



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. 111 OF 2001

(Being an appeal from the Ruling/Order of the Hon. Mr. Nyaga, Senior Resident Magistrate delivered in RMCC No. 799 of 1999, Gabriel Wambua –vs- Julius Mugambi on the 21st day of August, 2001)

JULIUS MUGAMBI.....APPELLANT

VERSUS

GABRIEL WAMBUA.....RESPONDENT

JUDGMENT

1. The Appellant, Julius Mugambi was sued in the lower court by the Respondent, Gabriel Wambua Makau, for damages arising out of a road traffic accident which occurred on 12th August, 1999 while the Plaintiff was a passenger in motor vehicle registration No. KAJ 281N. The Respondent blamed the accident on the alleged negligent manner in which the said motor vehicle which was owned by the Appellant was driven at the material time.
2. The Appellant filed a statement of defence and denied the Respondent's claim.
3. On 11th April 2000, the parties entered a consent judgment on liability at 100% against the Appellant. The award of general damages was agreed at Kshs 75,000/= and costs at Kshs 22,300/=.
4. The Appellant subsequently filed an application dated 24th July 2000 seeking orders that the consent judgment be set aside. The Appellant's case was that the P3 form forwarded to them by the Respondent during the negotiation process was subsequently found to have been fraudulently obtained.

The application was opposed. According to the Respondent, no new matter had been discovered to warrant a review of the consent judgment. It was averred that the p3 form was filled by Dr. Lumumba who also prepared and signed the medical report. The Respondent saw the application as a delaying tactic following the commencement of the execution proceedings.

5. The application was heard and dismissed. That is what has triggered this appeal.

6. The grounds of appeal are as follows:

(1) That the learned Senior Resident Magistrate erred in law and in fact in failing to appreciate that a consent judgment may be set aside on grounds of fraud, collusion or for any reason which would enable the court to set aside an agreement and that medical records upon which the consent was based having been adversely mentioned as being not genuine the judgment ought to have been set aside and the said documents subjected to strict proof through formal evidence.

(2) That the learned Senior Resident Magistrate erred in law and in fact in failing to appreciate that had the Defendants known that the said documents were fake or questionable, they would not have been a party to the said consent and that the said consent was void ab-initio.

(3) That the learned Senior Resident Magistrate erred in law and in fact in holding that the applicant had not strictly proved the allegations of fraud when in fact there was an official document from the hospital disowning the said medical documents.

(4) The learned Senior Resident Magistrate erred and occasioned injustice in holding that the appellant had not filed an affidavit from the hospital in support of the fraud and failed to appreciate that such strict evidence could only be adduced orally in a full trial. In the alternative the learned Resident Magistrate failed to also appreciate that the Respondent had not supplied any affidavit from the maker(s) of the said documents in support of their authenticity.

(5) The learned Senior Resident Magistrate erred in dismissing the said application when there was no basis for so doing.

(6) The learned Senior Resident Magistrate erred in awarding costs of the said application to the Respondent.

7. The appeal was canvassed by way of written submissions which I have duly considered.

8. This being the first appellate court, the court is duty bound to re-evaluate the evidence on record and come to its own findings – **See Selle –vs- Associated Boat Co. Ltd (1968) EA 123.**

9. A consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract, or if certain conditions remain to be fulfilled which are not carried out. (See for example **Wasike v Wamboko, HC Kakamega and Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd & Anor [1998] eKLR**).

10. It is common ground that the Appellant was supplied with the P3 form in question prior to the entering of the consent judgment. The Appellant therefore had the opportunity to carry out any investigations and authenticate the said document before recording the consent judgment. The P3 form was not a new matter or new evidence.

11. Allegations of fraud must be strictly proved. As stated by the Court of Appeal in **Peter Githinji & Anor. –vs- Julius Kiruma Kariuki & 2 others [2015]eKLR** while quoting the case of **Ratilal Gordhanbhai Patel –vs- Lalji Makanji [1957] E.A. 314** stated that –

“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

12. The affidavit in support was sworn by one Nancy Shikuku, a Legal Officer with the Appellant’s insurer. The letter from Machakos General Hospital dated 29th June 2000 is annexed to the said affidavit.

The said letter states that the P3 form does not bear the hospital's stamp and was therefore not an official document. The letter is signed by one S. K. Mutwika on behalf of the Medical Superintendent, Machakos. No affidavit by the S. K. Mutukia or from any official from the said hospital has been annexed.

13. The Respondent's contention on the other hand was that the P3 form in question was filled by Dr. Lumumba of the same hospital. Taking into account that the rival positions taken by the parties, it was the appellant's duty to specifically prove the allegations of fraud.

14. As provided for under S.107(1) of the Evidence Act, (*Cap. 80 Laws of Kenya*) –

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

The mere annexing of the letter in question failed to meet the threshold of proof required in such a case.

15. With the foregoing, the appeal has no merit and is dismissed with costs.

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B. THURANIRA JADEN

Dated and delivered at Machakos this 6th day of May 2015

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B. THURANIRA JADEN

JUDGE