



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO.16 OF 2016

DR. STEWART KABAKA TEKA.....APPELLANT

VERSUS.

PANEL FREIGHTERS LTD.....RESPONDENT

[An appeal from the judgment and decree in original Webuye SPMCC No.106 of 2012 delivered on 17/03/2016 by Hon S.N. Abuya Principal Magistrate]

J U D G M E N T

By way of plaint dated 30.06.2012, the appellant in this appeal sued the respondent for orders for general damages and special damages.

The Plaintiff claim was that on or about 25th March 2012 the defendant's motor vehicle registration number KBN 588W-ZC 4967, was carelessly driven by the defendant's driver that it lost control, veered off the road and crushed into the Plaintiff's plantation, thereby destroying trees, flowers, fence and barbed wire and as a result, the plaintiff suffered loss and damages.

The particulars of negligence on part of the defendant were set out in paragraph 4 of the plaint as follows;

- a) Driving at a speed that was excessive in the circumstance;***
- b) Disregarding the safety of the people's property and in particular the plaintiff's;***
- c) Failing to keep any or proper lookout and/or take proper control over the said motor vehicle;***
- d) Driving the said motor vehicle without due care;***
- e) Failing to stop or slow down to avoid the accident, loss and damage.***

The Defendant/Respondent entered appearance and subsequently filed his statement of defence dated 10th December 2015 denying the Plaintiff's claim and setting out particulars of negligence on part of the plaintiff under paragraph 6 of statement of defence as follows;

- i. Standing on the lawful path of the traffic.***
- ii. Failing to heed to the warning by the driver of motor vehicle registration number KAP 442X.***
- iii. Crossing the road without ascertaining that it was safe to do so.***
- iv. Walking on lawful path of motor vehicle registration number KAP 442X and substantially contributing to the accident.***

The particulars of damage were 200 poles at Kshs.5000/= each making a total of Kshs.100,000/= and 6 fencing posts at Kshs.200/= making a total of Kshs.1200

The respondent/defendant filed his statement of defence dated 9th August 2012 denying the plaintiff's claim as set out in the plaint. The defendant averred that if the said accident occurred the same was outside the scope and control of the defendant.

The parties entered a consent judgement on liability at ratio of 20:80% in favor of the plaintiff and then they fixed the matter for assessment of damages.

The evidence before the trial court was that PW1, Lucas Simiyu Babu testified that he is manager in the farm of Stewart Kabaka. He recalled that on 25/3/2012 at 8.30pm, an accident occurred when a lorry trailer coming from Mombasa to Malaba entered the land of plaintiff where he had planted trees and destroyed 200 trees.

He testified that he informed his boss and reported to Turbo Police station and recorded a statement. He stated that the lorry was KBN 588 and produced police abstract as exhibit 1.

He testified that he went to the Forest Officer who came and did valuation on damage and he wrote a report which he produced as exhibit. He also produced photographs of the damaged trees.

The defendant produced document dated 23/10/2014 and filed 29/10/2014 as exhibit 1 and 2 then both parties closed their cases.

After close of hearing the parties filed their respective written submissions on quantum and after consideration the trial magistrate entered judgement for the plaintiff for Kshs.101.200/= less 20% liability.

The appellant being dissatisfied then filed this appeal citing the following grounds:

- i. That the trial magistrate erred in law and fact in making an award contrary to the evidence adduced.*
- ii. That the trial magistrate erred in law and fact by failing to appreciate the evidence and submission of counsel thereby leading to miscarriage of justice.*
- iii. That the trial magistrate erred in law and fact by tending to re-write consent of the parties.*
- iv. The trial magistrate erred in law and fact in considering and taking into account issues that were not placed before her.*
- v. That the trial magistrate erred in law and fact by not taking into consideration submissions placed before her by the appellant.*

By consent of the parties and court directions, this appeal was canvassed by way of written submissions. Mr. Kimanga for the appellant submitted that parties had recorded consent on liability at 80:20 % in favor of plaintiff. He submitted that parties also had a further consent amending the plaint in respect of paragraph 4(i) but the trial court failed to take the same into consideration.

He submitted that the appellant proved the damages sought by report dated 26.03.12 where forest officer calculated the damages to be 200 trees at Kshs.5000/= each.

He submitted that the respondent on other hand produced a report dated 26.03.14 made by same officer with different calculation that valued the trees at Kshs.500/= each.

He submitted that the court relied on the 2nd report produced by respondent that was not accompanied by a certificate of origin for farm produce which is a requirement under Forest (Harvesting) Rules, 2009 and therefore the same was invalid report.

He submitted that the trial court erred in relying on evidence and issues not before it occasioning injustice when she held that the trees destroyed were 10 centimeters in diameter and sum of Kshs.5000/= applies to mature trees not the subject trees that were not yet mature.

He submitted appellant has satisfied all the principles for appellant court interfering with an award and relied on the case law authority in **Butler Vs Butler(CA 49 OF 1983)** and prayed that this appeal to be allowed.

The respondent submitted through their advocate on record Mr. Menezes. He submitted that this appeal is incompetently before this court.

He submitted that the appellant had filed an application for judicial review before trial court and the same was not prosecuted to date therefore this appeal is abuse of court process for filing parallel applications in court relying on authority in **Muchanga Investment Ltd V. Safaris unlimited & 2 others[2000] eKLR**. He submitted that this appeal is subjudice and is still active in the lower court.

He submitted that a party is bound by pleadings that the appellant cannot submit that the court erred in taking the computation of Kshs.500 instead of Kshs.5000/=. He relied on case law authority in **Dakianga Distributors Limited Vs. Kenya Seed Company Limited [2015] eKLR**.

He submitted that the appellant filed a supplementary record of appeal showing that there was a consent which consent has never been endorsed by the trial court. He submitted that the appellant never filed an application to amend his pleadings as required under order 8 of the Civil Procedure Rules, 2010.

He submitted this court should dismiss the current appeal as there is a pending application for review in Webuye PMCC number 106 of 2012 dated 13th June 2016.

This being a first appeal, this court is obliged to abide by the provisions of Section 78 of the Civil Procedure Act to reevaluate and reexamine the evidence before the lower court and arrive at its own independent conclusion. This is the principle of law that was well settled in the case of **Selle V Associated Motor Boat Company Ltd [1968] EA 123** where Sir Clement De le Stang stated that:

“This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect .

However, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had 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 Hammed Sarif V Ali Mohammed Solan [1955] 22 EACA 270).

I have carefully considered the evidence adduced and as Analyzed by the trial court in the judgment. I have also considered the submissions made before this court by the appellant and taking into account all the decisions relied on. In my view, the issues for determination in this appeal are;

i. Whether this court can entertain this appeal when there is a pending judicial review application before trial court on the same matter?

ii. Whether the quantum was properly accessed by the trial court.

The respondent has raised issue that this appeal is subjudice on ground that there is a pending application for review in **Webuye PMCC number 106 of 2012** dated 13th June 2016 before the trial court. Respondent submitted that the appeal incompetent before this court and the same should be dismissed.

I have analyzed evidence on record and it is my finding that the appellant filed an application dated 13/06/2016 an application for review and the same was filed before lower court. It is my finding that the application is pending for hearing and determination. It is my further finding that the application was filed on 16th June 2016 and he subsequently filed this appeal. It is my finding that the appellant has filed two parallel applications over the same matter.

It is imperative to state that: -

“Section 6 of the Civil Procedure Act[17] expressly provides that no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

I wish to state that when the appellant filed the application for review before filing the appeal, he sought to have the application to be heard before the appeal herein. It is therefore my finding that it amounts to abuse of court process. It is my finding that this appeal offends the principle of subjudice. This matter is still active in the lower court and to entertain the same in this court would amount to giving the appellant an opportunity to do a forum shopping which is an abuse of court process.

A cursory look at the prayers sought in this case show that they relate to the same subject matter. However, the principle of *sub judice* does not talk about the “*prayers sought*” but rather “*the matter in issue.*” I find that the matters in issue in the suits are substantially the same.

Having found the matter is sub judice I find no reason to deal with issue number two the merits of the appeal.

In the premises the appeal herein is without merit and is hereby dismissed to enable the magistrate court to make a decision on the review application filed by the appellant.

Dated, signed and Delivered at Bungoma this 5th day of June, 2020.

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S N RIECHI

JUDGE