REPUBLIC OF KENYA

IN TH HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 162 OF 2019

AUTO INDUSTRIES LTD ….....…… APPELLANTS

VERSUS

SAMUEL MUGUKU MAINA …… RESPONDENT

(Being an appeal from the ruling of Hon. P. Muholi (Mr) delivered on 6th July, 2018 at Milimani in CMC No. 3144 OF 2016)

JUDGMENT

This appeal arises from the ruling of the lower court delivered on 6th July, 2018. The respondent herein had sued the appellant for damages arising from a road traffic accident that took place on 31st January, 2016. The record shows that the appellant was served with summons to enter appearance but did not comply, neither was any defence filed. Upon an application at the instance of the respondent, interlocutory judgment was entered against the appellant and the suit listed for assessment of damages. The lower court judgment was delivered on 27th September, 2017.

The respondent then moved to execute the judgment and that is when the appellant filed an application dated 2nd February, 2018 seeking orders that there be a stay of execution of the said judgment, that the draft defence annexed to the application be deemed as duly filed and leave be granted to enjoin Mark Holdings, being the beneficial owners of motor cycle registration No. KMDL 196C.

Upon hearing the application, the lower court said as follows in its ruling,

> **"The applicant has also annexed a draft defence to the application which raises triable issues in the sense that they had sold the motor cycle to another party. That is an issue that ought to go to trial and be ventilated. In my view the defence raises triable issues.**
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> **I however, have looked at the notice of motion and the applicant has not asked this court to set aside the interlocutory judgment and therefore I will not grant an order that I have not been asked to grant. The net effect of failure to seek that the interlocutory judgment is set aside is that even the prayer for deeming the defence as duly filed cannot succeed and the one for enjoining Mark Holding can also not succeed since they are premised on the court setting aside the interlocutory judgment.**
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> **Parties are bound by their own pleadings and the court is not seized with powers to read the minds of litigants. The prayers being sought must be put up in clear and specific terms. The applicant in this case can only have himself to blame for the failure to seek that prayer."**

In the Memorandum of Appeal, the lower court is faulted for failing to allow the application even after establishing the defence raised triable issues. Further that, the lower court denied the appellant the constitutional right to be heard. The lower court was also faulted for failing to appreciate the prayer for stay of execution rendered the interlocutory judgement still-born.

The parties filed submissions in addressing this appeal. It is my duty to reconsider and evaluate the lower court record and arrive at independent conclusions.

What the lower court was being asked in the application leading to the ruling that prompted this appeal was to exercise its discretion. It is the mandate of the court to ensure that justice is done to all parties that come before it. The lower court rightly observed that the draft defence submitted alongside the application raised triable issues which ought to go to trial. The only reason the court declined to set aside the interlocutory judgment was because the appellant did not seek that order.

A clear reading of the application however should have informed the court that, the defence cannot be deemed as duly file if there is a judgment on record. It follows therefore that, notwithstanding the absence of an express prayer to set aside the interlocutory judgment, it should have occurred to the court that the appellant wished to be heard on merit. That could only happen if the ex -parte judgment was set aside and the defence filed.

The discretion of the court is to be exercised judiciously, but in this case the appellant was denied the right to fair trial under Article 50 of the Constitution. The default on the part of the appellant both in failing to enter appearance and file a defence in view of the issues raised in the draft defence could have been cured by payment of costs.

The appellant was clearly a victim of inadequate pleadings and that should not deny it its day in court. Accordingly, this appeal is allowed but the appellant shall pay the costs to the respondent.

Dated, signed and delivered at Nairobi this 9th Day of December, 2019.

A. MBOGHOLI MSAGHA

JUDGE