Vivo Energy Kenya Limited v Benard Ojwang Odero t/a Hope Oil (Civil Appeal E036 of 2022) [2023] KEHC 145 (KLR) (23 January 2023) (Judgment)

Neutral citation: [2023] KEHC 145 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL APPEAL E036 OF 2022

RE ABURILI, J

JANUARY 23, 2023

BETWEEN

VIVO ENERGY KENYA LIMITED .... APPELLANT

AND

BENARD OJWANG ODERO T/A HOPE OIL .... RESPONDENT

(An appeal arising from the Ruling and Order of the Honourable M.O. Wambani in the Chief Magistrate's Court at Siaya delivered on the 18th August 2022 in Siaya CMCC E065 of 2021)

JUDGMENT

Introduction

1. The respondent filed an application dated 5/6/2022 before the trial court seeking leave to file his statement of defence and the accompanying documents and further that the aforementioned pleadings be deemed to be properly on record. The appellant filed objection thereto contending that there had been unreasonable, unexplained and inordinate delay in the filing of the aforementioned application and further that the said application was based on an affidavit sworn by counsel for the respondent on factual issues outside his knowledge and the same ought to be have been expunged.

2. In her ruling, the trial magistrate allowed the respondent's application on the sole ground that it was fair and just to allow each of the parties to be heard at a full hearing so that they could ventilate all their issues.

3. Aggrieved by the said ruling, the appellant filed its Memorandum of appeal dated 26th August 2022 in which they raised 11 grounds of appeal as follows:

    i. That the learned trial magistrate erred in law and fact in finding that she had the jurisdiction to grant the orders sought in the Notice of Motion dated 5th

June 2022 before setting aside the judgement in default of filing of a statement of defence which was on record dated 18th November 2021.

ii. That the learned trial magistrate erred in law and in fact in not finding that the respondent was undeserving of any leave to file a statement of defence and witness statement out of time and/or to be heard on merit given the existence of a valid judgement in default of filing of a statement of defence entered on 18th November 2021 that had not been set aside.

iii. That the learned trial magistrate erred in law and in fact in allowing the respondent's application dated 5th June 2022 before setting aside the judgement in default of filing of a statement of defence dated 18th November 2021.

iv. That the learned trial magistrate erred in law in allowing the application dated 5th June 2022 whose effect was to grant the respondent herein orders not sought in its application dated 5th June 2022 to wit, the setting aside of the judgement in default of the filing of a statement of defence.

v. That the learned trial magistrate erred in law and in fact in allowing the application dated 5th June 2022 despite the paucity of evidential material to warrant the granting of the orders sought and/or the exercise of the court's discretion to set aside judgement in default of filing of a statement of defence.

vi. That the learned trial magistrate erred in law and in fact in allowing the application dated 5th June 2022 despite the lack of evidence to support the exercise of her discretion, to wit, reliance upon an affidavit sworn by the respondent's advocate on matters in issue of which he neither had first-hand information and/or resulted in misleading the court as established by the appellant's replying affidavit.

vii. That the learned trial magistrate erred in law and in fact by exercising discretion in an injudicious manner as factors necessary to set aside judgement in default had neither been established nor proved by the respondent.

viii. That the learned trial magistrate erred in law and in finding that the existence of an unfettered right to be heard existed unconstrained and thereby ousting the obligation of litigants such as the respondent to comply with procedural imperatives as they seek justice from the courts of law.

ix. That the learned trial magistrate erred in law in deeming as filed a statement of defence and counterclaim and witness statements despite;

   a) The existence of a default judgement entered on 18th November 2021 which had not been set aside; and

   b) The non-payment of court fees and/or directions for the payment of court fees in respect of the statement of defence and counter-claim and witness statement (thereby occasioning a waiver of court fees without an order that the defendant is defending the suit as an indigent person with leave to do so as a pauper under Order 33 of the Civil Procedure Rules).

x. That the learned trial magistrate erred in law and in fact in not striking out the respondent's advocate's supporting affidavit sworn on 5th June 2022 in respect of contentious matters that were contested and unsubstantiated and which was in clear breach of Rule 9 of the Advocate Practice Rules.

xi. That the learned trial magistrate erred in law and in fact by not dismissing the respondent's Notice of Motion dated 5th June 2022 with costs to the appellant.

4. The Appellant therefore seeks orders that "the trial court's order dated 18th August 2022 be set aside and substituted with an order striking out the respondent's Notice of Motion dated 5th June 2022 with costs being awarded to the appellant and that the appellant be awarded the costs of the appeal".

5. The appeal herein was canvassed by way of written submissions.

The Appellant's Submissions

6. The appellant submitted that while a valid judgement in default dated 18th November 2021 existed on the Court record, and was not set aside as there were no prayers to that effect, the orders of 18th August 2022 could not stand and ought to be set aside. Reliance was placed on the case of Galaxy Paints Co. Ltd v Falcon Grounds Ltd [2000]2 EA 385 wherein the Court of Appeal held that Courts do not plead and do not present cases for parties who are bound by their pleadings.

7. The appellant thus submitted that in the instant case, unfettered leave to defend could not be granted to the Respondent in the face of the default judgment dated 18th November 2021.

8. It was submitted that there was no just cause given by the Respondent for the delay in lodging its Defence as was established by the Appellant through its Replying Affidavit wherein the falsehoods were laid bare as it was demonstrated that the Respondent was in possession of all the documents it required to file its Statement of Defence as far back as 30th September 2021 thus there were no cogent grounds for the Trial Court granting the Respondent unfettered leave to defend itself as was held in Shah v Mbogo [1967] EA 116.

9. The appellant submitted that there was no draft defence attached to the respondent's Application in breach of the guidelines given by the Court of Appeal in Tree Shade Motors Ltd v DT Dobie & John Rading Wasambo [1998] eKLR therefore the Trial Court had no way of assessing whether the Respondent had a valid or reasonable defence (and ought to have disallowed the Application). Reliance was further placed on the case Magunga General Stores v Pepco Distributors Limited [1986-1989] EA 334 where it was held that mere denials of a debt in a statement of defence is not sufficient defence to a claim for a debt.

10. The appellant also relied on the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR where the Court of Appeal held that the Rules of Procedure aid the Court and cannot be ignored as constituting a technicality to be ignored as the Rules of procedure aid the courts in dispensing justice. Reliance was also placed on the case of Patricia Cherotich Sawe v Independent Electoral & Boundaries Commission(IEBC) & 4 others [2015] eKLR where the Supreme Court held that not all procedural deficiencies can be remedied by Article 159 as was the case herein.

11. It was submitted that the Supporting Affidavit by the Respondent's Counsel in support of the application dated 5th June 2022 was in breach of Rule 9 of the Advocates Practice Rules as was held in the case of Kamlesh Mansukhlal Damji Pattni v Nasir Ibrahim Ali & 2 Others [2005] eKLR given that the Affidavit touched on contentious matters that were not within the personal knowledge of the Respondent's Advocate.

The Respondent's Submissions

12. It is submitted that in considering whether to set aside or vary any judgement lawfully entered, the court has unfettered and unlimited discretion to do so, so long as the inherent powers are exercised judiciously and with a view of enhancing and meeting the ends of justice. It was submitted that the trial court exercised the said discretion judiciously and on terms that were very fair and just in circumstances. Reliance was placed on Article 159 (2) (d) of *the Constitution*, Sections 1A and 1B of the *Civil Procedure Act*, Order 50 Rule 6 of the Civil Procedure Rules as well as the case of Jomo Kenyatta University of Agriculture and Technology v Mussa Ezekiel Oebah [2014] eKLR and that of Gateway Insurance Company Ltd v James Ogembo Nyabongoye [2021] eKLR.

13. The respondent further submitted that he paid the requisite disbursements demanded by the appellant's counsel for the hardship it occasioned the appellant for adjourning the matter and requesting that it be allowed to file its defense.

14. The respondent further submitted that the appellant had in its possession critical documents that the respondent needed to mount a proper defense and hence the delay in filing his defence.

15. It was submitted that by allowing the respondent to file his defence, no injustice would be occasioned to the appellant.

Analysis and Determination

16. As a first appellate court, this court's role is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. This duty is spelt out in section 78 of the *Civil Procedure Act* and as was interpreted in the age-old case of Selle & Another v Associated Motor Boat Co. Ltd. & Others [1968] EA 123 and by the Court of Appeal or East Africa took the same position in Peters v Sunday Post Limited [1958] EA.

17. The question that arises for determination in this appeal is whether this court should interfere with the learned trial magistrate's exercise of discretion to allow the respondent to file a defence in the matter before the subordinate court. For this court to do so, it must be satisfied that the learned magistrate misdirected herself in some matter and as a result, arrived at a wrong decision. This principle was espoused in the often cited case of Mbogo and Another v Shah [1968] EA 93 that:

> " A Court on Appeal should not interfere with the exercise of the discretion of a single judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

18. I have considered the application before the trial court, the opposition thereto and the decision by the trial court. I have also considered the grounds of appeal herein and the submissions for and against the appeal by the parties' respective counsel. As I have observed, the court can interfere with the exercise of discretion by the trial court if it is satisfied that she misdirected herself in some matter and as a result, arrived at a wrong decision or if it is manifest that the judge was clearly wrong in the exercise of discretion with the result that there has been a miscarriage of justice.

19. In Patel v E.A. Cargo Handling Services [1974] EA 75, Sir William Duffus, P at page 76 stated:

> " The main concern of the court is to do justice to the parties, and the court will not impose conditions in itself to fetter the wide discretion given to it by the rules. I agree that where

it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

20. In Philip Chemwolo & Another v Augustine Kebende [1982-88] KAR 1036 Apaloo J.A at P.1042, had this to say:

> " I think a distinguished equity Judge has said:
>
> "Blunders will continue to be made from time to time and it does follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on the merits."
>
> I think the broad equity approach to this matter, is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."

21. In Sebei District Administration v Gasyali and others [1968] EA 300 Sheridan J of the High Court of Uganda stated as follows:

> " The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the Plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the Court."(Emphasis added).

22. The overall effect of those judicial pronouncements is that where a defendant raises a reasonable defence to the plaintiff's claim and the defendant has not been privy to obstruction of justice, the court should exercise its discretion in favour of the defendant.

23. Applying those principles to the matter at hand, it is not in dispute that the summons to enter appearance was served on the respondent. Subsequently, the appellant requested for judgement in default of appearance and defence on the 30th September 2021, and the interlocutory judgement was granted on the 18th November 2021.It is also on record that on the 9th December 2021 counsel Muchiri for the appellant informed the court that they had entered a consent with Mr. Oduol for the respondent and even served them with all their pleadings.

24. The application subject of the impugned ruling was filed on the 5/6/2022 in which the respondent sought leave to file his defence and resultant pleadings.

25. This court observes that the respondent's application dated 5/6/2022 was brought late in the day however, it is my view that the overarching consideration for the court is to do justice to the parties and where the court is satisfied that there is a defence on merit, or a defence that raises triable issues, the court should exercise its inherent jurisdiction to allow that defence to proceed for trial.

26. This court takes into account the fact that the respondent acted in person prior to getting an advocate who came on record on the 30/9/2021 when the appellant was filing their request for interlocutory judgement which judgement was entered in favour of the appellant. Further, the trial court was informed by the respondent's advocate on record that the delay in filing the defence by the respondent

was because there were some vital documents in the possession of the appellant, who had taken the same from the respondent's business premises.

27. I further note that the appellant's advocate on record did inform the trial court that they had served the respondent's advocate with all their pleadings, which must have been with the intent to have the advocate on record prepare the respondent's defense.

28. My further observation is that there was no material before the court to suggest that the respondent deliberately sought to obstruct or delay the cause of justice.

29. However, as correctly submitted by the appellant's counsel, as at the time that the trial magistrate was granting leave to the respondent to file his defence, there was and is still in place the interlocutory judgement entered on 18th November 2021 against the respondent in favour of the appellant as the impugned ruling did not set aside the said interlocutory judgment before allowing the respondent to file his defence. Neither does the impugned ruling of 18th August 2022 make any reference to the interlocutory judgment.

30. I have perused the application for leave to file defence and I find no prayer for setting aside the interlocutory judgment entered against the respondent. The question is whether, even if this court were to dismiss this appeal, the order of dismissal would assist the respondent in the lower court in any way.

31. A similar situation arose in John Maiga Wambua v Polycap O Nyakundi [2021] eKLR where the defendant applicant sought leave to file a defence in a case where interlocutory judgment had been entered, but made no prayer for setting aside of the interlocutory judgment. Mwangi J had this to say and I wholly agree with her reasoning as I find no reason to differe with my sister judge on the issue:

> " It is noteworthy that when the application herein was brought under certificate of urgency, the Trial Judge granted stay of execution pending the hearing and determination of the application herein. The Judge also granted leave to the firm of Kimondo Gachoka & Company Advocates to come on record for the defendant. This Court is therefore left to determine whether or not to grant the defendant leave to file its memorandum of appearance, statement of defence and any other consequential documents and who should bear the costs of this application.
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> 30. The plaintiff has an interlocutory judgment in place which was endorsed on 2nd November, 2020. Judgment was entered on liability and for special damages at Kshs. 252,489.00 with interest from the date of filing until payment in full in favour of the plaintiff, subject to formal proof. The said interlocutory judgment has not been varied and/or set aside neither is there an application in place to do so.
>
> In the absence of such an application and/or a prayer seeking to set aside the interlocutory judgment in the present application, this Court cannot grant leave to the defendant to file its memorandum of appearance, statement of defence and any other consequential documents.
>
> 31. 31. It is not in dispute that there is neither a pending appeal against the said interlocutory judgment that was entered on 2nd November, 2020 nor is there an application seeking to set aside the said interlocutory judgment. Therefore, granting leave to the defendant to file its memorandum of appearance, statement of defence and any other consequential documents would be an exercise in futility as the interlocutory judgment would still subsist.

32. Since the defendant invoked the provisions of the Sections 1 A & 1 B of the *Civil Procedure Act*, I find it necessary to consider the "overriding objective" under the said provisions and also Article 159(2)(d) of *the Constitution* of Kenya, 2010.

33. In Civil Litigation and Dispute Resolution: Vocabulary Series, Legal English Books Publishers, 2013, Michael Howard defines the Overriding Objective as hereunder -

"as a principle from the civil procedure rules. The purpose of the overriding objective is for the civil litigation and dispute resolution process to be fair, fast and inexpensive. The principle is that each case should be treated proportionately in relation to size, importance and complexity of the claim and the financial situation of the parties. The courts must consider the overriding objective when they make rulings, give directions and interpret the civil procedure rules."

34. In Hunker Trading Company Limited vs Elf Oil Kenya Limited [2010] eKLR, the Court held that Section 1A of the *Civil Procedure Act* came in, to provide facilitation of just, expeditious and proportionate resolution of civil disputes in Kenya as the overriding objective of the Act. The duty of the Courts in performing such mandate under Section 1B of the *Civil Procedure Act* are -

(a) The just determination of the proceedings,

(b) The efficient disposal of the business of the Court,

(c) The efficient use of the available judicial and administrative resources,

(d) The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties,

(e) The use of suitable technology.

35. In Adrian Kamotho Njenga v Cabinet Secretary, Ministry of Information, Communication and Technology & 8 others [2017] eKLR, the Court held that:

"Considering the above provisions which introduced the oxygen principle, in Deepak Chamanlal Kamani & another vs Kenya Anti-Corruption Commission [2010] eKLR the court drew comparisons to the Woolf reforms which introduced similar provisions in England in 1998 by way of the Civil Procedure Rules and further considered the English case of Biguzzi vs. Rank Leisure PLC [1999] 1 W.LR 1926 in which Lord Woolf himself talked about the concept of overriding principle objective as follows: -

"Under the {Civil Procedure Rules} the position is fundamentally different. As rule 1.1 makes clear the {rules} is a new procedural code with the overriding objective of enabling the court to deal with cases justly. The problem with the position prior to the introduction of the {rules} was that often the court had to take draconian steps such as striking out the proceedings..."

In the above cited case of Kamani vs Kenya Anti-Corruption Commission (supra) the court had this to say: -

"It is, accordingly, clear to us that the amendment to section 3 of the *Appellate Jurisdiction Act*, did not, without more, come in to sweep away the well-known and established

principles of law hitherto in place before the said amendment…This to our understanding means sections 3A and 3B of Cap 9 cannot be invoked as a matter of course so as to excuse all and any kind of failing on the part of a party to abide by the requirements of the rules made to regulate appeals to this court."

In this regard, I stand guided by the above quotation from the case of Kamani vs Kenya Anti-Corruption Commission (supra) that the amendments did not come to sweep away the well-known and established principles of law hitherto in place before the said amendment, and that the said amendments cannot be invoked as a matter of course so as to excuse all and any kind of failing on the part of a party to abide by the requirements of the rules made to regulate conduct of cases."

36. . This Court finds nothing in the overriding objective to suggest that it can grant leave to the defendant to file its memorandum of appearance, statement of defence and any other consequential documents where there is an interlocutory judgment in place that is yet to be varied and/or set aside.

37. Article 159(2)(d) of *the Constitution* of Kenya, 2010 which the defendant also relied on provides that in exercising judicial authority, the Courts and Tribunals shall administer justice without undue regard to technicalities of procedure. It would however be giving a long shot at nothing if this Court was to invoke the said provisions in this application as it would still not cure the defendant's oversight in failing to apply for the setting aside of the interlocutory judgment. Therefore, the defendant cannot seek refuge under Article 159(2) of *the Constitution* in the present circumstances.

38. It is trite that Court orders are not given in vain. Pursuant to the explanation given hereinabove, this Court finds that the present application was not well thought out and is fatally defective for lack of seeking for all the orders that would have assisted the defendant.

39. The upshot is that the application dated 4th January, 2021 is bereft of merit and the same is struck out with costs to the plaintiff."[emphasis added]

32. In addition, this court, just as the trial court, has not been shown a copy of the respondent's draft statement of defence for the court to consider whether the same raises triable issues. But still, even if a draft defence were annexed, I find that the respondent's application before the trial court was not well thought out as the court could not and should not have granted leave to file a defence when interlocutory judgment which was in place had not been set aside. In other words, the application was fatally defective for lack of the prayer and orders for setting aside of the interlocutory judgment and therefore the orders granted to the respondent cannot assist him in any way. In addition, the trial magistrate could not have granted such substantial orders that were never pleaded. The prayer for leave to file defence was in my view, dependent and conditional upon interlocutory judgment being set aside and with the interlocutory judgment in place, the orders for leave to file defence are barren.

33. For the aforementioned reasons, I find that the learned trial magistrate misdirected herself in exercising her discretion to allow the respondent to file his defence while a valid court judgement was still in force against him, which judgment had not been set aside.

34. In the end, I find this appeal merited on all fours. It is hereby allowed. The orders of the trial court made vide ruling dated 18th August 2022 allowing the respondent's application dated 5th June, 2022 and granting the respondent leave to file defence are hereby set aside and substituted with an order striking out that application for leave to file defence, with costs.

35. As this court has fast tracked this appeal, I order that the costs of the appeal assessed at Kshs 30,000 shall be paid to the appellant by the respondent within fourteen days from the date hereof in default, the appellant is at liberty to execute for recovery.

36. I so order.

37. This file is now closed.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 23RD DAY OF JANUARY, 2023

R.E. ABURILI

JUDGE