**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 389 OF 2015**

**SPIN KNIT DAIRY LTD.....APPELLANT**

**VERSUS**

**MUTISO MULEI WASYALA.....RESPONDENT**

**(Being an appeal from the ruling of Hon. R Ngetich (Mrs) chief magistrate,**

**delivered on 17th July, 2015 in Nairobi CMCC no. 8282 of 2009)**

**JUDGMENT**

The respondent filed a suit in the lower court against Francis Mburu Mungai, in the plaint dated 30th November, 2009 for damages arising from a road traffic accident which involved motor vehicle registration No. KAP 476 A. In the pleadings, the respondent placed the blame on the said Francis Mburu Mungai who was driving motor vehicle registration No. KAP 476A for colliding with his motor vehicle registration No. KAU 732J. As a result of the said accident the respondent sustained serious injuries for which he claimed damages.

This was followed by an amended plaint dated 20th and filed on 21st January, 2010 joining Spin Knit Dairy Ltd and Simba Colt Motors as the 2nd defendant in which it was alleged the 2nd defendant was the owner of the said motor vehicle registration No. KAP 476A and that the 1st defendant Francis Mburu Mungai was the authorised driver and or agent. An amendment was also made to the effect that the respondent was riding, not driving, motor cycle registration No. KAU 732 J.

On 8th April 2013 counsel for the parties appeared before the trial magistrate and recorded a consent in the following terms,

> **"By consent judgment on liability be entered in favour of the plaintiff as against the defendant in the ratio of 75%:25%. Mention on 10/5/2013 before SPM and above to record consent on quantum."**

Both counsel signed the said consent which was then adopted and referred as the judgment of the court. Thereafter, the respondent herein was called to testify on the issue of quantum and his evidence recorded accordingly. In a judgment dated 2nd May, 2014 the court determined the matter and awarded Kshs 600,000/= general damages, Kshs. 3,200/= special damages and Ksh. 150,000/= for future medical costs. The respondent was also awarded costs of the suit and interest.

On 25th March, 2015 the appellant herein filed an application to stay the execution of that judgment, and further to have the consent judgment recorded on 8th April, 2013 be set aside and or reviewed. That application was heard and dismissed in a ruling dated 17th July 2015. It is that ruling that prompted this appeal.

The grounds advanced by the appellant in that application were that, motor vehicle registration No. KAP 476A was not under the care and control of the appellant at the time of the accident on 17th December, 2007, the omission was a genuine mistake on the part of the appellant, and that the consent judgment recorded was detrimental to the appellant.

In the Memorandum of Appeal the lower court was accused for failing to appreciate that the said appellant was not the owner of the motor vehicle at the time of the accident, and therefore no liability could attach, that the appellant's pleadings and submissions to the application were not considered, and for finding that the appellant's insurers had information on the ownership of the vehicle as at the time the consent was recorded.

The lower court was also faulted or dismissing the application hence condemning the appellant unheard. Further that, it was wrong to

conclude that there was no discovery of new matters worth setting aside the consent judgment. Finally, the lower court was faulted for concluding that setting aside a consent order would occasion an injustice to the respondent, while by her own ruling she caused great injustice to the appellant.

In dismissing the appellant's application, the lower court said as follows,

> **"I have confirmed from the court record that consent judgment was entered on 8th April, 2013 and that the case proceeded for assessment of damages on 18th July, 2013 thereafter parties filed submissions and judgment was delivered on 2nd May, 2014. The legal officer of Kenindia Insurance Company stated that the Company received court summons and plaint from the 2nd defendant. I do believe that the 2nd defendant must have read the content of the documents before pasing them to the insurance company and that if the documents talked of an accident involving a vehicle which was not in their possession the same information should have been passed to the insurer. The information is expected to have been in the knowledge of the 2nd defendant. And if the vehicle had been sold as salvage, which information should have been passed to the insurer and third party proceedings would have been commenced. Bringing the issue after the close of the proceedings does not appear proper and it amounts to denying or delaying the plaintiff from enjoying the fruits of successful litigation. Copy of record from registrar of motor vehicles indicate that 2nd defendant was the registered owner of the vehicle at the time of the accident. It will not be in the interest of justice to set aside or review judgment entered in this suit."**

I am required to reconsider and evaluate the lower court record and arrive at independent conclusions. Section 8 of the Traffic Act provides as follows,

> **"The person in whose name a vehicle is registered shall unless the contrary is proved to be deemed to be the owner of the vehicle."**

That is *prima facie* evidence which however is rebuttable. The standard of that rebuttal is what decided cases have termed prima facie. – See **Ignatious Makau Mutisya vs. Reuben Musyoki Muli (2015) e KLR.**

By admitting that summons to enter appearance were served and forwarded to the insurance company to take charge of the defence, the appellant was being honest and credible in advancing its case before the lower court. Ordinarily, a motor vehicle sold as salvage would be in the knowledge of the insurer but mistakes do happen, and in this case the appellant is again honest to say that this was a mistake which was not in its knowledge at the time the consent was entered into. In the case of **D. Chandulal K. Vora & Co. Limited vs. Kenya Revenue Authority (2017) e KLR** the Court Of Appeal said as follows,

> **"To avoid injustice to either party in the circumstances of this case, and to prevent prejudice to one party, justice behooves this Court to allow this appeal. In Essanji & Another v Solanki (1968) EA 218 it was observed;**
>
> **"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that error and lapses should not necessarily debar a litigant from the pursuit of his rights."**
>
> **Taken in totality, the circumstances herein should entitle the parties in this suit to have their day in court to fully ventilate the claims they have against each other and bring it a meritorious closure. This is especially since a hearing would cause no greater prejudice to either party".**

The appellant has indicated its desire to have the consent judgment on liability set aside and lodge third party proceedings.

I note that this is a very old case which resulted in personal injuries to the respondent but again, the interests of the parties should be considered and more so, the degree of prejudice that may befall either party in the circumstances of the case.

Taking everything into totality, notwithstanding the delay occasioned by the mistake on the part of the appellant, I believe the ends of justice shall be served if the lower court record is aligned to achieving substantive justice to both parties.

The foregoing being the case, this appeal is allowed and the consent judgment on liability recorded on 8th April, 2013 is hereby set aside. It follows therefore all proceedings thereafter are also hereby set aside. The appellant shall institute third party proceedings in the lower court within 30 days from the date hereof.

It is not the mistake of the respondent that this case has been delayed and therefore, the appellant shall pay the respondent all the costs occasioned by this appeal which costs shall be agreed, and in the absence of an agreement, to be taxed by a taxing officer. The lower court file shall be returned for appropriate action, in this case, a hearing on merit expeditiously.

**Dated, signed and delivered at Nairobi this 5th Day of December, 2019.**

**A. MBOGHOLI MSAGHA**

**JUDGE**