



REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 84 of 2006

BROOKE BOND (K) LIMITED APPELLANT

AND

PAUL MANGOLI WESONGA RESPONDENT

(Being an appeal from the judgment and decree of the Hon. R.M., Mrs. Wewa

dated 10th April 2006 in Kisii CMCC NO.214 of 2004)

RULING

1. The respondent herein was the plaintiff in Kisii CMCC No.214 of 2004 in which he sought to be paid both special and general damages on account of injuries he alleged to have sustained in a road traffic accident while he was in the course of his employment with the appellant. The appellant, upon being served with summons to enter appearance and copy of plaint, entered appearance and filed defence in which it denied all the allegations made against it by the respondent. The appellant asked the court below to dismiss the respondent's suit with costs.
2. The case proceeded to full hearing in the subordinate court. Parties also filed written submissions. Upon careful consideration of all the evidence, the submissions and the law, the trial court apportioned liability in the ratio of 80%-20% in favour of the respondent. The trial court awarded the sum of Kshs.350,000/= in general damages and Kshs.3500/= in special damages together with costs and interest.
3. The appellant was aggrieved by the said decision and filed this appeal on 24th April 2006 citing the following 10 grounds:-
 1. *The learned magistrate erred in law and infact in holding that the scene of accident was the private property of the defendant and not a public road.*
 2. *The learned magistrate erred in law and infact in holding that there was no evidence on record to show that the scene of accident was a public road despite the same being in evidence as exhibit P5 on record.*
 3. *The learned magistrate erred in law and in fact in holding that the defendant was negligent in failing to manage the scene of accident.*
 4. *The learned magistrate erred in law and in fact in holding that a police abstract was enough to*

prove ownership of the subject motor cycle without regard to the copy of search certificate from the Registrar of Motor Vehicles contrary to settled law and practice and more specifically section 109 of the Traffic Act Cap 405 Laws of Kenya.

5. *The learned magistrate erred in law and in fact in apportioning contributory negligence between both parties yet the defendant did not plead any contributory negligence.*
6. *The learned magistrate erred in law and in fact in failing to read, appreciate and apply the appellant's submissions and cited authorities thereto making her to arrive at wrong findings.*
7. *The learned magistrate erred in law and in fact in failing to hold that the respondent's claim was misdirected, misconceived and untenable as against the appellant.*
8. *The learned magistrate erred in law and in fact in failing to dismiss the plaintiff's suit in the lower court despite the weight of the evidence on record.*
9. *The learned magistrate erred in law and in fact in awarding manifestly excessive general damages.*
10. *The learned magistrate erred in law and in fact in adopting the respondent's submissions as judgment of the lower court.*

4. The appellant therefore prayed that:-

- a) *The judgment and decree of the lower court be set aside and in place thereof there be an order dismissing the respondent's suit in the lower court.*
- b) *In the alternative and strictly without prejudice to the foregoing, the general damages awarded of Kshs.350,000/= be reduced substantially as they are excessive.*
- c) *Costs of this appeal and the lower court be awarded to the appellant.*
- d) *any other or further relief that this honourable court may deem fit and just to grant.*

5. Apparently, the appellant took no action on the appeal since 24th April 2006, prompting the respondent to file the notice of motion dated 9th May 2011 seeking the following 3 orders:-

(a) The appeal herein be dismissed with costs for being an abuse of the court process and or otherwise for want of prosecution.

(b) Upon granting Order (a) above monies due to the respondent deposited at Co-operative Bank Kisii amounting to Kshs.322,192.50 in the names of R.K. MUTHIGA AND CO. ADVOCATES AND KHAN & KATIKU ADVOCATES be released to the Respondent's counsel for onward transmission to the respondent upon which the respondent be at liberty to execute for any shortfall.

(c) The appellant do bear the costs of this appeal and application.

6. The application is premised on the grounds set out on the face thereof, the main ground being that the appellant had taken no action for upwards of five years since the appeal was filed and the Records of Appeal lodged in court and served upon the respondent's counsel on the 28th September 2006. The respondent/applicant also contended that the appellant appeared to have lost interest in the appeal. There is also an affidavit sworn by Don Z. Ogweno, advocate in support of the application. Mr. Ogweno reiterates the 3 grounds set out on the face of the application and avers that he is competent to make and swear the supporting affidavit because the facts to which he has deposed are apparent on the face of the record and do not therefore require the respondent himself to swear the affidavit. The deponent urges this

court to stamp its authority on indolent litigants who file pleadings in court for the sake of it and thereby deny successful litigants the fruits of decrees of this honourable court.

7. The notice of motion was duly served upon the appellant's counsel, M/s R.K. Muthiga & Company Advocates on the 4th July 2011. The court process was duly received by M/s R.K. Muthiga & Co. Advocates at 9.20 a.m. on 4th July 2011.

8. When this application came up before me for hearing on 7th July 2011, counsel for the respondent/applicant conceded that he had not given adequate notice to the appellant/respondent for the hearing of the application. It was therefore agreed to take out the application from the hearing list on that day. The respondent was given 7 days from that date to file its Replying Affidavit and thereafter parties were to file and exchange their written submissions together with relevant authorities on or before 27th July 2011. The application as then fixed for hearing on 28th July 2011.

9. On the 28th July 2011, the court was informed that the appellant/respondent had been unable to file and serve the Replying Affidavit and written submission as ordered on 7th July 2011 because M/s Muthiga had been unwell. Mr. Masinde advocate who appeared for M/s Muthiga for the appellant/respondent applied for adjournment. The application for adjournment was opposed. The court upheld the objection and since the respondent had already filed his written submissions it gave the parties a ruling date. Today, the appellant/respondent has not filed any response to the application.

10. I have read and considered the submissions filed on behalf of the respondent/applicant. The issue for determination is whether the respondent/applicant has made out a case for the orders sought.

11. The appeal herein was filed pursuant to **Order XLI** of the now repealed CPR. The appeal was admitted on 26th March 2009 and thereafter the appellant was under a duty, under **Rule 8B** of the said order to have the appeal listed before the judge for directions. The appellant could also have elected to proceed under **Order 42 rule 13** of the **CPR, 2010**, but it is clear that the appellant took no action either under the old or new rules. The appellant has also not filed any papers in opposition to the instant notice of motion. This is a clear indication to the court that the appellant has lost interest in this appeal and does not intend to prosecute the same. The appellant has thus not furnished any explanation to this court as to why no action has been taken on the appeal since filing on 24th April 2006 and admission on 28th September 2009. In the Court of Appeal case of **Abdul & another –vs- Home & Overseas Tusce Co. Ltd. [1971] EA 564**, it was held that where delays were not properly accounted for, the court can exercise its inherent jurisdiction against the indolent litigant by dismissing its pleadings.

12. In the instant case, I am satisfied that the appellant has not shown due diligence in the way it has handled this appeal since the filing thereof on 24th April 2006. The respondent has a judgment in his favour to the tune of Kshs.322,192/50 awarded to him as far back as 10th April 2006. He has not been able to enjoy the fruits of the said judgment, all because of this pending appeal in which the appellant has clearly lost interest. The respondent is clearly prejudiced by the pendency of this appeal.

13. In the premises and for the reasons above stated, I dismiss this appeal for want of prosecution and further order that the monies due to the respondent deposited at Co-operative Bank Kisii, amounting to Kshs.322,192/50 in the names of R.K. Muthiga & Co. Advocates and Khan & Katiku Advocates be released to the respondent's counsel for onward transmission to the respondent upon which the respondent be at liberty to execute for any shortfall.

14. The respondent/applicant shall have the costs of the appeal as well as the costs of this application.

15. Lastly, the delay in delivering this ruling/judgment is very much regretted. At the time it was due, I was engaged in hearing and determining the more than 125 boundary dispute cases against the Independent Electoral and Boundaries Commission. Judgment in the said cases was delivered by the 5-Judge Bench on 9th July 2012.

16. It is so ordered.

Dated and delivered at Kisii this 7th day of September, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

M/s R.K. Muthiga (absent) for Appellant/Respondent

Mr. Ogweno (present) for Respondent/Applicant

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.