REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 475 OF 2018

KENYA DIABETES MANAGEMENT & INFORMATION

CENTRE LIMITED.....1ST APPELLANT

SAMUEL WAWERU.....2ND APPELLANT

VERSUS

GUERASSIM NIKOLOV.....RESPONDENT

(Being an appeal from the ruling of the Senior Resident Magistrate, Hon. P Muholi delivered on the 26th September, 2018 in CMCC No. 6725 of 2015)

R U L I N G

The appellants were defendants in the lower court where the respondent had filed a suit for material damage claim following an accident that took place on 18th September, 2014. The accident involved a collision between motor vehicle registration No. KBZ 857V driven by the respondent and motor vehicle registration No. KBG 896K owned by the 1st appellant and driven by the 2nd appellant at the time of the accident.

Following that collision the respondent's car was damaged and therefore, he lodged a claim in the said suit claiming a total of Ksh.841,170/- being the cost of repairs, investigation report, assessment report and the police abstract.

The appellants were served with summons to enter appearance but did not comply. Following an application for judgment on behalf of the respondent, a judgement was entered on 21st December, 2017.

The record shows that the advocate for the respondent addressed a letter to the advocates of 1st appellant on 30th April, 2018 notifying them of the entry the of judgment. Upon receipt of the said notice, the appellants lodged an application dated 17th May, 2018 seeking orders that there be a stay of execution of the judgment entered on 21st December, 2017 and that the said judgment and all consequential orders be set aside.

That application was heard by the lower court, and in a ruling delivered on 19th September, 2018 the lower court dismissed the said application with costs to the respondent. It is that ruling that prompted the present appeal.

In the Memorandum of Appeal dated 5th October, 2018, the appellants faulted the lower court for holding that the appellants had not demonstrated that the failure to defend the suit was not wilful or negligent but due to circumstances beyond the appellants' control.

The lower court was also faulted for finding that the application lacked merit, yet it raised weighty issues of law. The lower court was also faulted for failing to grant the appellants a fair chance to be heard, despite demonstrating they had a defence that raised triable issues. Lastly, the lower court was blamed for finding that the appellants had a handsoff attitude towards the suit, despite them demonstrating their willingness and readiness to defend the suit.

Both parties have filed their respective submissions in the argument of this appeal. I have the duty to reconsider and evaluate the lower court record, with the view to arriving at independent conclusions.

There is no doubt that the appellants were served with summons to enter appearance. However, they forwarded this to their insurer with the hope they will take up the defence to the claim. This was not done and they only became aware of the default after service of the notice of the judgment.

In dismissing the appellants' application in the lower court, the court flagged some issues the first of which was that, the confirmation the appellants were served with the summons to enter appearance. The second issue was whether the appellants had any defence to the claim.Put the other way, if the statement of defence raised any triable issues. The court found as follows: -

> ***"I have looked at the statement of defence and the same contains denial of liability, and they put the plaintiff to stick proof. They have not produced any new defence that is worthy taking to trial. The defence contains mere denials."***

The lower court then went ahead and laid blame upon the appellants, for not following up their case after they forwarded the summons to their insurer. The court stated as follows: -

> ***"They did not bother to do anything from the time the matter was filed in court. Therefore can't state that someone did not inform them. The party to a suit has a duty to also ensure that the case is being handled and not to have the hand off kind of attitudes towards a case. It would appear that they were not interested in the case and were it not for the notice of entry of judgment they would still be asleep."***

The admission by the appellants that summons were served was an honest disclosure of due process. They had an opportuning to deny service but decided to stick to the truth that they forwarded the summons to their insurer. An insured person has a legitimate expectation that the insurer would take up the matter to its logical conclusion.

The appellants did not follow up the progress of the case, and there is some ground for the court to blame them in that regard. However, mistakes of this nature are not unusual in view of the circumstances of the case.

There are some issues that have been raised in the submissions as to whether formal proof should have been held. I elect to say nothing in that regard in view of what I am about to hold in this appeal. I have looked at the draft defence upon in which the lower court concluded was a mere denial. With respect, that is not the posision.

Paragraph 4 of the said defence pleaded that the accident was wholly caused and/or substantially contributed by the plaintiff. There are then several particulars of negligence pleaded and attributed to the respondent. In cases of this nature, many a times, the courts have found contributory negligence on the part of the parties. That is a triable issue which cannot be said to be a denial. The appellants, therefore, should have been given an opportunity to have their day in court. This would be in conformity with upholding the objectives to facilitate the just, expeditious, appropriate and affordable resolution of civil disputes.

I have noted the complaint raised by the respondent that this is an old matter which should be put to an end. While agreeing that there should be expeditious resolution of such a dispute, parties should not be locked out where circumstances demand that they should have their day in court.

Going by the material presented and the circumstances of this case, I have come to the conclusion this appeal should be allowed. Accordingly, the ruling of the lower court made on 19th September, 2018 and all consequential orders that followed are hereby set aside in their entirety.

The lower court file shall now be returned for trial before another magistrate of competent jurisdiction, provided that the defence lodged by the appellants, and which is on record, is regularized upon payment of appropriate fees, if this was not done, so that the trial can continue. As this is an old case, priority should be accorded. Each party shall bear their own costs.

Dated, signed and delivered at Nairobi this 14th day of November, 2019.

A. MBOGHOLI MSAGHA

JUDGE