



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 35 OF 2015

JULIUS MUNGA NDUNGI.....APPELLANT

VERSUS

JOHN MAINA.....RESPONDENT

JUDGMENT

1. This is an appeal arising out of the judgment of Honourable C. Mburu, Resident Magistrate in Nyeri CMCC No.385 of 2014 delivered on 3rd September, 2015; the cause of action arose from a traffic accident that occurred on 19th June, 2010 along the Nyeri/Karatina Road involving motor vehicle registration number KJZ 902 – Ford Tipper.
2. The respondent filed no appearance and subsequently interlocutory judgment was entered against him; the matter proceeded for Formal Proof wherein the trial court proceeded to dismiss the suit.
3. The appellant being dissatisfied with the trial court's decision filed this appeal seeking to have it set aside and judgment be entered in his favour; the appellant was directed to canvass his appeal by filing written submissions; hereunder is a summary of his case;

APPELLANT'S CASE;

4. Interlocutory judgment was entered against the respondent on 14th of January, 2015 for failure to enter appearance and file a defence; the matter then proceeded for Formal Proof on 23rd July, 2015.
5. The appellant was the only witness at the formal proof hearing; his evidence was that on the material day he had leased out motor vehicle registration number KJZ 902 Tipper to ferry building stones to Nyeri when an accident occurred; that an oncoming vehicle from Nairobi direction veered off the road causing the accident and it was his contention that the driver of the lorry was to blame.
6. The appellant had submitted both at the trial and in this instant appeal that when interlocutory judgment was entered against the respondent for failing to appear and file a defence this then meant that the issue of liability was fully resolved and determined; therefore his submission was that due to the foregoing, the trial court's only task was to assess damages; and that the trial magistrate erred in dismissing the suit;
7. His prayer was the trial court's decision be set aside and judgment be entered in his favour.

ISSUES FOR DETERMINATION

8. From the grounds of appeal and the submissions filed by the appellant, this court has framed the following issues for determination which are as follows:-

(i) Whether the entry of interlocutory judgment settled the issue of liability?

(ii) Whether the Learned Magistrate erred in dismissing the suit?

ANALYSIS

9. In considering these issues, this court is guided by the Court of Appeal in the case of **Selle & Another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123** therein the court held that the duty of an appellate court is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that the court had no opportunity of hearing or seeing the parties as they testified; in addition, the court will as an appellate court, not normally interfere with a lower court's judgment on a finding of fact unless

the same is founded on wrong principles of fact and or law; the Court of Appeal also held that:

“A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.” (See also LAW JA, KNELLER & HANCOX AG JJA IN MKUBE VS NYAMURO [1983] KLR, 403-415, AT 403).

Whether the entry of an interlocutory judgment settled the issue of liability:

10. The trial court having been satisfied that the respondent had been served with Summons to Enter Appearance and failed to do so, entered interlocutory judgment against him under the provisions of Order 10 Rule 4; the entry of such a judgment indicated that the appellant’s suit had on a prima facie level, a cause of action; however, the appellant still had to discharge his burden of proof which is why the matter went for formal proof; the particulars of negligence as pleaded in the plaint needed to be proved which was to be done by way of evidence at the formal proof.

11. While determining a matter similar to this one, C. Kariuki, J in the case of **GNN & another v Geoffrey Gichohi Njeri [2019] eKLR** relied on the observations of Emukule, J in the case of **Samson S. Maitai & Anor v African Safari Club Ltd & Anor [2010] eKLR**, Emukule, J observed thus;

“..... I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand according to Halsbury's Laws of England, Vol. 15, para,

260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption.”

Can hearing therefore, by formal proof, be similar to a full hearing" According to the observations of Emukule, J, in a formal hearing, all rules of evidence and procedure are observed and the party to a suit has to adduce evidence sufficient to sustain the suit. In adducing this evidence, the party has to raise a presumption that whatever is claimed is true and this therefore goes to the merits of the case. The Court considering a full hearing, to determine the matter based on the evidence that is presented before it by parties. In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits.”

12. This court finds that the entry of an interlocutory judgment did not settle the issue of liability; the appellant therefore still had to prove his case when the matter came up for formal proof hearing.

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

(i) Whether the Learned Magistrate erred in dismissing the suit?

14. The appellant in this matter during trial indicated that a motor vehicle veered off the road and an accident ensued; he gave no evidence as to what role the respondent’s driver played in the occurrence of the accident; he simply blamed the said driver; the appellant pleaded particulars of negligence against the respondent’s driver, but tendered no evidence to prove the same. On the face of it, it appears the appellant blamed the accident on the oncoming motor vehicle.

15. The applicable law is found at Section 107 of the Evidence Act, Chapter 80 Laws of Kenya which provides:-

‘107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.’

16. Faced with only pleadings of supposed negligence and no supporting evidence, this court is inclined to agree with the findings of the trial magistrate that the appellant did not discharge his burden of proof; this court reiterates that it is not enough to just plead negligence, it behoves a party to prove the same to the desired threshold.

17. The trial magistrate gave an award on the damages it would have awarded had the appellant been successful; it placed the award at Kshs.50,000/= as the appellant had suffered minor soft tissue injuries.

18. In the case of **Butt vs Khan (1977) 1KAR** Law JA stated that:-

“An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence

in some material respect, and arrived at a figure which was either inordinately high or low.”

19. Similarly in the case of **Kenya Breweries Ltd** [1991] eKLR it was held that,

“...It is now well established that this Court can only interfere with a trial judge’s assessment of damages where is it is shown that the judge has applied wrong principles or where the damages awarded are so inordinately high or low that an application of wrong principles must be inferred.....”

20. Applying the same principles this court finds no good reason to disturb the trial court’s intended award on damages and the same is upheld; the intended award for special damages is also upheld.

FINDINGS AND DETERMINATION

21. For the forgoing reasons this court makes the following findings and determinations;

- (i) This court finds that the entry of an interlocutory judgment did not settle the issue of liability.
- (ii) The appeal is found lacking in merit and it is hereby dismissed.
- (iii) There shall be no order as to costs.

It is so Ordered.

Dated, Signed and Delivered at Nyeri this 14th day of May, 2020.

HON.A.MSHILA

JUDGE