



Maina & another (Suing as the Legal Representative of the Estate of Edward Reuben Maina Mwangi - Deceased) v Emirates Traders & another (Civil Appeal E064 of 2022) [2023] KEHC 24063 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24063 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E064 OF 2022
DAS MAJANJA, J
OCTOBER 26, 2023**

BETWEEN

REGINA NAINI MAINA 1ST APPELLANT

PAUL MWANGI MAINA 2ND APPELLANT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF EDWARD
REUBEN MAINA MWANGI - DECEASED**

AND

EMIRATES TRADERS 1ST RESPONDENT

SIMON CHEGE MACHARIA 2ND RESPONDENT

(Being an appeal from the Ruling and Order of Hon. Y. Barasa, SRM dated 1st September 2022 at the Magistrates Court, Naivasha in Civil Suit No. E259 of 2021)

JUDGMENT

1. The Appellants in the appeal seek to set aside the ruling of the trial court dismissing their application to extend time within which to pay throw away costs and to be allowed to defend the suit before the Subordinate Court.
2. The Appellants failed to enter appearance and file defence within the stipulated period when served with the Summons to Enter Appearance. As a result, interlocutory judgment was entered against them on 30.07.2021. The Appellants filed an application dated 23.08.2021 in which they sought to set aside the interlocutory judgment. By a ruling dated 04.02.2022, the Subordinate Court considered the application and observed that the draft defence annexed to the application raised triable issues and that it would be unfair to lock out the Appellants from defending the suit. The court allowed application



on condition that they pay thrown away costs of Kshs. 10,000.00 to the Respondent within 7 days from the date of the ruling.

3. The Appellants failed to pay the thrown away costs within the time stipulated by the court. At the mention of the suit on 16.03.2022, the Respondents applied for the interlocutory judgment to be re-instated which the court obliged. This precipitated the Appellant to file the application dated 11.04.2022 seeking to review the order of 16.03.2022 and to enlarge time within which to pay the thrown away costs. By the ruling dated 01.09.2022, the trial court observed that although the Appellants had been given a chance to defend the suit on terms, they did not comply with the condition imposed by the court. The court dismissed the application leading to this appeal.
4. As this is an appeal challenging the exercise of the discretion of the trial court, the court is guided by the principle that the appellate court will not interfere with the decision of the trial court unless it is satisfied that the magistrate 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 magistrate has been clearly wrong in the exercise of his discretion and that as a result there has been an injustice (see *Mbogo v Shah* [1968] EA 93 and *United India Insurance Co. Ltd and Others v East African Underwriters (Kenya) Ltd* NRB CA Civil Appeal No. 36 of 1983 [1985] eKLR).
5. The parties have filed written submissions which I have considered. The 1st Appellant's plea before the trial court was that she was unable to raise the thrown away costs within the timelines stipulated by the court for various reasons, one being the demise of her husband who was the bread winner. She was however able to raise the amount through friends and relatives albeit almost a month and a half later, but the Respondent's counsel declined to accept the payment.
6. Having considered the submissions, I take the following view of the matter. The trial magistrate agreed with the Respondent that the Appellants had been given a chance to defend the suit but that they failed to pay the thrown away costs. The court noted that the, "allegation that the counsel for the respondent refused to take the cheque remains an allegation because the issue (was) never reported to the court."
7. Although the judgment was reinstated at a mention on 16.03.2023, the application for reinstatement of the interlocutory order provided an opportunity for the Appellants to bring forth and explain the reasons why they failed to comply with the order. The trial magistrate was duty bound to consider the application and determine whether the reasons given by the Appellant were plausible or reasonable in the circumstances in order to exercise discretion in favour of the Appellants or otherwise.
8. I allow the appeal on the ground that the trial magistrate failed to consider the grounds proffered by the Appellants in favour of their application. Further, the grounds set out by the Appellants were reasonable and plausible supported by the correspondence exchanged between the parties' advocates. The 1st Appellant explained that she tried her level best to raise the money ordered by the court and once she was able to do so, she remitted it to her Advocates who forwarded to the Respondents' Advocates the cheque of Kshs. 10,000.00 by the letter dated 17.03.2022 but the Respondent's Advocates declined to accept the cheque and the request to extend time for compliance by the letter dated 23.03.2022.
9. Had the court considered the explanation and efforts made by the Appellants to make payment coupled with the earlier finding the Appellants had a good defence to present, it would probably have come to a different conclusion. The duty of the court is to avoid too rigid an application of rules that may unjustly deprive a party of their rights. I do not believe extending time for the Appellants to pay the thrown away costs would cause great injustice to the Respondents as compared to completely locking out the Appellants from defending the suit. I would condone the Appellants' default and allow the application.



10. I therefore allow the appeal and set aside the ruling of the Subordinate Court dated 01.09.2022 on the following terms:
- a. The Appellants shall to pay throw away throw away costs of Kshs. 10,000.00 within 7 days from the date hereof.
 - b. Upon payment of the costs so ordered, the interlocutory judgment entered on 30.07.2021 be and is hereby set aside.
 - c. Failure to adhere to the conditions above stated within the stipulated timeline, the interlocutory judgment shall stand be reinstated and effective forthwith.
 - d. Each party shall bear the costs of the appeal.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIVASHA THIS 26TH DAY OF OCTOBER 2023.

G. K. NZIOKA

JUDGE

