



REPUBLIC OF KENYA



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**Kimando v Ganaki Multipurpose Sacco Co Ltd (Civil Appeal E177 of 2022)
[2024] KEHC 10700 (KLR) (Appeals) (23 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10700 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

APPEALS

CIVIL APPEAL E177 OF 2022

REA OUGO, J

AUGUST 23, 2024

BETWEEN

PRIMROSE WANJIRU KIMANDO APPELLANT

AND

GANAKI MULTIPURPOSE SACCO CO LTD RESPONDENT

*(An appeal against the Ruling in CMCC No. E302 OF
2021 was delivered on 2.3.2022 by PM, Hon. Kagoni)*

JUDGMENT

1. The background of this appeal is as follows; the respondent filed suit vide a plaint dated the 5th March 2020. A summons to enter appearance dated 11th May 2021 was issued to the plaintiff. On 3.6.2021 Bridah Kimathi, a process server served the appellant via her email address which she uses for communication. The appellant entered an appearance on 5.7.2021 through her advocate K. Kibuku & Company advocates. Thereafter interlocutory judgment was entered against the appellant in default of appearance. On 5.12.2021 the appellant filed an application dated 5.12.2021 seeking the following orders; a stay of execution of the judgment in default of defence, setting aside of the judgment in default of defence in default of defence entered against the appellant on the 23.11.2021 and that the appellant be granted unconditional leave to defend the suit. She also sought that the statement of defence and list of witnesses and statement of defence filed on the 17.8.2021 be deemed as duly filed on time and the defendant be at liberty to defend the matter on its merits. The application was supported by an affidavit filed by Mr. Paul Kariba Kibiku. He explained as follows in his affidavit; that receiving instructions from the appellant they entered an appearance on 5.7.2021 and served the memorandum of appearance upon the respondent's advocate on 6.6.2021. Thereafter his office inadvertently misfiled the defendant's file which was only retrieved in August 2021 upon which they proceeded to file a statement of defense on 17.8.2021 and served the respondent's counsel on 18.8.2021. On the 3.12.2021



his office received an alert from the Judiciary's E-filing system that interlocutory judgment had been entered against the defendant on 23.11.2021. they perused the file thereafter and discovered that the respondent had requested for the said judgment on the 13.8. 2021 three days before they filed their defense. The failure to file a defense arose due to inadvertence in his office which error he requested the court not to visit upon the appellant an innocent litigant. It is further averred that the appellant has a strong defense against the respondent since no evidence was placed before the court to show that the appellant had collected any monies from the respondent and that the respondent would not suffer any prejudice since they had served a statement of defense more than three months ago and the respondent's counsel did not protest the service of the same and any prejudice which they may suffer maybe remedied by an award of throw away costs in their favor. That the appellant would suffer substantial loss since the respondent could commence execution noting that the claim is liquidated.

2. The application was opposed by the respondent. The respondent averred as follows; the appellant entered an appearance on 5.7.2021 on 13.8.2021 the respondent filed a request for judgment in default of defence which had not been filed within the statutory period and the same was granted on the 23.11.2021. the appellant failed to file a defence within the legally stipulated time despite having procured an advocate. The appellant cannot claim inadvertence since she had filed a memorandum of defence and had not filed a defence three (3) months later. The suit was instituted and proceeded with the full knowledge of the appellant who elected out of her own volition not to participate in the said process. The defence filed only contains denials and does not contain any plausible defence to the documents filed by the respondent. The respondent would be prejudiced if the application was allowed.
3. In a Ruling dated 3.2.2022 the trial court dismissed the appellant's application dated 5.12. 2021. The said ruling is the subject of this appeal.
4. The appellant filed a Memorandum of Appeal on 24.3.2022 and has listed 4 grounds of appeal as follows;
 - i. The Hon. Magistrate grossly misdirected himself by treating the appellant's application to set aside Judgment in default of defence and submissions thereto superficially and consequently arrived at a wrong decision.
 - ii. The Hon. Magistrate erred in law and in fact by finding that the Appellant had not put forward a valid reason for failing to file her defence on time.
 - iii. The Hon. Magistrate erred in law and in fact by finding that the Appellant's defence which was filed out of time, did not contain any triable issues.
 - iv. The Hon. Magistrate erred in law and in fact by failing to set aside the Judgment in default of defence and refusing to grant the Applicant leave to defend the suit.
5. The appellant seeks that the appeal be allowed. The court be pleased to set aside the judgment in default of appearance entered on 23.11. 2021 and grant the appellant leave to file a defence in the suit and that costs of the appeal be granted to the appellant.

Analysis and Determination

6. The appeal was canvassed by way of written submissions. The appellant gave a background of the matter and proceeded to submit as follows; the trial court in its Ruling dated 02.03. 2022 dismissed the appellant's application with costs on grounds that; the appellant had not advanced sufficient reason for failing to file the statement of defence on time and that the statement of defence did not contain any triable issues and was full of denials. It was further submitted in considering an application to set aside



an ex parte judgment, the court exercises its discretion in allowing or rejecting the same. The discretion has to be exercised judiciously. The court on appeal will not interfere with the exercise of discretion on an application for summary judgment unless the exercise was wrong in principle or the judge acted perversely on the facts (see holding in [CMC Holdings Ltd vs James Mumo Nzioki](#) (2004) eKLR-page 11). That it is the counsel who made a mistake and not the appellant in that counsel misplaced the appellant's file in their office and the file was found only after the stipulated time to file defence had lapsed. This act was not deliberate and the judgment was entered 3 months later on 3.12.2021 after the appellant filed her defence. They moved swiftly after they discovered that judgment had been entered and filed the application on 5.12.2021. This shows that the appellant is not out to cause any delay and therefore deserves the favourable exercise of the court's discretion her favor. To buttress this, point the appellant relied also on the decision in the case of [Bank of Africa Kenya Ltd vs Put Sarajevo General Engineering Co. Ltd & Another](#) (2018) eKLR.

7. On whether the statement of defence has triable issues, the appellant submits as follows; the court erred in holding that the appellant ought to have explained why she was not indebted to the respondent instead of simply denying being indebted and that in so doing the trial court shifted the burden of proof upon the appellant who was the defendant yet the burden of proof always rests with the plaintiff. The defence has triable issues. The appellant relied on [Job Kilach vs Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono](#) (2015) eKLR where in defining what a triable issue is the court observed that;

“ A *bona fide* triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The [Black's Law Dictionary](#) defines the term “triable” as, “subject or liable to judicial examination and trial”. It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court”.

8. The respondent submitted as follows; the trial court rightly held that courts have the discretionary power to set aside ex-parte judgment on the basis that the applicant has a defense that should be heard on merit. On the reason given that the advocate had misplaced the file in chambers, the respondent submitted that it is general law that the advocate's failure to execute his client's instructions amounts to professional negligence. The respondent relied on the decision in [Water Painters International vs Benjamin Ko'goo t/a Group of Women in Agriculture Kochieng \(Gwako\) Ministries](#) (2014) eKLR where the Court stated that:

“ In words of Justice Ringera in [Omwoyo – vs – African Highlands & Produce Co. Ltd.](#) [2002] 1KLR, time has come for legal practitioners to shoulder the consequences of their negligent acts or omissions like other professionals do in their fields of endeavour. The Plaintiff should not be made to shoulder the consequences of negligence of the Defendant's advocates. This is a proper case where the Defendant's remedy is against its erstwhile advocates for professional negligence and not setting aside the Judgement”.

9. It was further submitted that the application arose out of the professional negligence of the advocate representing the appellant and that it is only fair that they bear the consequences therefore and that the reason advanced is not enough to warrant setting aside the judgment.
10. On whether the applicant has a valid reasonable defence, it was argued that the defence was filed out of time and that it contains mere denials and has no merit. For this argument, the respondent relied on the following cases namely [Patel vs E.A Handling Services Ltd](#) (1974), [Tree Shade Motor Ltd vs D.T. Dobie Co. Ltd](#) CA 38 of 1998, [Thayu Kamau Mukigi vs Francis Kibaru Karanja](#) (2013) eKLR and



Kimani vs MC Connell (1966) EA 545, these courts held that when an *ex parte* judgment was lawfully entered the court should look at the draft defence to see if it contained a valid or reasonable defence.

11. On the Court's discretion the respondent submitted that the court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in light of the facts and circumstances both prior and subsequent of the respective merits of the parties. Nothing warrants the court exercising its discretion to set aside the judgment but should the court decide to do there should be conditions that the appellant pays the decretal sum as security in court pending appeal (see the case of *Rayat Trading Co. Limited vs Bank of Baroda & Tetezi House Ltd* [2018] eKLR and *Creasy vs Breachwood Motors Ltd* [1993] BCLC 480). Lastly, it was submitted that the discretion of the court should be exercised to avoid injustice or hardship resulting from accident, inadvertence, and excusable mistake or error. The respondent urged this court to dismiss the appeal with costs to the respondent.

Analysis and Determination

12. This being the first appellate court, it was held in *Selle v Associated Motor Boat Co.* [1968] EA 123 that:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must 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 this respect, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

13. There is no dispute that the appellant was served with a plaint and summons to enter appearance and defence. Thereafter her counsel filed a memorandum of appearance but failed to file the defence within the stipulated statutory time and that judgment was later entered against the appellant. The rival submissions have clearly stated what the court has to consider in an application to set aside an interlocutory judgment.
14. The principles upon which a court can set aside interlocutory judgment are well settled. The appellant in her application sought to set aside the judgment entered against her on 3.12.2021. Order 10, rule 11 of the *Civil Procedure Rules*, provides that an *ex-parte* interlocutory judgment in default of appearance or defence may be set aside, it states as follows: -

“Where a judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

This provision indicates that a court has the discretion to set aside a default judgment.

15. In *Rayat Trading Co. Limited vs Bank of Baroda & Tetezi House Ltd* [2018] eKLR the court listed the matters to be considered in the exercise of this discretion as follows:
 - i. The defendant has a real prospect of successfully defending the claim;
 - ii. It appears to the court that there is some other good reason why;
 - iii. The judgment should be set aside or varied;
 - iv. The defendant should be allowed to defend the claim



16. In my view when considering an application to set aside an interlocutory judgment the court has to consider the following: the reasons given for seeking the order; the nature of the defence, the period of delay, any prejudice the claimant is likely to suffer if the default judgment was set aside.
17. The appellant's advocate stated that it was his mistake that he did not file the defence on time because they had misplaced their pleadings/file. The respondent has criticized this reason and argues that the appellant's counsel should not be excused for the alleged mistake and that the appellant's remedy is to sue her advocate. In my view, the appellant's counsel has persuaded this court that what happened was an oversight and inadvertent mistake on the part of their part as counsel and that they quickly moved to court to have the judgment aside. It is an excusable mistake.
18. The next issue is whether the defence raises any triable issue. A bona triable issue is any matter raised by a defendant that would require further interrogation by the court during a fully , this was the holding by the Court of Appeal in *Job Kilach vs Nation Media Group Ltd and 2 Others* Civil Appeal No.94 of 2006. The court cited the Black Law Dictionary which defines triable issues as subject or liable to judicial examination and trial. The court stated further that it does not need to be an issue that would succeed but just one that warrants further invention by the Court.
19. I have perused the defence that was filed outside the statutory period and I find that it is not a mere denial. At paragraph 4 the appellant avers as follows;

“The defendant denies the contents of paragraph 4 of the plaint and puts the plaintiff to strict proof thereof. Further, the defendant denies any privity in the transactions which were enumerated at paragraph 4 of the plaint and avers that she is a stranger to the parties, motor vehicles and amounts indicated therein”.

In my view, this paragraph read along with paragraph 4 of the plaint raises a triable issue that should be interrogated at the trial. The defence is not a mere denial. The respondent has also been put to strict proof. The documents attached by the respondent are the ones to be interrogated by the appellant at the trial. The defence is valid and reasonable. The appellant has made out a case for the granting of the discretionary orders to set aside the interlocutory entered on the 3.12. 2021

20. On whether the application to set aside the judgment was brought within reasonable time. The interlocutory judgment was entered on 3.12.2021 and the application was filed on 5.12.2021. There was no delay in applying.
21. Further in my view, the applicant will suffer prejudice if the matter proceeds to execution is that she will be condemned unheard due to a mistake that is not hers, but her counsel. Her defence has a triable issue and in the interest of justice, she deserves to be heard or to be given a chance to interrogate the claim against her. In *Rayat Trading Co. Limited v Bank of Baroda & Tetezi House Ltd* [2018] eKLR, the Court stated as follows on the subject of delay: -

“It's an old adage that, justice delayed is justice denied and that justice is weighed on a scale that must balance. Therefore, as much as the Court is obligated to promote the provisions of Article 159(2)(d) of the *Constitution* of Kenya, 2010 and uphold substantive justice against technicalities, the law must protect both the Applicant and the Judgment Creditor for justice to be seen to be done. Even then a mistake by a Counsel is not a technicality. In the same vein the provisions of Section 1A and 1B of the *Civil Procedure Act* obligates the parties to assist the Court in the expeditious disposal of cases.”



22. I therefore allow the appeal. the interlocutory judgment entered on 3.12.2021 in default of defence in Nairobi CMCC No. E302 of 2021 is set aside. The appellant is granted leave to defend the suit as sought in prayers 3 and 4 of the application dated 5.12.2021. The cost of the appeal is granted to the respondent. It is so ordered.

DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 23RD DAY OF AUGUST 2024.

R.E.OUGO

JUDGE

In the presence of:

Miss Kamau h/b for Mr. Kibuku - for the Appellant

Mr. Mwangi h/b Miss Kimanthi - for the Respondent

Diana - C/A

