T/A MUKHAN TRADERS.....RESPONDENT

(Being an Appeal from the orders of the Chief Magistrate's Court at Milimani Nairobi (Hon. Nditika) made on 4th February 2011 in Nairobi Milimani CMCC No. 10872 of 2005 dismissing the application dated 20th September 2010)

JUDGMENT

1. The Appellant instituted the suit against the Respondent by way of a plaint dated 3/10/2005 and amended on 29/6/2006. The Appellant's claim was for special damages of Kshs. 412,565/= stated to have arisen from an accident between the Appellant's and the Respondent's motor vehicles.

2. The claim was denied as per the Statement of Defence filed.

3. On 4/3/2020 when the suit was set down for hearing, there was no attendance on the Appellant's side. Consequently, the suit was dismissed by the court. Subsequently, the Appellant filed the application dated 13/5/2020, seeking to reinstate the case. The application was listed for hearing on 9/9/2010. However, the Appellant was not present and the application was dismissed for non-attendance.

4. The Appellant thereafter filed the application dated 20/9/2010 which is the subject matter of this Appeal. The application was opposed. After hearing the parties, the trial magistrate dismissed the application with costs.

5. The Appellant was dissatisfied with the said dismissal and appealed to this court. In the Memorandum of Appeal, the Appellant raised three grounds of Appeal as follows;

1. That the Learned Magistrate erred in both law and fact in failing to find that the Appellant's application dated 20/9/2010 was adequately meritorious and ought to have been allowed despite the weight of the supporting affidavit and submissions made.

2. That the Learned Magistrate erred in both law and fact in failing to find that genuine and compelling reasons had been advanced in support of the Appellant's application dated 20/9/2010.

3. That the Learned Magistrate erred in both law and fact in dismissing the Appellant's application dated 20/9/2010.

6. During the hearing of the Appeal, the Respondent did not attend court and did not file any submissions. The Appellant filed written submissions. The court was referred to the overriding objectives of the Civil Procedure Act, Article 159 (2) (b) of the Constitution of Kenya which provides for administration of justice without undue regard to technicalities and Article 50 which makes provision for a fair hearing.

7. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated Motor Boat Co. & others [1968] E.A. 123** where it was stated as follows: -

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that 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 judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)".

8. In the application dated 20/9/2010, the Appellant's counsel gave the reason for non-attendance as having been caught up in the traffic jam. It was further averred that the failure was unavoidable and unintentional and the mistake should not be visited on an innocent litigant.

9. The application was opposed. It was stated in the replying affidavit that traffic jams in the city of Nairobi are a common occurrence and not an excuse for failure to attend court. It was pointed out that the application at hand sought to reinstate the application dated 12/5/2010 which was also dismissed for non-attendance. The Respondent further stated that there was lack of interest by the Appellant in the matter which was old and that litigation ought to come to end.

10. It is clear that the suit herein was dismissed for non-attendance and the application filed for the reinstatement of the suit was also dismissed for non-attendance. I would agree with the observation by the trial magistrate that in the circumstances of this case, the conduct by the Appellant's side reflected lack of interest in the matter. If the counsel was held up in the traffic jam, he could have called his office or colleagues and arrangements made for another counsel to hold brief for him. A party who is keen on the matter would also make provision in case of traffic jams which are quite common.

11. This is an old matter dating back to the year 2005. By the date of the application at hand in the year 2010, the Respondent's side was already complaining of the delay in this matter. I would agree with the Respondent's contention that this litigation now ought to come to an end. I find no merits in the Appeal and dismiss the same with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF NOVEMBER, 2021

B.THURANIRA JADEN

JUDGE