Otsianda v Masime (Civil Appeal E531 of 2022)
[2023] KEHC 1294 (KLR) (Civ) (24 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1294 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E531 OF 2022

JK SERGON, J

FEBRUARY 24, 2023

BETWEEN

MAGDALENE OTSIANDA ..... APPELLANT

AND

BENSON OTIENO MASIME ..... RESPONDENT

(Being an appeal against the ruling and order of the Honourable B. J. Ofisi in Milimani SCC no.359 OF 2021 delivered on 24/06/2022 (Adjudicator)

JUDGMENT

1. The appeal herein is against the ruling of the trial court (Hon B J Ofisi) in Milimani SCC No 359 of 2021 wherein the trial court dismissed the appellant's application dated April 21, 2022 and which sought for the orders for setting aside of the ex-parte judgment and its draft response to statement of claim and witness statement be deemed as duly filed and have the matter heard on merit.

2. The appellant being aggrieved preferred this appeal and put forward the following grounds:

    i. The honourable magistrate grossly misdirected herself by treating the appellants pleadings and submissions superficially and consequently arrived at a wrong conclusion.

    ii. The honourable magistrate erred in law and in fact by dismissing the appellant's application dated April 21, 2022 seeking to set aside the judgment in default of appearance entered in the trial court on June 4, 2021.

    iii. The honourable magistrate erred in law and in fact by failing dismissing the appellant's application dated April 21, 2022 with costs to the claimant thus denying the appellant her day in court and breaching her constitutional right to be heard.

3. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions. I have also considered the rival written submissions found the issues for determination put forward by both parties to be as follows:

    i. Whether there was sufficient proof showing that service of summons to enter appearance and pleadings was effected properly upon the appellant.

    ii. Whether this court has unfettered jurisdiction to set aside the default judgment

    iii. Whether the appellant has a right to participate in the proceedings before the trial court so as not to be condemned unheard

4. On the first issue, the appellant submitted that that no such service had been effected and if at all there was any service, it was not proper on the basis that there was no cogent proof that the respondent had received the same as alleged.

5. The appellant further submitted that the respondent claimed in their affidavit of service dated February 19, 2019, that the appellant was served and acknowledged receipt by signing the bundle of documents provided by the process server. However, no such document bearing the purported appellant signature was presented to the court as proof to support the claimed service as impeccable.

6. On this the appellant relied on the Court of appeal case of CA No 6 of 2015 *James Kanyita Nderitu v Maries Philotas Ghika & Another (2016) eKLR* held that:

> "In a regular judgment on the other hand, judgment will have been entered against a defendant who has not been served with summons to enter appearance .In such a situation, the default judgment is set aside ex debito justiciae ,as a matter of right."

7. It is the appellant's submissions that it established that their defence raised triable issues which should be offered an opportunity to be heard and that a defence that raises triable issues is not a subjective defence but one that depends on the facts.

8. The appellant put reliance on *Job Kilach v Nation Media Group Ltd ,Salaba Agencies Ltd & Michael Rono (2015) eKLR* wherein defining what a triable issue is 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."

9. In retort, the respondent submitted that on October 16, 2018, a process server was assigned to serve the appellant. That day, the process server contacted the appellant on her mobile phone at 0722xxxx. Since the appellant hasn't disavowed using the aforementioned mobile number and hasn't denied ever meeting the process server or receiving the documents, these facts continue to be undisputed.

10. On this the respondent relied on the case of *China Wu Yi (K) Ltd v Ujenzi Works Ltd* Civil Appeal No 335 of 2012 where A Mbogholi Msagha ,J (as he then was)stated

> "An affidavit is evidence on oath and in the event the appellant was not satisfied with the contents thereof there was an opportunity to call the process server for cross examination."

11. As I noted earlier, the application which was before the trial court sought for orders for setting aside of the *ex parte* judgment dated October 29, 2020 and leave to file defence and have the matter heard

on merit. Order 10 rule 11 of the *Civil Procedure Rules* empowers the court to set aside an *ex parte* judgment for default of appearance and defence. 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;-

(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*."

12. In *Abdirahaman Abdi v Safi Petroleum Products Ltd & 6 others [2011] eKLR*, the Court of Appeal while discussing the input of article 159 of the *Constitution* in dispute resolution held:-

> " .....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".

13. Similarly 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."

14. It is therefore clear from the aforesaid provisions that the court has power to set aside the interlocutory judgment and allow the appellant herein to file a suitable defence. However, such leave is not to be granted as a matter of course. The court must satisfy itself that there is a good explanation that has been

offered to set aside such judgment and upon such terms that it would deem fit in the circumstances for the reason that such action would definitely be taking a plaintiff back in time causing delay in the conclusion of her case especially where the matter had proceeded to formal proof and a judgment given.

15. A court should not assist a party who had "deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice" as was held in the case of Shah v Mbogo (*supra*). However, having had due regard to the cases inter alia *John Peter Kiria & another v Pauline Kagwiria [2013] eKLR* and *Kenya Pipeline Company Limited vs Mafuta Products Limited [2014] eKLR* amongst several other cases where it was held that no party should be shut out from ventilating its defence, that a court may set aside interlocutory judgment if a party had a reasonable defence which raises triable issues and that at all possible times, cases should be heard on merit.

16. It is my considered view that despite the appellant having acted negligently in handling its matter, it is only fair and just to allow it to exercise its fundamental right to be heard as enshrined in article 50 (1) of the *Constitution* of Kenya. The appellant has shown its intentions to be heard and it is my view that it would not be in the interest of justice to deny them an opportunity to be heard. The prejudice that the respondent would suffer for the delay in the conclusion of his case by having it heard on merit can be compensated by way of costs.

17. In the end, I find the appeal to be meritorious. It is allowed. Consequently the ruling/order made on June 24, 2022 is hereby set aside and is substituted with an order allowing the application dated April 21, 2022.

18. In that regard, this court sets aside the judgment in default of appearance entered against on June 4, 2021 by the trial court and the appellant is given leave to defend the suit before the trial court.

19. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2023.

.....

J K SERGON

JUDGE

In the presence of:

..... for the appellant

..... for the respondent