Benjo (K) Limited v Okwemba (Suing as legal representative of the Estate of Philister Nabwire Wanyama) (Civil Appeal 69 of 2020) [2023] KEHC 27451 (KLR) (23 November 2023) (Judgment)

Neutral citation: [2023] KEHC 27451 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL 69 OF 2020

DO CHEPKWONY, J

NOVEMBER 23, 2023

BETWEEN

BENJO (K) LIMITED ..... APPELLANT

AND

HILLARY MUNAI OKWEMBA (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF PHILISTER NABWIRE WANYAMA) ..... RESPONDENT

(Being an Appeal from the Ruling of the Honourable C. K. Kisiangani (SRM) delivered on 27th May, 2020 in Kericho SPMC No.212 of 2019)

JUDGMENT

1. By way of background, the Respondent suing as a Legal Representative to the Estate of Philister Nabwire Wanyama (deceased) filed a suit against the Appellant seeking or the following prayers:-

    a. General damages for pain and suffering

    b. Special damages of Kshs.259,833/=

    c. Costs of this suit.

    d. Interest on (a), (b) and (c) above at court rates.

2. In his Plaint, the Respondent pleaded that on or about 8th November, 2018

    at around 1.30pm, that the Deceased was a lawful pedestrian along Thika Super Highway at Kahawa Sukari area where the Defendant's driver, servant and/or agent drove or controlled the Motor Vehicle Registration Nu.KCC 342D, a Toyota Hiace without due care and carelessly, negligently and/or recklessly hence causing it to lose control and knocked down the Deceased whereby she sustained services injuries, a result of which she succumbed.

3. The Respondent pleaded negligence on the part of the Appellant's driver or agent as particularized under Paragraph 5 of the Plaint. He pleaded that the Defendant was vicariously liable for the actions of their driver or agent.

4. It was the Respondent's contention that the Deceased sustained serious injuries for which she was first rushed to Neema Hospital where she received first aid and was later transferred to Kenyatta National Hospital, Nairobi for specialised treatment but succumbed to the severe injuries after four (4) days on 12th November, 2019 having undergone tremendous pain and subjecte4d her entire family to great mental anguish. He also pleaded special damages as particularised at Paragraph 6 of the Plaint.

5. The Appellant failed to enter appearance within the prescribed period despite having been served with the Plaint and Summons to enter Appearance. The Respondent then proceeded to file for a Request for Judgment dated 10th September, 2019 and on 12th September, 2019, the trial Court entered Interlocutory Judgment against the Appellant and set the matter for formal proof hearing on 19th September, 2019, on which date the matter proceeded for hearing and determination issued for the Respondent to file written submissions in support of his case.

6. The trial Court delivered its Judgment on 14th November, 2019, whereby the same was wholly entered in favour of the Respondent in the following terms:-

    a. Pain and Suffering - Kshs.50,000.00

    b. Loss of Expectation of Life - Kshs.150,000.00

    c. Loss of Defendancy - Kshs.2,160,000.00

    d. Special Damages - Kshs.259,833.00

    Total - Kshs.2,619,833.00

7. The Appellant then filed a Notice of Motion application dated 10th January, 2020 seeking, among other orders to stay execution of the Judgment, to set aside the Judgment and for leave to file its Defence, list of witnesses and list of documents out of time.

8. The grounds advanced for the application were that the Appellant was never served with Summons to enter appearance, hearing notices or mention notices, hence its failing to enter appearance, file a defence or participate in the proceedings. The Appellant then urged the court to set aside the Judgment so that it could defend its case as it had been condemned unheard. Also, the Appellant contends that the Deceased was crossing the road at an undesignated area as stated in their defence hence triable issues which need to be considered have been raised.

9. The application was opposed through a Replying Affidavit of Hillary Munai Okwembasworn on 14th February, 2020 wherein it was stated that the Appellant had been duly served with all the court proceedings as indicated in the Affidavit of Service which was filed in court on 29th August, 2019 which showed that service upon the Applicant had been done on 23rd August, 2019 at the Nairobi Country Bus Terminus.

10. The Respondent argued that the Appellant had engaged an advocate

    through its Insurer for an out of court settlement vide a letter dated 11th July, 2019. He also stated that the Appellant filed its Memorandum of Appearance on 23rd September, 2019 without seeking to set aside the Interlocutory Judgment and was thus aware of the court proceedings.

11. Upon considering the application, the submissions filed by the parties, on 27th May, 2020, the trial Court delivered its Ruling wherein it was stated that the Appellant had been served with Summons to enter Appearance but chose not to enter appearance. The Insurer had been notified through a letter dated 9th July, 2019. The court also went on to state that the Interlocutory Judgment was entered on 12th September, 2019, suit set for formal proof hearing on 19th September, 2019 and a mention date fixed for 4th October, 2019.

12. That the defence herein was then filed on 26th September, 2019 which the court held meant that the Appellant was aware or ought to have known of the proceedings but failed to move the court appropriately, hence had not come to court with clean hands.

13. Aggrieved by this Ruling, the Appellant filed an Appeal vide a

Memorandum of Appeal dated 2nd June, 2020 which is based upon the following grounds:-

a. The Learned Magistrate erred in fact and in law in dismissing the Appellant's application dated 10th January, 2020 which finding was against the height of the evidence on record.

b. The Learned Magistrate erred in fact and law in denying the Appellants an opportunity to defend themselves in the lower court which is against the Appellants constitutional rights.

c. The Learned Magistrate erred in fact and law in finding that the Respondent was entitled to general damages without granting the Appellants an opportunity to be heard.

14. The Memorandum of Appeal seeks the following orders:-

a. This Appeal be allowed with costs.

b. The ruling delivered on 27th May, 2020 by Hon. C. K. Kisiangani, Senior Resident Magistrate be set aside.

c. This Honourable Court be pleased to set aside the ruling dated 27th May, 2020 and the suit be heard with the participation of the Appellants based on the facts of the case and evidence on record as submitted by the Appellants.

d. Costs of this appeal be borne by the Respondents.

15. This being a first appeal, it is the duty of the court to re-evaluate the record and establish whether the trial Court decision should stand. This is in accordance with the decision in the case of Abok James & Associates –vs- John Patrick Machira T/A Machira & Co. Advocates [2013]eKLR, which stated as follows regarding the duty of first appellate court:-

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the Learned Trial Judge are to stand or not and give reasons either way".

16. Having read through the proceedings of the lower court in consideration

of the Grounds of Appeal cited herein, this Court finds the main questions for determination being:-

a. Whether the Ruling delivered on 27th June, 2019 by the Honourable C. K. Kisiangani, SRM can be set aside.

b. Whether the suit dated 28th June, 2019 can be re-instated for hearing.

Analysis and Determination

17. It is trite law that this Court being an Appellate one should be slow to interfere with the decision of the trial Court which is based on the decision of the court on the issue of whether or not to set aside a Judgment. The court in the case of Pindoria Construction Ltd –vs- Ironmongers Sanytaryware, Civil Appeal No.16 of 1976, held that:-

> " It is a common ground that it is a matter for discretion whether or not to set aside a Judgment under Rule 8 of Order 9B of the Civil Procedure Rules. It is also well settled that the Court of Appeal will not interfere with the exercise of the discretion of a 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 injustice ....."

18. In regard to the first issue, the main question for this Court to answer is whether the Interlocutory Judgment entered on 14th November, 2019 was regular or irregular. The distinction between the two terms was explained by the court in the case of Mwala –vs- Kenya Bureau of Standards EA LR [2001]1 EA 148, where the Court stated:-

> " To all that I should add my own views that a distinction is to be drawn between a regular and irregular ex-parte Judgment. Where the Judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the Judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a Memorandum of Appearance or Defence on record but the same was in inadvertently overlooked the same ought to be set aside not as a matter of discretion, but ex debit justiciae for a court should never countenance an irregular Judgment on its record".

19. From the Grounds of Appeal, the main grievance is that the Appellant's claim that they were never served with the application dated 6th September, 2019 in which the Respondent registered for Interlocutory Judgment and the same was granted without them being granted a chance to be heard.

20. The issue of the sequences of non-appearance, default of defence and failure to serve a party are addressed under Order 10 of the Civil Procedure Rules, 2010. On these, Order 10 Rule 4 empowers courts in the following manner:-

Order 10 Rule 9 provides:-

General rule where no appearance entered.

[9]. Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing.

Order 10 Rule 10 provides:-

Default of defence.

[10]. The provisions of Rules 4 to 9 inclusive shall apply with any necessary modification where any Defendant has failed to file a defence.

Order 10 Rule 11 then provides that:-

Setting aside Judgment.

[11]. "Where Judgment has been entered under this Order the court may set aside or vary such Judgment and any consequential decree or order upon such terms as are just".

21. The power of the court on setting aside Interlocutory Judgment is discretionary save that it should be exercised in a manner to ensure justice is served to both parties in a litigation. For a court to set aside or vary an Interlocutory Judgment, it must be satisfied that the explanation advances by the Defendant/Appellant for failing to enter appearance and file a defence within the legally stipulated period is plausible.

22. The unrebutted facts in this case are that a letter dated 19th July, 2019 addressed to the Directline Assurance Co. Ltd by the Respondent has been attached by the Respondent to confirm that they wrote to the Insurer to inform/notify it of the Ruiru SPMCC. No.212 of 2019 filed on 16th July, 2019 and was scheduled for mention on 15th August, 2019, Summons having been served upon the Insured.

23. There was also attached an Affidavit of Service sworn by the Process Server, one James Ndegwa Muthigaon 23rd August, 2019 and it confirmed that on 22nd August, 2019 he had been instructed and had proceeded to serve the Appellant's Manager, Mr. Njoroge Gateka copies of Summons to enter appearance, dated 16th July, 2019, a Plaint, Verifying Affidavit, Plaintiff's list of witnesses, statements and list of documents, all dated 28th June, 2019. The Interlocutory Judgment was entered on 12th September, 2019 and the suit proceeded for formal proof hearing on 19th September, 2019 and scheduled the matter for mention on 4th October, 2019 for parties to confirm filing of submissions.

24. In her ruling, and which I have confirmed on reading through the proceedings and ruling delivered on 27th May, 2020, the trial Magistrate noted that the defence was filed on 26th September, 2019, a clear indication that it was aware of the proceedings of 19th September, 2019 at the time of filing the defence and Memorandum of Appearance. It is further noted that the Appellants and or its counsel despite knowing of the proceedings in this case and the hearing and mention dates, the Appellants and or its counsel failed to attend court or more court appropriately.

25. Clearly, as can be seen from the proceedings, the Respondent followed the requisite procedure laid down under Order 10 of the Civil Procedure Rules with regard to what the law requires be done in cases where a party files a suit, serves the pleadings on the other party and the party then fails to acknowledge service and file a defence in response. The request for Interlocutory Judgment dated 6th September, 2019 is clearly before the formal proof hearing and delivery of final Judgment. The Interlocutory Judgment dated 6th September, 2019 is evidently a valid and regular Judgment.

26. In its submissions, the Appellant admits having been served with the Summons to enter Appearance vide a letter dated 11th July, 2019 from the Respondent and it acknowledged the Respondents notice dated 17th May, 2019. In this Court's view, the reason advanced by the Appellant that they had written to the Respondent a letter received on 18th November, 2019 that they should ..... the Ruiru CMCC No.212 of 2019 in abeyance pending an out of court settlement, which was meant to hold any further action against them and had no default clause, is not plausible.

27. In its submissions, the Appellant admits that they were not able to settle the matter out of court. The question then becomes, when they failed to settle the matter which had already been filed in court, what was the next cause of action expected of the Respondent? And even after the Appellant's Insurer was served with a letter dated 14th November, 2019 informing them of the Judgment delivered herein, it was not until two (2) month's later that they moved the court with the Notice of Motion application dated 10th January, 2020 seeking to set aside the said Judgment.

28. As the old adage goes, 'justice delayed is justice denied'. Litigation must come to an end with the scale of justice balancing in favour of both parties. The provisions of Sections 1A and 3B of the *Civil Procedure Act* obligates the parties to assist courts in the expeditious disposal of cases. So that where like in this case, a party who is confirmed to have been duly served with pleadings and failed to take appropriate action cannot expect to benefit from the court's discretionary power.

29. In the circumstances, this Court finds that there was no error in principle to warrant any interference with the decision of the trial Court as it rightly observed that the Appellants had duly been served with the pleadings, hearing and mention notices by the Respondent but chose not to enter appearance and file a defence within the legally stipulated period.

30. The upshot is that the appeal lacks merit and is therefore dismissed with costs to the Respondent.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS .....23RD .....DAY OF...NOVEMBER ..., 2023.

****

D. O. CHEPKWONY

JUDGE

JUDGMENT – HCCA. NO.69 OF 2020 - Page 15 of15