



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, JJA.)

CIVIL APPEAL NO. 127 OF 2017

BETWEEN

ZIPPORAH N. GICHIA.....APPELLANT

AND

SIMON CHEGE.....RESPONDENT

(Being an appeal from the judgment and decree of High Court at Nairobi (Njuguna, J.) dated 9th March 2017

in

HCCA No. 237 of 2009 and HCCA 553 OF 2015

JUDGMENT OF THE COURT

The appellant in this appeal, **Zipporah N. Gichia (Zipporah)**, is displeased with the decision of the High Court which found that the consent judgment entered into with **the respondent, Simon Chege (Simon)**, was valid and binding.

The appeal arises from the decision of the High Court in respect of two appeals which are, *Civil Appeal No. 237 of 2009* and *HCCA 553 of 2015*. The first appeal to the High Court was from the decision of Hon. E.N. Maina, Senior Principal Magistrate, in *CMCC 37 of 2003* delivered on 6th March 2007. And the second arises from a decision of Hon. D.W. Mburu, Principal Magistrate, delivered on 20th October 2015 in the same case.

The proceedings that have culminated in this appeal are rather convoluted, owing to the numerous and inelegantly drafted applications that have dominated the record. Needless to say, the background to the dispute as discernable is that Zipporah instituted a suit in the *Milimani Chief Magistrates' Court in CMCC No. 13288 of 2004 (previously SPMCC No. 37 of 2003 Muran'ga)* against Simon for damages for the injuries she suffered following a road accident which occurred on 24th May 2002. Upon considering the pleadings and submissions, the trial court (Hon. E.N. Maina), awarded Zipporah Kshs. 650,000 as general damages and Kshs. 56,059 as special damages.

Following the trial court's determination, Zipporah filed an appeal to the High Court, *High Court Civil Appeal No. 237 of 2009*, though there is no record of the Notice of Appeal or the Memorandum of Appeal having been filed. Whilst the appeal was supposedly pending before the High Court, on 29th December 2014, Zipporah and Simon entered into a consent judgment in the following terms;

- i. That the defendant do pay to the plaintiff Kshs. 1,475,000/= in final settlement of the decree.***
- ii. That Kshs. 700,000/= to be paid on or before 31st January 2015***
- iii. That the defendant do pay Kshs. 100,000 by 28th February 2015.***
- iv. That subsequent thereto, Kshs. 100,000/= by 30th of each succeeding month until payment in full.***
- v. That the defendant do pay auctioneers fees to be agreed or taxed.***

vi. That in default, execution.”

The consent was adopted as an order of the court on 30th December 2014. Soon thereafter, Zipporah filed an application dated 3rd August 2015 seeking orders for inclusion by the trial court of all costs and expenses that she had incurred including costs for filing a Bill of Costs and the proclamations costs, and that Simon be ordered to clear the entire outstanding decretal amount as well as the amounts spent trying to trace him. And because he had allegedly taken advantage of her poor health at the time the consent was entered into, she also claimed transport costs incurred since 2003 for travel to court through private means (taxi) that were omitted.

The application, which Simon opposed, was heard by the trial court, Hon. D.W. Mburu, and was dismissed with costs. Upholding the parties' consent, the court concluded that it could only be set aside if fraud, duress or misrepresentation was established. Since the respondent had already paid Kshs 1,200,000 out of the final settlement amount of Kshs. 1,475,000, it found that there was no need to interfere with the consent. It is that decision that gave rise to the second appeal to the High Court in *High Court Civil Appeal No. 553 of 2015*.

On 5th July 2016, the two appeals were consolidated and later heard together by the High Court (Njuguna, J.) who identified two issues for determination which were;

- i) Whether or not the trial magistrate misdirected himself in failing to set aside the consent order; and
- ii) Whether or not the consent judgment compromised *HCCA No. 237 of 2009*.

In determining the first issue, the learned judge found that no valid reason had been advanced to set aside the consent, and that Zipporah could not plead ignorance of a lay person when all the material details of the consent were well known to her. On the second issue, the court found that having subjected herself to the consent, appealing against the trial court's judgment on damages was *res judicata*, as the consent judgment had effectively settled the suit.

Zipporah was aggrieved by the decision and has appealed to this Court on grounds that the learned judge was wrong in concluding that she was not entitled to an enhancement of the trial magistrate's award; in finding that the consent filed and adopted as an order was in full settlement of the suit, and that the damages sought were *res judicata* since the consent judgment had settled her suit; in holding that the appeal could not stand alongside the consent, and no good reason was established as to why it should be set aside; in finding that the consent should not be set aside, yet the appellant was not in her right mind and was coerced into signing it; in failing to appreciate that Moran Auctioneers were the only auctioneers to be paid; and in failing to appreciate the appellant's dire medical condition, particularly her heavy dependency on medication.

Zipporah relied on her written submissions, and under a Power of Attorney donated by Zipporah, Mr. Gichia submitted that following the consent, it had not been possible to execute the orders against Simon; that the parties had entered into two consents which were procured under duress. It was further submitted that Zipporah had suffered extensive injuries that had result in 45% disability as evidenced by the medical report; and that the report had indicated that provision would need to be made for future medical treatment and transportation. We were urged to vacate the consent judgment of the lower court and substitute it with appropriate orders.

Ms. Chege, learned counsel for the respondent, also relied on written submissions. In highlighting them, she begun by pointing out that as this was a second appeal, this Court was limited to determining only matters of law. Counsel submitted that the parties compromised the claim by way of a consent dated 29th December, 2014; that thereafter the appellant returned to court seeking orders to obtain more money from the respondent, yet he had since paid all the sums specified in the consent; that the appellant had filed two appeals that were heard and determined by the High Court in its judgment, the subject of this appeal; and that the court dismissed the appeals on account of their having been compromised by the consent judgment.

On the appellant's injuries, counsel asserted that a medical report was undertaken one year after the accident, and subsequent thereto no other report had been provided; that the receipts produced were not genuine, and nor were they connected to the accident.

We have considered the appeal, the submissions by learned counsel and the law. This being a second appeal, we must confine ourselves to matters of law. As was held by this Court in the case of *Naomi Kemuntos Total (K) Limited and Kisii Total Service Station (Kisumu Civil Appeal No. 211 of 2008 (UR)*;

“This being a second appeal, we remind ourselves that Section 72 of the Civil Procedure Act applies and that only issues of law fall for consideration (See *Kitivo - v - Kitivo (2008) KLR 119.*)”

And as set out in the case of *Kenya Breweries Limited vs Godfrey Odoyo [2010] eKLR* it was again stated;

“In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court in a second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters that they should have considered or looking at the entire decision, it is perverse”.

Bearing these precincts in mind, the issues for our consideration are whether the first appellate court rightly found that the consent judgment dated 29th December 2014 was valid and binding, and if so, whether or not it compromised the pending appeals.

As concerns the validity of the consent, both the trial court and the High Court concluded that nothing demonstrated that the circumstances surrounding its entry into existence was fraudulent, or that it was entered into under duress or collusion or coercion or indeed that it was

against public policy. It is trite that fraud, collusion or matters against public policy are matters of fact that require to be proved. They are not matters to be taken lightly and for this reason, they should be adequately ventilated and a determination reached by the trial court. In this case, both the trial court and the High Court reached concurrent findings that none of the threshold requirements for setting aside the consent were established.

Addressing the manner in which an appellate court is enjoined to evaluate concurrent findings, in the case of *Njoroge vs Republic [1982] KLR 388*, this Court held that;

“On a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal, the court was bound by the concurrent findings of fact made by the lower courts, unless those findings were shown not to be based on evidence.”

The two courts below having reached the concurrent findings that Zipporah had not proved that when she entered into the consent she was subjected to fraudulent dealings or was coerced or that the consent was contrived through collusion, this Court is bound by the findings of fact. In the circumstances, we decline to interfere with the findings of the two courts below.

On the next issue which is whether the consent judgment compromised the appeal, the sequence of events that culminated in the consent were that the trial court found in favour of Zipporah on 6th March 2007. Subsequent to the judgment, Zipporah filed an appeal to the High Court. On 29th December 2014, she entered into a consent with Simon which was filed and adopted as an order of the court. The question for us to determine is whether following that consent the appeal filed as *HCCA No. 237 of 2009* was compromised? The answer to the question is to be found in **section 67 (2)** of the **Civil Procedure Act (Cap 21)** which states;

“No appeal shall lie from a decree passed by the court with the consent of parties.”

In this case, the decree would be with reference to the consent judgment between Zipporah and Simon that was adopted as an order of the court on 29th December 2014. With their having entered into that consent, **section 67**

(2) is unequivocal that as a consequence, the appeal was compromised, and there was no possibility of appealing from the consent judgment. Though the

High Court concluded that the trial court’s judgment on damages was *res judicata* as the consent had settled the matter, we are satisfied that what the court meant was that, the consent having been entered into rendered the appeal under **section 67 (2)** as effectively compromised.

As Platt, Ag. JA. succinctly put it in the case of *Flora N. Wasike vs Destimo Wamboko [1988] eKLR* where the facts were similar to those in the instant case;

“It is not necessary nor desirable for us to enter into an adjudication of the right or wrongs of the consent judgment. It is clear from section 67 (2) of the Civil Procedure Act that no appeal can lie from a consent judgment. The proper course for the appellant to take is to set aside the consent judgment by way of a Review by the High Court, or by some process in that court, according to the advice she receives”.

In so concluding, that Court found the appeal to be incompetent and struck it out.

For our part, in view of **section 67 (2)** of the **Civil Procedure Act** and having found that there was nothing upon which a challenge to the validity of the consent judgment was based, we have nothing further to add.

In sum, the appeal is not merited and is dismissed with costs to the respondent.

It is so ordered.

Dated and delivered at Nairobi this 25th day of October, 2019.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU (FCIArb)

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR