



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**CIVIL APPEAL NO. 52 OF 2016**

**BENJO TRAVELLERS (K) LTD.....APPELLANT**

**VERSUS**

**JUSTUS KAMENYA MWASYA (Suing as the**

legal representative of the Estate of

**KIVELANGE KAMEYA (DECEASED)....1<sup>ST</sup> RESPONDENT**

**BENJAMIN MAINA KIHORO.....2<sup>ND</sup> RESPONDENT**

**J U D G M E N T**

1. **Benjo Travellers (K) Limited**, the Appellant was the 2<sup>nd</sup> Defendant in a suit instituted by the 1<sup>st</sup> Respondent, **Justus Kamenya Mwasya** who sued it jointly with the 2<sup>nd</sup> Respondent herein, **Benjamin Maina Kihoro**. The Appellant was sued in his capacity as the registered owner of motor-vehicle registration number **KAK 069H Mitsubishi Minibus** while the 2<sup>nd</sup> Respondent was the owner of motor-vehicle registration number **KAQ 296E Toyota Hiace**.

2. The claim arose out of a road traffic accident that occurred on the **25<sup>th</sup> March, 2005** where **Kivelenge Kameya (Deceased)** was travelling in motor-vehicle registration number **KAQ 298E** along the Kitui-Kanyonyo Road which collided with motor-vehicle registration number **KAK 069H**. A claim that was for special damages in the sum of **Kshs. 15,200/=** general damages under the **Fatal Accidents Act** and the **Law Reform Act**.

3. The 2<sup>nd</sup> Respondent filed a statement of defence, denying liability and in the alternative he stated that if the accident occurred it was solely and/or substantially contributed to by the negligence of the driver and owner of the motor-vehicle registration **No. KAK 069H**. He also filed a Notice of Claim against the Appellant seeking the remedy of indemnity and/or contribution in full/or to such extent as the Court could decide; in respect of the claim by the Plaintiff as against the Appellant.

4. The matter proceeded exparte. An application was filed by the Appellant seeking to set aside the exparte proceedings conducted on two (2) separate days, the **12<sup>th</sup> September, 2013** and **27<sup>th</sup> March, 2014**, to allow the Appellant to participate in the proceedings by defending the suit. The application was dismissed by the trial Magistrate.

5. Being dissatisfied with the Ruling and subsequent order in an amended Memorandum of Appeal, the Appellant appealed on grounds that:

(i) The Court erred in law and in fact in finding that the defendant did not file its submissions to the application dated **10<sup>th</sup> April, 2014** when it has indeed filed the same.

(ii) The Court erred in law and in fact in finding that failure to attend Court by the Defendant's Counsel on the **12<sup>th</sup> September, 2013** and **27<sup>th</sup> March, 2014** was not justified while indeed there were good reasons for the non attendance.

(iii) The Court erred in law and in fact in failing to consider the 1<sup>st</sup> Defendant's submissions in support of the application dated **10<sup>th</sup> April, 2014**.

(iv) The Court erred in fact and in law in finding that the 1<sup>st</sup> Defendant is bent on delaying the course of justice which is not true in the circumstances of the case.

(v) The Court erred in law and in fact in finding that the defendant is not interested in defending the matter which is not true.

6. It prayed for the Ruling to be set aside and/or varied so that the proceedings of the **12<sup>th</sup> September, 2013** and **27<sup>th</sup> March, 2014** and all consequential orders would stand set aside to enable it file a defence, **Order 11** of the **Civil Procedure Rules** be complied with and that the matter be remitted to the Subordinate Court for a fresh hearing.

7. The Appeal was canvassed by way of written submissions. In highlighting submissions **Mr. Mathiru**, Counsel for Appellant stated that submissions were filed on the **4<sup>th</sup> June, 2014** therefore the Appellant was condemned unheard. That the mistake occurred on the **12<sup>th</sup> September, 2013** when Counsel failed to diarize the matter but on the **24<sup>th</sup> March, 2014** she was unwell. Their firm of advocates called **Mr. Mwalimu Advocate** to instruct him to hold their brief but he was not available. He urged the Court to find that the explanation given was reasonable.

8. In response, **Mr. Mburu**, Counsel for the 1<sup>st</sup> Respondent stated that it was not stated that when the matter came up for mention on **15<sup>th</sup> May, 2014** submissions had been filed. Time within which they were to file submissions was extended to **28<sup>th</sup> May, 2014** but submissions were not filed. That it was incumbent upon the Appellant to ensure submissions were on record.

9. Further, he argued that on **12<sup>th</sup> September, 2013** the matter proceeded after the Appellant failed to attend Court. And on the **24<sup>th</sup> October, 2013** after the Court was notified of the absence of the Appellant's Counsel following her appointment to the Higher Bench, it was indulged and an adjournment granted. And even after the Appellant was granted the opportunity to instruct another advocate the subsequent advocate who came on record did not attend Court.

10. Being an Appellate Court, I am duty bound to re-evaluate the record and decision by the trial Magistrate and reach my own conclusion.

11. The orders that were sought before the Lower Court were discretionary in nature. In the case of **Shabbir Din vs. Ram Parkash Anand (1955) 22 EAC A 48, 51** it was stated that a discretion of the Court to set aside exparte orders is to be exercised by a Court depending on facts of a particular case. The manner in which the discretion should be exercised could not be indicated.

12. This clearly means that the Court has a wide discretion which should however be exercised judicially.

13. The question of such a discretion was also considered in the case of **Shah vs. Mbogo (1966) EA 166** where the Court stated that:

*“This discretion is intended to be exercised to avoid injustice or hardship resulting from accident inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”*

14. The learned Magistrate has been faulted for not addressing herself on the Court record as she failed to find and consider submissions by the Appellant in respect of the application. Looking at the Ruling of the learned Magistrate it is apparent that she did not see or consider the submissions. I have perused the original file which does not have the submissions filed by the Appellant. However, the submissions filed by the Appellant were received by the Court on the **4<sup>th</sup> June, 2018** as seen on a copy with the stamp impression of the Court that is part of the record of Appeal.

15. Although the learned Magistrate did not consider submissions, she considered arguments of both parties as stated in affidavit evidence. It can therefore not be stated with certainty that the Appellant's case was not considered at all by the trial Court. In the premises the Appellant was not condemned unheard.

16. It is admitted by the Appellant that its advocate did not attend Court on the **12<sup>th</sup> day of September, 2013**. The advocate had been duly notified of the hearing date. Counsel averred that the matter was not diarized. When the matter came up on the **24<sup>th</sup> October, 2013** the Appellant's Counsel was aware of the matter. The Court was notified that she was indisposed by **Mr. Mwalimu Advocate** who held her brief. The Court noted the fact that the matter was old having been filed in **2005**. She granted the Appellant a final adjournment. When the matter came up on the **23<sup>rd</sup> January, 2014** it turned out that the Appellant's Counsel had been nominated for appointment as a Judge of the Superior Court. It was stated that the Appellant would have **30 days** within which to instruct another advocate. Following the development, the learned Magistrate granted the adjournment sought. She granted the Appellant two (2) months within which to instruct an advocate. When the matter came up there was no appearance on the part of Defendants therefore the matter proceeded.

17. The learned Magistrate exercised the discretion by granting the Appellant the opportunity of making an appearance and defending the case. She did not shut out the Appellant.

18. What is intriguing in the matter is the fact that the Appellant filed a Memorandum of Appearance but did not file any defence. No explanation was given by Counsel in the affidavit in support of the application as to why it was the case. Although it was represented, it had no intention of filing a statement of defence. The thought of seeking to file a statement of defence came up twelve (12) years down the line. In the circumstances it was not erroneous on the part of the learned Magistrate to reach a finding that the intention of the Appellant herein was to delay the course of justice.

19. In the premises, the Appeal lacks merit and is dismissed with costs to the 1<sup>st</sup> Respondent.

20. Consequently the file shall be placed before the Chief Magistrate's Court for purposes of writing a Judgment.

21. Mention on the **20<sup>th</sup> June, 2018.**

22. It is so ordered.

**Dated, Signed and Delivered at Kitui this 16<sup>th</sup> day of May, 2018.**

**L. N. MUTENDE**

**JUDGE**