Musyoka v Mibere & another (Civil Appeal E271 of 2021)
[2024] KEHC 14969 (KLR) (Civ) (28 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14969 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E271 OF 2021

TW OUYA, J

NOVEMBER 28, 2024

BETWEEN

JOSEPH MUSYOKA ..... APPELLANT

AND

MARY KINYA MIBERE ..... 1ST RESPONDENT

BONIFACE MUASYA NZIOKA ..... 2ND RESPONDENT

(Being an appeal against the ruling and order of Honourable D.O. Mbeja (Mr.), PM delivered on 7.05.2021 in Milimani CMCC No. 5539 of 2016)

RULING

Background

1. This appeal derives from the ruling delivered on 7.05.2021 in Milimani CMCC No. 5539 of 2016 (the suit). The background facts leading up to the said ruling are that Mary Kinya Mibere (hereafter the 1st Respondent) filed the suit in the lower court against Joseph Musyoka (hereafter the Appellant) and Boniface Muasya Nzioka (hereafter the 2nd Respondent) by way of the plaint dated 2.06.2016 and amended on 18.11.2017 (the amended plaint) seeking reliefs in the nature of general and special damages, founded on a claim for negligence and arising out of a road traffic accident.

2. Upon service of summons, the Appellant entered appearance and filed a statement of defence on 31.10.2017 denying the key averments in the amended plaint and liability. Upon the failure of the 2nd Respondent to enter appearance and/or file his statement of defence, an interlocutory judgment was entered against him on 26.09.2018, at the request of the 1st Respondent.

3. Thereafter, the matter was certified ready for hearing. However, the record shows that when the same came up in court on 27.08.2020 both the Appellant and his advocate were absent, hence the hearing proceeded ex-parte with the 1st Respondent's evidence. Upon close of submissions, the trial court delivered judgment on 18.12.2020 in favour of the 1st Respondent and against the Appellant and the 2nd Respondent.

4. The above turn of events prompted the Appellant to file the Notice of Motion dated 27.01.2021 (the application) seeking various orders; primarily an order setting aside the abovementioned judgment delivered on 18.12.2020, followed by a consequent order to the effect that the Appellant be granted leave to cross examine the 1st Respondent and testify viva voce in person and adduce his evidence, and a further order that corresponding leave be granted to the 1st Respondent to respond to, cross examine or adduce any further evidence in response to the evidence tendered by the Appellant. The application was opposed by the 1st Respondent.

5. Upon hearing the respective parties on the application, the trial court dismissed it for want of merit, vide the ruling delivered on 7.05.2021.

The Substratum Of The Appeal

6. The aforementioned ruling provoked the instant appeal which was brought through the memorandum of appeal dated 21.05.2021 and based on the following grounds:

    I. The Honourable Court erred in law by failing to stay and set aside its judgement dated 18th-December, 2020, which was entered without considering the Appellant's evidence, which is an affront to the constitutional principle of fair trial;

    II. The Honourable Court erred in law by denying the appellant an opportunity to testify viva voce and challenge the 1st Respondent's evidence which is against the principles of natural justice;

    III. The Honourable Court erred in law by issuing two contradictory judgements in two causes of action where the Appellant was sued alongside the 2nd Respondent, being Milimani CMCC No. 5539 of 2016 and CMCC No. 6697 of 2016, both arising from the same accident but with two different plaintiffs.

    IV. The Honourable Court erred in law, by dismissing the Application which would have allowed the Appellant herein to adduce evidence which would allow him to rebut the evidence adduced by the 1st Respondent during the trial. (sic)

7. The Appellant consequently seeks the following orders:

    I. THAT the trial court's ruling dated 7th May, 2021 be set aside and the Appellant's Application dated 27th January, 2021 before the trial court be allowed;

    II. THAT the execution of the judgment dated 18th December, 2020 be stayed and the judgement itself be set aside, and the Appellant herein be allowed to tender evidence, and the matter proceeds for cross-examination of the 1st Respondent herein by the Appellant.

Parties' Submissions On The Appeal

8. Directions were given for the appeal to be canvassed by way of written submissions. The record shows that the 2nd Respondent did not participate in the appeal or file any written submissions in that respect.

9. The Appellant's counsel anchored his submissions on the decision in Richard Nchapai Leiyangu v IEBC & 2 Others-Civil Appeal No. 18 of 2013 where the Court of Appeal reasoned that:

> " We agree with the noble principles which go further to establish that the courts' discretion to set aside ex parte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice."

10. Counsel further cited the decision in CMC Holdings Ltd vs James Mumo Nzioka, [2004] eKLR where the foregoing was echoed, also relying on Article 50 of *the Constitution* of Kenya, 2010, on the right to a fair hearing; as well as Sections 1A, 1B and 3A of the *Civil Procedure Act* (CPA) which set out the overriding objective of the Act and the duty and inherent power to the court to make such orders as it may deem necessary to meet the ends of justice.

11. Counsel proceeded to argue that in the present instance, the trial court failed to consider the fact that the firm of King'oo Wanjau & Company Advocates (the erstwhile advocates) had failed to update the Appellant regarding the hearing date of the suit and hence the non-attendance on his part was purely unintentional. That in the premises, it would serve the interest of justice for the Appellant to be granted an opportunity to be heard on his defence, pursuant to Article 48 of *the Constitution*, 2010 on access to justice.

12. On those grounds, counsel for the Appellant urged the court to allow the appeal and upon doing so, to set aside the impugned ruling accordingly and to additionally grant an order for a stay of execution of the decree pending the hearing and determination of the suit, pursuant to Order 22, Rule 25 of the Civil Procedure Rules (CPR).

13. On the part of the 1st Respondent, her counsel submitted that the erstwhile advocates for the Appellant were at all material times aware as and when the matter came up in court and that service of the hearing notice in respect of the suit had been effected upon them on 20.08.2020, and an affidavit of service was filed to that effect. Counsel further submitted that it is on the basis of the confirmation of service that the trial court agreed to have the hearing proceed ex parte. It is counsel's argument that subsequently, the erstwhile advocates were further served with a mention notice indicating that the matter had been scheduled to come up in court on 9.10.2020 for purposes of confirmation on the filing of final submissions by the parties; that even then, the said advocates were notably absent from court.

14. It is counsel's further argument that prior to filing the application which resulted in the impugned ruling, the Appellant had filed a similar application before the trial court and dated 13.10.2020 which application did not succeed. That the Appellant cannot be heard to fault the erstwhile advocates, in the absence of any evidence to prove that he had taken active steps at following up on the progress of the matter. Counsel therefore urged the court to decline to exercise its discretion in his favour at this appellate stage, contending that the appeal is merely intended to frustrate the 1st Respondent's access to justice and enjoyment of the fruits of her judgment. In this regard, counsel cited the decisions in Jared Benson Kangwana v Kenya Agricultural Research Institute [2020] KEELC 2732 (KLR) and Savings and Loans vs. Susan Wanjiru Muritu Nairobi Hcc No. 397/2002 where the respective courts held that a case ultimately belongs to a litigant and not his or her advocate; that as such, a litigant is obligated to follow up on the progress of his or her case, with the said advocate. That where no such efforts have been demonstrated, a litigant is bound by the omissions of his or her advocate and cannot therefore call upon the court to set aside an ex parte order or judgment.

15. It is the contention by counsel that for the above reasons, the trial court acted correctly in declining to set aside the ex parte judgment and in consequently dismissing the application. That the appeal therefore ought to be automatically dismissed with costs.

16. The court has considered original record, record of appeal and the submissions on record plus the authorities cited. The duty of this court as a first appellate court is to re-evaluate the evidence and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See Peters v Sunday Post Limited (1958) EA 424; Selle and Another v Associated Motor Boat Co. Limited and Others (1968) EA 123 and Williams Diamonds Limited v Brown (1970) EA 1. The Court of Appeal in Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) 1 KAR 278 stated that:

> " A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did."

17. Upon review of the memorandum of appeal and submissions by the respective parties before this court, it is the court's view the appeal turns on the central issue whether the learned trial magistrate acted correctly in declining to set aside the ex parte judgment and in consequently declining to grant the consequent orders sought in the application.

18. From a perusal of the lower court record, it is apparent that following delivery of the impugned judgment on 18.11.2020 in favour of the 1st Respondent and against the Appellant and the 2nd Respondent jointly and severally, the Appellant moved the trial court by way of the application, seeking to set aside the abovementioned judgment, and consequently seeking an order to the effect that the Appellant be granted leave to cross examine the 1st Respondent and testify viva voce in person and adduce his evidence, and a further order that corresponding leave be granted to the 1st Respondent to respond to, cross examine or adduce any further evidence in response to the evidence tendered by the Appellant.

19. In his supporting affidavit to the application, the Appellant stated that he had instructed the erstwhile advocates to act for him in the suit and was under the impression that they were actively pursuing the progress thereof. That it is not until the judgment was delivered that he discovered that the said advocates had failed to attend court on numerous occasions previously, and that the hearing had proceeded in the absence of his evidence. He stated that in the circumstances, the mistake of the erstwhile advocates should not be visited upon him.

20. The Appellant similarly stated that he had been sued in a separate suit namely Milimani CMCC No. 6697 of 2016 involving a different plaintiff but arising out of the same accident, in which case he had an opportunity to defend himself and that in the end, he was discharged from bearing any liability. That in the circumstances, it was necessary that he be granted an opportunity to be heard and to tender his viva voce evidence in his defence. That he would stand to suffer grave prejudice if the orders sought were to be denied.

21. As earlier mentioned, the 1st Respondent opposed the application by swearing a replying affidavit on 26.02.2021. Therein, she termed the application as being an abuse of the court process and a non-starter, for the reason that the Appellant was represented by able counsel at all material times, and that the erstwhile advocates acting for the Appellant in the suit were served with all the requisite notices and documentation. That the Appellant therefore ought to have been aware of the progress of the matter.

That the application was therefore brought mala fides and with the aim of denying the 1st Respondent the fruits of her judgment. That the said application ought not to be allowed.

22. Upon considering the application, the learned trial magistrate reasoned that there is evidence on record to show that the Appellant was duly notified of the hearing date and hence the said magistrate was not satisfied as to the credibility of the explanation provided in the application. The learned trial magistrate further reasoned that from the record, it is shown that the Appellant and/or his erstwhile advocate either participated in or had knowledge of the suit proceedings at all material times, and that the ex parte judgment was entered on the basis of proper service. On those grounds, the learned trial magistrate declined to set aside the said judgment and consequently dismissed the application, with costs.

23. From a perusal of the record, it is apparent that the ex parte judgment referenced hereinabove was entered pursuant to Order 12, Rules 2 and 7 of the CPR. Order 12, Rule 2 expresses that:

> If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the plaintiff attends, if the court is satisfied—
>
> a. that notice of hearing was duly served, it may proceed ex parte;
>
> (b) that notice of hearing was not duly served, it shall direct a second notice to be served; or
>
> (c) that notice was not served in sufficient time for the defendant to attend or that for other sufficient cause the defendant was unable to attend, it shall postpone the hearing.

Order 12, rule 7 on its part provides that:

> Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.

24. It is trite law that the grant or refusal to set aside or vary an order, judgment or any consequential decree or order, is discretionary, wide, and unfettered. However, the discretion must be exercised judicially and justly. The rationale for the discretion to set aside as conferred on the court was spelt out in the case of Shah v Mbogo and Another [1967] E.A 116:

> " The discretion to set aside an ex-part judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."

25. Upon re-examination of the lower court record, it is not in dispute that the Appellant was at all material times represented by the erstwhile advocates, in the suit. Upon further re-examination of the lower court record, it is also apparent that the Appellant through the erstwhile advocates, filed a statement of defence to refute the 1st Respondent's claim against it. The record further shows that when the matter came up in court for pre-trial directions on 20.11.2019 both the Appellant and the 1st Respondent were represented by their respective counsels. The outcome thereof was that the suit was certified ready for hearing. When the same subsequently came up in court on 16.07.2020 it was noted that neither the Appellant nor his advocate were present, hence the matter was rescheduled to 27.08.2020 for hearing, and counsel for the 1st Respondent was directed to serve a hearing notice to that effect. When the matter therefore came up in court on the scheduled 27.08.2020 it is apparent that the learned trial magistrate agreed to have the matter proceed ex parte, upon being satisfied that service had been properly effected.

26. From a study of the record, it is apparent that the requisite notices were served upon the Appellant through the erstwhile advocates. Upon therefore considering the explanation by the Appellant that the erstwhile advocates were solely to blame for their inadvertence in failing to attend court and/or update him on the progress of the matter and that he should not be faulted for their mistake, while the court acknowledges the existing legal principle that the mistake of an advocate should not be visited upon the client as a matter of general principle, it is worth mentioning that this principle does not apply in a blanket sense. It is also trite law that a suit (or in this case, a defence case) ultimately belongs to the litigant and not the advocate at the end of the day; and thus; it is the litigant's duty to pursue or otherwise take active steps to ensure the timely prosecution of his or her claim (or his or her defence, as was the case here). This position was laid out by the Court of Appeal in Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR when it held thus:

> "It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."

27. Moreover, the Court of Appeal went on to render itself as follows in the case of Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] eKLR:

> "While mere negligent mistake by counsel may be excusable, the situation is vastly different in cases where a litigant knowingly and wittingly condones such negligence or where the litigant himself exhibits a careless attitude (in Mwangi v Kariuki [1999] LLR 2632 (CAK)) Shah, JA. ruled that "mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant's careless attitude." The import of this is that while the mistake of counsel is excusable, if it is accompanied by a litigant's carelessness and inactivity, then the refusal by court to exercise discretion in favour of such a party cannot be impugned."

28. In the present instance, whereas mention was made by the Appellant that the erstwhile advocates had failed to update him on the progress of the suit; and had further failed to inform him of the ex parte judgment until it was too late, no credible material was tendered to demonstrate any efforts or attempts on his part at following up on the progress of the suit with the said advocates; or to show the difficulties; if any; experienced in reaching them.

29. Upon therefore considering the foregoing explanation given by the Appellant, the court is not satisfied that the Appellant provided any credible material or reasonable explanation to support the orders sought in the application. The court thus finds that the trial court acted reasonably in declining to set aside of the ex parte judgment, in the circumstances. Resultantly, the court sees no good reason to disturb the impugned ruling.

30. Further to the foregoing and in answer to Ground III of the appeal which concerns itself with the purportedly contradictory judgments delivered by the learned trial magistrate in the suit and CMCC No. 6697 of 2016 respectively, it is apparent that the present appeal lies against the ruling declining to set aside the ex parte judgment and which appeal does not necessarily concern itself with the merits of either the suit or the above-referenced matter. The Appellant cannot therefore call upon this court to delve into the merits of either judgment at this juncture. Consequently, the above ground of the appeal is unsustainable.

31. The upshot therefore is that the appeal lacks merit and is therefore dismissed, with costs to the 1st Respondent. Resultantly, the ruling delivered by the trial court on 7.05.2021 in Milimani CMCC No. 5539 of 2016 is hereby upheld.

Determination

a. This Appeal is hereby dismissed.

b. Cost of the appeal to the 1st Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF NOVEMBER, 2024

ROA 14 days.

HON. T. W. OUYA

JUDGE

For Appellant.....n/a

For Respondent.....n/a

Court Assistant.....martin