Choka & another v Nkonge (Civil Appeal E988 of 2022)
[2024] KEHC 9952 (KLR) (Civ) (26 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9952 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E988 OF 2022

RC RUTTO, J

JULY 26, 2024

BETWEEN

DAVID NGATIA CHOKA & ANOTHER ..... APPELLANT

AND

HENRY NKONGE ..... RESPONDENT

(Being an appeal from the Ruling delivered on 5th August 2022 at the Chief Magistrates court at Milimani (Hon. Kagoni E.M (SPM))

JUDGMENT

1. This appeal arises from the Ruling of Hon. E.M Kagoni in Milimani CMCC 2142 of 2019 delivered on 5/8/2022. In the said suit the Respondent herein, suing as personal representative of the estate of Amon Mutari Nkonge) was seeking compensation in the form of general and special damages. It was pleaded that the cause of action arose from a road traffic accident along Mombasa Road.

2. The Appellants were duly served with the Plaint but did not enter appearance on time resulting to entry of an interlocutory judgement on 21/5/2021.The Appellant vide a Notice of Motion Application dated 18/11/2021 sought to set aside the interlocutory judgement.

3. Upon hearing parties, the trial Court vide its ruling delivered on 5/8/2022 dismissed the application with costs on the basis inter alia that there was inordinate delay in filing the Defence and Application.

4. The Appellant aggrieved by the ruling, filed the present appeal raising the following grounds:

    a. That the learned magistrate erred in law and fact in making a finding that the Applicant's application dated 18th November 2021 was unmerited despite the Appellant's supporting affidavit and submissions therefore proceeded to dismiss the application with costs.

b. That the learned magistrate erred in law and fact in holding that the Appellant's defence did not raise any triable issues despite the submissions and material placed on record by the Appellants.

c. That the learned Magistrate erred in law an in fact in failing to consider the Appellant's submissions to the application dated 18th November 2021.

Submissions on the appeal

5. The parties canvassed the appeal by way of written submissions.

6. The Appellants submitted that the ruling denied them their right to be heard which is contrary to the rules of natural justice and a violation of their constitutional rights. They placed reliance on the Court of Appeal decision in *Patriotic guards limited v James Kipchirchir Sambu* (2018) eKLR.

7. While making reference to the *Pinnacle Projects Ltd v Presbyterian Church of East Africa, Ngong Parish & another* (2018) eKLR, it was submitted that the Court in dismissing their application restricted their right to fair hearing. That the delayed action did not obviate their constitutional right to present their case and the Court should be concerned with hearing and determining cases on their merits.

8. The Appellants fault the trial Court for failing to consider its reasons and submissions on record. They, contend that they gave sufficient, excusable reasons, for their delay in filing the statement of defense and displayed effort and willingness to defend the suit.

9. Further, that the delay was occasioned by an error of the advocate and it's a principal of law that mistakes of counsel should not be visited upon the Client. They urged that the trial Court erred in associating the Appellants with the mistakes of counsel hence it failed to balance the rights of the parties and arrived at an unjust finding. Reliance was placed on *Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others* (2015) eKLR. *Philip Keipto Chemwolo & another v Augistine Kubende* (1986) eKLR *Bank of Africa Kenya Limited v Put Saranjevo General Engineering Co. Ltd & 2 others* (2018) eKLR.

10. It was equally the Appellants submission that their defence raises triable issues and they should be allowed to defend the suit as the fundamental duty of the Court is to do justice and allow parties the opportunity to argue their cases on the merits.

11. In conclusion the Appellants submitted that if the ruling dated 5/8/2022 is allowed to stand it will occasion grave injustice to them vis-a-vis the inconvenience to be suffered by the Respondent if the Appeal is allowed and a fresh trial ordered.

Respondent's Submissions

12. The Respondent on the other hand submitted that the trial Court did not err in holding that the justification by the Appellants for the delay was not tenable. This is because the Appellants were served on 16/3/2020 and ought to have entered appearance on or before 30/3/2020. However, they did not enter appearance and file defence within the stipulated time, as a result the Respondent applied for interlocutory judgement which was entered on 21/5/2021. That the Appellants filed appearance and defence on 28/5/2021 after interlocutory judgement had been entered.

13. They submitted that the Appellants having been served were duly notified of the existence of the suit and thus given an opportunity to defend themselves which they did not.

14. It was their further submission that, the trial Court's ruling dismissing the Appellants' Application was legally sound as they did not tender a plausible reason for the delay in filing their appearance and defence.

15. The Respondent further contend that the Appellants did not demonstrate steps taken upon being served to ensure that appearance had been entered and defence filed on their behalf, yet it is trite law that a case belongs to the litigant and not the advocate thus it is the duty of the party to follow up on the progress of the suit. They made reference to the case of *Mwaro & another v Charo & 5 others* (Environment & Land case 27 of 2018) (2023) KEELC 21604 (KLR) *Rajesh Rughani v Fifty Investments Ltd & another* (2016) eKLR.

16. It was the Respondent's submission that the Appellants were deliberately indolent thus undeserving of the Court's discretion as there was no reasonable explanation for delay from the time of service on 16/3/2020 to 21/5/2021 when interlocutory judgement was entered. Reference was made to the case of *Prime Bank v Paul Otieno Nyamodi* (2014) eKLR.

Analysis and Determination

17. This being a first appeal, this court reminds itself of its primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the Record of Appeal and make its own conclusions. See the case of *Selle v Associated Motor Boat Company Limited* (1986) E.A 123.

18. I have considered the pleadings and the evidence adduced before the trial Court as well as the contending submissions in this appeal. The crux of this appeal is a determination on whether the trial Court properly exercised its discretion in dismissing the Appellant's application seeking to set aside the interlocutory judgment. The Appellant also seeks that and their defence deemed to be properly on record.

19. Order 10 rule 11 of the *Civil Procedure Rules 2010* gives the Court unfettered discretion to set aside a default judgment. However, such leave is not to be granted as a matter of course. The Court must satisfy itself that there is a good explanation that has been offered to set aside such judgment and upon such terms that it would deem fit in the circumstances because such action would definitely be taking a Plaintiff back in time causing delay in the conclusion of his case.

20. In *Thorn PLC v Macdonald* (1999) CPLR as cited in *David Kiptanui Yego & 134 others v Benjamin Rono & 3 others* [2021] eKLR the Court of Appeal highlighted the following guiding principles in the exercise of the discretion:

    a. While the length of any delay by the defendant must be taken into account, any pre-action delay is irrelevant;

    b. Any failure by the defendant to provide a good explanation for the delay is a factor to be considered but is not always a reason to refuse to set aside;

    c. Primary considerations are whether there is a defence with real prospect of success and that justice should be done; and

    d. Prejudice, or the absence of it, to the claimant also has to be taken into account.

21. In the present case, the first ground foe analysis is a consideration on the length of delay. It was not disputed that the Appellants were duly served with the plaint and summons to enter Appearance on 16/3/2020. It was also not disputed that the Appellants did not enter appearance or file a defence

within the stipulated period thereby causing the Respondents' request for default judgment on 7/8/2020 which judgment was entered on 21/5/2021.

22. From the chronology of the events leading to the entry of the impugned interlocutory judgement, it is clear that it took the Appellants at least 18 months, from the date of service, to file the instant application. I find that the 18 months' delay in filing the present application was not only inordinate but was also not sufficiently explained by the Appellants.

23. Further, a perusal of the record shows that the interlocutory Judgement was entered on 21/5/2021 and the application dated 18/11/2021 filed on 22/11/2021. The Appellants did not proffer any plausible explanation for the 6 months' delay in filing the Application after entry of judgement.

24. The Appellants in their supporting affidavit dated 18/11/2021 sworn by the 2nd Appellant attributed the delay to an officer at their counsel's firm who left the firm's employment without handing over the file to the managing partner. In my view, the reasons advanced by the Appellants for failure to file the defence were not persuasive.

25. As correctly observed by the trial Court the Appellants did not place any evidence before the Court to show that such an officer did leave the advocate's firm at the time or any details of the files handed over by the officer with the omission of the Appellants' file. It was not enough for the Appellants to just allege that an unnamed officer did not hand over the file without any evidence to support it.

26. The Appellants did not also demonstrate the concrete steps they took to follow up on the position of their case for the entire 18 months since service prior to the filing of the instant application. It was not enough for them to simply blame an officer in the advocate's office for the mistake. They ought to have shown the tangible steps taken in following up their matter. I associate with the holding of Kimaru J in *Savings and Loans Limited v Susan Wanjiru Muritu* Nairobi (Milimani) HCCS No 397 of 2002 where he pronounced thus: -

> " Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour is an indictment on the defendant."

27. Thus, my considered opinion is that the reasons advanced by the Appellants for the delay are not plausible and have no merit.

28. Notwithstanding the aforementioned, the second factor for consideration is whether the defendant has a defence on merit. In *Tree Shade Motors Ltd v D.T. Dobie v another* (1995-1998)IEA 324 as cited in *M/S Jondu Enterprises Ltd v Spectre International* (2019)eKLR the Court held that even when ex-parte judgment was lawfully entered, the court should look at the draft defence to see if it contains a valid or reasonable defence. See also *Prime Bank Limited* (*supra*)

29. Notably, the trial Court did consider the Appellants' draft defence and concluded that it raised triable issues to wit: whether the accident occurred; and whether the 2nd Appellant is the registered owner of motor vehicle registration No KBZ 746U.

30. However, despite the finding that the defence raised triable issues the Court proceeded to dismiss the application on the ground that there was no justification for the inordinate delay in filing the memorandum of appearance and statement of defence as well as the Application.

31. In *CMC Holdings Limited v Nzioki* [2004] KLR 173 the Court of Appeal held that if a defence raises triable issues the defendant should be given leave to enter and defend. Accordingly, the trial Court having found that the defence raised triable issues it was only appropriate to allow the Application.

32. Also guided by the holding in the case of *Martin Maurice Odhiambo v Kipsigis Traders Co-operative Society Ltd & another* (2010) eKLR the right of a party to be heard is paramount and it supersedes any inconvenience caused to the court or other litigants who can be compensated by costs.

33. Similarly in *Wachira Karani v Bildad Wachira* (2016) eKLR cited in *David Gicheru v Gicheha Farms Limited & another* [2020] eKLR the Court held that:-

> "The fundamental duty of the Court is to do justice between the parties. It is in turn, fundamental that to that duty, those parties should each be allowed a proper opportunity to put their cases upon the merits of the matter..."

34. Therefore, it is my considered view that while no plausible reason was offered for the inordinate delay the fact that the Appellants have a triable defence, it is only fair and just to allow them to exercise their fundamental right to be heard as enshrined in Article 50 (1) of the *Constitution* of Kenya.

35. The third factor for consideration by the Court in exercising its discretion, is the extent to which the Respondent would suffer prejudice if the interlocutory judgement was set aside. I note that the trial Court merely stated that the Respondent would be highly prejudiced without addressing its mind to the extent of prejudice and if the same was incapable of being compensated by costs.

36. Further the Respondent did not place any evidence before the Court to show that the prejudice he will suffer would be so irreparable as to constitute a grave injustice that could not be adequately compensated by way of costs.

37. Taking into account the foregoing factors it is my considered view that this Court should exercise its discretion so as to allow the suit to be heard on merit. The Appellant has shown its intentions to be heard and it would not be in the interests of justice to deny them that opportunity. The prejudice that the Respondent would suffer for the delay in the conclusion of his case by having it heard on merit can be compensated by way of thrown away costs.

38. In view of the above I issue the following orders:

    a. The Ruling delivered on 5/8/2022 is hereby set aside and is substituted with an order allowing the Notice of Motion Application dated 18/11/2022.

    b. The interlocutory judgment entered on 21/5/2021 and all consequential orders are hereby set aside.

    c. The memorandum of appearance and statement of defence dated 20/4/2020 and filed on 10/8/2021 are deemed to be properly on record.

d. The Appellants shall pay to the Respondent thrown away costs in the sum of Kshs 30,000/= within fourteen (14) days from the date of this ruling.

e. In the event the Appellants fail to comply with order (d) hereinabove, the Respondent will be at liberty to move the Court for appropriate orders.

f. The Lower court matter to be mentioned before the Head of Station, Chief Magistrate Court on 22nd August, 2024 for purpose of re-allocation setting down for hearing on a priority basis.

g. Costs in the cause.

It is so ordered.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 26TH DAY OF JULY 2024

For Appellants: Ms. Nyambaka H/b For Mr. Githinji

For Respondent: Ms. Njeri H/b For Kiungu

Court Assistant: Peter Wabwire