REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 149 OF 2014

MOSES MUNYIRI GITHAIGA.....APPELLANT

-VERSUS-

GERALD WANJAU KIBOGO.....RESPONDENT

(Being an appeal against the judgment and decree delivered by L.W. Kabaria (Ms.) (Resident Magistrate) on 21st March, 2014 in CMCC NO. 1891 OF 2005)

JUDGMENT

1. Moses Munyiri Githaiga, the appellant in the present instance, instituted a suit against the respondent vide the plaint dated 27th October, 2005 in which he sought for special damages in the sum of Kshs.304,100/ plus costs of the suit and interest thereon.

2. The appellant pleaded in his plaint that sometime on or about 2nd July, 2005 his motor vehicle registration number KAJ 977A was being lawfully driven along Tom Mboya Street in Nairobi area when motor vehicle registration number KAS 189K being at all material times registered in the name of the respondent and being controlled by his driver/agent collided with the appellant's motor vehicle, resulting in extensive damage to it.

3. The appellant attributed the accident to negligence on the part of the appellant's driver/agent by setting out its particulars in his plaint.

4. Upon entering appearance, the respondent filed his statement of defence to deny the allegations set out in the appellant's plaint.

5. In the course of the hearing, the appellant testified and called another witness to give evidence in support of his case while the respondent chose to close his case without calling any witnesses.

6. Eventually, the trial court dismissed the suit on 21st March, 2014.

7. Being aggrieved with the aforesaid decision, the appellant has preferred an appeal against the same and put forward the following grounds vide his memorandum of appeal dated 17th April, 2014:

> ***(i) THAT the learned trial magistrate erred in law and in fact in holding that there was no case to be heard on 28th January, 2014 when the hearing proceeded as the case had already been dismissed.***
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> ***(ii) THAT the learned trial magistrate erred in law and in fact in failing to hold that although the court had earlier ruled that the suit be prosecuted within 90 days, that order was subsequently varied by another order made on 25th February, 2013 requesting the parties to comply with the provisions of Order 11 of the Civil Procedure Rules by 1st March, 2013 which order the appellant had complied with.***
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> ***(iii) THAT the learned trial magistrate erred in law and in fact in failing to hold that by the appellant's advocate's letter dated 7th December, 2012 and filed on 19th December, 2012 the appellant did all within his power to ensure that he had complied with the court order made on 28th November, 2012.***
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> ***(iv) THAT the learned trial magistrate erred in law and in fact in holding that owing to the appellant's failure to comply with the court's order made on 28th November, 2012 the suit stood dismissed whereas the appellant was subject to administrative procedures at the registry on fixing of dates and could not dictate the actual fixing of mentions and hearing dates to the registry, but could only mention to them the said court's directions in his attempt to procure a hearing date.***

(v) THAT the learned trial magistrate erred in law and in fact in dismissing the suit on a technicality after the appellant had tendered evidence which was unrebutted, without taking Article 159 of the Constitution into consideration.

(vi) THAT the learned trial magistrate erred in law and in fact in failing to hold that the appellant had, on a balance of probabilities proved his claim against the respondent.

8. This court directed the parties to file written submissions on the appeal. On his part, the appellant contended that his suit was dismissed on a technicality, placing reliance on the case of **Margaret Kareo Gitonga v Gillian Wambui Karanja [2016] eKLR** where the High Court on appeal set aside a suit dismissed on a technicality and ordered a retrial of the suit.

9. The appellant further urged that notwithstanding the fact that the trial court did not consider the evidence on record, it would not be a proper use of judicial time to remit the suit back to the said court, thus urging this court to instead proceed and find that the appellant has proved his case on a balance of probabilities.

10. On the issue of quantum, the appellant argued that he is entitled to the entire sum of Kshs.304,000/ pleaded and proved in his plaint.

11. The respondent on his part submitted that not only did the appellant lack diligence in complying with the order of 28th November, 2012 requiring him to prosecute his suit within 3 months of that date, but that the appellant both failed to bring the aforesaid order to the attention of the trial court and failed to seek an order for reinstatement of his suit. In this regard, the respondent urged this court to consider the holding in **Peter Kinyari Kihumba v Gladys Wanjiru Migwi & another [2006] eKLR** that where it is clear that a party was casual in litigating his or her matter, it would be prejudicial to the other party if the matter is reopened.

12. On a separate note, it was the respondent's contention that the appellant's case was defeated by his own pleadings and that he not only failed to prove his case against the respondent but also failed to prove entitlement to the special damages pleaded, relying on the cases of **Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR** where it was reiterated that a party must prove his or her case to the required standard notwithstanding the fact that his or her evidence remains uncontroverted, and **Joseph Mbuta Nziu v Kenya Orient Insurance Company Ltd [2015] eKLR** in which the High Court reasoned that parties are bound by their pleadings hence their evidence ought to support their pleadings in order to see the light of day.

13. I have considered the competing submissions on appeal alongside the authorities cited. Whereas the appellant put in six **(6)** grounds of appeal, I note that the main issue for determination has to do with whether the trial court's decision to dismiss the suit was proper in the circumstances.

14. The record confirms that when the parties appeared before the trial court on 28th November, 2012 an adjournment was sought and granted on the condition that the suit be prosecuted to completion within 3 months from that date, failing which it would stand dismissed on the 91st day. The appellant was also directed to fix a pre-trial date within 30 days from the aforesaid date.

15. It is apparent from the record that on the said date of 28th November, 2012 the appellant through his advocate fixed the suit for pre-trial directions scheduled for 15th February, 2013 which obviously surpassed the 30 days ordered by the trial court.

16. The record shows that the suit proceeded for hearing by consent of the parties on 28th January, 2014 which once again exceeded the timelines for prosecution previously ordered by the trial court, with the appellant relying on the evidence of two witnesses while the respondent did not call any witnesses to testify for the defence case.

17. At the close of the hearing, the parties were directed to put in written submissions. However, when the suit came up for delivery of judgment, the learned trial magistrate pointed out that the suit stood dismissed on or about 22nd March, 2013 pursuant to the orders issued earlier on by her colleague and consequently, there was no suit for which judgment could be delivered.

18. It is interesting to note that though it is evident from the foregoing that the suit was not prosecuted within the timelines set out by the trial court on 28th November, 2012 neither of the parties made mention of such order subsequently before the trial court.

19. It is even more interesting to note that the trial court did not take notice of the existing order but directed the parties to proceed with the hearing of the suit to the very end. Whereas I note that different magistrates handled the file since the time of making the order of 28th November, 2012 it is reasonable to state that the record remained the same throughout, hence the order ought to have been noticeable thereafter but this was not the case.

20. In my view therefore, while I fault the parties for not bringing the existence of the order to the attention of the trial court, I cannot overlook the fact that the trial court muddled the situation by giving the parties the go-ahead to proceed with the hearing, thereby reversing the earlier orders by its conduct so to speak.

21. I am thus satisfied that it was improper for the trial court to then turn around and dismiss the suit at the last minute after taking evidence and directing the parties to file written submissions.

22. In the premises, I find that the trial court fell into error by contradicting itself and consequently creating confusion as to the correct position in respect to the suit. It would be in the interest of substantive justice to allow the parties to proceed with the matter, considering that the respondent in no way challenged the appellant's action of prosecuting his case thereafter and in fact participated at the hearing.

23. Suffice it to say that it is noted that in making her decision, the learned trial magistrate did not consider the evidence placed before her

and therefore did not deliver a judgment in the strict sense of the word. It therefore follows that there is no basis on which this court can delve into the merits of the suit.

24. Accordingly, the appeal succeeds only to the extent of setting aside the trial court's decision. For the aforementioned reasons, I hereby order a retrial of the suit before another magistrate having competent jurisdiction other than Hon. W. Kabaria. This being quite an old matter, I further order that a hearing date be given on priority basis.

25. In the circumstances of this appeal, a fair order on costs is to direct each party to meet its own costs of the appeal.

Dated, Signed and Delivered at Nairobi this 13th day of December, 2019.

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J.K. SERGON

JUDGE

In the presence of:

……. for the Appellant

……. for the Respondent