REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 207 OF 2010

CHARLES AYIEKO.....APPELLANT

=VRS=

LOCHAB BROTHERS LIMITED.....-RESPONDENT

Being an appeal against the Judgement & Ruling of Hon. J. A. Owiti – RM Eldoret dated and delivered on the 13th September 2010 & 11th day of October 2010 respectively in the original Eldoret Chief Magistrate's Court Civil Case No. 963 of 2009

JUDGEMENT

1. By a plaint dated 1st December 2009 filed in the court below on 3rd December 2009 the appellant brought a claim for material damage to his motor vehicle registration No. KAS 205A following a collision between it and the respondent's motor vehicle KAA 527W Isuzu Lorry. The accident is alleged to have occurred at Sirikwa along the Eldoret – Kitale Road on 17th November 2009.

2. The appellant particularized the loss as follows: -

(a) Costs of repairs – Kshs. 144,849/=

(b) Costs of investigation & assessor's report – Kshs. 6,500/=

(c) Police abstract – Kshs. 200/=

(d) Loss of user @ 3000 per day for 18 days – Kshs. 54,000/=

3. The appellant also prayed for the costs of the suit and interest.

4. Upon hearing and evaluating evidence from both sides the trial Magistrate by a judgement delivered on 13th September 2010 finding that some of the items were not proved entered judgement for the appellant against the respondent for a sum of Kshs. 44,850/= and costs of the suit only.

5. On 17th September 2010 the respondent filed a notice of motion seeking a review of that judgement on the following grounds: -

(a) That there was an error apparent on the face of the record.

(b) That there is discovery of new and important matter that was not within the knowledge of the defendant.

(c) That the judgement/decree order of 13th September 2010 was made on account of some mistake or an error apparent on the face of the road.

(d) That this application has been brought without unreasonable delay and in exercise of justice.

6. The gravamen of the Notice of Motion was that the plaint served upon the respondent and upon which it relied in its defence described the appellant's motor vehicle as being KAS 527W which number was different from the one in the plaint filed in court.

7. After hearing and considering the submissions of Counsel for the parties, the trial Magistrate allowed the application for review and finding there were sufficient grounds to review the judgement dismissed the appellant's suit with costs to the respondent.

8. Being aggrieved the appellant filed this appeal which is two pronged as it challenges the judgement of the trial Magistrate on the merits and also challenges the ruling by which the self said Magistrate reviewed the judgement by setting it aside and effectively dismissing the suit.

9. The grounds of appeal are: -

> **"1. THAT the learned magistrate erred in law and in fact in failing to consider and determine all the issues raised in evidence.**
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> **2. THAT the learned magistrate erred in law and in fact by failing to find that application dated 14th/9/2010 was incompetent and fatally defective.**
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> **3. THAT the learned magistrate erred in law and in fact in failing to fully appreciate the facts and circumstances surrounding the suit.**
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> **4. THAT the learned magistrate erred in law and in fact in failing to take into consideration matters that she ought not to have taken into consideration and not matters which she ought to have taken into consideration at her decision.**
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> **5. THAT the learned magistrate erred in law and in fact in introducing and addressing herself to matters that were not pleaded and canvassed for.**
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> **6. THAT the learned magistrate erred in law and in fact in failing address pertinent issues raised in the trial and submissions thereof.**
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> **7. THAT the learned magistrate erred in law and in fact in introducing and addressing herself to extraneous issues at arriving in her ruling and judgement.**
>
> **8. THAT the learned magistrate erred in law and in fact exercising jurisdiction when the court was already *functus officio.***
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> **9. THAT the learned magistrate erred in law and in fact in failing to address and or consider material issues raised during the hearing of the application.**
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> **10. THAT the learned magistrate misdirected herself in finding that the Appellant had not proved its claim on balance of probability and thereby disallowing the sum of Kshs. 100,000/=.**
>
> **11. THAT the learned magistrate misdirected herself on the assessment of quantum on damages that she ought to have awarded to the appellant in her judgement."**

10. In summary the appellant's argument in respect to the judgement is that it ignored some of the evidence adduced and hence went against the weight of judgement. On the ruling the appellant argues that after delivering the judgement the trial Magistrate became *functus officio* and did not therefore have jurisdiction to review or revisit the judgement as it were.

11. In opposing the appeal against the judgement the respondent argues firstly that the same is incompetent for being filed out of time and secondly that the appeal is a non-starter as it does not contain a prayer to set aside the judgement. That moreover the fact of ownership of the motor vehicle purported to belong to the appellant was not proved and that the sum of Kshs. 44,850/= awarded by the trial court is what was proved.

12. Regarding the ruling, Counsel for the respondent argued that the appellant's appeal thereto was also filed out of time without sufficient reason and without first obtaining leave and hence it is equally incompetent and defective and should be struck out with costs to the respondent.

13. As the appeal both against the judgement and the impugned ruling have in the first instance been opposed on account of being filed late, I shall deal with that issue first. **Section 79 G of the civil Procedure Act** states: -

> **"79G. Time for filing appeals from subordinate courts**
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> **Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:**
>
> **Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."**

It is clear from this Section that an appeal must be filed within thirty days unless the appellant satisfies the court that he **"had good and sufficient cause for not filing the appeal in time."** The appeal against the judgement was filed twenty-nine days out of time without the appellant satisfying the court that he had good and sufficient cause for doing so. However, the appeal against the ruling having been filed on 11th November 2010 while the ruling was delivered on 11th October 2010, was within time.

14. The appellant in this case had opportunity before filing the appeal to seek leave of the court to do so. He did not and has not even in the submissions before me acknowledged the fact of the delay and even upon being notified of the issue through the submissions of Learned Counsel for the respondent no response was filed on the issue of delay. As such no sufficient reasons have been advanced for the delay and I echo the decisions of Musinga J, as he then was and Mulwa J in the cases of **Andrew Nganga Ndungu v Godfrey Karuri & another [2006] eKLR** respectively and find that the appeal against the judgement is fatally incompetent and does not lie. The appeal against the merits of the appeal is therefore struck out.

15. The gist of the respondent's application dated 14th September 2010 which gave rise to the impugned ruling was that he had been served with a plaint different from the one filed in court; that the said plaint indicated the registration number of the appellant's motor vehicle as KAS 527W while in the plaint filed in court the Reg. No. was KAS 205A. That as such in its written statement of defence the appellant admitted that motor vehicle KAS 527W belonged to the appellant. In the Notice of Motion therefore it urged the trial Magistrate to find there was an error on the face of the record and that given the pleadings filed on itself it had made discovery of a new matter which was not within its knowledge. In the ruling the trial Magistrate agreed with that argument and found that motor vehicle KAS 205A was not the subject matter of the suit as the pleading served upon the respondent showed a different number. For that reason, she proceeded to set aside the judgement and to dismiss the suit. Whereas it is my finding that she did have jurisdiction under **Section 80** of the **Civil Procedure Act** and **Order 45** of the **Civil Procedure Rules** to review the judgement, it is my finding that she misdirected herself. The pleading before the court was the one filed in court. The same clearly indicated the appellant's motor vehicle was KAS 205A. The evidence adduced in court was in respect of KAS 205A and cross examination of the appellant was in regard to motor vehicle KAS 205A. At no time in the trial did the respondent raise the issue of the plaint which had a wrong registration number. Moreover, if indeed there was a reference to motor vehicle KAS 527W then it must have been a typographical error. The Magistrate proceeded on the pleadings on the court record as she ought to have done. Indeed, the record indicates that in the course of the trial the respondent applied to amend its defence in vain. Moreover, the testimony of Maranga Otiso Okari (Dw1) given on 23rd August 2010 indicated that they were aware of the claim they were defending and it was not the wrong claim. The respondent was not therefore prejudiced by reason of being served with a plaint with an error if at all. It is instructive that the trial Magistrate herself made several typographical errors in regard to the appellant's motor vehicle. I find that if there was a typographical error in the plaint served upon the respondent then it was cured at the trial and the respondent did not suffer any prejudice. Moreover, the issue of the registration number was not a new one the same having been raised during the hearing and more specifically cross examination of Dw1. There was no merit in the trial Magistrate's ruling therefore. The appeal against the ruling is therefore set aside together with all consequential orders thereto and the judgement of the lower court is reinstated and the costs of this appeal awarded to the appellant. It is so ordered.

Signed and dated this 21st day of January 2020.

E. N. MAINA

JUDGE

Dated and delivered in Eldoret this 5th day of February 2020.

H. A. OMONDI

JUDGE