Citi Hoppa Limited v Mwanzia & 2 others (Civil Appeal E597 of 2022)
[2024] KEHC 12251 (KLR) (Civ) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 12251 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E597 OF 2022

MA OTIENO, J

SEPTEMBER 26, 2024

BETWEEN

CITI HOPPA LIMITED ..... APPELLANT

AND

DOROTHY NTHAMBI MWANZIA ..... 1ST RESPONDENT

SOSPETER NDERE NJOROGE ..... 2ND RESPONDENT

JAMES EVANS WAMBUA ..... 3RD RESPONDENT

(Being an appeal against the Ruling and Order of Hon. S.G. Gitonga (Mrs.)) RM delivered on 28th July 2022 in Nairobi CMCC No. 6654 OF 2019)

JUDGMENT

Introduction

1. This Appeal emanated from the lower court's Ruling delivered on 28th November on the Appellants Notice of Motion Application dated 12th April 2019 in the Nairobi CMCC No. 6654 of 2019 in which the Appellants herein sought stay of execution and the setting aside of the trial court's judgment dated 13th March 2019 and the consequential decree.

2. The background of the matter is that following a road traffic accident that occurred on 18th May 2013 along Argwings Kodhek Road involving the 2nd Respondent's motor vehicle registration KBB 812G (which was then being driven by the 3rd Respondent), the 1st Respondent (then a Plaintiff) who was injured in the aforesaid accident instituted proceedings in the lower court against the 2nd Respondent (then the 1st Defendant), the Appellant herein (then the 2nd Defendant) and the 3rd Respondent herein (then the 3rd Defendant) seeking compensation for the injuries suffered in the accident.

3. The Appellant herein (then a 2nd Defendant) together with the 3rd Respondent (then the 3rd Defendant) was described in the suit as "the beneficial and/or ostensible owners and/or possessors of the said motor vehicle registration number KBB 812G which was at all material time being driven by the 3rd Defendant". The 2nd Respondent was described as the registered owner of the motor vehicle in question.

4. The law firm of Ngaywa Ngigi & Kibet Advocates entered appearance for all the Defendants on 15th December 2016 and filed a defence on the same date denying liability.

5. On 18th January 2019, the Appellant herein appointed the law firm of Anne W. Kimani Advocates to take over and act for them in place of Ngaywa Ngigi & Kibet Advocates. A notice of change in that regard was filed in court on 21st January 2019.

6. From the proceedings, it is evident that apart from entering appearance and filing of the defence, the defendants did not participate any further in the matter and did not adduce any evidence at trial.

7. On 13th March 2019, the trial court delivered its judgment in favour of the 1st Respondent herein, finding the Appellant and the 1st and 2nd Respondents jointly and severally liable for the accident. A sum of Kshs. 600,000/= was awarded by the court as general damages; Kshs. 150,000/= as cost of future medical treatment and a further Kshs. 75,345/= for special damages. Costs and interest of the suit were also awarded to the 1st Respondent.

8. Following the delivery of the judgment, the Appellant on 12th April 2019 filed an application under certificate of urgency seeking to have the following orders; -

    i. That leave be granted to the firm of Anne W. Kimani & Company Advocates to come on record for the 2nd Defendant/ Applicant herein (present Appellant).

    ii. That there be a stay of execution of the judgment and decree pending inter-partes hearing of the application.

    iii. That the judgment and decree issued as against the 2nd Defendant (present Appellant) be set aside and all consequential orders be vacated.

    iv. That the 2nd Defendant (present Appellant) be granted unconditional leave to defend the main suit and be allowed to file its appearance and defence in this suit.

    v. That the 2nd Defendant's (present Appellant) draft annexed defence be deemed as having been filed and served with the leave of the court.

    vi. That costs be provided for in any event.

9. On 28th November 2019, the trial court (Hon. S.G. Gitonga -RM) delivered its ruling and dismissed the aforesaid Appellant's Notice of Motion Application dated 12th April 2019 for lack of merit. The court found that contrary to the Appellant's allegation that they were never served with the summons, evidence on record showed that they were in fact served and duly entered appearance but chose not to participate in the hearing.

The Appeal

10. Aggrieved by the trial court's ruling of 28th November 2019, the Appellant vide his memorandum of appeal dated 28th July 2022 lodged an appeal to this court raising eight grounds of appeal against the whole of the aforesaid Ruling. Principally, the Appellant's main contention is that the trial court erred

in law and fact in failing to grant their application dated 12th April 2019 for setting aside the trial court's judgment of 13th March 2019.

11. The Appellant thus prays that: -

    a. This appeal be allowed

    b. That the finding of the lower court be set aside and more specifically, the finding, ruling and order of the Hon. Mrs. S.G. Gitonga, Resident Magistrate delivered on 28th November 2019 against the Appellant be set aside.

    c. The judgment against the Appellant in Nairobi Chief Magistrates Court Civil Suit No. 6654 of 2016: Doroth Nthambi Mwanzia v Sospeter Ndere Njoroge & 2 Others be set aside unconditionally and the Appellant grated leave to defend the claim against it in the lower court.

    d. That the Appellant be awarded costs of the appeal.

Submissions

12. At the hearing of the appeal, parties took directions to have the same canvassed by way of written submissions. The Appellant filed its submissions dated 7th March 2024 whilst the 1st Respondent filed hers dated 4th April 2024.

13. In support of the appeal, the Appellant submitted that the trial court in arriving at its conclusion in the impugned ruling did not address the Appellant's contention that they had not been served with the summons to enter appearance in the primary suit. That while the court acknowledged that the firm of Nyagwa Ngigi & Kibet Advocates entered appearance for all the defendants, the court failed to address itself on the issue of who issued instructions to the aforesaid firm of advocates to enter appearance and defend the suit.

14. Citing the Court of Appeal decision in James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR, the Appellant submitted that the Appellant having not been served with the summons, the judgment in question ought to be set aside ex debito justitiae, as a matter of right and that the court does not have to be moved by any party once it comes to its notice that the judgment was irregular. Further reliance was placed in the case of Ali Bin Khamis v Salim Khamis Korobe & 2 Others [1956] 23 EACA 195, and the Appellant stressed the point that an order made without service of summons is a nullity which must be set aside as of right, and that the court can set aside the null order on its own motion pursuant to its inherent jurisdiction.

15. The 1st Respondent on the other hand supported the impugned ruling by the trial court and submitted that the Appellant's Notice of Motion Application dated 12th April 2019 for setting aside the judgment is incompetent for having been brought under the wrong provisions of the law and therefore ought to be dismissed for being incompetent.

16. According to the 1st Respondent, Order 6 and Order 10 rules 6, 10 and 11 of the Civil Procedure Rules 2010 under which the application was expressed to have been brought were inapplicable to the issues at hand since unlike in the present case, those provisions of the law are only applicable in instances where a defendant fails to enter appearance. The 1st Respondent asserted where a defendant has entered appearance and filed a defence as was the case herein, the proper provisions of the law ought to have been Order 12 Rule 7 of the Civil Procedure Rules.

17. On the merits of the application, it was the 1st Respondent's submissions that contrary to the Appellant's submissions, summons were duly served on the Defendants and that they accordingly

entered appearance and filed defence through the law firm of M/s Ngaywa Ngigi & Kibet Advocates. That the law firm of M/s Anne W Kimani & Co Advocates subsequently came on record, replacing the former advocates, well before the delivery of the judgment in question. Consequently, the 1st Respondent urged this court to dismiss the appeal with costs in her favour.

Analysis and determination

18. This being a first appeal, this court is obligated to reassess and reevaluate the evidence which was adduced in the subordinate court both on points of law and facts and come up with its own findings and conclusions. [See: Court of Appeal for East Africa in Peters v Sunday Post Limited [1958] EA 424]. In so doing the court must take into account that it had no opportunity to hear and see witnesses testify first hand and therefore must make due allowance in that regard. (See: Selle & Another v Associated Motor Boat Co. Ltd & Another (1968 (E.A. 123).

19. Having pointed out above, I now wish to turn to the Appellant's Notice of Motion Application dated 12th April 2019 and the trial court's ruling thereon dated 28th November 2018 which is the subject of this appeal.

20. I have considered and analyzed the pleadings and the evidence adduced before the trial court by the parties to this appeal. I have also carefully considered the respective parties' submissions in this appeal and it is my view that the main issue for determination is whether the trial magistrate erred in law and fact in dismissing the Appellant's application dated 12th April 2019.

21. The Appellant's Notice of Motion dated 12th April 2019 which was primarily seeking to set aside of the lower court's judgment in the primary suit was expressed to have been brought under "Order 6 and Order 10 rules 6, 10 and 11 of the Civil Procedure Rules and all enabling provisions of the law". However, as rightly submitted by the 1st Respondent, this provision of the law is not applicable in the instant case. This is obviously a matter where a party had entered appearance and filed a defence, well before the delivery of the judgment. The judgment could not in law therefore be termed as a default judgment. This court is aware that the Appellant has in this appeal disputed service, I will therefore return to this later.

22. The Appellant having entered appearance and filed a defence (however irregular it was), then it is obvious that the application was brought under wrong provisions of the law. However, taking into account the position taken by the Appellant in this appeal and in the spirit of Article 159 (2) of *the Constitution* and Section 1 A and B of the *Civil Procedure Act*, I will preserve the application since failure by a party to cite the correct provisions of law is not fatal and would not, in my view warrant a dismissal of the application as pushed by the 1st Respondent. See the case of Purity Kagendo Anampiu & another v Nelie Mugambi & another [2021] eKLR where Muriithi J, in dealing with a similar situation adopted the reasoning by the Court of Appeal (P. N. Waki JA, M. Warsame JA and F. Sichale JA) in the case of Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu (Suing for and on behalf of 112 Plaintiffs) Civil Appeal No. 212 of 2015 [2019] eKLR where the judges held as follows: -

> " Lastly, having established that the respondent's application dated 17th December 2010 had been brought under the wrong law, we agree with the court's finding that the irregularity was not serious enough to prevent the court from exercising its discretion, hearing and determining the said application on its merit. Taking note that the rules of procedure should be used as handmaids of justice but not to defeat it, the court weighed the issues before it

and found that there would be no injustice visited on the appellant in the spirit of Article 159 (2)(d) of *the Constitution* and Sections 1A and B of the *Civil Procedure Act*."

23. Again in Abdirahaman Abdi v Safi Petroleum Products Ltd. & 6 others [2011] eKLR, the Court of Appeal stated the following regarding the place of Article 159 in relation to procedural technicalities before court:-

> " .....Article 159 (2) (d) of *the Constitution* makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its documents. The court in that regard exercise judicial discretion."

24. Further in Nicholas Salat v IEBC & 6 others, CA (Application) No 228 of 2013, the Court of Appeal further held that;-

> " Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness."

25. The defect in the application notwithstanding, and in the spirit of Article 159 (2) of *the Constitution* and Section 1 A and B of the *Civil Procedure Act* as indicated above, I will now proceed and go into the merits of the appeal.

26. In its Notice of Motion Application dated 12th April 2019, the Appellant sought primarily the setting aside of the trial court's judgment in the main suit. The main basis of the application was that the Appellant was never served by the 1st Respondent with the summons to enter appearance and that the Appellants never instructed the law firm of M/s Ngaywa Ngigi & Kibet Advocates to act for them in this matter.

27. Having considered and analyzed the pleadings and the evidence adduced before the trial court by the parties to this appeal, and the submissions in this appeal, I am of the view that the allegation by the Appellant that they were never served with the summons to enter appearance in the main suit to be untenable. From the proceedings, it is clear that the law firm of M/s Ngaywa Ngigi & Kibet entered appearance for all the defendants and filed a defence on their behalf on 15th December 2016. Further, it is also evident from the record that the Appellant who was the 2nd Defendant in the primary suit later appointed the law firm of M/s Anne W Kimani & Co Advocates on 18th January 2019, well before the judgment was delivered on 13th March 2019.

28. In the Notice of change of advocates, it was clear that the new firm of advocates were taking over from the Appellant's previous advocates. If it is true that the Appellant had not appointed and given instructions to the law firm of M/s Ngaywa Ngigi & Kibet as they argue in this appeal, then what would have been filed by the firm of M/s Anne W Kimani & Co Advocates ought to have been a notice

of appointment of advocates as opposed to the notice of change of advocates. Further, apart from mere assertions, no evidence had been adduced by the Appellant to the trial court or to this court, supporting the Appellants submissions the law firm of M/s Ngaywa Ngigi & Kibet had no instructions from them.

29. The application before the trial court was one for setting aside of the ex-parte judgment dated 13th March 2019. The principles applicable under this rule were laid down by the Court of Appeal in Pithon Waweru Maina v Thuka Mugiria [1983] eKLR and restated in Toshike Construction Company Limited v Harambee Co-operative Savings & another [2019] eKLR as follows;-

    a. "Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just ... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76 C and E

    b. Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah v Mbogo [1967] EA 116 at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA

    c. Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. Mbogo v Shah [1968] EA 93."

30. Looking at the totality of the evidence in this matter, like the trial court, I am not convinced that the Appellants were wholly unaware of the suit in the lower court and that they were equally unaware that the law firm of /s Ngaywa Ngigi & Kibet Advocates were representing their interest in this matter. Granted, instructions to the law firm may have been given by the insurance company, but that notwithstanding, this is not ground enough for concluding that the Appellant had not been served with the summons and that they were unaware of the proceedings in the lower court.

31. In any event, evidence on record shows that the Appellant was duly served with the pleadings and hearing notices in this matter.

32. Accordingly, having considered the grounds of appeal and the submissions in support thereof as presented by the Appellant in this appeal, it is my considered view that the appeal lacks merit and is hereby dismissed with costs.

33. It so ordered.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 26TH DAY OF SEPTEMBER 2024

ADO MOSES

JUDGE

In the presence of: -

C/A – Moses

.....N/A.....for Appellant

.....N/A.....for Respondent.