



**Angelique Medical Supplies v Consteng Consultants Limited (Civil Appeal E028 of 2021)
[2023] KEHC 20964 (KLR) (Commercial and Tax) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20964 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E028 OF 2021
JWW MONG'ARE, J
JULY 26, 2023**

BETWEEN

ANGELIQUE MEDICAL SUPPLIES APPELLANT

AND

CONSTENG CONSULTANTS LIMITED RESPONDENT

(An appeal from the Ruling and Order of Honourable B.J Ofisi, Resident Magistrate in Milimani Commercial Courts CMCC No. 2683 of 2021)

JUDGMENT

1. On April 1, 2021 the Applicant moved this court by a Memorandum of Appeal seeking to overturn the decision of the trial court in CMCC No 2683 of 2021. The Appeal has been preferred from a ruling of the court declining a Notice of Motion application dated September 6, 2019 seeking to set aside a summary judgment and /or stay its execution.
2. The appeal is premised on the grounds set in its Memorandum of Appeal filed herein. In the said grounds, the Appellant has urged this court find that the trial court erred in law and in fact in disregarding the Appellant's right to a fair hearing and in disregarding the application brought by the Appellant to set aside the judgment
3. Because of transition in the Law Firm that was representing the Appellant, the Appellant argues that there was a lapse in representation and that they only came to learn that their case had been heard and concluded pursuant to a proclamation in execution of the judgment thereto. The Appellant avers that it moved quickly to set aside the exparte judgment and explain to the trial court the circumstances of the failure to put forth its defence but the trial court dismissed the application and upheld the said judgment.



4. Being aggrieved by the courts action, the Appellant has preferred the current appeal seeking to set aside the said judgment. The Appellant argues that it was an error of fact and law on the part of the trial court to allow entry of judgment without first ascertaining if indeed the Appellant had been served or that the hearing date had been taken with its consent and concurrence. The Appellant has urged the court to set aside the *exparte* judgment and allow it to defend the suit as to let the *exparte* judgment stay will visits an injustice to the Appellant who argues that they have a good defence.
5. The Appellant further urges the court to uphold its constitutional right to a fair hearing as enshrined under Article 50 of the *Constitution* and not to visit the mistakes of its counsel on the Appellant or deny it an opportunity to be heard on a technicality. The Appellant argues further that it is desirous of defending the suit filed against as it believes it has a good defence in the matter and it acted promptly upon realization that it had been locked out of the seat of justice and filed this appeal to set aside the lower court *exparte* judgment and allow the case to be heard on merit.
6. The Respondent opposes the appeal herein and urges the court to dismiss the appeal as filed for want merit. The Respondent argue that the matter was first listed for hearing on August 28, 2017 by the lower court after it was certified ready for trial. However, on several occasions the matter was adjourned at the behest of the Appellant citing several reasons why it was not ready to proceed. The Respondent argues that this matter came up for hearing on April 18, 2018 and again November 21, 2018 and the Appellant's counsel on record was served with the hearing notice but failed to attend court. Subsequently, the Respondent called its witness and the matter proceeded to be heard and a judgment rendered by the court. Subsequently the decree was extracted and a Certificate of Costs served upon the Appellant. Subsequently, an application to reinstate the suit was dismissed on February 11, 2021 which is the subject of the appeal before this court.
7. The Respondent avers that in filing this appeal, the Appellant is visiting the inefficiencies of his counsel on the Respondent instead taking action against his counsel by following the Law Society disciplinary process and suing him directly for compensation and loss incurred by his failure to attend court when required to do so. The Respondent urges the court to dismiss the Appeal and allow the Respondent to execute the decree of the judgment in the lower court.

Analysis and Determination: -

8. I have carefully considered the appeal filed herein and the submissions filed by the parties in support and opposition thereto. In my mind this appeal rests on one issue only to wit, 'whether the trial court, in disallowing the Appellant's Notice of Motion application of September 6, 2021, has denied it an opportunity to a fair hearing.' A perusal of the record of appeal reveals that indeed upon been served with the plaint in CMCC No 2683 of 2016, the Appellant promptly instructed legal counsel and put in a defence. The record further reveal that the Appellant appeared severally in this case and went through the pretrial processes until the matter was certified ready for trial and the same set down for hearing. On more than one occasion, the Appellant was present in court when the matter was set down for hearing but did not proceed for one reason or another. Further, the record reveals that it is only on the one occasion when the Appellant was absent in court, the matter proceeded with the Respondent's witness and judgment subsequently entered against the Appellant. The Appellant has explained that the absence of counsel or the Appellant on the date that the matter was heard was not through negligence or abandonment of the suit on its part but on the unfortunate events that occurred as a result of the transition in the Law firm representing the Appellant in court. The Appellant argues that upon discovery of the *exparte* judgement, it moved swiftly to set it aside but the trial court dismissed the said application. The Appellant urges this court to accord it its constitutional right to a fair hearing and allow the appeal.



9. Article 50(1) of the Constitution guarantees parties the right to a fair hearing before the courts. The said article provides as follows:-

' Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body'.

Moreover, courts have held the view that parties are distinct from the counsels despite the agency created by instruction and should not be punished for omissions or commissions of their counsel. The court in the case of Joseph Wekesa Tulula -v- Hilda Wanjiru ELC No 52 of 2013 the Court stated as follows:-

' mistakes of counsel are common and in certain deserving cases, this court is inclined to overlook those mistakes if only to do substantive justice to an applicant'.

10. I have noted that the Appellant herein has put in a spirited fight to have its day in court and acted with speed to have the trial court vacate its *ex parte* judgment albeit unsuccessfully. Guided by the ethos of the Constitution that has guaranteed all parties before the courts access to justice in the true meaning of the word and taking into account the facts surrounding the case before me, I find that the Appellant has made a case to have this court allow the appeal and return the matter to the trial court for hearing *inter partes*.

11. In view of the above findings the appeal herein is successful and is allowed in its entirety. The judgment of the Magistrates court in CMCC No 2683 of 2016 is vacated and set aside. The trial court is ordered to reinstate the suit and hear the same *inter partes* to its logical conclusion. Each party shall bear its own costs of this appeal. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF JULY 2023

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J. W. W. MONG'ARE

JUDGE

In the Presence of:-

1. Mr. Kelvin Njiru holding brief for Martin Gitonga for the Appellant.
2. No appearance for the Respondent.
3. Sylvia- Court Assistant

