REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HC. CIVIL APPEAL NO. 56 OF 2013

AJESHKUMAR AGRAVAT &

HASMIYA V. AGRAVAT T/A AGRAVAT & CO.....APPELLANT

VERSUS

NAZERALI HASSANLI

MULLA MANSURALI.....RESPONDENTS

RULING

1. Appeal No.55 and 56 were on 26.5.2016 consolidated by consent of the partes for reasons that they raise same questions of law and that in both similar application seeking dismissal, were lodge. It was therefore directed that proceedings be taken in No.56 and the outcome to bind NO.55 of 2013.

Outline of facts

2. The appellant filed this appeal on 15.5.2013 essentially complaining and impugning the order by the tribunal which declined to extend time within which to file a reference. Simultaneous with the memorandum of appeal was filed a Notice of Motion under certificate of urgency by which the appellant sought stay of execution of the decision of the Tribunal.

3. That application for stay was canvassed before Kasango J, for determination and in a ruling dated 20.9.2013, the Judge allowed the application and made an order staying the Landlord's notice to increase rent. After that ruling, the file was placed before the Judge on 9.10.2014 for purposes of admissions or summary rejection of the appeal when the appeal was admitted but the judge directed that due to shortage of judges at the station, the appeal be listed for hearing when new judges report to the station.

4. There is a reason on the record for the judges direction and I know that under Cap 301, section 15 an appeal to the High Court is the first and last appeal hence a practice has developed over the years whereby such appeals are h heard by two judges. The record of the file is that the file then went into a lull till the 24.2.2016 when the Respondent filed the Notice of Motion dated the same day and sought for orders that:

1. This appeal be dismissed for want of prosecution.

2. This appeal be dismissed for want of jurisdiction of this Honourable court.

3. That costs of this application be provided for in the cause.

5. That application disclosed on its face the broad grounds being that the appellant is guilty or inaction and that the jurisdication of the court to entertain appeals from Business Premises Tribunal is limited by the Act to only decisions emanating from a reference.

6. In opposition to the application the Respondent/Appellant filed a replying affidavit sworn by one JAYESHKUMAR AGRAVAT in which it is deponed that steps were taken to prosecute the appeal as shown by the recrods upto 9.10.2014 when the appeal was admitted and directions given that appeal be fixed for hearing once new judges report at the station and that there were attempts at fixing a date for hearing in July 2015 to no avail. On the prayer to strike out the appeal for want of jurisdiction the respondent terms such, unfair unjust and unconstitutional while relying on the provisions of Article 159 (d) of the Constitution. There was a second replying affidavit sworn by one FAKHRUDDIN HUSSEIN which is word for that sworn by MR.AGRAVAT.

Submission by Parties

7. At the hearing of the application the Respondent/Applicant was represented by Mr.Hassan while Mrs.Moolraj appeared for the Appellant/Respondent. In his oral submissions, Mr.Hassan urged the court that pursuant to Order 42 Rule 13 it was mandatory for the Appellant to list the appeal for direction after the service of the Memorandum of Appeal which obligation the Appellant had failed to meet and therefore compromised the need for timely disposal of the appeal as underscored by Kasango J in the ruling dated 20.9.2013.

8. On jurisdiction, Mr.Hassan submitted that the appeal contravened the provisions of section 15(1) Cap 201 which limits Appeals to the High Court to only those arising from the decision of the Tribunal on a reference and not otherwise. It was pointed out that the decision appeal against declined an application to extend time within which to rile a reference which did not grant to the Appellant the right to appeal as only a party aggrieved in a reference can appeal. He then referred the court decision in Re Hubtula Properties Ltd.[1979] KLR for the proposition that only a decision on a reference attract the right to appeal.

9. In her response Mrs.Moolraj submitted that from the start that indeed the appeal was provoked by the ruling by the Tribunal declining to extend time within which to file a reference out of time. She added that the failure to file reference in time was occasioned by the issuance by the landlord of numerous Notices some of which were withdrawn. In her submission the filing of the Notice of Motion was a reference to the Tribunal and therefore the appeal was duly before the court. She sought to distinguish the decision in Re Hematula Properties Ltd.(supra) as having been based on the fact of a complaint and not an application. She added that in her ruling of 20/9/2013 Kasango J. had underscored the fact the court had jurisdiction. She added that the matter has been pending since 2013 without objection by its Respondent on jurisdiction.

10. On dismissal for want of prosecution the counsel reiterated the affidavits field and summed it up that there had been attempt at prosecuting the appeal and that the provisions of the law cited mandated the court to strive at doing justice between the parties and not knocking out disputes without hearing.

11. In his rejoinder, Mr.Hassan submitted that questions of jurisdiction can be raised at any time and referred the court to the Court of Appeal in the matter of Owners of Motor Vessel Lillian “S”]1989] KLR 1.

12. On reference, he submitted that a reference is filed before the Notice takes effect and that an application to extend time is not a reference.

13. I have considered the affidavits filed and the submissions offered and equally perused the entire file to appreciate the dispute before me for determination. In my assessment, there are two issues that present themselves from determination;

I) Whether this appeal, lies being a challenge to the decision by the tribunal reforming to grant

leave to file a reference out of time.

14. In my view, this was the evidence placed before the trial court on which it was to exercise its discretion and make an award as liability had been settled by consent between the parties.

15. In the reserved judgment after parties had filed written submission and cited decided cases binding on the court, the trial court delivered itself as follows:

> **"I have perused the written submissions filed and the authorities cited together with the proposed awards. I have also perused the medical report by DR.NDEGWA and DR.IBRAHIM which are unanimous that the plaintiff suffered acompound fracture and disclosed of the right ankle which was confirmed by ex-rays. It is also clear that from the two report that the plaintiff had healed from the injuries without any permanent disability. It is my considered view that an award of kshs.180,000 would be adequate and fair compensation to the plaintiff and..."**

16. I have highlighted the words I consider informed and influenced the decision in that award; the medical reports and the decisions cited. In making the determination in this appeal, I note that the award was for pains, suffering and loss of amenities. Consequently it is my view and finding that the award although made as lumpsum consists of three distinct heads. One (the plaintiff) is compensated for the injury, the pains suffered and the effects of such injury and pain on his subsequent life and life style. It is therefore important to take note of what is reasonably expected to be the amenities of life as lost by the claimant. The term *"Loss of amenities"* of life has been defined to mean:-

> **"a legal term which occurs in injury compensation claims and relates to how your quality of life has been affected by an injury. This is a feature of a personal injury claim which acknowledges personal adjustments that have been made to your work,social and domestic lifestyle which are not financial.**
>
> **These factors of an injury claim are not life threatening and to qualify for loss of amenity compensation they don't even have to be lasting. Compensation for loss of amenity is monetary**
>
> **settlement for any loss of enjoyment of life also known as inconvenience of incapacity."**
>
> **see www.oxfordreference.com.and www.ukclaims.ltd.co.uk**

17. In the judgment impugned before me, it appears to me that the trial Court took into account and gave premium to the fact that there was no permanent disability disclosed. The court therefore ignored the plaintiffs testimony that he suffered pain every time it was cold, the injury site swells and he was unable do heavy work. These factor were relevant and due for consideration considering that the plaintiffs disclosed occupation was that of a loader. It was equally important to take into account the evidence in Dr.Ibrahims medical report to the effect that development of post-traumatic arthritis of the right ankle joint later on was a possibility. I am convinced that failure to consider these factors is sufficient cause for me to interfere with the trial courts award. I shall so interfer.

18. The second area I think was due for consideration was the decided cases cited to the court which the judgment says it had taken into account. The decision are between pages 30-38 of the Record of Appeal. While it is expected that parties would invariably take extreme positions in their submissions, where both cite decisions, it is the duty of the court to give reasons for believing on set of submissions and disbelieving the other or just departing from all the submissions filed.

19. The plaintiff proposed to court the sum of Kshs.500,000 and grounded its submissions in the decision of **PETER MWAURA -VS- SOLOMON KINUTHIA, HCCC NO. 1081 OR 1991 BY MBITO J**, dated 1.4.1998 in which an award of Kshs.300,000 was made to a plaintiff who suffered injuries disclosed to be compound fracture of ankle joint and bruises over the shoulder, chest and dorsal spine, was

hospitalised for one day during which duration he was done reduction by P.O.P. In it there was healing without permanent incapacity.

20. On the other side the defendant proposed a sum of Kshs.110,000 and cited:

> **NBI HCC.NO.1296 OF 1989 SAMUEL WARUI KIRATHE -VS- PHILLIP INTERNATIONAL & ANOTHER in which Mbogholi J on 31.7.1990 awarded the sum of kshs.100,000 for fracture of the ankle which, healed with a limping gait found by the Judge to be a permanent disability.**

21. Equally relied upon was the decision in the **HCC. NO.4956 OF 1991 JOHN CHIRIBA MUTONDO -VS- NAFTALI OGOMBO OGIRA** decided on 6.5.95 by Mwera J, as he then was, in which an award of Kshs.100,000 was made to a plaintiff who had suffered a dislocation of the ankle joint and was reduced and healed without permanent disability.

22. It is clear that the two parties took extreme positions in their submissions and the authorities cited. It then fell on the shoulders of the court to consider those positions and make a determination of its own but bound by the dictates that it gives reasons for such decision. For me I hold the opinion that it was not enough to say that the trial court had read the submissions and the authorities. That would pass if the authorities and submissions were reconcilable in figures awarded. They were not and therefore he had to take position one way or another. Questions of age of the decided case, and hence erosion of value of money by effects of inflation as well as the nature and extent of injuries were therefore due for consideration but were never considered or if considered, inadequately so. This is another reason for the court to interfere with the award.

23. I will therefore interfere but do so well aware that an award of damage is an exercise in discretion and I am convinced that the discretion was not properly exercised. This being a jurisdiction the court exercises by way of a retrial, I will take into account the evidence tendered, the expert opinion rendered, the submissions filed both at trial and in this appeal and the law relied upon.

24. I take note that all the decisions cited were only persuasive upon this court but were binding on the trial court. In my view, and opinion the submissions by the defendant/Respondent totally failed to take into account the ages of the decisions cited and the incidence of initiation on value of money. I am equally aware that money is not a panacea to restore physical impaired body and all the court can do is award what it considers fair and reasonable Compensation. Of the decisions cited, I chose to be by persuaded by that by Mbito J made on 1.4.1998 in PETER MAINA MWAURA (supra) as the more comparable to the plaintiffs injuries albeit a little more extensive. I equally take regard of the length of appellants hospitalistaion, the fact that he was on a plaster for some six(6) weeks and his occupation as a loader and award the sum of Kshs.450,000.

25. The upshot of the foregoing is that the trial courts assessment of damages is therefore set aside and in its place substituted with an award of kshs.450,000.

26. The sum payable to the appellant therefore works out as follows

General damages	kshs. 450,000
Special damages	kshs. 16,734
Total	kshs. 466,734
Less 30% contribution	kshs.141,020.20
Net due.	kshs. 325,713.80

27. The sum shall attract interest at the court rates from the date of Judgment till payment in full. I

further award to the appellant the costs of this appeal and the costs in the trial court.

Dated, signed and delivered at Mombasa this 2nd day of June 2016 in the presence of

Mr.Nyabena for the Appellant

Kabue for Munyasi for the Respondent.

P.J.O.OTIENO

JUDGE