



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, WARSAME & MAKHANDIA, JJA)

CIVIL APPEAL NO. 236 OF 2017

BETWEEN

COSMAS MAWELIWE WEPUKHULU.....APPELLANT

AND

SAMEER AFRICA LIMITED (previously known as

FIRESTONE EAST AFRICA (1969) LIMITED.....RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Mbogholi Msagha J) dated 5th July 2016)

IN

H.C.C.C. NO.219 OF 2009

JUDGEMENT OF THE COURT

This is an appeal by **Cosmas Maweliwe Wepukhulu** (hereinafter referred to as the Appellant) against the judgment and decree by the High Court (Mbogholi Msagha J) delivered on the 5th July 2016.

Briefly, the background of this appeal is that on the 1st November, 1995 the respondent employed the appellant as a Security Inspector. On the 13th November 2000, the appellant was redeployed to work as a Tyre Inspector after the respondent outsourced the security services. Sometime in the year 2001 the appellant developed problems with his vision and he had to undergo two surgeries in 2002 and 2004. He later lost his vision and was forced to retire from his work on the 21st May, 2005.

That upon his retirement the appellant with help from his Member of Parliament lodged a complaint for compensation against the respondent and on 22nd August, 2006 he signed a discharge voucher for payment of Kshs.1,291,500/=. Under the discharge voucher it was indicated that the payment of the Kshs.1,291,500/= was in full and final settlement of any claims by the appellant against the respondent arising from the loss of sight.

However, on the 22nd April, 2009 the appellant filed a plaint in the High Court against the respondent. According to the plaint, the plaintiff claimed that he had developed an occupational illness due to exposure to harmful toxic and dangerous radiation while working for the respondent. The appellant claimed that the exposure to radiation resulted in his total loss of sight which led to his retirement from work. The appellant averred that the injuries he sustained were as a result of breach of contract by the respondent. The appellant prayed inter alia for general damages for pain and suffering, loss of amenities and loss of capacity to earn in future. The respondent filed a defence denying the appellants claim and averred that the discharge voucher released the respondent from all claims including the claim filed under the plaint. The parties filed the documents they sought to rely on and also filed a statement of agreed issues for determination. The statement contained 19 issues for determination.

The High Court after hearing the case rendered its judgment on the 5th July 2016. In his decision the learned judge dismissed the case and held that the appellant having executed the discharge voucher and in the absence of evidence that he did so as a result of fraud, duress, mistake or undue influence was precluded from making a further claim against the respondent. The appellant was aggrieved by this judgment of the High Court and proffered this appeal. The memorandum of appeal filed by the appellant listed 9 grounds of appeal as follows:

a. That the learned honourable judge erred in dismissing the appellant's case

b. That the learned honourable judge erred in dismissing the appellant's case on the single issue as to whether or not the discharge voucher executed by or on behalf of the appellant settled in totality the question of liability.

c. That the learned honourable judge erred in failing to address the appellant's response to the issue of the discharge voucher as pleaded in the reply to defence, in evidence and submissions.

d. That the learned honourable judge erred in failing to assign meaning to the words "ex-gratia payment" in the discharge voucher.

e. That the learned honourable judge erred in failing to decide the issues for determination as framed by the parties.

f. That the learned honourable judge erred in failing to distinguish whether the settlement of Kshs.1,291,500/= was for employment emoluments or was for occupational illness contracted by the appellant.

g. That the learned honourable judge erred in failing to determine whether on clear provisions of the Work Injuries Benefits Act and its predecessor law, the repealed Workmen Compensation Act, the compensation of Kshs.1,292,500 met the legal threshold entitling the respondent to a discharge.

h. That the learned honourable judge erred in law in failing to address or to give meaning or to distinguish or depart from the decision of Justice Githinji in *Kimeu vs Kasese 1990 KLR 35* on a similar issue of fact and/or law.

i. That the learned honourable judge erred in failing to assess quantum of damages while dismissing the appellant's case in any event, a legal prerequisite.

When the matter came up for hearing Mr. Muturi appeared for the appellant and Ms Matata appeared for the respondent. Mr. Muturi submitted that the learned judge decided the matter on a single issue while there were 19 issues identified for determination.

Counsel argued that the learned judge did not address the response of the appellant in respect of the discharge voucher. He contended that if we were to consider the issues set out for determination we would disturb the findings of the learned judge.

On her part Ms. Matata submitted that the amount paid under the discharge voucher was in full and final settlement of the claim.

She argued that the discharge voucher was a legal document. Counsel further submitted that there was no evidence to demonstrate that the illness of the appellant was contracted at the respondent's work place.

Having considered the record, respective submissions by learned counsel and authorities cited, it is our considered view that the only issue for determination is whether the learned judge erred in failing to consider the statement of agreed issues for determination filed by the parties.

The Court's mandate on a first appeal is set out in Rule 29(1) of the Court's Rules namely to re-appraise the evidence and to draw inferences of fact. Where the exercise of judicial discretion is involved, the exercise of which is called to the Court's interrogation, the Court should remain guided by the principles enunciated in **Selle v Associated Motor Boat Company Ltd. (1968) EA 123** and **Pill Kenya Ltd Vs. Oppong [2009] KLR 442**; that it will not interfere unless it is satisfied that the judge misdirected self in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice by such wrong exercise.

The appellant contends that the learned judge erred when he failed to consider the statement of agreed issues filed in court by the parties. In order to determine whether indeed the learned judge failed to consider the statement of agreed issues it is important for us to look keenly at the judgment by the learned judge. The learned judge stated thus when giving his determination:-

"It has not been easy to determine with certainty at what point the plaintiff contacted the ailment that led to the blindness of the plaintiff. What is clear is that the plaintiff was paid the sum of Kshs.1,291,500/= on the basis of his salary and percentage of disability which was 100%. It was his evidence that this payment was higher than what is payable under the workman's compensation Act and therefore the plaintiff is not entitled to any more payment. In any case the plaintiff executed a discharge voucher releasing the defendant of any liability to him before the plaintiff signed the discharge voucher, it was explained to him in the presence of his wife and the personal assistant to Dr. Kibunguchy which he accepted in the presence of his witnesses. There are several decisions that have addressed the issue of a discharge voucher which in my judgment holds the key to success or failure of the plaintiff's case before the court."(emphasis added)

The judge then went on to make a finding that because the appellant had not pleaded the existence of fraud, duress, mistake or undue influence in his plaint and because a party is bound by his pleadings he cannot raise it in his submissions and on this ground the learned judge dismissed the appellant's claim.

We have looked at the statement of agreed issues filed by the parties and as noted above the same contains a myriad of issues which the parties wanted the court to determine. We are of the view that one of the most important issues for consideration by the court was whether the illness of the appellant leading to his loss of vision was a result of his work with the respondent. The other issue that was also important is whether the respondent owed the appellant a statutory duty of care and if so whether it was a breach of that duty that led to the injuries suffered by the appellant. We note that the issue of the discharge voucher was one of the agreed issues for determination. However, we take note that even then there were other several issues that the parties wanted the court to determine with regard to the discharge voucher. One of them was whether the discharge was in respect of plaintiff's employment emoluments or whether it included workmen compensation and

common law claims.

The parties put forward 19 agreed issues for determination before court titled “*statement of agrees issues for determination*” in a letter dated 28th July 2009 and filed in court on 5th August 2009.

It is clear from the plaint and submission filed before the trial court, that the appellant attributes his injury, loss and damage to exposure to harmful, toxic and dangerous radiation emanating from the respondent’s trade in the manufacture of tyres. Additionally the appellant contended that the said exposure resulted in him developing painful headaches, blurred vision, making him to undergo two major surgeries in 2002 and 2004 to excise tumor. It is further contended by the appellant that as a result he suffered total loss of sight. The same allegation can be found at paragraphs 7 and 8 of the plaint filed by the appellant.

Another fundamental point pleaded by the appellant is *Res Ipsa Loquitor*, in addition to the breach of duty of care. From or perusal of the record, the appellant also filed comprehensive and detailed submissions in respect of all the issues placed before court for determination. We have also note3d that the respondent filed a defence and detailed submission answering all the issues raised by the appellant, paving the way for the court to address its mind to all the issues pleaded, agreed and set for its determination.

The question that falls for our determination is whether the honourable trial judge addressed his mind to the 19 issues agreed by the parties for his determination. And secondly whether he was entitled to determine the dispute on a single and isolated issue. In answering the first question it is clear from our reading of the judgment that the honourable trial judge decided the dispute on the single issue of discharge voucher dated 22/8/2006 signed by the appellant in the presence of his wife. The trial judge was of the view that the appellant was not entitled to any more payment after executing a discharge voucher. In essence the judge was of the position that the discharge voucher signed by the appellant, released the respondent of any further liability.

In our humble view the parties framed 19 issues for determination before the trial judge. As a matter of good order and procedure the parties were entitled to an answer to each of the 19 issues set for determination, notwithstanding the contents and style employed by the judge. That was not done, which in essence means that the trial judge failed to consider material and fundamental aspects of the dispute between the parties. Respectfully we think the trial judge fell into an error, which clearly vitiates the judgment subject of this appeal. Consequently the failure and/or omission to consider 18 issues goes to the root of the judgment, which we cannot allow to stand.

We therefore agree with the counsel for the appellant that indeed the court erred in considering only the issue of the discharge voucher. From the excerpt of the judgment which we have underlined above it is clear that according to the learned judge the issue of the discharge was the crux of the case and held the key to success or failure of the appellant’s case. We respectfully disagree with the learned judge and hold that the learned judge should have considered the other issues raised by the parties, in arriving at its final decision.

The upshot of the above is that it would be proper to refer this case back to the superior court for re-trial. Rule 31 of this Court’s rules gives us power to do so. It provides;

“On any appeal the court shall have power, so far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior court, or to remit the proceedings to the superior court with such direction as may be appropriate, or to order a new trial and to make any necessary incidental or consequential orders, including orders as to costs.”

In conclusion, we allow the appeal and direct that the matter be referred to the High Court for re-trial before any other judge other than the Hon. Mr. Justice Msagha Mbogholi. Each party to bear their own costs.

Dated and delivered at Nairobi this 2nd day of March 2018

P. N. WAKI

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

ASIKE MAKHANDIA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR