



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 473 OF 2013

GODFFREY MUNZALA.....APPELLANT

-VERSUS-

PAUL WANYIKA WAMBUGU.....RESPONDENT

(Being an appeal from the ruling and order of C.C. Kipkorir (Ms.) (Resident

Magistrate) delivered on 19th August, 2013 in Civil Suit No. 4041 of 2007)

JUDGMENT

1. The appellant, being also the plaintiff in Civil Suit No. 4041 of 2007, instituted the said suit against the respondent herein on 11th May, 2007 claiming special damages in the sum of Kshs.238,752/= for the material damage occasioned to his motor vehicle registration number KAQ 556A allegedly by the respondent's motor vehicle registration number KAD 025V on or about 13th May, 2004.
2. Upon entering appearance, the respondent put in his statement of defence on 19th July, 2007 denying ownership of motor vehicle registration number KAD 025V and further denying the occurrence of the accident or the particulars of negligence appearing on the plaint.
3. When the matter came up for hearing before the trial court on 28th August, 2012 as scheduled, the appellant was notably absent and consequently, his suit was dismissed for non-attendance. Subsequently, the appellant's advocate filed an application dated 29th August, 2012 seeking to reinstate the same and which application proceeded for hearing *ex parte* and was eventually allowed.
4. The suit came up in court for hearing on 13th June, 2013 and the same was once again dismissed for want of evidence, causing the appellant to file a Notice of Motion seeking for the reinstatement of the suit.
5. The respondent opposed by relying on the replying affidavit of *Lucy W. Kamau* the respondent's learned advocate. The trial court through its ruling of 19th August, 2013 dismissed the said Motion with costs.
6. The appellant being aggrieved filed the memorandum of appeal dated 2nd September, 2013 in which he put forward the following grounds:

i. THAT the learned trial magistrate erred in law and in fact in failing to appreciate the issues raised in the appellant's Notice of Motion dated 13th June, 2013 and to reinstate the suit for hearing.

ii. THAT the learned trial magistrate erred in law and in fact in failing to appreciate that the appellant's witnesses were in attendance in court when the case was called out for hearing and ready to testify and produce evidence in support of the appellant's claim.

iii. THAT the learned trial magistrate erred in law and in fact in dismissing the suit under the provisions of Order 17, Rule 4 of the Civil Procedure Rules.

iv. THAT the learned trial magistrate erred in law and in fact in holding that the respondent was entitled to the costs of the suit.

7. This court gave directions for the appeal to be canvassed by way of written submissions. The appellant states in his detailed submissions that the learned trial magistrate did not appreciate the fact that the appellant had provided a reasonable and excusable explanation for failing to proceed with the hearing on the scheduled date.

8. It is also the appellant's submission that the said magistrate ought to have acknowledged the presence of the appellant's witnesses were in court during the call-over notwithstanding the absence of his advocate at such time.
9. The appellant's contention is essentially that the learned trial magistrate disregarded the law surrounding the dismissal of cases, thus arriving at a wrong decision in the circumstances and in so doing, denied him the opportunity of being heard.
10. In his brief submissions in reply thereto, the respondent argues that there existed reasonable grounds to warrant the dismissal of the appellant's suit, citing that the appellant has been indolent in prosecuting the same and that the said suit had previously been dismissed.
11. The respondent further indicated in his submissions that by the time the file was called out on 13th June, 2013, the appellant's witnesses and his advocate were absent from court and it is on this very basis that the trial court opted to dismiss the suit for want of evidence.
12. The respondent maintains that notwithstanding the court's right to exercise discretion when it comes to the dismissal of suits, the appellant owed a duty to take steps in prosecuting his case but did not, hence the dismissal order was timeous.
13. The four (4) grounds of appeal are related in the sense that they revolve around the subject of dismissal and reinstatement of suits; I will therefore determine them together.
14. The Notice of Motion of 13th June, 2013 set out among its grounds that at the time the matter was called out, the appellant's witnesses were in court whereas his advocate was engaged before the Co-operative Tribunal over another matter.
15. The above assertion was made in the supporting affidavit sworn by *Flavia Kalande*, advocate for the appellant, who averred that she left her clerk in the trial court while she dashed to attend to the case before the tribunal, only to be informed that the trial court had declined to allocate time for the hearing and had instead indicated that the matter would proceed after the call over.
16. The deponent averred that she then contacted her colleague, Mr. Mungai, to hold her brief before the trial court but that the suit was dismissed at 10.00 am before either she or Mr. Mungai had arrived.
17. The affidavit of *Nicholas Mutuku* was filed in further support of the aforesaid Motion. The deponent stated that he was at all material times the driver of the appellant's subject motor vehicle registration number KAQ 556A and that he was present in court when the file was called out at 9.45 am and 10.00 am but that he did not respond as he knew the relevant advocate would address the court.
18. In her replying affidavit, *Lucy W. Kamau*, learned counsel for the respondent, stated that no valid reason was given for the absence of the appellant's advocate and that in any case, the advocate holding brief in the matter confirmed the same as ready for hearing but the appellant's advocate did not turn up despite being given ample time, hence the trial court had no alternative but to close the appellant's case and consequently, dismiss the same.
19. The above arguments were reiterated by the parties' respective advocates at the hearing of the Motion. The learned trial magistrate outlined in her ruling that when the matter was called out, both parties communicated their readiness to proceed though no time allocation was proposed, causing her to direct that the case proceeds for hearing after the call over.
20. The said magistrate went on to indicate in her ruling that she called out the matter at 9.45 am at which time Mr. Omondi holding brief for Mrs. Macharia for the appellant stated that his instructions were unclear and thus requested that the matter proceeds at 10.30 am; which request was denied for the reason that the magistrate had already slotted hearings for 10.45 am and 11.00 am respectively.
21. At 10.00 am, the trial magistrate called out the file once more but there was no response, prompting her to dismiss the suit for want of evidence with costs pursuant to Order 17, Rule 4 of the Civil Procedure Rules.
22. The trial court proceedings attached to the record of appeal indicate that when the matter was called out, Mr. Omondi holding brief for Mrs. Macharia, advocate for the appellant confirmed her readiness to proceed with three (3) witnesses, while Mwangi holding brief for Kamau, advocate for the respondent had one (1) witness. The trial court indicated that the hearing would proceed after the call over.
23. The proceedings further confirm the learned trial magistrate's sentiments that when the suit was called out at 9.45 am and thereafter, at 10.00 am but there was still no appearance for the appellant, thereby resulting in its dismissal under Order 17, Rule 4 of the Civil Procedure Rules which reads as follows:
- "Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the suit forthwith."***
24. The appellant has stated that the learned trial magistrate ought to have acknowledged the presence of his witnesses in court. This submission is not controverted by the respondent. It is therefore clear that the suit was dismissed while the appellant's witnesses were present in court. The suit was simply dismissed because the appellant's advocate was absent. In essence, the trial magistrate punished the appellant for the mistake of his advocate. The trial magistrate therefore erred in allowing a litigant to suffer for the inadvertent mistake of his advocate.
25. In this appeal I am of the view that the learned trial magistrate ought to have taken into account the presence of the appellant's witnesses and therefore appreciate that it would do justice to grant the appellant another opportunity to prosecuting his case.

26. The upshot is that the appeal is allowed. The order dismissing the Motion dated 29th September, 2012 is set aside and is substituted with an order allowing the Motion. Costs of the appeal to abide the outcome of the reinstated suit.

Dated, Signed and Delivered at Nairobi this 12th day of July, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent