REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 237 OF 2009

ZIPPORAH N. GICHIA…….APPELLANT

VERSUS

SIMON CHEGE……..RESPONDENT

(Appeal from the original judgment and decree of Hon. E.N. Maina (SPM) in Milimani CMCC No. 13288 of 2004 (previously Murang'a SPMCC No. 37 of 2003) delivered on 6th March, 2007)

CONSOLIDATED WITH

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 553 OF 2015

ZIPPORAH N. GICHIA…….APPELLANT

VERSUS

SIMON CHEGE……..RESPONDENT

(Appeal against the ruling of Hon. Mburu D.W. Principal Magistrate dated 23rd October, 2015 delivered in Milimani CMCC No. 13288 of 2004 (previously Murang'a SPMCC No. 37 of 2003))

JUDGMENT

The appellant sued the respondent for recovery of damages she suffered as a result of an accident which occurred on 24th May, 2002. The trial magistrate heard the case and found the respondent liable for the accident. She then awarded the appellant KShs.650,000/- as general damages and KShs.56,059/= as special damages.

Subsequent to the delivery of judgment, the parties on 29th December, 2014 entered into consent on the following terms.

" i. That the defendant do pay the plaintiff KShs.1,475,000/= in final settlement of the decree.

ii. That the KShs.700,000/= to be paid on or before 31st January, 2015.

iii. That the defendant do pay KShs.100,000/= by 28th February, 2015.

iv. That subsequent thereto, KShs.100,000/= by 30th of each succeeding month until payment in full.

v. That the defendant to pay auctioneers fees to be agreed or taxed.

vi. That in default, execution."

The appellant filed an application dated 3rd August, 2015 seeking orders that the court grants orders to adopt all costs and expenses incurred by the appellant as awarded by the court from the judgment and the rulings and the orders made from all applications; that the defendant be ordered to clear all outstanding decretal amount plus all the money the plaintiff had spent in tracing the judgment debtor for six weeks; that the plaintiff be allowed to file bill of costs, that the defendant took advantage of the plaintiff and her state (sick) being a layman and her poor health during the consent order which was omitted and was very important since 2003 to date, the applicant has been coming to court through private means (taxi).

The motion was opposed on the grounds that he and the appellant agreed on the terms of settlement of the appellant's claim and the said terms were adopted as the orders of court vide a consent that was recorded on 29th December, 2014. He stated that he had since paid the appellant KShs.500,000/= as per the annexures SC1 and SC1a in his replying affidavit. He further annexed a letter dated 31st January, 2015 being a forwarding letter for a cheque No. 000080 for KShs.700,000/= being 1st installment payment for the decretal amount as per the terms of the consent of 29th December, 2014. The trial magistrate considered the application and dismissed it on the basis that the terms of the consent were not worded in technical terms.

That the parties were only meant to agree upon the auctioneers fees or it be taxed. That the auctioneer would be the one to file his bill of costs in the event he had not been paid and not the plaintiff. He found that a consent could only be set aside in cases where there was fraud, duress or misrepresentation. That there was no good reason advanced by the appellant to warrant the setting aside of the consent order.

The appellant felt aggrieved by the trial magistrate's decision and filed Nairobi High Court Civil Appeal No. 553 of 2015 appeal based on the following grounds:

i. The learned magistrate erred in law and fact by failing to appreciate that the consent order entered into on 29th December, 2014 failed to clarify that there were four Auctioneers who were all paid by the appellant before they went on the ground for proclamation and attachments in the matter and each of them needed to be paid their fees.

ii. The learned magistrate erred in law and fact by finding that Moran Auctioneers were the only auctioneers in the matter and that the total amount to be paid was only KShs.195,520/= as endorsed on a receipt on 21st January, 2015 and the actual figure paid to the said auctioneers Moran was KShs.75,000/= which clearly reflect a fraud since the said auctioneer had already been paid by the appellant KShs.30,000/= and they did all this in bad faith without the consent of the appellant who had offered them the services. The said amount could not be shared by four auctioneers who had not appointed Moran to collect on their behalf.

iii. The learned magistrate erred in law and fact by failing to appreciate that there was misrepresentation by the lawyers of the respondent who glossed over the issues of costs and auctioneers fees by taking advantage of the appellant being a layman.

iv. The learned magistrate erred in law and in fact by failing to find the appellant had indeed paid all the auctioneers with her own money and was entitled to refund the same is supported by all receipts in the court file and was served to the respondent on March, 2015 which he had not responded or disputed in short there was absolutely no reason as to how he could evade money

which was paid out of his own mess (contempt).

v. The learned trial magistrate erred in law and fact by failing to find that the appellant was entitled to file bill of costs since the consent signed by the parties was about this.

vi. The learned trial magistrate erred in law and fact by failing to observe that even the simplest form of language in legal documents is jargon to the lay person. The magistrate never captured the facts of the appellant and conduct of the respondent.

vii. The learned trial magistrate erred in law and fact by finding that the appellant's application dated 3rd August, 2015 had no merits and yet there were overwhelming grounds and reasons in support of the same which was inconsistent with his ruling.

viii. Any other reasons to be conducted at the hearing hereof.

High Court Civil Appeal No. 237 of 2009 was on the other hand filed on the following grounds:

i. The learned trial magistrate erred in law and in fact for basing her fact in awarding the general damages to the appellant on lower side.

ii. The learned magistrate erred in law and fact by basing her finding on wrong facts and not taking into account the extent of the appellant's injuries.

iii. The learned magistrate seriously erred in law and facts by dismissing the hospital receipts and other expenses for reason they were not having a Kenya Revenue Stamp.

iv. The learned magistrate erred in law and facts by not taking the appellant doctor seriously and failed to note the extent of injuries suffered.

v. The learned magistrate erred in law and fact for not considering the appellant will always suffer from the injuries throughout her life.

vi. The learned magistrate erred in law and facts for refusing to compensate the appellant for the medicine and drugs to be taken by the appellant all through.

vii. The learned magistrate erred in law and fact by not considering the nine severe injuries suffered by the appellant as described in the Dr. James Mogire testimony and medical report.

viii. The learned magistrate erred in law and fact by not carefully scrutinizing the authorities cited to guide her in arriving to her judgment.

ix. The learned magistrate erred in law and facts for awarding KShs.650,000 and KShs.56,059 in general and special damages being reduced to half of all what the appellant had asked and prayed for.

It was submitted on behalf of the appellant that had there been an intention to compromise the appeal while recording the consent, then there would have been a clause so providing. That the appellant as a lay person would not have appreciated the importance of dealing with the issues of the pending appeal. That to her, the consent dealt with the amount already awarded by lower court and had nothing to do with the appeal. That since she had a judgment, she was entitled to get what she was entitled to as she awaited the outcome of the appeal. That the consent was not a bar to her appealing.

It was further submitted that the trial magistrate failed to consider the degree of injuries suffered by the appellant, the incapacity and the fact that she still required medication and was unable to undertake any economic activities. That she ought to have awarded a higher amount of damages bearing the said factors in mind. The appellant relied on **MSA HCCC No. 70 of 1997 Edward Mzamili Katana v. CMC**

Motors Group Limited where the court awarded KShs.2,000,000/-, **Kisumu HCCC No. 35 of 2004 Julian Anyango Kuni v. United Millers Limited** where the court awarded KShs.1,500,000/-, **Nairobi HCCC No. 1015 of 2003 A.A.M v. Justus Gisairo Ndarera** where the court awarded KShs.2.5 Million and **Nairobi HCCC No. 145 of 2010 Rosemary Wanjiru Kungu v. Elijah Macharia Githinji** where the court awarded KShs. 3 Million.

It was submitted that the rejection of her receipts because of lack of revenue stamps was a misdirection. That the magistrate acted contrary to section 19 (3) of the Stamp Duty Act Cap 480 Laws of Kenya. That she ought have impounded the receipts and forwarded them to the stamp collector to afford the plaintiff opportunity to apply for leave from collector of stamp duty.

On the other hand, the respondent submitted that at the time of recording the consent, none of the parties was represented by counsel. That the court order extracted by the appellant has never been challenged and cannot therefore be subject of appeal. It was argued that the decree having been finally settled in terms of a consent order, it cannot subsequent to the consent order be a subject of an appeal. The respondent referred to a vast number of authorities on the principles of setting aside of a consent order and submitted that the consent between the appellant and the respondent does not fall within the purview of a consent that can be set aside. Among them; **The Board of Trustees National Social Security Fund v. Michael Mwalo (2015) eKLR** and **Kenya Commercial Bank Ltd v. Specialised Engineering Co. Ltd (1982) KLR 485**.The respondent contended that on the face of record what the appellant had taken to court would never been subject of the judgment under appeal and that the ailment of which she was under treatment would not be a subject of the injuries that arose from the accident in issue. Some of the documents used to illustrate the said submission were Kenyatta National Hospital Case Summary dated 29th October, 2010, Meridian Equator Hospital Discharge summary dated 24th March, 2012, Dr. Kiongi Mwaura's diagnosis dated 2nd February, 2011 and Cash sale receipt from Sigis restaurant. It was further contended that it was upon the appellant to prove her pleadings on special damages. On the probative value of the receipts produced by the appellant, the respondent cited **Leonard Nyongesa v. Derrick Ngula, Mombasa Civil Appeal No. 168 of 2008 (unreported)**.

In determining the said issues, this court is minded of its duty as a first appellate court to re-evaluate, re-assess and re-analyse the evidence on record and reach its own determination. See **Selle v. Associated Motor Boat Company Ltd [1968] EA 123.** The court in considering this appeal must remain guided by the principles enunciated in **PIL Kenya Ltd v. Oppong [2009] KLR 422** that it will not interfere with the decision of the trial court unless it is satisfied that the trial court misdirected itself and as a result arrived at a wrong decision.

From the foregoing, and in my view the issues for this court's determination are:

i. Whether or not the trial magistrate misdirected himself in failing to set aside the consent order.

ii. Whether or not the consent could compromise Nairobi High Court Civil Appeal in 237 of 2009.

The principles to be considered in determining whether or not to set aside a consent order are well settled. In **Flora N. Wasike v. Destimo Wamboko [1982-88] 1 KAR 625** Hancox JA held as follows:

> ***"it is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which could justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out…it seems to me that, if a consent order is to be set aside, it can only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract."***

The learned Judge continued at page 627 and cited the decision in **Hirani v. Kassam (1952) 19 EACA 131** at page 134 with approval as follows:

"The mode of paying the debt, then, is part of the consent judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. No such ground is alleged here.

The appellant herein claimed that the respondent's counsel took advantage of the fact that she was a lay person. The consent adopted by the court was in form of a document (page 19 of the record of appeal in 553 of 2015). The said document bore the signatures of the appellant and the respondent. From my reading and analysis of the record, the respondent's counsel was merely present in court during its adoption as an order of the court. It follows therefore that the terms of the consent were by the appellant and the respondent. I say so because the appellant appended her signature to the consent document headed "RE; CONSENT ON CMCC 13288/2004 whose contents are exactly the same as the consent recorded and adopted as court order the appellant has not claimed fraud, coercion or misrepresentation of facts at the time of appending her signature.

The other issue is whether the fact that the appellant was a lay person could warrant the setting aside of the consent. At the time of getting into an agreement with the respondent as to the terms of settlement, the appellant knew all that she wanted and had all the facts with her. She ought to have addressed all her needs then and not after the fact. On this aspect I adopt Judge Nambuye's words in **Hassan Nyanje Charo v. Khatib Mwashetani and Others, Application No. 14 of 2014** thus:

> ***"…The court is also alive to a judicial practice, doctrine to the effect that a court of law is a court of justice and not a court of sympathy. Further that when a litigant choses to litigate on his own human he should be taken to be competent to comprehend the court procedures and be able to conduct his/her proceedings smoothly and at no time should the standard required to be met by such litigant's papers be less than that required of a litigant assisted by legal advice. That both stand on equal footing before the feet of justice…"***

On the second issue, I find bearing in the Court of Appeal's decision of Livingstone **Kunini Ntutu v. County Council of Narok (2015) e KLR** where it was stated as follows:

> ***"The appellant's counsel submitted that the consent judgment, having been sanctioned by the court, constituted a determination of the matters in controversy contained in the pleadings and the agreement. He cited the case of KENYA COMMERCIAL BANK v MUIRI COFFEE ESTATE LIMITED & 4 OTHERS, Civil Appeal no. 100 of 2010 where this Court held that a consent judgment determines the issues which are subject of the controversy in a matter and those issues cannot be re-litigated once settled. See also section 7 of the Civil Procedure Act.***
>
> ***In POP-IN (KENYA) LIMITD & 3 OTHERS v HABIB BANK A.G.ZURICH, [1990] eKLR, this Court held that:***
>
> ***"Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this was permitted litigation would have no end except when "legal ingenuity is exhausted".***
>
> ***The 1st respondent's advocate tried to draw a distinction between a consent judgment entered into between the parties disposing of a suit and a judgment delivered by a court. In his view, since the alleged unconstitutionality and illegality in the said consent was occasioned by the parties and their respective advocates and not by the trial judge, it was in order for the court to review the judgment. We do not agree. This Court in KENYA COMMERCIAL BANK v MUIRI COFFEE LIMITED & OTHERS***
>
> ***(supra) held that in an application for review, it does not matter that the judgment was by consent and not on merits. In our view, therefore, the matters in controversy in the suit became res judicata upon entry of the consent judgment. The 1st respondent was estopped from reneging***

on the consent and attempting to found a new cause of action. It is the 1st respondent who approached the appellant for a settlement of the suit between them and as a result the appellant lost the opportunity to prosecute his case against the 1st respondent. And when the 2nd respondent attempted to quash the said consent, the 1st respondent vehemently opposed the 2nd respondent's application. In the circumstances, the 1st respondent, in seeking to set aside its own freely negotiated consent, was a classical case of approbating and reprobating which the law frowns upon. The 1st respondent was estopped from so doing."

In view of the foregoing, since the appellant subjected herself to the terms of the consent, appealing against the trial magistrate's judgment on damages would be res judicata since the consent judgment had settled her suit. The appellant's appeal against the consent order cannot also stand as she has not shown good reasons why the same should be set aside. This court finds that the two appeals have no merits and they are hereby dismissed with no orders as to costs.

Dated, Delivered and Signed at Nairobi this 9th day of March, 2017.

…….

L. NJUGUNA

JUDGE

In the presence of

…….***For the Appellant.***

……..***For the Respondent.***