



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO. 744 OF 2002

EMMANUEL MWANGEMI MWANSIAPPELLANT

VERSUS

TEITA SISAL ESTATE LIMITEDRESPONDENT

JUDGMENT

1. This appeal arises from the judgment and decree of the Resident Magistrate Mrs E. Maina (as she then was) dated 8th November 2002 in Nairobi CMCC No. 8921 of 2000.
2. The appellant, Emmanuel Mwangemi Mwasi was the plaintiff in the subordinate court. He sued the respondent Teita Estate Limited by a plaint dated 9th November 1999 claiming for damages for the injuries that he allegedly sustained on 6th March 1007 while he was engaged upon his duties at the respondent/employer's premises, while brushing the floor, he slipped and thereby injuring himself. He allegedly sustained injuries involving:
 - a. Bruising in the chest and back.
 - b. Presently pain in the chest area.
3. He claimed for general damages and special damages of shs 2000 costs of the suit and interest at court rates. The appellant blamed the respondent, his employer for the accident and injury and set out particulars of negligence and breach of statutory duty of care.
4. The respondent filed defence dated 23rd January 2001 denying the appellant's claim and allegation of negligence/breach of statutory duty of care. It also denied that the appellant was injured while on duty as claimed and also set out particulars of the appellant's own negligence, while maintaining that in any event the appellant engaged upon duties which were not allocated to him.
5. The lower court record shows that the suit was set down for hearing. On 16th October 2001, the parties appeared to be negotiating for a settlement hence it was slated for mention on 26th November 2001 with a view to recording a settlement which was never reached and on 26th November 2001 the matter was stood over generally.
6. On 29th October 2002, the matter came up for hearing which date was fixed by consent before E.N. Maina on 17th September 2002 when it was adjourned because the doctor was not available.
7. On 29th October 2002, the court record shows that the plaintiff was not in court and only Miss Ombima for the defendant/respondent herein was in court. The court set the hearing for 10.50 a.m.

8. At 10.50 a.m, the trial magistrate recorded that the plaintiff was still absent. The defence case proceeded with 3 witnesses and its case closed. Judgment was slated for 8th November 2002 at 2.30 pm.
9. On 8th November, judgment was delivered in the presence of Ms Ombima for the defendant and Mrs Nyamu held brief for Mr Oduk advocate for the plaintiff.
10. In the brief judgment, the trial magistrate found that the plaintiff/appellant had not attended court to prosecute her case and that the defence had called evidence to controvert her pleadings that she had on 6th March 1997 slipped and fallen at her place of work. The trial magistrate accordingly dismissed the appellant's case with costs to the respondent. It is that judgment that provoked this appeal by the appellant.
11. The Memorandum of Appeal filed on 4th December 2002 and dated the same day sets out the following 5 grounds of appeal namely:
 1. That the trial court erred in fact in calling for the proceedings with the suit in the absence of the plaintiff when the same did not appear and was not listed in the daily cause list.
 2. The learned trial magistrate erred in law and in fact in calling for the hearing of the suit at an earlier time (10.15 a.m.) than the time she had already allocated for the hearing to take place (11.00am) and thereby denied the plaintiff a chance to present his case.
 3. The learned trial magistrate erred in law in failing to conduct the proceedings according to law by taking only (unprocedurally) the defendant's case.
 4. The learned trial magistrate erred in dismissing the suit allegedly for want of prosecution on the grounds that the defendant had rebutted the claim yet the defendant prosecuted the claim and the plaintiff's case was not presented to afford the defence an opportunity of rebuttal.
 5. The whole trial was mischievous and a nullity and the exercise was prejudicial to the plaintiff's case.
12. The appellant prayed that the appeal be allowed and the judgment dated 8th November 2002 be set aside; and that the court do order the suit remanded for hearing before any other magistrate.
13. The appeal was admitted to hearing on 19th March 2014 despite the earlier attempts to have it dismissed for want of prosecution.
14. On 15th December 2015 parties advocates Mr Oduk for the appellant and Miss Kairu for the respondent appeared before me and argued the appeal orally. None of the parties relied on any decided case or statutory provisions of the law.
15. In his submissions, Mr Oduk submitted, relying on the grounds of appeal as set out in the Memorandum of Appeal. According to Mr Oduk, the proceedings in the subordinate court do not reflect that the file had been placed aside for hearing at 11.00 am. He attacked the decision by the trial magistrate in allowing the defendant to present its case in rebuttal.
16. Further, he complained that the time allocated for the hearing was not adhered to and instead the file was called at 10.50 thereby misleading the parties. That when counsel went to court at 11.00 am he found when the matter had been concluded. It was further submitted that it was an exercise which was a nullity as the court ought not to have allowed the defendant/respondent to rebut its case in the absence of the plaintiff. He urged this court to allow the appeal, set aside the order of dismissal and reinstate the suit for hearing and determination on merits with costs.
17. The appeal was opposed by Miss Kairu who submitted that the lower court record was clear that the suit was to be heard at 10.50 am and not 11.00a.m. Further, that the appellant has never shown any interest in prosecuting this appeal which was filed in 2008 and which has taken more than 7 years to have it prosecuted. She prayed that the appeal be dismissed with costs to the respondent.
18. In a rejoinder, Mr Oduk counsel for the appellant submitted that the court erred by proceeding in the absence of the plaintiff and gave judgment on 8th November 2002 and the appeal was filed on 4th December 2002. That delay in prosecuting this appeal is administrative delay which is not material before the court. Further, that the file had been left in the registry when the appellant's counsel went and had it brought before the magistrate on the material day and that counsel protested the hearing in the plaintiff's and his counsel's absence but that the trial magistrate threw the file at the advocate saying he could read it for himself.

19. This being the first appeal, I am reminded of my primary role to re-evaluate, reassess and re-analyze the extracts on the record and then determine whether the conclusions reached by the trial court are to stand or not and give reasons either way (See **Kenya Ports Authority V Kuston (Kenya) Ltd (2009) 2 EA 212** wherein the Court of Appeal held, inter alia that:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

20. In my assessment, based on the rival arguments set out above, the appeal herein is hinged on the following questions/issues:

- i. Whether the trial magistrate erred in law and fact in proceeding to hear the defence case in the absence of the plaintiff to prosecute his case.
- ii. Whether this appeal is competent.
- iii. Whether this appeal has any merits.
- iv. What orders the court should make.
- v. Who should bear costs of the appeal.

21. I shall determine the above issues together. On whether the trial court erred in law and fact in proceeding to hear the defence case in the absence of the plaintiff to testify, the appellant contends that it was unprocedural for the trial court to let the defence witnesses testify as if the plaintiff had prosecuted and closed its case. The law applicable for dismissal of suits for non attendance to prosecute is the old order IXB Rule 4(1) of the old Civil Procedure Rules which provide that:

“ If on the day fixed for hearing after the suit has been called on for hearing after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.”

22. Thus the law requires the court to dismiss the suit, if the plaintiff is absent, on the day fixed for hearing the suit, but if there is good cause, which must be recorded. It is for the trial court to determine what ‘good cause’ is.

23. Under Order IXB Rule 8 of the Old Civil Procedure Rule, ***“ where judgment has been entered under this order, the court, on application by summons, may set aside or vary judgment and any consequential decree or order upon such terms as are just.”***

24. In **Peter Ngome V Plantex Company Ltd [1983] e KLR**, the Court of Appeal, when interpreting the provisions of Order IXB Rule 4 (1) of the Civil Procedure Rules stated that:

“ In my view, a judgment is a judicial determination or decision of a court on the main questions in a proceeding and includes a dismissal of the proceedings or a suit under Order IXB Rule 4(1) or under any other provision of the law. A dismissal of the suit under Order IXB Rule 4(1) is a judgment for the defendant against the plaintiff. An application under Order IXB Rule 3 includes application to set aside the dismissal. This must be so because when neither party attends court on the day fixed for hearing, after the suit has been called on for hearing outside the court, the court may dismiss the suit and in that event, either party may apply under Rule 8 to have the dismissed suit set aside or the plaintiff may bring a fresh suit subject to any law of limitation of actions.....This, I think, clearly shows that Rule 7(2) was intended to bar a plaintiff whose suit has been dismissed under Rule 4(1) only from bringing a fresh suit. That provision does not bar such a plaintiff from applying for the dismissal to be set aside under Rule 8.”

25. The above Court of Appeal, citing **Herman Magachia V Hamis Mwakibundu & Another CA NOS. 59 and 89 of 1983** (unreported) *stated; Obiter:*

“ Rule 4 provides for entering judgment in default by the plaintiff to attend court on the day fixed for hearing his case and Rule 8 is the provision under which an application to set aside such ex parte judgment under Order IXB may be made.”

26. In **Mulla on Indian Civil Procedure Code page 802 paragraph 2-**

“ A plaintiff whose suit is dismissed under Rule 8 for default of appearance on the day fixed for the hearing, cannot appeal from the order of dismissal, as such an order is not a decree...but may apply under this rule for an order set aside the order of dismissal.”

27. In this case however, the trial magistrate upon finding that the plaintiff/appellant was not present to prosecute his case, went ahead to allow the defendant/respondent to state its case, call witnesses, produce exhibits and she proceeded to deliver a judgment and therefore a decree had to issue, dismissing the appellant's suit with costs. It is for that reason that there was a decree that the appellant had to file this appeal. However, had the suit been dismissed for non attendance without the defence which had no counterclaim adducing evidence, the appellant had an unfettered right under Order 12 Rule 7 to apply for setting aside the order of dismissal of his suit for non attendance. It is at that stage of the application that the appellant could have, by way of affidavit evidence, provided the reasons for the failure to attend court at 10.50 for hearing of his case leading to its dismissal.

28. The appellant's counsel has submitted that it was an error of law to proceed with the defence hearing at 10.50 am when the hearing had been slated for 11.00 a.m and that by the time he arrived in court at 11.00am the hearing had been concluded and an altercation between him and the trial magistrate ensued leading to her throwing the file at him to read the file for himself.

29. In my humble view, those submissions may be evidence of what transpired in court on the material date of the hearing yet they are not made on oath. Submissions cannot be taken to be evidence and this court would not be correct if it were to take those submissions as evidence and rely on them to determine the merits of this appeal. However, this court is entitled to reexamine the record of the lower court and make its own independent conclusion.

30. As stated in the background information summarized hereinabove, the lower court record for 29th October 2002 when the suit was by consent of both parties of 17th September 2002 slated for hearing, only the defendant's counsel Ms Ombima was recorded to be in court. The court then recorded the time for hearing which is erased and overwritten with 10.50 am. The original writing before the overwriting appear to be 11.00 am. Later at 10.50 am, the court recorded that the plaintiff was still absent and DW1 was sworn to testify for the defence. Two other witnesses testified for the defence and judgment was reserved for 8th November 2002 at 2.30pm. The said judgment was delivered promptly on 8th November 2002 as scheduled in the presence of the plaintiff's counsel's representative hence the filing of this appeal.

31. The appellant complains that the court record in the lower court does not reflect that the file had been placed aside for hearing at 11.00a.m. That the file had initially been left in the registry and Mr Oduk went for it. That he also appeared before the trial magistrate on the material day and protested the hearing in their absence but she threw the file at him saying he should read the file himself.

32. As I have stated, that information on the altercation is not on record for consideration. Nonetheless, there is evidence of the trial court proceeding to hear the defence case and writing and delivering judgment on 8th November 2002 dismissing the plaintiff/appellant's case with costs to the defendant/respondent.

33. In my humble view, there was a serious procedural lapse on the part of the trial magistrate. That procedural lapse in my view, went to the core of the legal process in the sense that it denied the appellant an opportunity to be heard on his claim to ventilate his grievances. He was ousted from the judgment seat. There was evidence that the parties had as at 16th

November 2001 been attempting an out of court settlement which did not bear fruit hence the hearing. On 19th September 2002, the suit was adjourned by the court which stated that it could not proceed with a part heard case as the doctor was said to be absent. Then on 29th October 2002, the record by the trial magistrate shows that the matter was slated for hearing at 11.00am but erased and overwritten to left 10.50 a.m. The plaintiff's advocate appears to have gone to court after 11.00am and was furious that the file he had allegedly tracked from the registry had been heard and concluded. No one appears to be precise with the exact timings of the hearing since, going by the lengthy proceedings on record covering 3 witnesses this court doubts that the case could have proceeded and been concluded within 10 minutes. However, the erasures and overwriting by the trial magistrate on the time for hearing created doubt in the mind of this court as to whether indeed the trial proceeded at the allocated time or was changed to the detriment of the appellant.

34. There also appears to have developed bad blood between the appellant's counsel and the trial magistrate.

35. In my humble view, there being no provision for hearing of the defendant's case other than a counterclaim where the plaintiff fails to attend court, the decision by the trial magistrate to hear the defence case was unprocedural. It is for that reason alone that I would allow this appeal.

36. The appellant's counsel prayed that this court sets aside the order of dismissal and reinstates the suit for hearing and determination on merits. Section 78 of the Civil Procedure Act gives power to the appellate court to:

1.

a. Determine a case finally,

b. Remand a case.

c. Frame issues and refer them for trial.

d. Take additional evidence or to require evidence to be taken

e. To order for a new trial;

2. Perform as nearly as may be the same duties as are conferred and imposed by the Act on courts or original jurisdiction in respect of suits instituted therein.

37. Under Order 42 Rule 24 of the Civil Procedure Rules, this court is empowered to remand a case where the suit was disposed of upon a preliminary point and the decree is reversed on appeal. Further, Order 42 Rule 26 empowers this court to order for a new trial to be heard upon setting aside decree of the trial court. In the instant case, as the decree/judgment entered by the trial court was irregular, I find that this is a proper case for a new trial in order to accord the appellant/plaintiff an opportunity to be heard on the merits of his claim.

38. Accordingly, I allow this appeal, set aside the judgment and decree of the trial magistrate in Milimani CMCC No. 8921/2000 and order that the said suit shall be reheard by the subordinate court presided over by another magistrate since the trial magistrate then is now a High Court Judge on its merits interpartes.

39. In view of the old age of the suit, the lower court file shall be expeditiously remitted to the lower court together with this judgment for the suit to be heard on priority basis. As the error was committed by the trial magistrate who flouted the procedure for hearing of cases and or dismissal for non attendance, I order that each party bear their own costs of this appeal.

Dated, signed and delivered in open court at Nairobi this 9th day of March 2016.

R.E. ABURILI

JUDGE

In the presence of :

Miss Kairu for the Respondent

N/A for appellant

Adline: Court Assistant