REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL APPEAL NO. E052 OF 2024

TOYOTA KENYA LIMITED……………………………….APPELLANT

VERSUS

JOHN MBURU KINYANJUI…………………………1ST RESPONDENT

PETER MAINA MWANGI…………………………..2ND RESPONDENT

JUDGMENT

1. The Appellant, an insured in respect to Ng'arua Petrol Total Service Station sued the Respondents. The claim is for special damages in the sum of Kshs.205,701/-.
2. The claim was stated to have arisen following an accident where the 2nd Respondent stated to have been the authorized driver of motor vehicle Reg. No. KBE 755G owned by the 1st Respondent drove the said motor vehicle which rammed into a diesel spreader box at the petrol station causing extensive damage to it.
3. The 1st Respondent filed a statement of defence where he denied ownership of the motor vehicle and further urged that the claim is statute barred under the **Limitation of Actions Act.**

4. The 2nd Respondent denied allegations put forth but claimed beneficial ownership of the motor vehicle in issue.
5. Through chamber summons dated 1st November, 2021, the 1st Respondent sought an order for his name to be struck out of the suit.
6. Subsequently, on 14th February, 2022 the 2nd Respondent filed a Notice of Preliminary Objection seeking dismissal of the suit for being in contravention of the mandatory provisions of the **Civil Procedure Act, 2010.** And that it was statute barred as it offends the provisions of the **Limitation of Actions Act.**
7. In its ruling dated 30th March, 2022, the trial court guided by **Section 57(a) of the Interpretation and General Provisions Act** dismissed the Preliminary Objection.
8. The application seeking to have the name of the 1st Respondent struck out was disposed through written submissions and it was dismissed for want of merit.
9. In the result, pretrial directions were taken and the case proceeded to hearing. The Plaintiff (Appellant) availed six (6) witnesses. The application to call one more witness was declined hence the defence (Respondents) tendered evidence and parties were granted time to file submissions. In the intervening period the Appellant filed an application under certificate of urgency seeking an order of the court setting aside the order closing the Plaintiff's case so as to re-open the case. In the impugned ruling dated 2nd December,

2024, the application was however dismissed for lack of merit. Aggrieved, the Appellant appeals on grounds that;

1) ***That the learned trial Magistrate misdirected himself and erred both in fact and law in dismissing the Appellants Notice of Motion dated 17th October, 2024 by holding that the Appellant had been adducing evidence in piece hence delaying the conclusion of the matter which holding is contrary to the facts already on lower file record.***
2) ***That the learned trial Magistrate misdirected himself and erred both in fact and law by holding that the Appellant had no case to warrant the court to exercise its unfettered discretion of reopening the suit, thereby occasioning a grave miscarriage to the Appellant.***
3) ***That the learned trial Magistrate by failing to appreciate the evidence to be tendered in at the trial by the Appellant's intended witness on the quotation with regard to the Appellant's damaged spreader box, the subject matter, thereby occasioning gross miscarriage of justice to the Appellant.***
4) ***That the learned trial Magistrate misdirected himself and erred both in fact and in law in***

dismissing the Appellant's Notice of Motion application dated 17th October, 2024 effectively denying the Appellant an opportunity to be heard on merit despite having triable issues on record, thereby arriving at an erroneous conclusion on matter.

5) ***That the learned trial Magistrate misapprehended and grossly misunderstood the extent and the purpose of the Appellant's intended evidence to be tendered in at the trial and which evidence is properly on record thereby leading to erroneous conclusion of the same.***
6) ***That the learned trial Magistrate misdirected himself and erred both in fact and in law by failing to uphold precedent and doctrine of stare decisis.***
7) ***That the learned trial Magistrate misdirected himself and erred both in fact and in law by totally ignoring the Appellant's submissions and the authorities cited and provided thereby leading to an erroneous decision that had occasioned gross miscarriage of justice to the Appellant.***
8) ***That the learned trial Magistrate misdirected himself by failing to adequately and properly***

evaluate the evidence judiciously and exhibits provided and properly on record thereby leading to a decision unsustainable in law.

9) ***That the learned trial Magistrate misdirected himself by proceeding on wrong principles when applying precedents and tenets of the law applicable thereby leading to erroneous decision and in the circumstances occasioning miscarriage of justice.***

10) ***That the impugned ruling/order contravenes and contradicts the established case law on reopening of the Plaintiff's/Appellant's case.***

10. The appeal was canvassed through written submissions. It is urged by the Appellant that they have not been accorded a fair hearing in line with **Section 4 of the Fair Administrative Actions Act** and as enshrined in the Constitution. That the court failed to explain how its denial to have a Human Resource and Safety Manager would aid in reaching a just and conclusive decision. Reliance is placed on ***Joseph Njoroge Kimondo & Another v (a Minor suing through her next of friend and father JWM) [2018] eKLR*** where Nyakundi J stated that;

> ***"I can appreciate from the order that there was a genuine dilemma on the part of the trial magistrate, in regard to varying the words "payment be made before the next hearing***

date.” Instead of proceeding with the hearing without hearing any arguments on this issue, the learned trial magistrate had the discretion to stop the trial or vary the directions altogether. I cannot over emphasize that judicial discretion in order to attain procedural fairness in each circumstances remains unfettered. In my judgement exercise of discretion cannot waive the provisions of the constitution, on access to justice and right to a fair hearing as espoused under Articles 48 and 50 of our Constitution.

One of the reasons behind this application appears to revolve around the question of completely denying the appellant any opportunity to present his case. It is not in dispute that in accordance with the Civil Procedure Rules a party need not attend court so long as he has retained an advocate.

This was a claim based on tort of negligence against the Appellants. The final judgment if decided in favour of the plaintiff/respondent would be executed against the appellants. In view of the manner in which the suit was prosecuted I do not think the appellants would be bound by the outcome or subsequent decree of the court obtained exparte. It is trite that a mistake of

counsel should not be used to punish a litigant who has a legitimate and equitable right before a court of law. In other words, the court should not visit the acts of omission or commission or negligence of counsel on an innocent litigant.

I agree with the submissions by the appellants that in arriving at the decision the trial court wrongly exercised the discretion and improperly applied the law to be in violation of a right to a fair hearing and access the court. Failure to pay interlocutory costs arising in the course of the proceedings cannot entitle the learned magistrate to limit rights to access justice and constitutional right by the appellant to have his version of the case heard and considered.

In the instant application the trial magistrate abused her discretion when she denied the appellant to participate in the hearing and cross-examination of the five witnesses. The court action unfairly prejudiced the appellants/defendants and eventually rendered the proceedings a mistrial.

I take the queue from the well-established principles in the cases of Shah V Mbogo 1908 EA, Patel V EA Cargo Handling Services Ltd 1974

EA75 and do find that the exercise of discretion by the trial magistrate occasioned prejudice and a failure of justice on the part of the appellants. The principle to right to a fair hearing under Article 50 of the Constitution is applicable to this application. The trial magistrate condemned counsel unheard. The impugned order must therefore be set aside as of right. The exparte proceedings arising and commenced on 14/8/2018 be and are hereby set aside."

11. Also cited is the case of ***Lawrence Muturi Mburu v Dalago Tours Limited [2019] eKLR*** and ***Job Obanda v Stage Coach International Services Ltd & Another [2009] eKLR.***

12. The 1st Respondent submits that the Appellant was granted numerous indulgences throughout the proceedings but failed to comply with the court directions and only sought to re-open the case after both the Plaintiff and Defendant had testified. That a party should not abuse judicial discretion as stated in ***Samba v Nzuki & Another (Civil Appeal 22 of 2018) [2023] KEHC 25733 (KLR).***

13. That the right to be heard does not amount to abuse of process especially so where the party was granted multiple opportunities to be heard. Reliance is placed on ***Tana & Athi Rivers Development Authority v Jeremiah Kimigho & 3 Others [2015] eKLR*** where the court noted that;

"It is immediately apparent from the chronology of events that the appellant and its then counsel have done everything in their power to derail the conclusion of this suit. It is equally apparent that both the High Court and the respondents have time and again bent over backwards to accommodate the appellant. This being the case, the trial court cannot be faulted for finally putting a stop to the appellant's delay tactics. The appellant and its counsel failed to exonerate themselves from blame for this state of affairs."

14. That the Appellant failed to act diligently hence he does not deserve the court's equitable relief. That the appeal is intended to delay the case yet delay defeats justice as stated in ***Ivita v Kyumbu [1975] eKLR*** where the court delivered itself thus;

"27. Finally, I consider the submission that in dismissing the appeal, the Appellant was denied a right to be heard. It is trite that rules of natural justice dictate that a party should not be condemned unheard. However, in this case there is no cogent demonstration of the prejudice that the Appellant stands to suffer. The principle of expeditious disposal of cases applies across the board for the efficient administration of justice. Further delay would therefore amount to delayed

justice on part of the Respondents. The Appellant seems to have lost interest in its appeal for it to have taken a year in filing the instant application after the appeal had been dismissed.

28. I am of the considered opinion that the delay has not been satisfactorily explained and do further find that delay is a source of prejudice to the Respondent as it affects the fair distribution of justice. Article 159 of the Constitution provides that justice shall not be delayed. It is my finding that the application lacks merit."

15. The 2nd Respondent argues that the application and appeal are an abuse of the court process. That the Appellants misled the court hence they have not approached it with clean hands. That the multiple adjournments at the instance of the Appellant and several applications were a sign of the Appellant gambling with the court intending to delay the conclusion of the case. Reliance in this regard was placed on the case of ***Stephen Somek Takuenyi & Another v David Mbuthia Githere & 2 Others Nairobi (Milimani) HCC No. 303 of 2009*** where the court stated that;

"The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative terms,

it is said that there is inherent power to prevent abuse of the process of the court. In the civilized legal process, it is the machinery used in the courts of law to vindicate a man's rights or to enforce her duties. It can be used properly but can also be used improperly, and so abused.

An instance of this is when it is diverted from its proper purpose and is used with some ulterior motive for some collateral one or to give some collateral advantage, which the law does not recognize as legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing.

Sometimes it can be shown by the very steps take and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue… There is the inherent jurisdiction of every court of justice to prevent or abuse of its process and its duty to intervene and stop the proceedings or put an end to it."

16. That the Appellant was given a fair hearing and the court outstretched itself in allowing filing of further documents and witness statements after several witnesses

had testified. That the appeal has been overtaken by events since the matter is at an advance stage as it is pending judgment.

17. That the Appellant is abusing the court's indulgence and discretion. That the Respondents will be prejudiced as nine years have lapsed from the time of the incident. Reliance is placed on ***Kebande v Arasa (Environmental and Land Originating Summons E004 of 2022) [2024] KEELC 7103 (KLR) 29th October, 2024) (Ruling)*** where Munyao J stated;

> ***"It will need quite a compelling case to allow a plaintiff reopen his case after a defendant has already testified, presented his evidence and witnesses, and has closed his case. The hurdle at this stage of the case is much higher than in an instance where the plaintiff is applying to reopen his case before the defendant has testified. It should be appreciated that a defendant or respondent responds to the case of the plaintiff/applicant as presented. A defendant may even opt not to call evidence based on what the plaintiff has presented, or can decide to not call other witnesses depending on the evidence that the applicant has tabled. There can be great prejudice to a defendant if a plaintiff is allowed to reopen his case after the defendant has***

already closed his. It would appear in our case that the respondent did not see it necessary to call her surveyor witness or present a survey report given that the applicant had presented none.

What displays itself in the application at hand is that maybe the applicant feels that there were some gaps left in his evidence which he was hoping the defendant would fill, but now that the defendant has not taken that path, he wishes to reopen his case so as to fill them. That, as I have said, is not the intention of the exercise of the court's discretion in allowing a party to reopen his case."

18. And, in ***Agwu Ukiwe Okali v Suresh Sofat & 3 Others, ELC Case No. 410 of 2011, Milimani Court,*** where court stated that;

"The Courts have in many cases considered factors which should be considered when a court is determining whether to re-open a case or not. Re-opening cannot be ordered where it is clear that the party applying is seeking to seal certain loopholes he/she has seen in his/her case as the trial progresses. In High Court Succession Cause No.26 of 2008. In the matter of the Estate of Ngethe Karuga (Deceased),Justice Achode

referred to Malindi HCCC No. 56 of 1999 where the court states as follows:-

> ***" …….re-opening a case is not an impossibility but there must be urgent reasons for re-opening and not because a party has suddenly had a brain wave and spotted a loophole in its case, which it can now seal by re-opening the case…".***

19. Additionally, in ***Samuel Kiti Lewa v Housing Finance Co. Limited of Kenya & Another HCCC No. 37 of 2008 – Mombasa eKLR*** where Kasongo J stated that;

> ***"The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion, the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence."***

20. This being a first appellate court, its duty is to re-evaluate what transpired before the trial court and come up with its own independent conclusions. In ***Abok James Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] KECA 203 (KLR)*** it was stated that;

> ***"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to***

re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held inter alia that:-

> ***"On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"***

21. The chronology of the events per the record is that the suit was instituted by the Appellant on 21st August, 2020. Memorandum of appearance was filed on 5th October, 2021. The 1st Defendant (Respondent) changed advocates on 25th October, 2021. In the intervening period, there were applications to strike out the suit by the 1st defendant and a preliminary objection filed on 16th February, 2022.

22. As at 26th June, 2023, the Appellant (Plaintiff) was ready to proceed with three (3) witnesses, however, the 2nd Respondent was not ready to proceed. The adjournment sought was allowed. On 11th September, 2023 an application at the instance of the 1st Defendant was vehemently opposed by the Appellant who had availed witnesses, such that the 2nd Respondent was granted a last adjournment.

23. On the 20th November, 2023 the case proceeded. Two (2) witnesses testified and the case was adjourned to 26th February, 2024. In the cause of the testimony the question of production of documentary evidence arose and the court reserved a date for ruling, which was delivered on 4th March, 2025.

24. The matter proceeded on 10/06/2024 when the Appellant's two (2) witnesses testified. An application to avail a witness and filing of witness statement was made which was allowed but marked as a last adjournment.

25. On 30th September, 2024 when the matter came up PW6 testified then the Appellant sought an adjournment, the reason being that his last witness was indisposed. The application was opposed as no evidence of indisposition was tendered and the application was declined for the reason that no evidence of sickness and the Appellant should have communicated to the Defendants early enough. The court proceeded to close the Plaintiff's case whereby the

Defendants tendered evidence and closed their case immediately.

26. On the 17th October, 2024, the Appellant filed a formal application to set aside orders closing his case. The application was supported by an affidavit deposed by the intended witness and medical evidence of his indisposition. However, the application was dismissed on 21st February, 2024. Dissatisfied, he proffered the instant appeal.

27. The grievance of the Appellant is that he was not given a fair hearing following the denial to re-open the case to enable him present evidence of his witness who was indisposed. A party to a case is expected to be given an opportunity to present the case to enable the court come up with a merited decision based on evidence adduced.

28. The learned trial Magistrate was clothed with wide discretion to determine the issue presented. The application for an adjournment was made on grounds of indisposition. Counsel stated that the witness was not available due to sickness. The application was opposed vehemently on grounds that no evidence was presented to show that he was indeed indisposed and it was an old matter and that adjournments were occasioned by the Appellant.

29. In ***Salat v Independent and Boundaries Commission & 7 Others (Application 16 of 2014) [2014] KESC 12 KLR,*** the Supreme Court stated that it is a principle of the rules of court that a Plaintiff should not in the ordinary way be denied

an adjudication of his claim on its merits because of procedural defects unless the defect causes prejudice to his opponent for which an award of costs cannot be compensated.

30. Gleaning the record discloses that the matter proceeded virtually hence the question of hardship or increased costs incurred was not denoted. Although alleged, it was not demonstrated that the adjournment sought following the alleged indisposition was a delaying tactic. What was apparent was some insinuation as it was not only the Appellant who caused the adjournment of the matter.

31. It is alleged that evidence to be adduced by the witness who was indisposed was material as the entire case hinges on it. This meant that it materially affected the case. This implies that refusal of the adjournment sought was foible and not fair.

32. Looking at the record, an application was made and responded to but the Appellant’s counsel was not granted the opportunity to reply hence it cannot be imagined what he would have stated. It cannot be envisaged what kind of repartee he would have put forth.

33. The court was seized of the discretion to grant or decline the adjournment sought but it was obligated to act judiciously and to take into consideration the interest of justice. Good judgment coupled with wisdom would have made the court accord the Appellant the opportunity, even if it were just a day to present evidence.

34. Notably, the trial court closed the case suo moto. It delivered itself thus;

> ***"In the circumstances the application for adjournment by the Plaintiff is declined. The Plaintiff's case is hereby closed matter to proceed for defence hearing."***

35. The Appellant's counsel was not even given the opportunity to close the case. This was not only contrary to the rules of procedure but an injustice. The upshot of the above is hence that the Appellant has demonstrated on a balance of probabilities that the appeal is meritorious as the refusal to adjourn the case resulted into miscarriage of justice.

36. For those reasons, I allow the appeal and order thus;

(i) The order dismissing the application by the Appellant dated 2nd December, 2024 be and is hereby set aside.

(ii) Similarly, the ruling of the court dated 30th September, 2024 and subsequent proceedings are hereby set aside.

(iii) The Appellant be and is hereby allowed to call the last witness to testify.

(iv) The Respondents shall be paid adjournment costs of 30th September, 2024, to be taxed.

(v) Costs on appeal shall be borne by the Respondents.

37. It is so ordered.

Dated, signed and delivered virtually this 17th day of December, 2025.

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L.N. MUTENDE

JUDGE

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