



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 526 OF 2014

HUDSON BIRUNDU GETABU.....APPELLANT

- V E R S U S -

CITY HOPPER LIMITED.....RESPONDENT

(Being an appeal from the order of the Chief Magistrate's Court at Milimani

Civil Case No. 10582 of 2007 delivered by Hon. Leah W. Kabaria (Ms) on 07/11/2014)

JUDGEMENT

1) Hudson Birundu Getabu, the appellant herein, filed a compensatory suit before Chief Magistrate's Court, Milimani against City Hopper Ltd, the respondent herein for the injuries he sustained on 18.5.2007 while alighting from the respondent's motor vehicle registration no. KAV 870S at the bus stage along Mbogani Road. The respondent filed a defence to deny the appellant's claim.

2) When the aforesaid suit came up for hearing on 27.5.2014, the same was dismissed for want of prosecution. The appellant filed the motion dated 5th June 2014 in which he sought for the dismissal order to be set aside and for the suit to be reinstated.

3) Hon. L. W. Kabaria, learned Resident Magistrate heard the application and had it dismissed.

4) The appellant was aggrieved by the dismissal order hence he preferred this appeal and put forward the following grounds in his memorandum:

i. The learned trial magistrate erred in law in dismissing the application before the court.

ii. The learned trial magistrate erred in law and in fact in not considering the application on its merits and ended upon in disregarding the submissions of the appellant.

iii. The trial magistrate erred in law in awarding special damages which were not proved by the respondent.

iv. The trial magistrate erred in law in not considering the issue that there was a moratorium on Invesco Assurance Co. Ltd hence the appellant could not have prosecuted the suit.

v. The trial court punished the appellant rather than the advocate in dismissing the application.

5) When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the arguments which were made before the trial court. I have also taken into account the rival written submissions. In the motion dated 5th June 2014 the appellant stated he was not informed by the advocate who held brief on behalf of Jackson Onwenga, the appellant's advocate that the court had issued an order directing the suit to be prosecuted by 22.4.2013 or the same shall stand automatically dismissed and for that reason he sought for the dismissal order to be set aside. The appellant beseeched the trial court not to allow him suffer for the mistakes of his advocate.

4) The record shows that the respondent filed the replying affidavit of Lucy Kamau to oppose the motion in which the deponent averred that the appellant has been indolent and was never ready to proceed with the hearing of the case on 22.4.2013 when the court issued orders directing the appellant to prosecute the suit by 30.8.2014. The respondent urged the trial court not to reinstate the suit because to do so would prejudice its defence.

6) Upon taking into consideration the competing arguments, the learned Resident Magistrate noted that the appellant was indolent and was not eager to prosecute his case.

7) I have on my part re-evaluated those arguments which were presented before the trial court. The appellant specifically stated that he was not aware that there was an order issued to the effect that the suit must be prosecuted by 30.8.2013. The record shows that the appellant's averment that the advocate who attended court on 22.4.2013 did not report back to the appellant's advocate about the new development. That averment was not controverted by the respondent.

8) The respondent on its part has not presented any evidence to show the prejudice it would suffer if the suit was reinstated. The record shows that on 22.4.2013 the suit came up for hearing but could not proceed for hearing because the appellant was yet to undergo a second medical examination. It was argued that the doctor who was to examine the appellant had relocated elsewhere from his known clinic hence it was difficult to trace the doctor.

9) The record further shows that the learned Resident Magistrate noted that the suit was filed in 2007 and has been adjourned every occasion it comes up for hearing. It was also noted by the trial magistrate that there was no explanation given as to why the appellant had failed to avail himself for a second medical examination.

10) The learned Resident Magistrate proceeded to adjourn the hearing of the suit but directed the appellant to prosecute the suit by 30th August 2013 in default the suit would stand dismissed for want of prosecution. At that time one Mr. Mahungu held brief for Mr. Omwenga for the appellant.

11) When the suit came up for hearing on 30.8.2013, both parties failed to attend court prompting the court to adjourn the matter with an order referring back the file to the registry.

12) On 19.11.2013, a representative of the appellant's advocate appeared before the registry and had the matter fixed for hearing on 27.5.2014. On the aforesaid date one M/s Maina who held brief for Mr. Omwenga learned advocate for the appellant informed the trial magistrate that the appellant was ready for hearing and sought for time allocation.

13) The respondent's advocate told the trial magistrate that the respondent was not ready to proceed for hearing because the witness, a doctor, who was supposed to testify had travelled to Malindi. It is at this point that the learned Resident Magistrate informed the parties that since the suit was not prosecuted before 30.8.2013, the same got automatically dismissed for want of prosecution by virtue of her orders issued on 22.4.2013.

14) I have already noted that the trial magistrate in her ruling dismissing the motion dated 5th June 2014 stated the appellant was indolent and was not keen in prosecuting this suit.

15) With respect, I think the learned Resident Magistrate misapprehended the point here. The appellant had specifically stated that he was not informed about the order given on 22.4.2013 directing him to prosecute his case by 30.8.2013.

16) It is also clear from the record that the plaintiff was always eager to have the suit prosecuted. This is evident in the proceedings of 27.5.2014 when the appellant stated he was ready to proceed for hearing and that he needed to be given time allocation. I agree with the submissions of the appellant that the learned Resident Magistrate completely disregarded his submissions.

17) The appellant's assertion that his advocate was not informed of the orders made on 22.4.2013 was controverted. I also agree with the appellant's submission that the appellant was punished for the mistakes of his advocate. Had the learned Resident Magistrate carefully considered the material placed before her, she would have come to a different conclusion over the motion dated 5th June 2014.

18) In the end, I find the appellant's appeal meritorious, it is allowed.

Consequently, the order dismissing the motion dated 5/6/2014 is set aside and is substituted with an order allowing the aforesaid motion.

19) The end result is that the appellant's suit is reinstated and the same be heard on priority basis by another magistrate of competent jurisdiction other than Hon. L. W. Kabaria.

20) In the circumstances of this appeal, I am convinced that a fair order on costs is to order which I hereby do that each party bears its own costs.

Dated, Signed and Delivered in open court this 9th day of November, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondents