



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 224 OF 2010

1. VEGPRO (K) LIMITED 1ST APPELLANT

2. GEORGE MUIRURI 2ND APPELLANT

-VERSUS-

1. NAOMI WAMBUI MATHU 1ST RESPONDENT

2. WIFRED NYARUKI NYAMETO 2ND RESPONDENT

3. DAMARIS BONARERI AIMA.....3RD RESPONDENT

4. JANE MORAGWA OCHEGO 4TH RESPONDENT

5. PETER ONTWEKA KIYONDI 5TH RESPONDENT

6. JULIUS MUNGAI 6TH RESPONDENT

6. LUCY WANJIKU WAWERU 7TH RESPONDENT

7. JOHNSON IKWABE RIOBA 8TH RESPONDENT

8. MARGARET WAMBUI MACHARIA 9TH RESPONDENT

9. TOM ONGUTI 10TH RESPONDENT

10. TABITHA GATHONI 11TH RESPONDENT

11. MODESTER MONYERA SHIHOMOLI 10TH RESPONDENT

12. SAMUEL WAINAINA WAMBOI 11TH RESPONDENT

13. MIRICAH WANGARI GITAU 14TH RESPONDENT

15. EUNICE WAMBUI WANJIKU 15TH RESPONDENT

16. ANN WANJIRU THUKU 16TH RESPONDENT

17. HANNAH WANJIRU THUKU 17TH RESPONDENT

(Appeal from the Ruling of the Principal Magistrate dated 17th Day of August 2010 in Naivasha Senior Principal Magistrate's Court Civil Cases No. 297, 298, 299, 301, 415, 416, 417, 418, 419, 420, 421, 423, 424, 599, 600, 601 and 602 of 2008)

JUDGMENT

1. Background

Arising from a motor vehicle accident along the Moi/South Lake road at Naivasha involving motor vehicle Registration Number KTQ 686 property of the 1st Appellant and being driven by the 2nd Appellant's authorised driver, eighteen(18) persons alleged to have been authorised passengers were injured. They each filed separate suits against the Appellants and upon hearing of the suits, judgments for each individual plaintiffs now Respondents in this Appeal were entered in terms of general and special damages.

2. During the hearing of the various suits before the trial magistrate at Naivasha, three consent orders were recorded by Advocates for the Appellants and the Respondents. Judgments were delivered in the various cases by the trial magistrate on diverse dates.

A dispute however arose when the Respondents took out execution proceedings against the appellants who sought stay of execution orders pending hearing and determination of this appeal. Execution was stayed.

3. The appellants filed this appeal against the trial Magistrates **Ruling dated 17th August 2010 dismissing the appellant's application for review dated 17th August 2010 made in Naivasha SPMCC No. 297 of 2008, and in all the other seventeen(17) suits.** It was made under **Order XLIV Rule 1 and Order L Rule 1 of Civil Procedure Rules (now Order 45 of Civil Procedure Rules)** being an application for review. Prayer No. 3 is in the following terms:

3. That Judgment delivered on the 19th May 2010 be reviewed viz a viz

a) That there was a mistake on record

b) There was an apparent error on record and the court on consents that were none existent in Naivasha SPMCC No.300 of 2008.

4. That Judgment/decree be set aside entirely and the suit be heard on its merit as provided for under the Civil Procedure Rules.

4. The grounds for the Review application are stated as follows:

(b) That while pronouncing judgment the court erred in referring to consents in SPMCC No. 300 of 2008 that were erroneous and non existent,

(c) That it was never consented to treat SPMCC 300/2008 as a test suit on liability,

d) That each case was filed separately and ought to have been heard and determined as such.

5. Upon hearing the Review application, the trial magistrate in the **Ruling dated 17th August 2010** dismissed the application on grounds that the court was not satisfied that there was an error apparent on the face of the court record or any new evidence discovered that could not have been placed before the court at the time of hearing of the suit.

This order was to apply to all the other seventeen cases.

It is this order that is the subject of the appeal.

Parties filed submissions on the appeal and proceeded to highlight them.

6. Issues for determination

At the centre of this appeal are the **four consent orders** recorded by the parties advocates in respect of liability as well as the manner of assessment of damages in each of the cases. I have seen them.

They are dated 16th October 2009, 24th March 2010, 31st March 2010 and 14th April 2010.

7. In my opinion, the proper construction and intended meaning of these consent orders will resolve the issues raised in the Appeal, and whether the application for review of the judgments arising from the various cases was merited and if so, whether the trial magistrate erred and misdirected himself in dismissing the application for review.

8. Analysis of submissions and findings:

I will herebelow reproduce the four consent orders.

9. Consent order **dated 16th October 2009** was as follows:

“By consent the evidence of PW2 be adopted in all the files mentioned and exhibits produced” (Recorded in SPMCC No. 300/2008).

The other files mentioned to which this consent would apply are (as per court record):

SPMCC Nos. 297/2008, 299/2008, 602/2008, 415/2008, 416/2008, 417/2008, 418/2008, 420/2008, 421/2008, 423/2008, 424/2008, 419/2008, 298/2008, 422/2008, 301/2008, 599/2008, 600/2008 and 601/2008 (No. 18).

10. Consent order **dated 31st March 2010** recorded in SPMCC No. 300/2008.

“By consent evidence tendered in respect of the files be used for purpose of assessing general damages without calling the plaintiff.”

The evidence referred to above is the medical reports prepared by Dr. Kiamba in respect of each claimant in the same cases I have stated above.

11. Consent order **dated 24th March 2010** – also recorded in SPMCC No. 300/2008.

“By consent medical report exhibit 12, receipt for medical report Exhibit 10, court attendance receipt for Kshs.10,000/= Exhibit 13.”

12. Consent order **dated 14th April 2010** also in SPMCC 300/2008

“By consent evidence in this file as to causation of this accident do apply to all the files.”

13. This is the first appellate court. I am obligated to revisit and re-evaluate the evidence adduced before the trial magistrate, and find out whether the trial magistrate's findings were based on the evidence on record or not, with a view to coming up with my own findings - **Eunice Auma Onyango -vs- Salin Akinyi Oluoch (2015) e KLR and Mwanasokoni -vs- Kenya Bus Services Ltd (1982-88) I KAR 278** among others.

While re-evaluating the evidence before the trial court, an appellate court will be very reluctant to interfere with factual conclusions made by the trial court unless there are glaring contradictions by the witnesses and their credibility is at issue – **Karuga -vs- Karuga & Another (1988) e KLR 348**.

14. The findings of the trial magistrate in the impugned ruling were that the Orders reproduced above were by consent of counsel or the parties. At all times the appellants were represented by Mr. Mburu Advocate instructed by the firm of Jones & Jones, Advocates for the Appellant.

15. I have considered arguments before the trial magistrate on the application for Review on grounds of mistake and error apparent on the face of the record.

I agree with the Appellants that there was no express consent order recorded in SPMCC No.300/2008 being selected as a test suit on either liability or quantum in respect of the eighteen(18) cases. There was no consent on liability either, and I find none on record.

16. However, **the matter of liability and manner of determining quantum of damages for the eighteen claimants were settled in the consents recorded on the 16th October, 2009, 24th April 2010, 31st March 2010 and 14th April 2010**. If indeed there was a mistake in their recording the appellants did not apply to set the consent orders aside. They waited until judgments were delivered and execution proceedings taken against the appellants.

17. **On liability**

My understanding of the consent order recorded on the **14th April 2010 in SPMCC 300/2008 is that judgment on liability in that case, as far as the causation of the accident is concerned, would apply to all the other seventeen files**. Judgment on liability in the said file was delivered on the 19th May 2010 to the effect that the appellants were found to be jointly and severally wholly to blame for the accident at 100%.

18. I do not understand how the appellants interprets the consent order because, if the trial magistrate were to apply the evidence in this case to the others, it would come to the same findings and by implication, that the appellants would be held 100% to blame for the accident.

That in my view, was the intention when the advocates were recording the consent orders. No contrary interpretation was offered.

The consent order on causation of the accident is clear, and plain. I do not see any ambiguity therein to warrant review due to any error or mistake. The appellant has not pointed to any. See **Abdullahi Mohamud -vs- Mohammad Kahiye (2015) e KLR and Kwame Kariuki & Another -vs- Mohammed Hassan Ali & 4 Others (2014) e KLR**. The relief of review is only available where an appeal has not been preferred against an order or judgment.

19. On an error apparent on the face of the record to warrant a review the court must be satisfied that the error is self evident and need no elaborate argument to be established – **Mwihoko Housing Co. Ltd -vs- Equity Building Society (2007) 2 KLR**.

The application must be clear and specific on the alleged error or mistake – **Court of Appeal No. 293/2014 Board of Trustees NSSF -vs- Michael Mwalo (2015) e KLR.**

20. Whichever way I revisit and reconsider the consent orders, I find no error, or mistake on their face. However whoever wants a court to find in his favour must prove the allegations. It cannot be enough to just allege hoping the court would somehow agree with the party – **Section 107 – 109 Evidence Act.**

It is settled law that a consent order or judgment can only be set aside on grounds that justify setting aside a contract or agreement and only on grounds of fraud, collusion or any other reason which would enable the court to set aside an agreement -**Brooke Bond Liebig -vs- Nallya (1975)EA 266.**

21. I do not find on what basis Mr. Mahinda Advocate for the appellants submits that the consent orders were wrongly on record, and ought not form part of the court record, yet so long as the consent orders are not set aside, varied or discharged, they shall remain on record. There was no allegation that the consent orders were recorded without the appellants consent or authority or that they were against public policy or that they were fraudulently recorded – **Civil Appeal No. 275/2010 Pancras T. Swai -vs- Kenya Breweries Ltd (2010) e KLR.** No submission was made to that effect.

22. Further, no evidence on any new evidence that may have been discovered was placed before the court. No mistake in recording the consent orders was demonstrated at all – **Order 45 of Civil Procedure Rules** - the appellants Advocate Mr. Mburu having fully participated in recording the consents.

It is therefore my finding that the consent order on liability is properly and competently on record. The trial magistrate found no sufficient grounds upon which he would have reviewed the consent order on liability, and the other orders. I too cannot find any. The judgment delivered on **liability in SPMCC 300/2008** is on record and properly so. The finding on liability in the case applies to all the other eighteen cases, to the effect that the appellants are jointly and severally wholly (100%) to blame for the accident.

23. Consent Order recorded on 24th March 2010

This consent was basically on the matter of special damages, being medical report fees, doctors fees on court attendance and the medical report itself, and was recorded – in SPMCC No.300/2008.

Each of the eighteen(18) claimants in the various suits paid the fees in respect of the Medical expenses. The Doctor was on his feet at the time. It made sense that the Advocates including the Appellants, agreed that the Doctor produces all his documents for all the eighteen claimants then, instead of coming to court eighteen times, to obviously save time and costs. The consent was initiated by the Appellants advocate Mr. Mburu. It is on record that the claimants were in court and ready to testify and produce their receipts on medical expenses.

A party cannot give with one hand and take with the other. I find no reason to fault the trial magistrate on his finding. I do not agree with the Appellant's submission that the trial magistrate did not understand, appreciate and pay attention to the application for review. I find no misdirection in law or fact.

24. On Consent order recorded on the 31st March 2010 in SPMCC 300/2008

This is in respect of assessment of damages for each of the claimants. My understanding of this order is that the evidence adduced on the claimants injuries meaning the medical records produced by the doctor and receipts for medical expenses – see consent dated 24th March 2010, were admitted as exhibits without calling the plaintiffs, and would therefore be the basis upon which the trial court would assess general damages arising from the plaintiffs injuries.

I do not see any ambiguity or error or mistake thereon. If there was any misunderstanding for instance or mistake, the appellants could not have proceeded to file their submissions on quantum of damages and take the ensuing judgments. They would have moved the court earlier, before judgment.

25. Upon closure of the appellants case, the court recorded that

“Judgment on 19th May 2010. Submissions be put in by both counsels. Orders to apply to all the 18 files.”

In **Kenya Commercial Bank Ltd -vs- Benjoh Amalgamated Ltd & Another – Civil Appeal No. 276 of 1997**, the Court of Appeal rendered that:

“Prima facie, any order made in the presence and with consent of counsel is binding on all parties to the proceedings or action --- and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court --- or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”

26. I have agonised over the appellants submissions on these consent orders. At no one time did the appellant plead or prove fraud or collusion. Mistake is stated but was not substantiated.

It is trite that an advocate has authority to act in the best interest of his client, and to compromise his case. I have considered submissions by

the appellant on the 31st March 2010 on the evidence tendered for use in the assessment of damages without calling the plaintiff.

It has not been submitted or suggested by the appellants that Mr. Mburu Advocate who was party to the consent orders had no authority to record the consents or that he acted malafide and contrary to instructions. That being so, then the intention of the parties Advocates ought be respected. I do not think the advocates had any bad intentions in compromising their clients cases – **Specialised Engineering Co. Ltd (1980) e KLR.**

27. It was submitted by Mr. Mahinda for the appellants that the Application for Review was not made in SPMCC No. 300/2008 but in CMCC No. 297 of 2008 (Naivasha), and was for Review of judgments and not the consent Orders.

Looking at the grounds upon which the application was based – See paragraph 5 of this judgment – reference was made in **Paragraph 3 of the prayers** sought that:

“There was apparent error on record and the court on consent that were non existent in Naivasha SPMCC No. 300/2008.”

28. I have already made a finding on the above that the consents were recorded in SPMCC No. 300/2008 and were applicable in all the eighteen cases. In my mind it does not matter in which case, out of the eighteen where the consent orders were recorded as it was express and specific that the said consent orders would apply in all the eighteen cases.

29. The objective of **Section 1A, 1B and 3A of the Civil Procedure Act** is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. The Advocates while recording the consent orders were properly guided by the spirit of the above provisions by consolidating the eighteen(18) matters, thereby shortened the time they would have had taken the eighteen cases to be heard individually.

30. In its entirety, and having carefully interrogated the grounds of the appeal and submissions, I am satisfied that the trial magistrate's ruling was a proper reflection of the events prior to and after the ruling under attack and there was no misdirection in law or fact nor did he misunderstand the intention of the Advocates who recorded the consent orders. Consequently I find no merit in the appeal. It is dismissed with costs to the Respondents.

Dated, signed and delivered at Nakuru this 5th Day of July 2018.

J.N. MULWA

JUDGE