REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CIVIL DIVISION

CIVIL APPEAL NUMBER NO. 2 OF 2018

BETWEEN

ABDIGAN OMARI MOHAMED.....1ST APPELLANT

MOHAMED IBRAHIM SANTU.....2ND APPELLANT

ENOCK KIPTOO SAWE.....3RD APPELLANT

AND

RWJ(minor suing through next friend and mother) GAM.....RESPONDENT

(Being an appeal from the ruling written by Hon. V. O. Adet, Senior Resident Magistrate and delivered on 30th August, 2018 in Kapenguria SPMCC No. 50 of 2012)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

The Appeal

1. Being dissatisfied with the ruling of Hon, V. O. Adet, SRM dated 30th August, 2018 dismissing the appellant's application dated 24th August, 2018 in Kapenguria, SPMCC No. 50 of 2020, the appellants filed this appeal on 13th September, 2018 on the following grounds:-

> ***1. THAT the learned trial magistrate erred in law and fact in dismissing the appellants' application seeking leave to file list of witnesses and documents despite clear pleadings which pleaded fraud on the part of the respondents'.***
>
> ***2. THAT the learned trial magistrate erred in law and fact in failing to consider the appellants' oral submissions, grounds in the application dated 24/8/2018 together with the supporting affidavit relied upon in support to the application thereof.***
>
> ***3. THAT the learned trial magistrate erred in law and fact by failing to take into account the fact that the respondents suit had initially been dismissed for want of prosecution hence contributing to delay in conclusion of the case.***
>
> ***4. THAT the learned trial magistrate erred in law and fact by making a finding that it would have been prejudicial to grant the appellants leave to tender their evidence in support of the pleadings thus occasioning a miscarriage of justice.***
>
> ***5. THAT the learned trial magistrate's decision albeit, a discretionary one was plainly wrong.***

2. It is the appellants' prayer that their appeal be allowed and the ruling dated 30th August, 2018 by the learned trial magistrate be set aside and the same be substituted with proper finding/judgment.

3. This is a first appeal and in that regard, this court is under a duty to carefully reconsider and evaluate the entire lower court record and in particular, the impugned ruling of the learned trial magistrate and to come up with its own conclusions in the matter case has to be taken however that where there are no good reasons to interfere with the discretion of the learned trial magistrate this court should leave the same undisturbed. Generally see **Selle & another –vs- Associated Motor Boat Co. Ltd & others [1968] EA 123**.

Background

4. By the plaint dated 13th August, 2012 the respondent sought to recover both general and special damages from the appellants in respect of a road traffic accident which occurred on or about 30th May, 2020 at about 6.00 p.m. When the respondent who was a lawful fare paying passenger aboard a motor vehicle registration number KBH 285C Nissan UD bus when at Kamatira along the Lodwar-Makutano road the 3rd appellant and/or the lawful and/or authorized driver while lawfully driving the said motor vehicle without due care and attention and so negligently/or carelessly drove, managed and/or controlled the said motor vehicle that he caused it to lose control and veer off the road and rolled thereby inflicting serious personal injuries to the respondent.

5. The respondent alleged further at paragraph 8 of the plaint that the said accident was caused or substantially contributed to by the 3rd appellant as the lawful and/or authorized driver of the subject motor vehicle. Particulars of negligence are set out in the said paragraph 8 of the plaint. The respondent also alleged that as a result of the said accident, he suffered serious injuries, loss and damage as follows:-

a. Blunt injuries to the neck with swelling.

b. Cut wound on the anterior chest.

c. Cut wound on the left side of face below eye (measuring) about 2.0 cm x 0.2 cm.

d. Blunt injuries to the chest and back.

6. The respondent also pleaded the following special damages:-

a. Medical report - Kshs 3,500/=

b. Motor vehicle records - Kshs 500/=

c. Treatment costs - Kshs 320/=

Total - Kshs 4,320/=

7. The appellants entered appearance and filed defence dated 18th October, 2012. They denied all the allegations labelled against them and further averred at paragraph 5 of the defence that the accident in which the respondent was allegedly injured was caused solely and/or substantially contributed to by the negligence of the respondent as set out thereinunder. The appellants also averred at paragraph 7 of the defence that the respondent's claim was based on fraud and/or misrepresentations of the respondent that the minor had been involved in an accident and injured and further by fabricating or procuring the fabrication of documents and/or evidence in support of the minor's claim and that because of the said alleged fraud, the minor's claim was unlawful improper and an abuse of the court process. Particulars of fraud are set out under the said paragraph 7 of the appellants' defence. Finally, the appellants averred that if any accident occured, which was denied then the same was due to an inevitable accident and urged the court to dismiss the claim.

8. The respondent filed reply to defence on 19th November, 2012 and denied the appellant's allegations.

Submissions

9. This appeal proceeded by way of written submissions the appellants' submissions are dated 2nd December, 2019 and filed in court on 9th December, 2019. The appellants placed reliance on the case of **Ndungu Dennis -vs- Ann Wangari Ndirangu & another [2018] eKLR** in urging this court to critically subject the whole of the evidence herein to a fresh and exhaustive scrutiny and make its own conclusions in the matter while remembering that it has no opportunity of seeing and hearing the witnesses first hand.

10. Counsel for the appellants submitted that the affidavit in support of their application dated 24th August, 2018 gave the reason for the delay in filing the required documents after suffering a delay in recovery, documentary evidence from the medical superintendent of Kapenguria County Referral Hospital in addition to the ademoted fact that the respondent's case had at one time been dismissed for want of prosecution, thereby causing more delay. It was thus the appellants' case that the delay in concluding the case in the lower court was largely contributed to by the respondent, a fact which they said the trial court failed to consider.

11. Appellants' counsel urged this court to consider Article 159 of the constitution and make a finding that the application dated 24th August, 2018 was merited. Citing the case of **Julia Wambui Mwangi -vs- Family Bank Limited & Ruth Njeri Karanja [2018] eKLR**, the appellants submitted that no prejudice would be suffered by the appellants that would not be compensated in monetary terms.

12. The respondents rival submissions are dated 9th December, 2019 and filed in court on 10th December, 2019. The submissions give a background of the case which was filed together with PMCC No. 51 of 2012 – in which the plaintiff was the mother to the respondent herein, Reagan W. John, a minor aged 2 years from the submissions the following scenario unfolds:-

- On 25th October, 2012, the appellants filed similar defences in both matter but did not file lists of witnesses or list of documents or any witness statements. Thereafter the case was fixed for hearing by counsel on 9th May, 2013.
- When the matters came up for hearing on 9th May, 2013, PMCC No. 51 of 2012 was chosen by consent as the lead file and the

evidence of the witnesses to be taken in that file since the two cases involved mother and child and the witnesses were common to both matters. Counsel submitted that all the proceedings touching on PMCC No. 50 of 2012 are in PMCC 51 of 2012 (this court confirms the same).

- On 9th May, 2013, two witnesses the plaintiff (PW1) and the Base Commander (PW2) testified in respect of both files, and all the treatment notes, the P3 form and the respective police abstracts were produced by consent, without any challenge or reservations on the part of the appellants.
- The matters were then fixed for further hearing on 6th June, 2013 for the evidence of Dr. S. C. Njenga who was to produce medical reports.
- On 25th June, 2013 PMCC No. 51 of 2020 was marked as settled thus leaving PMCC No. 50 of 2012.
- On 4th June, 2014, a consent dated 24th June, 2013 was filed to settle PMCC No. 50 of 2012 at Kshs 58,000/= only. The said consent was duly adopted as an order of the court in the following terms:-

By consent

1. That this matter be and is hereby marked as settled at an all inclusive sum of Kshs 58,000/=.

2. That there be no further orders as to costs.

3. That there be 30 days stay from the date of filing this consent.

This consent filed on 4th June, 2014 was set aside by another consent dated 18th August, 2014 and filed in court on 18th September, 2014.

- Despite PMCC No. 51 of 2012 having been marked as settled both matters were fixed for hearing on 21st January, 2016. On 21st January, 2016 and in the absence of the counsel for the respondent, appellants' counsel applied for dismissal of PMCC No. 50 of 2012, but left PMCC No. 51 of 2012 intact, as the same had been marked as settled by consent, PMCC No. 50 of 2012 was thus dismissed on grounds that it was an old matter having been filed in 2012. Though the last witness and respondent's counsel arrived sometime later on that same day after the dismissal order had been made. The matter was fixed for mention on 11th February, 2016.
- Thereafter PMCC No.. 51 of 2012 was fixed for further hearing on 12th May, 2016 when Dr. S. C. Njenga, PW3 testified in respect of PMCC 50 of 2012. The plaintiff thus closed her case.
- By an application dated 11th May, 2016, the respondent sought to have the dismissal orders in respect of PMCC No. 50 of 2012 set aside but on 26th January, 2017 the court directed that the suit still stood dismissed.
- On 12th May, 2016, after the plaintiff in PMCC No. 50 of 2012 closed her case, the matters were fixed for defence hearing on 30th June, 2016, the defence (appellants) having been granted the last adjournment. As the trial court was not sitting on 30th June, 2016 the matter was fixed for defence hearing on 14th June, 2018.
- On 14th June, 2018, the appellants, and defendants, applied for adjournment to enable them file an application for leave to amend the defence while granting the application for adjournment in PMCC No. 50 of 2012, PMCC No. 51 of 2012 was fixed for defence hearing on 16th August, 2018.
- Come 16th August, 2018, the defence had no witnesses and sought an adjournment which was granted as a last adjournment and the matter fixed for defence hearing on 30th August, 2018 after vehement opposition by respondent's counsel.
- When the matter finally came up on 30th August, 2018, the defence did not avail witnesses but instead they filed their application dated 24th August, 2018. After hearing that application, the trial court dismissed it by refusing to grant leave to the appellants to file a list of witnesses and documents out of time, hence this appeal.

13. It is on the basis of the above historical background that the respondent's counsel submit the appeal herein has no basis and ought to be dismissed with costs. The respondents contend that the appellants have been solely responsible for the delay in hearing. The respondent's case concluded the respondent also contends that the learned trial court was in order to dismiss the appellant's application dated 24th August, 2018 on grounds, *inter alia* that the appellants have remained indolent and sought to seize every opportunity to thwart the course of justice in favour of the respondent. The respondent cites a number of authorities which I shall consider as appropriate during the analysis stage of this judgment.

Issues for Determination

14. The only issue of determination in his appeal is whether the learned trial court was justified in dismissing the appellant's application dated 24th August, 2018, because that is really the aux of the matter.

Analysis and Determination

15. From the record, the appellants filed their application dated 24th August, 2018 more than 2 years from the time they were meant to give their defence the ultimate paragraph of the impugned ruling reads:-

> ***"I have looked at the arguments from both counsel I agree that Order 7 Rule 5 gives in mandatory terms that parties should file all requisite documents before the pre-trial conference and I believe the parties herein did the same. I also agree that Article 159 of the constitution cited by the applicant read with Section 3A of the Civil Procedure Act requires the court to act on matters***

without delay, and [to ensure] that justice prevails. Having looked at the time when the matter was filed the proceedings herein and application beforehand, it would not be in the interest of justice to allow the application as the same would prejudice the respondent who have already closed case long time [ago] in 2016, in this breath I decline to allow the application, the same is dismissed."

16. It was thus the considered view of the learned trial magistrate that would be prejudicial to the respondent if the application was allowed. The appellants contend that no amount of prejudice that would accrue to the respondent is incapable of being compensated in costs.

17. After carefully analyzing and evaluating afresh the whole of the proceedings, and in light of the submissions and the law, I am satisfied that the decision of the learned trial magistrate was sound. Why do I say so? First of all, the reasons given for the appeal fail to consider the totality of the proceedings from the date of filing suit the defences and reply to defence and the fact that the respondent's case was closed more than 2 years before the application was filed. It is also my considered view that the appellants have been extremely indolent in the manner they have prosecuted this matter, and their consistent indolent conduct flies in the face of provisions of Section 1A, 1B and 3A of the Civil Procedure Act but more fundamentally, I find that the appellants have not acted in good faith, if the history of the case is anything to go by.

18. The appellants submitted that since the respondent's suit had initially been dismissed for want of prosecution, then it is the respondent who has contributed to the delay in conducting this matter. While it is true that the respondent's suit was dismissed for want of prosecution, when the whole record is read together like reading all the articles of the constitution 2010 together, I find that the said dismissal was a technical matter because counsel for the appellants know that his colleague together with the last witness for the respondent were on the way and indeed at 12.00 p.m. on the same day counsel and Dr. S. C. Njenga came to court ready to proceed with matter, but appellant's counsel had already left the ……of the court. In my humble view the conduct of appellant's counsel leaves a lot to be desired. In this court's ruling dated 9th April, 2019 the court noted, while allowing appellant's application for stay of proceeding in PMCC NO. 50 of 2012 pending determination of this appeal, but the applicants who have not acted with diligence on 25th October, 2012 cannot just be left to walk away..."

19. In support of the learned trial court's ruling counsel for the respondent contend the filing of the application seeking leave to file defence documents over two (2) years after close of the plaintiff's case and over seven (7) years after close of pleadings defeats the essence of the provisions of Order 7 Rule 5 of the Civil Procedure Rules and the mischief it was meant to are for clarity Order 7 Rule 5 of the CPR reads as follows:-

"Order 7 Rule 5 – Documents to accompany defence and counterclaim.

The defence and counterclaim filed under rules 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."

20. What comes out for the above provision is that the only documents that may be filed outside of the time allowed under Order 7 Rule 5 are the written statements of witnesses, and even then the same to be filed at least fifteen days prior to the trial conference under Order 11. The situation in the instant case is that the appellants sought to produce the documents under sub-rule (c) and (d) more than 2 years after close of the plaintiff's case. Apart from the fact that there is no provision under the rules to allow such an application the courts have frowned upon litigants who try to arm-twist the court by whatever reasons to grant such applications.

21. In **Concord Insurance Co. Ltd -vs- NIC Bank Ltd [2013] eKL**, a case cited by the respondent in support of the trial court's findings Hon. Justice J. B. Havelock was faced with a similar application and in dismissing the application, the learned Judge said: –

"The function of the discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist than in appraising the strength or weakness of their relevant cases, and thus to provide the basis for fact disposal of the proceedings before or at the trial each party is thereby enabled to see before the trial or to adduce in evidence at the trail relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation."

22. The above view was also held by Hon. Justice E. K. O. Ogola in disposing of a similar matter in the case of **Leslie Okubo Atuma -vs- National Bank of Kenya Ltd [2015] eKLR**. The learned Judge held in part, **"Discovery of documents is a requirement of our law of procedure and is a process or concept which is adequately supported by legal practice and legal jurisprudence there is not short cut to this process. It must be done as by law required, both in terms of substantive law and procedural law. Where a party has failed to do so, or to complete discovery of documents, that party must take full responsibility for the consequences, and lay the blame on its own door."**

23. I entirely agree with the legal position taken by my learned colleagues on the above cited cases, and hold that the appellants herein must

take full responsibility for their inordinate non-compliance with the legal requirements as to discovery from the record, the respondent's case was closed on 12th May, 2016. For more than 2 years, the appellants played a hide and seek game with regard to the hearing of their defence. They were given more than one last adjournment in the matter and when they eventually discovered that the noose of time was finally tightening around their necks, they did what they thought was best in the circumstances: file the application dated 24th August, 2018 whose ruling gave rise to this appeal.

24. The appellants seek to rely on the provisions of Article 159 of the constitution, but I must point out that the said provisions are not a panacea for mischief. All parties in a suit are entitled to fair trial, and playing tricks or trying to steal a march on another is not part of the process of fair trial. One of the reasons why I think the appellants are guilty of mischief is that the document they sought to introduce was in their possession not only at the commencement of the suit but even as they filed their defence and entered into the various consent.

25. In any event, litigation must come to an end and courts will not allow a party to abuse the process of the court through piece meal litigation. Such conduct amounts to ambush and the courts will not allow it. I agree with Munyao Sila J's view of such matters expressed in the case of **Johana Kipkemoi Too -vs- Hellen Tum [2014] eKLR** to the effect that "There is no provision in the rules that permits the court to accept a list of witnesses or documents filed outside the time lines provided in Order 3 Rule7 and Order 7 Rule 5. The provisions of Order 3 and Order 7 are meant to curb trials by ambush. The objective is to make clear to the other party, the nature of evidence that he will face at the trial. There is however no clear cut provision setting out the consequences of failure to comply. The Rules do not state that such party will be deterred from relying on witnesses or documents which were not furnished at the filing of the pleadings or later filed with the …….of the court. But the constitution under Article 50 (1) provides that every party deserves a fair trial and it is arguable that a trial will not be a fair trial, if a party is allowed to hide his evidence and ambush the other party at the hearing." Also see Supreme Court of Kenya ruling in **Raila Odinga & 5 others -vs- IEBC and 3 others [2013] eKLR** in which the Supreme Court declined to bend the rules in favour of a party who had failed to comply with the rules of procedure.

26. Taking all the above legal jurisprudence into account, I find and hold that it would not be in the interest of justice to allow this appeal. I agree with the trail court's position that to do so would be prejudicial to the respondent and as submitted by the appellants, allowing this appeal would "fundamentally later the character" of the respondent's case to one that she never contemplated in the first place. The trial would thus not be fair to the respondent. In this regard, I have also read the judgment of Habari Waweru in the case of **P. H. Ogola Onyango t/a PHS Consult Consulting Engineers -vs- Daniel Githegi t/a Quantalysis [2002] eKLR** Waweru J. held that to allow the applicant to introduce documents after the plaintiff had closed his case will occasion the plaintiff serious prejudice that cannot be cured by cross examination. That the playing field would not be fair in such a case.

27. In the instant appeal, the appellants have argued that any p0rejudice accruing to the respondent can be cured by payment of costs. I disagree with such argument especially when allowing such an application would fundamentally alter the character of the case against the respondent who had adequately prepared and presented her case.

Conclusion

28. In light of all the foregoing, I find and hold that the appellants' appeal lacks merit and the same is hereby dismissed with costs to the respondent.

Orders accordingly.

Ruling delivered, dated and signed in open court at Kapenguria on this 5th day of May, 2020

RUTH N. SITATI

JUDGE

In the presence of:-

N/A for Appellants

M/S Chebet for Gacathi

Mr. Juma – court assistant