Kandira v Okoth & another (Civil Appeal E025 of 2020)
[2023] KEHC 2854 (KLR) (30 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2854 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E025 OF 2020

JN KAMAU, J

MARCH 30, 2023

BETWEEN

ERASTUS IAN KANDIRA ..... APPELLANT

AND

MOST REV ZACCHEAUS OKOTH ..... 1ST RESPONDENT

THE REGISTERED TRUSTEES ARCHDIOCESE OF KISUMU .... 2ND RESPONDENT

(Being an appeal from the Ruling and Order of Hon P. Gesora(CM) delivered at Kisumu in Chief Magistrate's Court Case No 303 of 2016 on 9th December 2020)

JUDGMENT

Introduction

1. In his decision of 9th December 2020, the Learned Trial Magistrate, Hon P. Gesora, Chief Magistrate, allowed the 1st Respondent's Notice of Motion Application dated 8th October 2020 and granted the following orders:-

    a. The Judgment given by this court on 3rd April 2019 and the consequential decree and all other subsequent orders be set aside.

    b. The order given by the trial magistrate on 21st February 2019 closing the defence case be set aside and the Defendants be granted time and/or opportunity to present their evidence and final submissions before a fresh judgment may be prepared and delivered.

2. Being aggrieved by the said decision, on 18th December 2020, the Appellant filed a Memorandum of Appeal dated 15th December 2020. He relied on seven (7) grounds of appeal.

3. His Written Submissions were dated 11th July 2020 and filed on 12th July 2022 while those of the Respondents were dated 18th August 2022 and filed on 24th August 2022. The Judgment herein is based on the said Written Submissions which the parties relied upon in their entirety.

Legal Analysis

4. It appeared to this court that the only issue that had been placed before it for determination was whether or not the Trial Court erred in setting aside its Judgment dated 3rd April 2019 and consequential orders thereto.

5. The Appellant submitted that the Trial Court erred in setting aside a consent and Judgment without affording concrete reasons and ignored all the legal tenets and principles that guide the setting aside of consents. He set out several issues he stated demonstrated that the 1st Respondent appointed one Ken Omollo to act for him.

6. It was his contention that the denial by the said Ken Omollo that he was never appointed by the 1st Respondent amounted to collusion between counsel and advocate (sic) to defeat justice as he had filed a Notice of appointment, applications and an appeal to wit Kisumu HCCA No 114 of 2019, executed a consent and attended court on several occasions on the 1st Respondent's behalf.

7. He rubbished the Respondents' assertions that one Peter Warindu Advocate had resorted to use of the name of Ken Omollo & Company Advocates which they had never appointed to act for the Respondents and/or that the said Ken Omollo was acting on the instructions of Peter Warindu. He termed this conduct on the part of the said advocate Ken Omollo, a malpractice that the Trial Court should have taken up with the Law Society of Kenya (LSK) and the Director of Criminal Investigations (DCI) to initiate investigations on the counsel.

8. He also asserted that the fact that the Respondents were represented by incompetent lawyers and the fact that the said Peter Warindu, Advocate did not have a practicing certificate was immaterial as they should have done their due diligence. It was his contention that the advocates' data was available in the Law Society of Kenya website which could be assessed by members of the public. It pointed out that nonetheless Peter Warindu Advocate was not the one who was on record in this case but Ken Omollo Advocate whose license to practice was not being queried.

9. He argued that the Trial Court acted on wrong principles of law because once an advocate was appointed, he had ostensible authority to represent his client in court and that if a client felt that his advocate was negligent, he could institute a suit against him because practicing lawyers had indemnity cover. In this regard, he relied on the case of Kitale HCCC No 97 of 2008 Marcellus Lazima Chege vs Joel Bob Sirengo (eKLR citation not given) where it was held that an advocate had ostensible authority to compromise a suit or consent to judgment.

10. He also placed reliance on the case of Nairobi Industrial Case No 201 of 2013 John Warunge Kamau vs Phoenix Aviation Ltd (eKLR citation not given) where it was held that a consent could only be made after parties fully understood the contents of the order, either personally or through their advocates and that once such an order was made, it could not be lightly set aside and/or varied save by consent of the parties.

11. He was categorical that a consent was a binding agreement and could only be set aside by the court on serious grounds like mistake, fraud, collusion, misrepresentation or by an agreement contrary to the policy of court as was held in the cases of Gerishom Likechi Kitungulu vs Patel Prabhakar issuer Bhai [2005] eKLR, Brookbond Liebig (T) Ltd vs Mallya (1975) EA 266 and Flora Wasike vs Destino Wamboko (1882-88) 1 KAR.

12. He argued that the Respondents and the Trial Court did not allude to the factors for setting aside the consent in this case and having entered into a consent on settlement of the decretal sums, they were bound by the said terms of the consent and were estopped from taking the court back.

13. He asserted that the Respondents' claim that they were not served was an afterthought as the proceedings of 21st February 2019 as there was a return of service that was filed by Patrick Okwiri and the Trial Court was satisfied with the mode of service.

14. He further contended that the Respondents' application was an afterthought having been filed three (3) months after they recorded a consent and making part payment of the sum Kshs 540,593/=. He averred that the delay in filing the said application was not explained and that it was filed to delay the just conclusion of the matter.

15. He referred this court to the case of Civil Appeal No 352 of 2005 Gerphas Alphonse Odhiambo vs Felix Adiego (eKLR citation not given) where it was held that no matter how short the period of delay was, it had to be explained.

16. He therefore urged this court to set aside and/or vacated the Trial Court's decision that was delivered on 9th December 2020 and substitute it with an order dismissing the Respondent's Notice of Motion application dated 8th October 2020. He also prayed for costs in the Trial Court.

17. On its part, the Respondents submitted that after the Trial Court granted the orders being appealed herein, the Appellant consented to the following orders which were recorded by court:-

    a. Leave to the Respondents to file their documents to be relied upon at the re-opened trial.

    b. Leave to the 2nd Respondent to file witness statement to be relied upon at the re-opened trial.

    c. Leave to recall the Appellant for cross-examination.

    d. A hearing date of 3rd February 2021.

18. They pointed out that pursuant to the aforesaid orders, they filed the 2nd Respondent's Witness Statement and the Respondents' List and Bundle of Documents. It was therefore their contention that the Appellant having consented to the said orders waived his right of appeal and should be estopped from pursuing his appeal. They added that court orders are not given in vain and that the orders having been granted by consent of parties, the Appellant was bound them.

19. In that respect, they relied on the Treatise of Chief Justice M. Monir and A.C Moitra, in their Book- The Law of Estoppel and Res judicata, 4th Edition in which they stated that once an order had been passed and complied with, it could not be challenged on any ground and that where one knowingly accepted the benefits of any order, he was estopped from denying the validity or the binding nature of such order.

20. They asserted that the subsequent application for stay of further proceedings which the Appellant filed and successfully prosecuted before this court was merely an afterthought and his appeal was incompetent for the reason that he did not challenge the orders of the Trial Court. It was their assertion that the Appeal herein lacked merit and urged this court to dismissed the same.

21. They asserted that on 25th October 2018, the Trial Court granted their advocate leave to cease acting for them in the said advocates' absence and that only the Appellant's advocate was in court. They pointed out that the Trial Court irregularly allowed the application without the applicant prosecuting the same which was contrary to Order 9 Rule 13 of the Civil Procedure Rules, 2010 in that the order was not

served upon them to make them aware that their advocates had been allowed by the court to cease acting.

22. They averred that the failure to serve them with the order meant that the firm of M/s Nyauke & Company Advocates remained their advocates and hence the Appellant should have continued to serve the said firm of advocates with all processes by virtue of the proviso to Order 9 Rule 13 of the Civil Procedure Rules 2010.

23. They contended that the Trial Court agreed to set aside the judgment after they showed that the 1st Respondent and their advocates were not served with the hearing Notice for 21st February 2019 when the case was listed for hearing of the defence case.

24. They placed reliance on the cases of Wachira Karani vs Bildad Wachira [2016] eKLR, Aggrey Odanga vs Joshua Siambe [2008] eKLR and Maina vs Mugiria [1983] KLR 78 where the common thread was that where it appeared there had been no proper service, the court had no option but to set aside the ex parte judgment as a matter of right.

25. They asserted that the Trial Court's finding that it was not clear upon who service was effected hence setting aside the ex parte judgment and all consequential orders could not be faulted.

26. They submitted that they got to know that Nyauke & Company Advocates had been granted an order on 25th October 2018 to cease acting for them when Judgment had already been obtained against them without their knowledge whereupon they instructed Mr. Peter Warindu to take up the matter on their behalf.

27. They denied having instructed the said Ken Omollo Advocate or his firm to handle the case on their behalf and were emphatic that they never authorised the said Peter Warindu to delegate their instructions to his firm. They asserted that M/s Ken Omollo & Company Advocates therefore came on record for them without their instructions. It was their assertion that neither Peter Warindu Advocate or Ken Omollo Advocate had instructions to record the consent that was purportedly recorded on 21st July 2020.

28. To buttress their point they relied on the cases of In Re-Estate of the Late Okwany Ongoye (Deceased) [2021] eKLR and Republic vs District Land Registrar Nandi & Another, Ex-parte Kiprono Tegerei & Another [2005] eKLR where the common thread was that where an advocate who entered into the consent did not have instructions to take that step, that was sufficient reason to set aside the said consent order.

29. It was their contention that the purported malpractice could not be the basis for the court to allow this appeal. They placed reliance on the case of Ochanda Onguru T/A Ochanda Onguru & Co Advocates vs Asha Sharrif Alwy Abraar [2009] eKLR where it was held an advocate who had no practicing certificate had no instructions to consent to anything. It was their case that the Trial Court correctly held that the consent could not bind them because it was recorded without instructions.

30. They were categorical that they had a good defence to the Appellant's claim because in the ex parte judgment that was set aside, the Trial Court had awarded unconscionable interest far beyond the usual court rate of twelve (12%) per cent per annum. They added that Appellant had previously sued the 2nd Respondent in the Employment and Labour Relations Court (ELRC) at Kisumu and had been awarded a sum of Kshs 1,799,948/= 26th November 2014 rendering the matter in the matter in which the Judgment, res judicata.

31. They also averred that the capacity in which the 1st Respondent herein was sued and the question of whether or not the 2nd Respondent could be liable to the Appellant on the basis of the purported

agreement dated 2nd October 2015 executed between the Appellant and the 1st Respondent were pertinent issues for determination by the Trial Court.

32. They placed reliance on the case of Wachira Karani vs Bildad Wachira (Supra) where it was held that the main concern of the court was to do justice to the parties and that the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. They thus urged this court to dismiss the Appellant's appeal.

33. Notably, the two (2) issues that were in contention in this appeal were whether or not the Respondents were properly served so as to attend court on various dates and whether or not the consent order dated 21st July 2020 was valid.

34. The Respondents claimed that their advocates were never served with the hearing notice for the defence hearing on 21st February 2019. They had also asserted that they were also not served personally and they were not served with the order indicating that the firm of Nyauke & Company Advocates had ceased acting for them. This averment was not rebutted by the Appellant and neither did he submitted on it.

35. The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice. This was the position in Onyango Oloo vs Attorney General [1986-1989] EA 456 where the Court of Appeal stated that denial of the right to be heard rendered any decision made null and void ab initio.

36. In considering whether or not to set aside the default judgement a court has to judge the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed. Hence, a regular judgement would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a prima facie defence which should go to trial or adjudication.

37. The principle obviously is that, unless and until the court has pronounced a judgement upon the merits or by consent it is to have the power to invoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure. While the judge may not be satisfied with the blunders or inaction of the defendant or his advocate, nevertheless he may hold that it would be just to set aside the ex parte decision as was held in the cases of Bouchard International (Services) Ltd vs M'mwereria [1987] KLR 193 and Evans vs Bartlam [1937] 2 All ER 647.

38. Order 9 Rule 13 of the Civil Procedure Rules provides that:-

    1. Where an advocate who has acted for a party in a cause or matter has ceased so to act and the party has not given notice of change in accordance with this Order, the advocate may on notice to be served on the party personally or by prepaid post letter addressed to his last- known place of address, unless the court otherwise directs, apply to the court by summons in chambers for an order to the effect that the advocate has ceased to be the advocate acting for the party in the cause or matter, and the court may make an order accordingly: (emphasis court)

        Provided that, unless and until the advocate has—

        a. served on every party to the cause or matter (not being a party in default as to entry of appearance) or served on such parties as the court may direct a copy of the said order; and

        b. procured the order to be entered in the appropriate court; and

c. left at the said court a certificate signed by him that the order has been duly served as aforesaid, he shall (subject to this Order) be considered the advocate of the party to the final conclusion of the cause or matter including any review or appeal.

2. From and after the time when the order has been entered in the appropriate court, any document may be served on the party to whom the order relates by being filed in the appropriate court, unless and until that party either appoints another advocate or else gives such an address for service as is required of a party acting in person, and also complies with this Order relating to notice of appointment of an advocate or notice of intention to act in person..”

39. A court should only allow an application granting leave to an advocate to cease acting only if it is satisfied that the client has been properly served with such an application. This satisfaction can only be made possible by affidavit of service. There was no evidence that the Respondents were served with an order showing that their advocates were granted leave to ceased acting on 25th October 2018 or that they had been notified of the said application so that they could make arrangements either to act by themselves or to instruct a new advocate.

40. Going further, the proceedings of 21st February 2019 show that the Trial Court did not satisfy itself whether the Respondents had been property served with a hearing notice. The said proceedings were recorded as follows:-

> Odeny: We served. It is for defence hearing. We have served. The Defendants were duly served and they are absent. There are no witnesses either. We seek that the case of defence be closed. We can have a judgment date.
>
> Court: The defence case is closed in the absence of the Defendants. Mention on 7/3/19 to confirm filing of submissions and taking of Judgment date...

41. Notably, the Trial Court did not indicate whether there had been proper service upon the Respondents before it closed their case of. A perusal of the said Affidavit of Service showed that serve was not proper in the circumstances as it was not clear to whom the service was effected. This court did not therefore fault the Trial Court for having set aside the proceedings of 21st February 2019.

42. Turning to the issue of the consent order dated 21st July 2020, it is trite law that a consent judgment or order can only be set aside on the same grounds as would justify the setting aside a contract, for example on grounds of fraud, mistake or misrepresentation as was held in the case of Flora Wasike vs Destimo Wamboko [1988] KLR 429.

43. The Respondents denied ever instructing the firm of Ken Omollo & Company Advocates to act on their behalf. They were also emphatic that they never instructed their advocate Peter Warindu to instruct Mr. Ken Omollo to act on their behalf. If the advocate who entered into a consent, had done so without instructions from the advocate on whose behalf he was holding brief, that may be a sufficient reason to warrant a review of the consent.

44. However, that does not mean that whenever an advocate was recording a consent order or signing a consent order, the other party must first verify that that advocate had the requisite authority to do so. An advocate is deemed to have ostensible authority from his client to represent the client in the case, including the execution of consent orders, where they should arise.

45. It was this court’s considered view that indeed the Appellant and his Advocate had no obligation of verifying that the advocate for the other party had been duly instructed to enter into the consent. In this regard, this court due regard to the holding of the Court of Appeal in the case of Kuwinda Rurinja

Co Limited vs Andkuwinda Holdings Limited & 13 Others [2019] eKLR where it held that a third party was under no obligation to ensure that the advocate of the opposite party is duly instructed.

46. Having said so, the Respondents persuaded this court to find and hold that they did not give instructions to the Advocate to act on their behalf in the first place and to record the consent order on 21st July 2020. The advocate who recorded the consent swore an affidavit in which he confirmed that he was not the Respondents' advocates.

47. This court had due regard to the case of CMC Holdings Ltd vs Nzioki [2004] KLR 173 where the Court of Appeal held that:

> " 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..."

48. Taking into account all the circumstances of this case this court was satisfied that the justice of the case mandates that the Respondents be given an opportunity of being heard. A court of justice, it has been held, has no jurisdiction to do injustice as was held in M Mwenesi vs Shirley Luckhurst & Another [2000]eKLR.

49. Accordingly, as the advocate who entered into the consent did not have instructions to take that step, that was sufficient reason to set aside the said consent order. In addition, it was the considered view of this court that the Appellant had consented to have the matter heard a fresh and could not therefore turn around and object to the matter being heard again.

50. This court came to the firm conclusion that the Trial Court did not misdirect itself when it set aside the consent judgment. This court also found and held that save for a delay in the conclusion of the dispute between him and the Respondents herein, the Appellant would not suffer any prejudice if his case was heard on merit. If there was any prejudice, he did not demonstrate the same. On the other hand, this court found that the Respondents would be the ones who would suffer prejudice in the event they were denied an opportunity to defend their case.

Disposition

51. For the foregoing reasons, the upshot of this court's decision was that the Appellant's appeal lodged on 18th December 2020 was not merited and the same be and is hereby dismissed. The effect of this Judgment is that the Ruling and Order of Hon. P. Gesora delivered on 9th December 2020 be and is hereby upheld. Each party to bear its own costs of the appeal.

52. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF MARCH 2023

J. KAMAU

JUDGE