



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 475 OF 2010

PETER NJOGU MURANGA.....APPELLANT

VERSUS

RAMESH SODHARESPONDENT

(Appeal from the original judgment and decree of Mr. P. Nditika (SRM) in Milimani Courts, CMCC No. 8104 of 2005 delivered on 1st November 2010)

JUDGMENT

1. The appellant **Peter Njogu**, sued the respondent **Ramesh Sodha**, seeking compensation following a road traffic accident which occurred on 1st March, 2003. The appellant filed an application seeking summary judgment in the lower court against the respondent in the sum of kshs 400,000/=. Upon hearing the application, the trial court found that contrary to Order XXXV Rule 1(a) and 2, Order V1 rule 13 (1)(b,c and d) of the Civil Procedure Rules, the appellant had not brought the application without delay and the issues raised were triable including the fact that the jurisdiction of court was in question. The court was of the view that the mere fact that the respondent was convicted for a traffic offence was not enough reason to issue a summary judgment.
2. Being dissatisfied with the trial court's ruling, the appellant filed this appeal on the following grounds:
 - a. ***"That the Learned Magistrate erred in law and fact in finding that the appellant application dated 25th August 2010 lacked merit thus denying to enter a summary judgment;***
 - b. ***That the Learned Magistrate erred in law and fact in finding that the defence raised triable issues;***
 - c. ***That the Learned Magistrate erred in law and fact by failing to appreciate that the respondents admission to guilt in traffic case no. 5056 of 2003- Republic versus Ramesh Sodha, estopped the respondent from denying his guilt in subsequent proceedings and the defence should have been struck out and matter ordered to go for formal proof;***
 - d. ***That the Learned Magistrate erred in law and fact by failing to consider the submissions of the appellant including the cited authorities and exhibits.***
 - e. ***That the Learned Magistrate erred in law and fact in finding that the appellant had taken inordinately long to bring the application;***
3. This being the first appeal, it is my duty to re-evaluate the evidence tendered before the trial court and arrive at an independent conclusion taking into account the fact that I did not have the advantage of hearing the parties. (See: **Peter v. Sunday Post (1958) at Pg. 429**).
4. The appellant's case was that, on 1st March, 2003, his authorized driver was lawfully driving his motor vehicle registration number KAM 526Y Nissan Matatu along Waiyaki way when the driver

- of motor vehicle registration no. KXX 769 drove so recklessly and negligently hitting the appellant's vehicle damaging it to the extent of being written off. Following traffic proceedings preferred against the respondent arising from the same accident, the appellant filed an application to have a summary judgment entered against the respondent. In the traffic proceedings traffic case number 5056 of 2003, the respondent was charged with careless driving, where he pleaded guilty and was convicted and sentenced to pay a fine of kshs 12,000/= or in default 3 months imprisonment. It is for this reason that the appellant filed an application dated 25th August 2010 seeking orders that the court enters a summary judgment for 404,000/= in favour of the appellant.
7. The respondent in response to the application sought the application dismissed on the grounds that he had a good defence as the claim involves two motor vehicles and there is the issue of contributory negligence. There was also the issue of which court has the requisite jurisdiction to hear the matter. He argued that just because he pleaded guilty to the offence does not mean that the appellant's driver did not contribute to the accident.
 8. The appellants submissions are on record. The respondent did not file his submissions as was consented to in court on 29th May 2015. I have considered the appellants submissions and also the evidence on record and the law. Issues of determination include:

- i. ***Whether the defence raises any triable issue; and***
- ii. *Whether a summary judgment ought to have been entered in favour of the appellant;*

9. The appellant seeks summary judgment which is provided for under Order XXXV as it was then, currently Order 36. Normally a **summary judgment should only be entered where the amount claimed is specific, where it is due and payable or has been ascertained or is capable of being ascertained as a mere fact of arithmetic. In the case of Diamond Trust Bank Kenya V Peter Muilanyi & Another [2006] eKLR** it was cited with approval the decision of Newbold P in **Zola & Another V Ralli Brothers Ltd & Another** and stated that:

“Order XXXV is entitled to enable the Plaintiff with a liquidated claim to which there is clearly no good defence to obtain a quick summary judgment without being unnecessarily kept from what is due to him by delaying tactics of the Defendant.”

In another case of *Patel vs. E.A. Cargo Handling Services Ltd. [1974] E.A. 75 at P. 76 Duffus P. said:-*

“In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as SHERIDAN, J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

10. The main issue of consideration is whether the respondent has a good defence that raises triable issues, one that prima facie raises an issue for adjudication. "Triable" has been defined in the **Black Law's Dictionary** as, **“subject or liable to judicial examination and trial.”** The question therefore is whether the appellant defence is subject to judicial examination. Firstly, the defence questions the jurisdiction of the trial court to hear the matter as the respondent claims that he resides and works in Kisumu. Secondly the defence avers that the accident was contributed to by the negligence of the appellants driver and finally that the vehicle was not damaged to the tune of Kshs 404,000/= being the damages the appellant is claiming the same is deemed excessive in the circumstances.
11. The appellant claims that since the respondent was charged and convicted for the accident, then the court should enter a summary judgment and the matter should proceed to formal proof. *A summary judgment is a draconian measure and should be given in only the clearest of cases. A trial must be ordered if a triable issue is found or one which is fairly arguable is found to exist. In this case there is a claim by the respondent that the appellant contributed to the accident due to his negligence. Indeed, the fact that the respondent pleaded guilty to careless driving and was convicted on his own plea cannot exonerate him from blame, however, the respondent claims that there was contributory negligence on the part of the appellant. I believe that raises a triable issue for determination. There seems to be grey area that needs to be subjected to adjudication in the*

interest of justice. There is no clear cut case here to warrant issue of a summary judgment. I 'am alive to the fact that in practice, once an individual pleads guilty to a careless charge they shoulder the blame, however, if there is a claim of contributory negligence, it is only just for the defence to be given an opportunity to be heard.

12. In view of the above, I find that the defence raises triable issues, this is not a case suitable for entry of summary judgment as prayed for by the appellant..

13. In the circumstances, I agree with the findings of the trial court and dismiss the appeal herein, with costs..

Dated, Signed and Delivered in open court this 9th day of October, 2015.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent