**Susat v Canobbio & another (Civil Appeal 131 of 2022)**
**[2024] KEHC 16190 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16190 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**CIVIL APPEAL 131 OF 2022**

**SM GITHINJI, J**

**DECEMBER 18, 2024**

**BETWEEN**

**GABRIELLA SUSAT ..... APPELLANT**

**AND**

**PIETRO CANOBBIO ..... 1ST RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 2ND RESPONDENT**

***(Being an Appeal from the decision and/or Ruling of the Chief Magistrate Court at Malindi delivered by Hon John Ongondo – SPM on 1{{^st}} November, 2022 in Malindi Cmcc No.415 of 2009)***

**JUDGMENT**

**Representation:**

Ms Oloo Advocate for the Appellant

Mr. Kinaro Advocate for the 1st Respondent

1 By this Appeal, the Appellant challenges the Ruling and/or orders dated 1st November 2022 of the Senior Principal Magistrates court in Malindi in Civil Suit No. 415 of 2009 which ruling dismissed the Appellant's Notice of motion dated 4th July 2022 that sought stay of execution.

2 Aggrieved by the ruling, the Appellant lodged the instant appeal on the following grounds;

1. That the learned magistrate erred in both law and fact by dismissing the defendants/ applicant's application dated 4th July 2022 without considering in totality the facts, grounds in the application, the supporting affidavit and submissions thereof.

2. That the learned magistrate erred in law and fact in unreasonably and unjustifiably dismissing the Appellant's subject Application dated 4th July 2022 by failing to exercise his discretion judiciously and failing to take into account that the Appellant's right to be heard and right to a fair administrative action as enshrined in Article 47 and 50 of *the Constitution* of Kenya 2010 and Section 4 of the *Fair Administrative Action Act* 2015 are so fundamental that they cannot be fettered by an exercise of discretion, and cannot be limited as in accordance to Article 25 of *the Constitution* of Kenya 2010.

3. That the trial learned magistrate erred both in fact and law by failing to apply to the benefit of the Appellant the provisions of Article 27 of *the Constitution* of Kenya which provides that every person before the law has the right to equal protection and equal benefit of the law thereby arriving at unjustified, unreasonable and unfair decision.

4. That the learned trial magistrate grossly erred in fact by making a finding that the Appellant and/or her counsel had willfully absented themselves from the trial while there was no evidence tendered by the Plaintiff/Respondent to demonstrate that the Appellant had personally delayed the prosecution of the matter or willfully absented herself from the hearing of the matter at the subordinate court.

5. That the learned magistrate grossly erred in both fact and law by failing to set aside the ex parte judgment dated 21st May 2022 and the decree thereof considering the fact that there was sufficient evidence before him that the Appellant had not been aware of the hearing of the matter at the subordinate court and she had not delayed the matter in any way hence the mistake of the advocate should not be meted on the Appellant.

6. That the learned magistrate grossly erred both in fact and law by making a finding that the mistake of the advocate which led to non-attendance of the Appellant during the hearing was not explained while the same had been sufficiently explained by the Appellant, thereby arriving at unjust and unreasonable decision.

7. That the learned trial magistrate erred in fact and law by failing to evaluate and take into account that the Appellant risks to be highly prejudiced by the subject ex parte judgment of the subordinate court dated 21st May 2022 as she will be condemned to pay a huge decretal sum of Kshs. 900,000 at onec in these harsh economic times. This is without according to the Appellant a chance to be heard on merit considering she was not made aware of the hearing date when the matter came up for hearing.

8. That the learned trial magistrate misdirected himself both in fact and law for failing to have undue regard to a procedural technicality as enshrined in article 159 (2) (d) of *the constitution* of Kenya 2010 so as to ensure that this dispute is adjudicated in fair, just and proportionate manner.

9. That the learned trial magistrate misapprehended the law by ruling that there had to be an affidavit from the previous advocates of the Appellant explaining their mistake of failing to attend a hearing which holding is not based on any law and is not tenable.

10. That the learned trial magistrate grossly erred in fact and law by failing to find that the filed statement of defence of the Appellant in the subordinate court was merited and raised triable issues warranting the matter to be heard and determined in a full trial.

11. That the learned trial magistrate fundamentally erred in both fact and law by failing to exercise his discretion judiciously to set aside the ex parte judgment and order the suit to start de novo.

12. That the "learned judge of the superior court" fundamentally erred in both fact and law by awarding the costs of the application dated 4th July 2022 in the subordinate court, to the 1st Respondent/Plaintiff.

13. That in the circumstances of the case, the learned trial magistrate failed to do justice before him and the subject orders dated 1st November are insupportable in law.

**Analysis and determination**

3 The appeal was canvassed by way of written submissions. I have considered this appeal and the grounds it is set upon, submissions by parties and the authorities relied on. I have also perused the trial court's record and the impugned ruling. This being a first appeal, it is by way of a retrial, and parties are entitled to this court's reconsideration, reevaluation and reanalysis of the evidence on record in order to reach its own conclusions. The court should however bear in mind that the trial court had the advantage of seeing the witnesses testify and give due allowance for that.

4 From the grounds of appeal on the memorandum of appeal, the issue arising for determination is whether the trial court erred in dismissing the Application dated 4th July 2022.

5 The Application dated 4th July 2022 brought by way of a Notice of motion, sought stay of execution of decree of the trial court and setting aside of the ex parte judgment to allow the 1st Defendant defend the suit. It was based on grounds that the 1st Defendant did not participate in the hearing of the suit as her former counsel did not inform her of the hearing date. In dismissing the application, the trial court observed that the court expected at least a brief explanation from the former advocates as to what difficulties or the 'mistake' that hindered them from attending to defend the matter whenever it came up for hearing.

6 The decision whether or not to set aside an *ex parte* judgment is discretionary, and is not in doubt that the discretion is exercised so as to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice. See Shah vs. Mbogo & Another [1967] EA 116.

7 As was held by the Court of Appeal in CMC Holdings Ltd vs. Nzioki [2004] KLR 173:

> " In an application for setting aside ex parte judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle. In the instant case the learned trial magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant's unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place ex parte and hence it would appear was true or not and if true, the effect of the same on the ex parte judgement that was entered as a result of the non-appearance of the appellant and on the entire suit. The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In our view, in doing so she drove the appellant out of the seat of justice empty handed when it had what it might have very well amounted to an excusable mistake visited upon the appellant by its advocate.

> The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the ex parte judgement is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues. The law is now well settled that in an application for setting aside ex parte judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues. ..... In this case before us, the defence and counterclaim was already in the file when the matter was heard ex parte and the trial magistrate stated that she considered the same and dismissed it. We do not appreciate how she could have dismissed the same defence and counterclaim when the appellant was not in court to put forward its case. Further, it appears that certain matters raised in the defence were not considered at all and indeed could not be considered without the appellant's input..... What we feel the Trial Court should have done when hearing the application to set aside ex parte judgement, was to ignore her judgment on record and look at the matter afresh considering the pleadings before her and see if on their face value a prima facie triable issue (even if only one) was raised by the defence and counterclaim. If the same was raised then, whether the reasons for the appellant's appearance were weak, she was in law bound to exercise her discretion and set aside the ex parte judgement so as to allow the appellant to put forward its defence. Of course in such a case, the applicant would be condemned in costs or even ordered to pay throw away costs. The learned judge should also not have, in our view, not considered what the learned Trial Court had concluded on the evidence before her but should have in the same way looked at the pleading and considered whether a triable issue was raised by the defence and if so, then the appeal should have been allowed."

8 In as much as the trial court exercised its discretion by not setting aside the ex parte judgment, given the foregoing, I am of the view that the Appellant herein should have been granted an opportunity to be heard in the interest of justice. She ought only to have been condemned to pay throw away costs and the ex parte judgment set aside. Guided by the above authorities and in exercise of my discretion, I do hereby set aside the ex parte judgment dated 21st May 2022 and order that the suit be reopened. The Appellant herein shall pay throw away costs of Kshs. 30,000. No orders as to the costs of appeal. Throw away costs be paid within 30 days from the date hereof and incase of delay with interest at court's rate.

**JUDGMENT READ, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF DECEMBER, 2024.**

**.....**

**S.M.GITHINJI**

**JUDGE**

In the Presence of; -

1. Ms Oloo for the Appellant

2. Mr Kinaro for the 1st Respondent