REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 438 OF 2013

ELIJAH KAGONDU.....APPELLANT

VERSUS

ELIAS KIMANI GITAU.....1ST RESPONDENT

DAVID KURIA..... 2ND RESPONDENT

KIAMBU INSTITUTE OF SCIENCE & TECHNOLOGY.....3RD RESPONDENT

JUDGMENT

1. This appeal challenges the ruling and orders delivered by *Hon. Mr. J.N. Onyiego (Ag. CM)* on 17th July 2013 in Kiambu Civil Suit No. 16 of 2008. In that ruling, the learned trial magistrate who is wrongly described in the memorandum of appeal as *Hon. Mr. Onchuru (Ag. CM)* dismissed an application filed by the appellant by way of a Notice of Motion dated 12th August 2011. In the motion, the appellant had sought that judgment on liability be entered against the 3rd party enjoined by the defendants in CMCC No. 16 of 2008. The appellant also prayed that the 3rd party be ordered to pay KShs.581,065 being 20% of the damages awarded to the plaintiff in the suit together with costs and interests from 8th June 2011 and that the 3rd party be ordered to pay costs of the application.

2. In order to understand the context in which the appeal was filed, it is important to briefly outline the background against which the Notice of Motion giving rise to the impugned ruling was filed.

3. The court record shows that the appellant was the plaintiff in CMCC No. 16 of 2008 while the 2nd and 3rd respondents in this appeal were the defendants. The appellant had sued the defendants seeking special and general damages following injuries sustained in a road traffic accident on 4th February 2007. It was the appellant's case that he was a lawful passenger in motor vehicle registration number KAS 963V and that the accident was caused by the negligence of the 1st defendant in the manner in which he negligently drove, managed or controlled motor vehicle registration number KAR 686V which was owned by the 2nd defendant (3rd respondent).

4. In their statement of defence initially dated 21st January 2008 and amended on 22nd February 2009, the respondents denied all allegations of negligence attributed to them and put the appellant to strict proof thereof. In the alternative and on a without prejudice basis, the respondents claimed that the accident was wholly or substantially contributed to by the negligence of the owner of the other vehicle which was also involved in the accident, namely motor vehicle registration number KAS 963V and expressed their intention to enjoin the owner of that vehicle as a 3rd party to the proceedings.

5. The record further shows that the respondents subsequently took out a 3rd party notice addressed to the 1st respondent *Elias Kimani Gitau* who was the owner of the motor vehicle registration number KAS 963V. upon being served with the notice, the 1st respondent filed a statement of defence dated 28th November 2008 admitting occurrence of the accident as alleged by the appellant but denying that he in any way caused or contributed to its occurrence. He averred that the 2nd and 3rd respondents were to blame for the accident at 100%.

6. It is also apparent from the record that besides the suit filed by the appellant, various other suits were also filed by different parties premised on causes of action emanating from the same accident. Among the suit was CMCC No. 237 of 2008 in which the 3rd party in CMCC No. 16 of 2008 and the 1st respondent in this appeal was the plaintiff while the 2nd and 3rd respondents were the defendants. On 26th May 2009, the trial court by consent of the parties selected CMCC No. 237 of 2008 as the test suit for purposes of determination of liability so that the court's finding on liability in that suit would bind all the other related suits. Those suits included CMCC No. 16 of 2008. The proceedings in all the five related cases were stayed pending determination of the test suit.

7. The test suit was determined vide a judgment delivered on 1st December 2009 which was entered in favour of the 1st respondent against the 2nd and 3rd respondents on liability at 100%. The respondents were aggrieved by the decision of the trial court on liability. They proffered an appeal to the High Court being HCCA No. 719 of 2009.

8. In the meantime, parties to CMCC No. 16 of 2008 excluding the 3rd party recorded a consent dated 15th September 2010 in which the plaintiff (the appellant) and the 2nd and 3rd respondents agreed *inter alia*, that judgment on liability be entered against the 2nd and 3rd respondents jointly and severally at 80% and that damages for pain and suffering and future medical expenses be assessed at KShs.1,000,000 and KShs.250,000 respectively; that damages for lost earnings, special damages and costs of the suit be subjected to trial and court's determination. However, on 14th April 2011 the parties recorded another consent in which the appellant was awarded KShs.1,330,560 and KShs.294,720 for lost earnings and special damages respectively. Trial was subsequently conducted to assess the cost of taxi services accorded to the appellant in the course of his treatment at the end of which the appellant was awarded a global sum of KShs.30,000.

9. Turning now to the appeal filed in HCCA No. 719 of 2009, the record discloses that the same was determined on 16th February 2011. The High Court overturned the trial court's finding on liability in the test suit and substituted its finding in which liability was apportioned in the ratio of 20:80 in favour of the 1st respondent as against the appellants. It is apparent that this finding is what informed the filing of the appellant's Notice of Motion dated 12th August 2011 which principally sought to enforce the High Court's apportionment of contributory negligence against the respondent who was a 3rd party in the lower court proceedings. I had earlier in this judgment indicated the prayers that were sought by the appellant in that application.

10. After hearing arguments from all the parties, the trial court in its ruling delivered on 17th July 2013 dismissed the application. This is what triggered the filing of this appeal. In his memorandum of appeal dated 13th August 2013, the appellant urged this court to set aside the aforesaid trial court's ruling and substitute it with an order allowing the application dated 12th August 2011 on the following four grounds:

> ***i. That the learned trial magistrate failed to appreciate the nature of the plaintiff's application dated 12th august 2011 and thereby erred in law in dismissing he said application.***
>
> ***ii. That the learned trial magistrate misdirected himself and erred in law by failing to adopt the judgment on liability as apportioned in High Court Civil Appeal No. 719 of 2009 which was an appeal against judgment on the test suit.***
>
> ***iii. That the learned trial magistrate failed to appreciate the law on test suit and thereby erred in failing to adopt the finding of the test suit and subsequent appeal on liability.***
>
> ***iv. That the learned trial magistrate's decision cannot be supported by the law and or facts.***

11. The appeal was prosecuted by way of both written and oral submissions. The appellant and 1st respondent filed written submissions on their own motion but the 2nd and 3rd respondents did not. All parties however made oral submissions through their advocates on record buttressing the positions taken by each of them with regard to the issues raised on appeal. Learned counsel *Mr. Njuguna* represented the appellant while learned counsel *Mr. Gitau* and *Ms Luchano* appeared for the 1st, 2nd and 3rd respondents respectively.

12. This being a first appeal to the High Court, this court's duty as succinctly summarized by the Court of Appeal in ***Abok James Odera T/A A.J. Odera & Associates V John Patrick Machira & Company Advocates, [2013] eKLR*** is to:

> ***"….. re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."***

13. I have carefully considered the grounds of appeal, all the material contained in the record of appeal as well as the rival written and oral submissions made by learned counsel on record and the authorities cited. I have also read the impugned ruling. Having done so, I find that the main contestants in the appeal are the appellant and the 1st respondent as it is common ground that the 2nd and 3rd respondents settled their 80% share of liability pursuant to the consent recorded by them and the appellant on 15th September 2010. *Mr. Njuguna* confirmed in his oral submissions that the appellant did not have any complaint against the 2nd and 3rd respondents.

14. Having said that, and after considering the rival submissions made by the parties, I find that the key issue for my determination is whether or not the trial court erred in failing to adopt the High Court's finding on liability as apportioned in HCCA No. 719 of 2009 and in dismissing the appellant's Notice of Motion dated 12th August 2011.

15. From the summary of the proceedings in the suit which is the subject matter of this appeal, it is clear that though the 1st respondent in this appeal was the respondent in HCCA No. 719 of 2009 and the plaintiff in the test suit that gave rise to the aforesaid appeal, he was a 3rd party in CMCC No. 16 of 2008 in which the application resulting into the impugned ruling was made while the appellant was the plaintiff.

16. Given these facts, the question that this court must now answer is whether the High Court's finding on liability could be used as a basis for compelling the 1st respondent to settle part of the decretal sums awarded to the appellant in the primary suit.

17. In answering this question, I wish to start by pointing out that as a general principle of law and in accordance with the doctrine of *stare decisis*, the subordinate courts are bound by all decisions of the High Court and all other superior courts in the same way that the High Court is bound by decisions of the Court of Appeal and the Supreme Court. In the premises, given that the High Court decision in HCCA No. 719 of 2009 was as a result of a finding on liability in a test suit, I agree with *Mr. Njuguna's* submissions that the decision of the High Court on

liability was binding on all the principal parties in the suits that were related to the test suit and the lower court was bound to enforce the same on the affected parties in accordance with the law.

18. In this case, in dismissing the application, the learned trial magistrate found that by the time the application was filed, there was already a final judgment on liability and quantum of damages in the suit before him which did not involve the 1st respondent who was a 3rd party in the proceedings; that the High Court's determination in HCCA No. 719 of 2009 could only be enforced in the suit before him if an application for review was filed and allowed and not by an application seeking to enter judgment against the 3rd party as sought in the Notice of Motion.

19. After my own independent consideration of the prayers sought in the application dated 12th August 2011, the facts of the case and all the material placed before me, I find that the appellant's cause of action in the suit filed in the lower court was against the 2nd and 3rd respondents who were the only defendants in the suit. The 1st respondent was thus not a principal party to the suit. He only became a party after he was enjoined in the proceedings as a 3rd party by the 2nd and 3rd respondents.

20. A reading of *Order 1 Rule 15* of the *Civil Procedure Rules* makes it clear that a 3rd party enjoined in proceedings is only liable to contribute to the liability adjudged to a defendant in the suit or indemnify the defendant to the extent stated in the 3rd party notice unless there was a consent on liability entered into between the plaintiff, the defendant and the 3rd party or unless the court had determined the issue of liability between the plaintiff and the 3rd party.

21. This therefore means that a plaintiff does not have a direct cause of action against a 3rd party in a suit and cannot therefore seek to enforce a decree obtained against the defendant on a 3rd party unless there was a consent on apportionment of liability between the plaintiff, the defendant and the 3rd party or a determination to that effect by the court. Only a defendant who has enjoined a 3rd party in a suit has a right to make claims of indemnity against the 3rd party.

22. In this case, it is clear from the record and this is not disputed by the parties that the consent on liability was entered into between the appellant and the 2nd and 3rd respondents. The 1st respondent was not involved in the recording of the consent and no liability was apportioned to him. The 20% liability that the appellant sought to enforce against the 3rd party was apparently the share of liability that he was supposed to shoulder. Although the determination of liability in HCCA No. 719 of 2009 was binding on all the five cases related to the test suit including the one subject matter of this appeal, it did not entitle the appellant who was the plaintiff in that suit to make any claim against the 1st respondent who as stated earlier, was only a 3rd party in the suit.

23. Given the aforesaid facts, it is my conclusion that the appellant could only execute judgment obtained in his favour against the 2nd and 3rd respondents who in turn had a right to claim indemnity from the 1st respondent if they so wished. In this case, however, the 2nd and 3rd respondents did not apparently wish to pursue any claim against the 1st respondent since they fully settled their share of the decretal amount.

24. In view of the foregoing, I find that though the learned trial magistrate did not address his mind to the law on the role of 3rd parties in a suit, he was correct in his finding that there was a final judgment in the suit that did not apportion any liability on the 1st respondent and that the application before him could not lawfully be used as a basis of entering judgment on liability against the 1st respondent notwithstanding the existence of the High Court's determination in HCCA No. 719 of 2009. I am therefore unable to fault the trial court's finding that the application lacked merit and was a good candidate for dismissal. The trial court's decision to dismiss the application was correct and is hereby upheld.

25. For all the reasons stated above, I do not find any merit in this appeal and it is hereby dismissed with costs to all the respondents.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this 14th day of November, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Githire holding brief for Mr. Njuguna for the appellant

Mr. Wambua for the 2nd and 3rd respondents

No appearance for the 1st respondent

Mr. Salach: Court Assistant