



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL APPEAL NO. 211 OF 2018

JAPHETH MWANZIA MULE)

KATULU MUENDO.....APPELLANTS

VERSUS

PENINAH MUTUTE.....RESPONDENT

(Being an Appeal from the Judgment and Order in **Kitui Principal Magistrate's Court**

Civil Suit No. 84 of 2008 by Hon. B. M. Kimemia (PM) on 19/06/14)

J U D G M E N T

1. On **4th March, 2014**, **Messrs M. M. Uvyu & Co. Advocates** filed an application seeking leave to represent the Defendants (Applicants) instead of **Getrude Matata & Co. Advocates**; secondly they sought stay of execution of the decree and all consequential orders and setting aside of the Judgment entered against the Appellant so that they could have an opportunity of defending the suit unconditionally.

2. In the Ruling dated **19th June, 2014** the trial Court dismissed the application.

3. Aggrieved, the Appellant appeals on grounds that:

- The learned Magistrate erred in law and in fact in failing to exercise her discretion to set aside the Judgment.
- The learned Magistrate erred in law and in fact in finding that there were no valid reasons to warrant granting of the orders sought.
- The learned Magistrate erred in law and in fact in failing to find that the Appellants have a good defence on record which raises triable issues.
- The learned Magistrate erred in law and in fact in failing to consider the Appellant submissions.
- The learned Magistrate erred in law and in fact in holding that she had no powers to interfere with a regular Judgment.
- The learned Magistrate erred in law and in fact in failing to give the Appellants an opportunity to be heard on merits.
- The learned Magistrate erred in law in applying the wrong principles of law in arriving at her conclusion.

4. This is a matter where both parties who were represented by advocates entered into a consent on the **17th June, 2008**. Following the consent entered into, Judgment was entered for the Respondent as against the Appellant on liability of **90:10%**. Further general damages were set at **Kshs. 100,000/=** and special damages of **Kshs. 3,107/=**. Costs of the suit were to be agreed upon or assessed by the Court. Subsequently the Respondent's bill of costs was assessed at **Kshs. 34,540/=**.

5. On the **4th March, 2014**, six (6) years later, the firm of **M. M. Uvyu & Co. Advocates** filed the application that the Court considered and came up with the impugned Ruling. The argument of the Appellant in the Lower Court was that the matter proceeded Exparte.

6. The Respondent filed a response to the application arguing that the Appellant was represented by counsel. The matter did not proceed Exparte but a consent was endorsed by the Court as it was by the firm of **Getrude Matata & Co. Advocates** who represented the Appellant.

7. In its Ruling the trial Court was of the view that it could not interfere with the Judgment of the Court which was entered by consent. In the result the application was dismissed in its entirety.

8. Following directions given by the parties, the Appeal was to be canvassed by way of written submissions. Only the Appellant filed submissions outside the timeline set. But since the Respondent sought time to file submissions, leave to extend time was deemed to have been granted.

9. The argument raised by the Appellant was that the motor-vehicle in issue was insured by Standard Assurance Co. LTD and no execution was issued against the Insurance Company which was supposed to satisfy the decretal sum pursuant to the provisions of the **Insurance Act**.

10. This being a first Appellate Court, its duty is to reconsider what transpired in the Lower Court and to come up with its own conclusion.

11. The first limb of the application was for the firm of **M. M. Uvyu Advocates** to come on record instead of the firm of **Getrude Matata Co. Advocates**. **Order 9 Rule (9) and (10) of the Civil Procedure Rules** provides thus:

“Change to be effected by order of court or consent of parties.

9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

10. An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.”

12. The trial Court did not seem to belabour this particular issue but it is worth noting that in the affidavit in support of the application, the Appellant deposed that the firm of **Getrude Matata & Co. Advocates** had refused to sign a consent agreeing to cease acting for him. It was therefore upon the firm of **M. M. Uvyu & Co. Advocate** to serve the application on them which it did not do.

13. The Appellant sought an order setting aside the Judgement entered into. In the Ugandan case of **Lenina Kemugisha Mbabazi Star Fish Limited vs. Jing Jeng International Trading LTD (HCT-00-MA-344-2012)** grounds upon which a consent may be varied or set aside were stated as follows:

“i) Where the consent was obtained fraudulently.

ii) In collusion between affected parties.

iii) Where an agreement is contrary to the policy of the Court.

iv) Where the consent is based on insufficient material facts.

v) Where the consent is based on misapprehension or ignorance of material facts.

vi) Any other sufficient reasons.”

14. In the case of **Flora vs. Wasike vs. Destimo Wamboko (1988) eKLR** the Court stated that:

“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.”

15. On the **17th June, 2008**, both parties were represented by counsels. It is common knowledge that a consent entered into by an advocate binds his client, the party in the proceedings. It is not suggested that the consent was obtained as a result of some fraud or collusion or some arrangement, therefore for the Appellant to have waited until six (6) years later to come up with the application was not justifiable.

16. In the circumstances the application was bereft of any merit and the learned trial Magistrate did not misdirect herself in dismissing it. Therefore, I find the Appeal lacking merit. Accordingly, it is dismissed with costs to the Respondents.

17. It is so ordered.

Dated, Signed and Delivered at Kitui this 3rd day of December, 2019.

L. N. MUTENDE

JUDGE