REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 329 OF 2018

CONSOLIDATED WITH

CIVIL APPEAL NO. 325 OF 2018

FRERA ENGINEERING COMPANY LIMITED.....APPELLANT

VERSUS

MORRIS MUREITHI MUTEMBEI.....RESPONDENT

JUDGMENT

1. The above two appeals were consolidated for hearing since they involved the same parties and they challenged two different decisions made by the trial court in Milimani CMCC No. 1328 of 2014.

2. The facts leading to the filing of the appeals are straight forward and undisputed. The respondent, who was the plaintiff in the suit filed in the lower court was injured on 11th October 2013 in the course of his employment with the appellant. He sued the appellant seeking general and special damages a result of injuries sustained in the accident whose occurrence he blamed on the negligence of the appellant or its agent's.

3. On the date suit was scheduled for hearing, though duly served with a hearing notice, the appellant or its advocates did not attend the court and consequently, the respondent's case was heard *ex parte*. After the hearing, the learned trial magistrate, *Hon. Ms. E. Wanjala* (SRM) delivered her judgment on 7th July 2017 in favour of the respondent against the appellant for a total sum of KShs.361,660 together with costs of the suit and interest.

4. On 13th March 2018, the appellant presented a Notice of Motion before the trial court seeking setting aside of the *ex parte* judgment to pave way for hearing of the suit afresh so that it could be given an opportunity to be heard on its defence. However, before filing that application, the appellant had on 11th January 2018 filed an application before the High Court vide Misc. Civil Application No. 7 of 2018 seeking leave to file an appeal out of time to challenge the same *ex parte* judgment. The application was pending hearing before the High Court when the motion seeking to set aside the trial court's judgment was heard on 26th March 2018.

5. In its ruling dated 22nd June 2018, the trial court declined jurisdiction to determine the application on its merits on grounds that there was a similar application that was pending hearing before the High Court. This is what prompted the appellant to file the appeal in HCCA No. 325 of 2018.

6. The court record shows that the appeal was filed on 12th July 2018 and on the following day, that is, on 13th July 2018, the appellant filed the appeal in HCCA No. 329 of 2018 challenging the validity of the trial court's judgment on liability and quantum.

7. In both appeals, the appellant urged this court to set aside the trial court's judgment albeit for different reasons.

8. In HCCA No. 325 of 2018, the appellant contests the trial court's ruling refusing to set aside the *ex parte* judgment. In its prayer's, the appellant requests this court to set aside the said judgment and remit the case back to the trial court for a fresh trial whereas in HCCA No. 329 of 2018, the appellant requests this court to inquire into the validity of the same judgment it wants set aside in HCCA No. 325 of 2018. In the premises, I agree with the respondent's submissions that in filing the two appeals one after another seeking conflicting orders, the appellant was playing lottery with the judicial process so that if it was unsuccessful in its challenge on the process through which the judgment was entered, it would have another bite of the cherry by seeking to have the judgment overturned on grounds that it was not legally sound.

9. I would have proceeded to strike out the appeals for having been filed in abuse of the court process if this anomaly had been brought to the court's attention earlier but now that the appeals are pending judgment, in the interest of dispensing substantive justice, I will proceed to

determine them on merit so that the appellant's grievances can be resolved with finality. I will start by considering HCCA No. 325 of 2018 since its outcome will determine whether it will be necessary to deal with HCCA No. 329 of 2018.

10. In its memorandum of appeal, the appellant raised seven grounds of appeal in which it principally complained that the trial court erred in law and fact in dismissing the Notice of Motion dated 12th March 2018 for not inquiring into its merits on grounds that there was a similar application pending before the High Court which was not the case given that the application dated 11th January 2018 sought leave to file an appeal out of time not setting aside the *ex parte* judgment; that despite demonstration of sufficient cause, the learned trial magistrate failed to exercise her discretion to set aside the *ex parte* judgment; that the trial court erred in failing to appreciate the principle that mistakes of an advocate should not be visited on a client.

11. Both appeals were prosecuted by way of written submissions. The respondent was the first to file its submissions on 14th January 2020 while the appellant filed its submissions on 12th March 2020.

12. In its submissions, besides reiterating its grounds of appeal and urging the court to find that the trial court erred in declining to determine the motion on its merits, the appellant introduced a new issue which it had not raised either before the trial court or in its grounds of appeal. The appellant submitted that the trial court lacked jurisdiction to hear the suit given that it involved a work injury claim; that under the provisions of the *Work Injury Benefits Act (WIBA)* as confirmed by the Supreme Court in ***Law Society of Kenya V Attorney General & Another, [2019] eKLR***, the jurisdiction to adjudicate on such claims was divested from the courts and was donated to the Director of Occupational Health and Safety.

13. As noted earlier, the respondent filed his submissions before the appellant and did not file supplementary submissions to respond to the new issue raised by the appellant in its submissions.

14. Before delving into the merits or otherwise of the appeal, I wish to comment on the issue of jurisdiction raised in the appellant's submissions. *Order 42 Rule 4* of the *Civil Procedure Rules* (the *Rules*) prohibits an appellant from relying on any ground of objection not raised in the grounds of appeal except with leave of the court. Even where such leave is granted, the court is barred from basing its decision on a ground not raised in the memorandum of appeal unless the opposite party had been given sufficient opportunity to contest the appellant's case on that ground.

15. It is worth noting that in this case, the appellant did not seek court's leave to raise the issue of jurisdiction as an additional ground of appeal. It belatedly raised it in its submissions without leave of the court. Given that the respondent had filed his submissions earlier than the appellant, the respondent did not obviously have any or a fair opportunity to contest the appeal on grounds that the trial court lacked jurisdiction to hear his suit.

16. The Court of Appeal when confronted with a similar scenario in ***Republic V Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & Others ex-parte Tom Mbaluto, [2018] eKLR*** stated the following when interpreting *Rule 104* of the *Court of Appeal Rules* which is equivalent to *Order 42 Rule 4* of the *Rules*:

> ***"Rule 104 of the Court of Appeal Rules, among others, prohibits an appellant from arguing, without leave of the Court, grounds of appeal other than those set out in the memorandum of appeal. The appellant did not seek leave of the Court to raise the new ground of appeal but rather belatedly, and literally from the blue, raised it in the written submissions. It needs no emphasis that submissions must be founded on the issues before the court and the evidence on record regarding the issue. A party is not at liberty to change the nature of his case surreptitiously at the submissions stage.***
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> ***It is in the discretion of the Court to allow a party to raise a new point on appeal, depending on the circumstances of the case. (See also George Owen Nandy v. Ruth Watiri Kibe, CA No. 39 of 2015 and Openda v. Ahn [1983] KLR 165). In this case we have stated that the appellant never raised the issue in his judicial review application, neither party addressed the issue in the High Court, the learned judge, quite properly did not address the issue and, to make the matters worse, the appellant did not raise the issue in his memorandum of appeal in this Court…. As has been stated time and again, there is a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate court to consideration of the issues that were canvassed before and decided by the trial court. If that were not the case, the appellate court would become a trial court in disguise and make decisions without the benefit of the input of the court of first instance."***

17. Given that the appellant did not seek leave of the court to raise the new ground of appeal and the respondent did not have an opportunity to contest the same, I find that it would be prejudicial to the respondent to have the ground entertained on appeal. I can however briefly observe that even if the *Work Injury Benefits Act* came into force on 2nd June 2008, the provisions donating jurisdiction to the Director of Occupational Health and Safety to adjudicate on work injury claims had been declared unconstitutional by the High Court (*Ojwang J*, as he then was) in the case of ***Law Society of Kenya V Attorney-General, [2008] eKLR*** and it was not until 17th November 2017 when the Court of Appeal overturned that decision. It is apposite to note that the law on this issue was finally settled by the Supreme Court on 3rd December 2019 long after the respondent's suit had been concluded by the trial court.

18. Turning to the merits of the appeal, I have considered the application that was before the trial court, the parties' rival submissions and the trial court's ruling.

It is not disputed that the trial court declined to consider the merits of the motion on grounds that there was a similar application that was pending hearing before the High Court. The learned trial magistrate did not apparently appreciate that what was pending before the High Court was an application for leave to file an appeal out of time and not an application seeking to set aside the *ex parte* judgment.

19. Be that as it may, given that the appellant had already manifested its intention to challenge on appeal the very judgment it sought to have set aside and it had already started the appeal process by seeking leave to file an appeal out of time, the trial court cannot be entirely faulted for arriving at the decision it did. But this is not to say that the learned trial magistrate was correct in failing to address the reasons advanced by the appellant in support of its application and determining it on merit. This was an error on the trial court's part. As the trial court did not consider the application on its merit, it now behooves this court being the first appellate court to examine the material that was placed before the trial court and determine whether the appellant had demonstrated sufficient cause to warrant grant of the orders sought in the application.

20. A reading of the motion reveals that it was premised on grounds that though the appellant's erstwhile advocates *M. Mutinda & Associates Advocates* had been served with a hearing notice, the advocate in the said firm who was seized of the matter, a *Mr. Mutisya Boniface Mwau* was unable to attend court on the hearing date because unknown to the appellant, he had been struck off the roll of advocates on 20th May 2005; that the appellant did not learn about the entry of the *ex parte* judgment till 10th January 2018 when it instructed its current advocates who perused the court file and discovered that judgment had been entered against it; that the appellant was keen on defending the suit and that mistakes of his previous advocates should not be visited on it.

21. It is pertinent to note that the application was filed on 12th January 2018 about six months after entry of the *ex parte* judgment. This prolonged delay was not explained. In my view, it was inordinate. Had the appellant been a diligent litigant, he would have followed up with his erstwhile advocates on the status of his case and would have probably discovered the predicament they were facing and take remedial measures in good time.

22. The appellant has solely blamed its previous advocates for its quandary but has failed to show what efforts it made on its part to follow up with its advocates to establish the progress or status of the litigation so that it could take appropriate action to protect its interests.

As stated in ***Habo Agencies Limited V Wilfred Odhiambo Musingo, [2015] eKLR***:

> ***"It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."***

Since the appellant instructed its previous advocates and went into slumber, it must take the consequences of its indolence.

23. Regarding the argument that mistakes of counsel should not be visited on their clients, I will do no more than to reproduce the holding of the Court of Appeal in ***Pyramid Hauliers Limited V James Omingo Nyaanga & 3 Others, [2019] eKLR*** where the court expressed itself thus:

> ***"Although it has commonly been stated that the mistake of counsel should not be visited upon an innocent litigant, this statement is not a blanket protection to clients who have failed to comply with procedural requirements; that clients will not always be protected merely by blaming their counsel; that a client cannot continue to hide behind the failure of their advocates to perform certain required actions on their part; that the mere citing of inadvertence or mistake on the part of the advocate is not sufficient excuse for the failure; that, in appropriate situations, the litigants must bear the brunt for mistakes made by their advocates; and that the clients would be at liberty to pursue their advocates individually for such mistakes."***

24. In view of the foregoing, I am satisfied the appellant failed to demonstrate sufficient cause that would have warranted the exercise of the trial court's discretion in its favour by setting aside the *ex parte* judgment. In the result, i do not find any merit in the appeal.

25. Turning now to the appeal in HCCA No. 329 of 2018, the respondent's learned counsel *Mr. Kaburu* submitted that the appeal was filed out of time without leave of the court as it was filed a day after the time limited by the parties in their consent which compromised an application filed by the appellant seeking leave to file an appeal out of time. The consent was recorded on 5th July 2018 and adopted as an order of the court. It was to the effect that the appellant had been granted leave to file its intended appeal within 7 days of 5th July 2018.

26. The respondent claims that the appeal was filed on 13th July 2018 which was a day after the expiration of 7 days of the consent and that therefore, the appeal was incompetent and ought to be struck out. For this proposition, counsel relied on this court's decision in ***Bonfide General Contractors Company Limited V Johnstone Mwanthi Mbindyo & Another, [2018] eKLR*** in which I struck out an appeal which had been filed one day after the lapse of the statutorily prescribed period of 30 days.

27. The appellant's learned counsel *Mr. Njuru* in his response denied the respondent's claim that the appeal was filed a day late and maintained that it was filed on time.

28. On perusing the record, I have confirmed from the order made by this court (*Sergon, J*) on 5th July 2018 by consent of the parties that the appellant was granted 7 days from that date to file its intended appeal. I agree with the respondent that the seven days expired on 12th July 2018 which did not fall on an excluded day and therefore, since the appeal was filed on the following day, that is, on 13th July 2018, it was filed a day late without leave of the court.

29. However, unlike in ***Bonfide General Contractors Company Limited V Johnstone Mwanthi Mbindyo & Another, [supra]*** where the appeal had been filed outside the statutory time frame of 30 days, the appeal herein was filed only a day after time limited by the court. Time limitation imposed by a court is different from time imposed by statute and can be extended by the court in its discretion when the ends of justice so require. In my view, filing the appeal late by one day amounted to a procedural irregularity which this court ought to disregard under *Article 159 (2) (d)* of the *Constitution* in the interest of dispensing substantive justice.

30. Regarding the merits of the appeal, the appellant has faulted the trial court's findings on both liability and quantum. In its submissions, the appellant only countered the respondent's claim that its appeal was incompetent for having been filed out of time. The appellant did not make any submissions to demonstrate its claim that the learned trial magistrate erred in her finding on both liability and quantum.

31. I have considered the grounds of appeal, the pleadings in the lower court and the evidence adduced by the respondent before the trial court. I have also read the trial court's judgment.

The record reveals that the respondent testified as the sole witness and adopted his witness statement in which he narrated how the appellant's negligence caused the accident in which he was injured in the course of his employment. He also produced in evidence a medical report prepared by *Dr. Wokabi* confirming the injuries he suffered as a result of the accident.

32. The learned trial magistrate in her judgment accepted his testimony finding that it was not controverted by any evidence to the contrary. This finding represented the correct factual position in the matter. I am thus unable to fault the trial court's finding that the appellant was liable for the respondent's injuries at 100%.

33. On quantum, the medical report by *Dr. Wokabi* dated 10th December 2013 confirmed that the respondent suffered fractures of the 1st and 2nd metacarpal bones. At the time of examination about two months after the accident, the respondent still had a plaster cast on his right forearm. It is evident from the trial court's judgment that she was guided in her assessment of damages by the authority of ***Crystal Industries Ltd V Sevvas Mutunga Kilonza, [2015] eKLR*** in which the plaintiff had sustained comparable but slightly more serious injuries than the respondent. In that case, the plaintiff was awarded KShs.400,000 in the year 2018.

34. In this case, after considering the nature of the respondent's injuries and inflationary trends, the trial court awarded the respondent general damages in the sum of KShs.350,000. My reading of the trial court's judgment does not show that the learned trial magistrate applied any wrong legal principle or took into consideration any irrelevant factor or failed to consider relevant ones in arriving at her decision on quantum. I cannot also say that the award was unreasonable or inordinately high or low as to lead to an inference that it amounted to an erroneous estimate of the damage suffered. I thus find no basis to justify interfering with the award. The same is therefore confirmed.

35. As the award of special damages in the sum of KShs.11,660 was not contested on appeal, the same remains undisturbed.

36. For all the foregoing reasons, I find no merit in the consolidated appeals and they are hereby dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 16th day of July 2020.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Njuru for the appellant

No appearance for the respondent

Ms Mwinzi: Court Assistant