REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 236 OF 2013

S.S.MEHTA & SONS .....APPELLANT

VERSUS

JOB MAINA MURIUKI .....RESPONDENT

(Being an appeal from the judgment of T.S. Nchoe (Mr.) RM delivered on 10th April, 2013 in Milimani Chief Magistrate Court Case No. 4035 of 2009)

JUDGMENT

1. The Appellant, S.S. Mehta & Sons Ltd, was sued in the Lower Court by the Respondent, Job Maina Muriuki for damages arising from a road traffic accident which occurred on or about the 13th March, 2001. The accident involved motor vehicle Reg. No. KAH 398W Nissan Urvan which was being driven by the Respondent and motor vehicle Reg. No. KAJ 376P- ZB 3110 Mark Tipper which was claimed to be owned by the Appellant. The Respondent blamed the accident on what he termed as the negligence manner in which the Appellant's motor vehicle was being driven.

2. The Appellant filed a defence and a set off and counterclaim. The Appellant denied the Respondent's claim. The Appellant blamed the accident on what he stated as the Respondent's negligence and/or contribution to the same. The Respondent filed a reply to the defence and defence to the counter claim and denied the Appellant's claim.

3. In his judgment, the trial magistrate apportioned liability on a 50-50 basis and assessed general damages at kshs.1,500,000/= on 100% basis. Special damages awarded was Kshs.9,000/=. The costs awarded in CMCC Nbi No. 2562 of 2004 were to be set off if the same had not been paid. CMCC Nbi 2562 of 2004 had earlier on been withdrawn by the Respondent.

4. The Appellant was aggrieved by the said judgment and appealed to this court on the grounds stated in the amended memorandum of appeal. The same can be summarized as follows:-

a) That the trial magistrate failed to find that the leave to appeal out of time was not legally or properly obtained.

b) That the trial magistrate failed to fully record the Appellant's cross examination of the Respondent on the issues of leave to file suit out of time.

c) That the trial magistrate erred in holding that the Appellant was 50% liable for the accident.

d) That the trial magistrate failed to consider the Appellant's submissions.

e) That the trial magistrate failed to apply the correct principles of the law.

5. The appeal was canvassed by way of written submissions. I have considered the said submissions and the authorities cited.

6. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

> **"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must 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 this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed sholan (1955), 22 E.A.C.A. 270)".**

7. The background to this appeal is HCCC Embu No. 77 of 2007 which was filed pursuant to leave obtained in HCC Misc. Appl. Embu No. 35 of 2007 for extension of time within which to file suit. Although both the Appellant and the driver were sued the case against the driver was withdrawn.

8. The Respondent's evidence was that at the material time he was working for Express Kenya Ltd. That at about 2.00 a.m., while in the course of his duty he was driving his employer's aforestated motor vehicle when he was involved in the accident in question. That it was raining and the Appellant's motor vehicle had stopped on the road without any road signs. The Respondent applied brakes but his motor vehicle skidded and hit the Appellant's motor vehicle on the angle line, driver's side. The Respondent fell unconsciousness and was taken to hospital where he was admitted. The Respondent sustained a severe head injury which resulted in 35% permanent disability and impaired vision.

9.DW1 James Wambugu Kingori who described himself as a turn-boy in the Appellant's motor vehicle at the material time gave evidence. He stated that the driver of their motor vehicle has since passed on. His evidence was that their motor vehicle was hit from behind while they were driving at a speed of about 15-20 Kph. That it was raining but there was no on-coming motor vehicle. He further stated that their motor vehicle was in motion and had reflectors and the rear lights were on.

9. DW2 David Mureithi Njagi the Appellant's accounts assistant produced their bundle of documents and exhibits: These exhibits included the following documents:-

a) The plaint and the verifying affidavit in CMCC Nairobi No. 2563 of 2004.

b) The statement of defence in CMCC Nairobi No. 2563 of 2004.

c) The judgment in CMCC Nairobi No. 2563 of 2004.

d) The medical report produced in CMCC Nairobi No. 2563 of 2004

e) The plaint and the defence verifying affidavit in CMCC Nairobi 2562 of 2004

f) H.C. Misc. Appl. Embu No. 35 of 2007

10. The Respondent was the driver of his motor vehicle and ought to have kept a proper look out. His evidence however leaves some unanswered questions for example on which side of the road be was driving, at what speed, the distance from where he first saw the Appellant's motor vehicle and the point of impact. The police abstract produced as an exhibit reflects that the police file was closed without any further action. There is no evidence of the investigations that were carried out.

11. The plaint filed by the Respondent and the particulars of negligence pleaded seem to suggest that the Appellant's motor vehicle was being driven and/or stationery. The motor vehicle could not have been stationary and also moving at the same time. The 1st Respondent's evidence failed to come out clearly not only on the manner in which he was driving but also as to the position of the Appellant's motor vehicle on the road.

12. On the other hand the Appellant's turn boy's (DW1) evidence was that their motor vehicle was at a speed of about 15-20 Kph. Although the evidence of the turn boy that their motor vehicle was being driven at gear No. 4 is inconsistent with the speed of 15-20 Kph, it was the 1st Respondent's duty to prove his case on a balance of probability. He who alleges must prove. I am not satisfied that the 1st Respondent proved his case. The trial magistrate erred in apportioning liability on a 50:50 basis on account of the trailer having been driven at night. The issue before the trial magistrate was that of negligence.

13. It has been submitted that the trial magistrate did not properly handle the question of leave to appeal out of time. The law on how to challenge the leave granted (exparte) for the filing of suit out of time was stated by the court of appeal in the case of **Mbithi v Municipal Council of Mombasa & another [1993] KLR** as follows:-

> **"The defendant will have every opportunity of challenging the facts and the law afterwards at the trial. The judge who tries the case is the one who must rule finally whether the plaintiff has satisfied the conditions for overcoming the time bar. He is not in the least bound by the provisional view expressed by the judge in chambers who gave leave."**

14. I have perused the record of the Lower Court. I have seen no answers in the cross examination of the Respondent that reflect any challenge to the said leave. It is not possible to tell whether the trial magistrate failed to record the said evidence or whether the issue is being raised during the appeal as an afterthought. Be as it may, the application in HC Misc. Appl. Embu No. 35 of 2007 was produced as an exhibit. Although the ruling in the miscellaneous application was not produced as an exhibit, it is noted in paragraph No. 4 & 5 of the affidavit in support of the said application dated 16th March, 2007 that the Respondent averred that he was admitted in ICU for 30 months and thereafter continued with out-patient treatment particularly in regard to the head injuries which he stated resulted in brain damage and grossly interfered with his vision.

15. It is therefore clear that the plaintiff relied on grounds of physical disability although the application was stated to have been brought under Section 27 & 28 of the Limitation of Actions Act. Under Section 22 of the Limitation of Actions Act the Respondent was at liberty to bring his suit any time before the end of six years from the date when he ceased to be under a disability. The said provision of the law stipulates as follows:-

> **"If, on the date when a right of action accrues for which a period of limitation is prescribed by this Act, the person to whom it accrues is under a disability, the action may be brought at any time before the end of six years from the date when the person ceases to be under a disability or dies, whichever event first occurs, notwithstanding that the prescribed period of limitation has expired."**

16. I am persuaded by dicta of the Portter, J who posited as follows on the issue of disability in the case of **Gathoni vs Kenya Co-operative Creameries Ltd (1982) KLR 104:**

> **"....of course, if the applicant were under a relevant disability, she would not need the leave**

of the court to commence her action. The issue as to whether the period of limitation was extended in her case under section 22 would no doubt be raised as a preliminary issue at the trial. The applicant's application for leave was made under Section 27, where the applicant has to show that her failure to proceed in time was due to material facts of a very decisive character being outside her knowledge (actual or constructive)...Section 30(3) of the Act provides that for the purposes of Section 27 a fact shall be taken at any particular time to have been outside the Knowledge (actual or constructive) of a person, if but only if (1) he did not know that fact; and (2) in so far as that fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken that time for the purpose of ascertaining it; and (3) in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances...In section 30(5)"appropriate advice" is defined as meaning in relation to any facts or circumstances "advice of a competent person qualified in their respective spheres, to advice on the medical, legal or other aspects of that fact or those circumstances, as the case may be.... The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest....."

17. The 1st Respondent in the instant case filed CMCC Nbi No. 2563 of 2004 Job Maina Muriuki vs. Express (K) Ltd which was dismissed on 20th February, 2007 after a full hearing. The Respondent did not disclose CMCC 2563 of 2004 when he filed HC Misc. Appl. Embu No. 35 of 2007 for leave to file suit out of time. The fact that the 1st Respondent filed CMCC Nbi No. 2563 of 2004 means that he was not under incapacitation by the year 2004.

18. It has been submitted by the Appellant's counsel that the trial court ought to have applied the principle of *estopel* or *res judicata* since the subject matter was the same in CMCC Nbi No. 2562/04; 2563/04 and CMCC Nbi No. 4035/09. It is noted that CMCC Nbi 2562/04 was withdrawn. Thereafter CMCC Nbi 2563/04 was filed. CMCC Nbi No. 2563/04 was heard and a judgment delivered dismissing the Respondent's case. The subject matter of CMCC Nbi No. 2563/04 and CMCC Nbi No. 4035/09 is the same. It is the same accident and the same motor vehicles. The only changes made is the substitution of the Defendant with the Appellant herein in CMCC Nbi No. 4035 of 2009

20. On whether a matter is *res judicata* the Court of Appeal stated as follows to the case of **Kamuye v Pioneer Assurance Ltd [1971] E.A.**

"The test whether or not a suit is barred by *res judicata* **seems to me to be-is the plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of** *res judicata* **applies not only to points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward....."**

21. In the case of **Nicholas Njeru v Attorney General [2013] eKLR**, the Court of Appeal posited as follows:-

"The doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and that the individual should not be harassed twice with the same account of litigation."

22. I am also persuaded by the reasoning of the court in **E.T v Attorney General & another [2012] eKLR** where the judge observed as follows:-

"The courts must always be vigilant to guard against litigants evading the doctrine of *res*

judicata **by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff is in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi v national Bank of Kenya Limited and others [2001] EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit."**

In that case the court quoted Kuloba J., in the case of **Njangu v Wambugu and Another Nairobi HCCC No. 2340 of 1991** (unreported) where he stated:-

"If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion be comes to court, then I do not see the use of the doctrine of res judicata....."

23. In the instant case, the changes made by the 1st Respondent to his claim are cosmetic the nature. The subject matter is the same and has already been litigated in a court of competent jurisdiction. I agree with the Appellant's counsel that the Respondent was debarred by either estopel and /or the *res judicata* from filing CMCC Nbi No. 4035 of 2009.

24. For all the above stated reasons, I find the appeal has merits. Although this court empathizes with the Respondent due to his injuries he is not without remedy. It emerged from his cross examination that he was paid Kshs.250,000/= under the Workmen's Compensation Act. I allow the appeal and substitute the orders of the Lower Court with the orders dismissing the Respondent's (Plaintiff's) suit. Taking into account the circumstances of this case, each party to meet own costs of the appeal and in the Lower Court.

Dated, signed and delivered at Nairobi this 15th day of Nov.,2016

B. THURANIRA JADEN

JUDGE