



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J)

CIVIL CASE NO. 4 OF 2018

PATRICK KANAI WAWERU.....PLAINTIFF

VERSUS

GEORGE OGWELLA.....1ST DEFENDANT

GEORGE OCHILO AYAKO.....2ND DEFENDANT

PARTIAL RULING

Background

1. The background to this matter is that the Plaintiff's wife died in a road accident on 12th January 2007. Following the hearing of a suit in respect of compensation thereof, the High Court in Nakuru awarded damages of Ksh 4,718,350/= vide a judgment delivered on 7th April 2019. The parties had consented to apportion liability in the ration 85%:15%:

“In favour of the Plaintiff and against the Defendants jointly and severally.”

2. The vehicle in which the deceased was travelling as a fare paying passenger was Registration No. KAM 929G, and the other accident vehicle was Registration No. KAE 201J.

3. Despite the heading in the judgment of the High Court in Nakuru showing three Defendants, it is clear from the documents on file that the parties in those proceedings are only the Plaintiff and George Ogwella (1st Defendant) and George Ochilo Ayako (formerly the 3rd Defendant). Accordingly the title has been corrected to reflect the true position as to parties.

Application dated 23rd October, 2019

4. When the Plaintiff sought to execute the decree emanating from the judgment, the 2nd Defendant filed an application dated 23rd October, 2019, under certificate, seeking:

a) Stay of judgment.

b) Setting aside of judgment and leave to Applicant to file defence.

c) Annulment of the decree and warrant of attachment.

d) Invalidation of an impending auction by proclamation on the strength of the attachment.

5. The 2nd Defendant alleges he is a stranger to the proceedings leading to judgment; that he was never served with summons or copy of the Plaintiff; that he appointed counsel who discovered the suit had existed since 2007; that the counsel who was on record for him was never appointed by him and had no authority to transact on his behalf; that the proceedings leading to the judgment arose due to his misjoinder in that suit; that as far as he is concerned the said proceedings were conducted exparte; that in any event he has never been the owner of Motor Vehicle Registration KAM 929G Range Rover; and that a search on the vehicle at the National Transport and Safety Authority (NTSA) e-citizen platform yielded no result.

6. The Respondent/Plaintiff in his replying affidavit filed on 1st November, 2019, opposes the application as incompetent, a delaying tactic and an abuse of the court process. He asserts, essentially, that he filed suit against the Defendant, suit papers were served, consents entered, and judgment delivered. That the 2nd Defendant was duly represented and therefore participated in the proceedings.

2nd Defendant's Preliminary Objection

7. The 2nd Defendant's Preliminary Objection is dated 2nd December, 2019. It seeks to expunge several paragraphs contained in the Replying Affidavit of C. N. Kihara, Plaintiff's Advocate, dated 1st November, 2019; and similarly several paragraphs in the Replying Affidavit of the Plaintiff dated 30th October, 2019. Being the first objection filed, I deal with it first.

8. I have carefully perused the voluminous court file and all documents in it, the proceedings of the court at Nakuru, and the present filings by the parties.

9. With regard to the Affidavit of C. N. Kihara, I agree with the counsel for the 2nd Defendant as follows:

In Paragraph 6 the following words are expunged as hearsay:

".....and when I came to know that he knew the second defendant personally as they had been in the same law firm when Ayako was in his youth."

In Paragraph 7 the following words are expunged as hearsay

".....who received on his behalf and on behalf of his driver but declined to sign the original copy reason being that he is going to liaise with his insurance to deal with the matter."

10. With regard to the Replying Affidavit of the Plaintiff I agree with counsel for the 2nd Defendant as follows:

In Paragraph 12 the following words are expunged:

".....(and who has known him over a number of years since his youthful days as they had been in the same law firm)."

Paragraph 13 is not expunged as the annexure 'PKW6' is clearly marked as "copied to client", giving the deponent a basis to annex his copy and refer to it.

Plaintiff's Preliminary Objection

11. The Plaintiff's Preliminary Objection dated 25th February 2020, was filed on 26th February 2020. In essence, the objection asserts that the 2nd Defendant's Notice of Motion application of 24th October, 2019 is fatally defective as it offends various provisions of the Civil Procedure Act and Civil Procedure Rules.

12. The Notice of Motion application is stated to be brought, inter alia, under the provisions of **Section 38 (b), 63 (e), and 89** of the **Civil Procedure Act**.

Section 38 (b) of the **Civil Procedure Act** applies to application by a decree holder and is therefore not applicable to the 2nd Defendant.

Section 63 (e) of the **Civil Procedure Act** applies to the making of interlocutory orders. As the present motion is an application to set aside an existing judgment in a concluded suit, this provision is inapplicable to the present motion.

Section 89 of the **Civil Procedure Act** is a general provision regarding suits. It informs parties to follow the procedures in the Civil Procedure Act, it is applicable generally to "suits" which are defined in **Section 2** of the **Civil Procedure Act** to mean "*all civil proceedings commenced in any manner prescribed.*" This provision applies to the present Notice of Motion.

13. The Plaintiff also challenges the 2nd Defendant's reliance on **Order 9 Rules 9, 10 and 11, Order 10 Rule 11, Order 12 Rule 7, Order 21 Rules 7 and 8, Order 22 Rules 1, 3 and 4, Order 18 (1) (b) and Order 51** of the **Civil Procedure Rules**. The Plaintiff asserts that those provisions are not available to the 2nd Defendant.

14. The 2nd Defendant asserts that the court has broad unrestricted power to review its ruling and judgments, and this is particularly so where injustice has been occasioned and the court in such cases can never be *functus officio*. But the 2nd Defendant's real and kernel complaint is that they have become the judgment-debtor in a suit where they allege they were never served with suit papers and therefore allegedly could not enter appearance.

15. I agree with the Plaintiff's counsel that a slew of the provisions relied upon by the 2nd Defendant are not properly available to them. I

will, however, not enter into and analyse each such provision, as I consider that to be a merely esoteric exercise in technicality. I think the substance of the issue before me is whether the 2nd Defendant was properly given opportunity to be represented in the lower court suit.

16. As such, I consider that this court has a constitutional duty and powers under **Article 159** of the **Constitution** to forge ahead beyond the technicalities and deal with the substance of the issues in dispute before me. Further, the court's inherent powers under **Section 3A** of the **Civil Procedure Act** are not limited by technicalities of procedure under the Act, where the court thinks it may be necessary to make orders for the ends of justice or to prevent abuse of the process of the court.

17. To that end, I make the following observations and give the following directions and orders:

1. Observations:-

- a) There is evidence on record that AMACO Limited was the insurance company that had issued the policy in respect of the subject Motor Vehicle KAM 929G.
- b) That AMACO Limited was represented in court by Counsel Tom Onyambu Partner in Nyaundi Tuiyott Advocates.
- c) That Service of process was allegedly effected in the matter by Jacob Okore process server.

2. Orders and Directions:-

- a) AMACO Limited be and is hereby enjoined in these proceedings to produce and or confirm through contemporaneous documents the insurance policy in respect of KAM 929G, and the issuance of instructions to counsel to defend the suit.

In the alternative, AMACO Limited may produce the aforesaid information through their duly appointed counsel. This action shall be effected within thirty (30) days of today's date.

- b) Counsel Tom Onyambu of Nyaundi Tuiyott Advocates to file an affidavit to confirm acting for the 1st and 2nd Defendant in the suit vide Memorandum of Appearance dated 23rd November, 2009, and the filing of the Statement of Defence dated 25th January, 2010. This action shall be effected within thirty (30) days of today's date.
- c) Jacob Okore, process server, shall appear before court for cross-examination on his Affidavit of service of process deposed on 9th October, 2009 and filed on 27th October, 2009.
- d) A hearing for purposes of cross-examination of the process server shall be fixed within sixty (60) days hereof.
- e) In light of the age of this matter no liberty to apply is granted until after the hearing is concluded.

18. Costs in the cause.

Administrative directions

19. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

20. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

21. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 5th Day of November, 2020.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Mr. C. Kihara for the Plaintiff/Respondent
2. Mr. Omollo for the Defendant/Applicant

3. Court Clerk - Quinter Ogutu