REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CIVIL APPEAL NO. 13 OF 2020

(CORAM: F.M. GIKONYO J.)

(*Being an appeal from the Ruling of Hon. W. Juma (C. M)*

Delivered on 3rd June 2020 in Narok CMCC No. 17 of 2017)

RAJ DEVANI.....APPELLANT

VERSUS

NORTHWOOD AGENCIES LIMITED.....RESPONDENT

JUDGMENT

[1]. The subject of this appeal is the ruling dated 3rd June 2020 which dismissed the Notice of Motion dated 28th February, 2019 which sought, inter alia, setting aside of Judgment in default of appearance entered on 20th November, 2017 against the appellant.

[2]. The appeal cites the following grounds namely:

i. **That the Learned Magistrate erred in fact by failing to appreciate that the appellant was not left with hard copies of the pleadings after purportedly served while in G.K. prison battling criminal case no. 354 of 2017.**

ii. **That the Learned Magistrate erred in fact and law by failing to appreciate that there were triable issues that warranted setting aside of the ex parte interlocutory judgement.**

iii. **That the Learned Magistrate erred in law by failing to appreciate that the ex parte interlocutory judgment denied the appellant an opportunity to be heard.**

iv. **That the Learned Magistrate erred in fact by failing to appreciate that the attached motor vehicle was not exclusively owned by the applicant.**

v. **That the Learned Magistrate erred in fact by failing to appreciate that the appellant only became aware of the suit recently and the same was not rebutted.**

vi. **That the Learned Magistrate erred in fact by failing to appreciate that a court order in miscellaneous application no. 6 of 2015 from the high court Nairobi, appointing Bindya Devani as a guardian of the appellant confirmed that indeed the appellant had been mentally incapacitated since 2015.**

vii. **That the Learned Magistrate erred in fact by failing to appreciate that the suit was filed in 2017 and there was evidence of appearance of the appellant in a mental hospital at Mathari National Teaching and Referral Hospital.**

viii. **That the Learned Magistrate erred in law and fact by failing to appreciate that the application to set aside ex parte interlocutory judgement was fully merited.**

ix. **That the Learned Magistrate erred by failing to appreciate that the ex parte interlocutory judgement did not accord the appellant an opportunity to challenge the huge decretal amount awarded.**

[3]. The appeal was canvassed by way of written submissions.

Appellant's submissions

[4]. The Appellant has faulted the ruling by the trial court in dismissing his application dated 28th February, 2019 seeking to set aside interlocutory judgment when there was no proper service on the appellant at a G.K. prison at the time. He alleges that no copy of pleadings was left to him as required in law. This, he says, prejudiced his right to be heard. The appellant cited the case of ***MWK V JDK [2020] eKLR.***

[5]. The appellant submitted that trial magistrate ignored evidence of mental incapacity. The appellant contends that the mental incapacity happened from the year 2015 way before the suit was commenced in 2017. The appellant produced a high court miscellaneous application no. 6 of 2015 where the appellant's sister Bindya Devani and Dipen Morarji Rajani were appointed as managers of the appellant's estate under the provisions of the Mental Health Act. It was therefore erroneous for the court to claim that assessment was required since mental assessment and inquiry is a prerequisite to obtain such orders. The appellant cited section 26(3) of the Mental Health Act.

[6]. The appellant submitted that trial magistrate ignored triable issues raised in the draft defence. The appellant contends that it was erroneous for the court to merely condemn the appellant as having delayed in making the application to set aside *ex parte* judgment as a basis not to scrutinize whether there were triable issues or not, while the appellant made it clear that it was not aware of the existence of the suit owing to an improper service. The appellant cited the case of ***Twiga Chemical Industries Limited V Rotam Agrochemicals Co. Ltd [2019] eKLR.***

[7]. The appellant submitted that the interlocutory judgment denied HIM an opportunity to participate in the proceedings as well as to cross examine the plaintiff to test the allegations whether the appellant was the one who caused the accident or not and also the alleged amount of damage. He urged this court to intervene on his behalf in the interest of justice. He prayed that the appeal be allowed, orders of Hon. W. Juma be set aside and notice of motion by the appellant in CMCC no. 17 of 2017 dated 28/02/2019 be allowed with costs to the appellant.

[8]. The respondent submitted that the appellant did not fulfil the conditions for setting aside an *ex parte* judgement. The respondent contends that the main reasons why the court failed to set aside judgement is that the trial magistrate made a positive finding that summons to enter appearance were validly and properly done and that the two-year delay in seeking to set aside judgment was inordinate. The court was also not convinced of the alleged mental incapacity of the appellant. The affidavit of service was clear that indeed the appellant was served with summons to enter appearance and copies of pleadings. The service was acknowledged by a signature and an admission was made in the proceedings. The issue of not being served with the plaint is being raised for the first time in these proceedings. The respondent insists that the appellant was served with all the pleadings and summons. The process server was not called for cross examination at all. the issue of mental incapacity was not believed by the trial court since these proceedings are being undertaken by the appellant and not his alleged handlers. This court and the trial court cannot tell when the appellant was allegedly mentally incapacitated and the trial court was right in stating that an assessment of mental status was never availed. By virtue that the appellant was in GK prison and was facing a criminal charge led credence to the fact that he was indeed of sound mind at the time of service. Further the alleged incapacity was not raised at the time of service and was raised two years after the respondent had obtained judgement. In this case the appellant deliberately failed to enter appearance. there is no mistake or inadvertence that was demonstrated. They cited the case of ***Shah V Mbogo and Another [1967] EA. 116.***

[9]. The respondent submitted that constitutional right to be heard is conditional and may be declined where a party has deliberately failed to act and is obstructing the course of justice. The respondent contends that the appellant failed to explain why it took him two years to file the application to set aside. They cited the cases of ***William Macharia Maina & Another Vs Francis Barchuro & 3 Others Kibiwott Yator Kuryases& 8 Others (Interested Parties) eKLR, James Kanyiita Nderitu & Another V Marios Philotas Ghikas & Another.***

[10]. The respondent submitted that the appellant did not identify any triable issues but just tendered a draft defence which contained general traverses. The respondent contend that it is the duty of the party seeking to set aside a judgement that he has triable issues. These are supposed to be proved by affidavit evidence. They cited the case of ***Blue Sky EPZ Ltd Vs Natia Polyakora & Another (2007) eKLR.***

[11]. The respondent submitted that the appellant has not demonstrated how the learned trial magistrate improperly exercised her discretion. The respondent contend that the appellant admitted being charged with a criminal offence for being unruly in a helicopter and causing malicious damage to property. The claim by the respondent is in relation to his unruliness. The appellant admitted initiating the causation and as such lead to the damage sought in the plaint. The claim by the respondent being a special damage claim and considering the finding of the court of appeal in ***Nkuene Dairy Farmers Co-Op Society Ltd & Another Vs Ngacha Ndiya [2010] eKLR*** the respondent only needed to prove the damage by way of an assessment report.

[12]. The respondent submitted that the judgment by the trial court has been partially fulfilled. They prayed that this appeal be dismissed. They relied on the case of ***Abdalla Mohammed & Another Vs Mbaraka Shoka [1990] eKLR.***

ANALYSIS AND DETERMINATION

Duty of court

[13]. Conscious of my duty as the first appellate Court, I will reconsider the evidence, assess it and make my own conclusions **(See Seascapes Ltd vs. Development Finance Company of Kenya Ltd [2009] KLR, 384).**

Issues

[14]. The main question for determination is whether there are sufficient reasons to set aside the *ex parte* Judgment herein.

[15]. The 3 reasons given by the appellant were: -

> **a) That there was no service or proper service of summons to enter appearance and plaint as required in law;**
>
> **b) That the appellant was mentally incapacitated during the pendency of the suit; and**
>
> **c) That the Appellant had a good defence that raised triable issues.**

Power to set aside *ex parte* judgement

[16]. The court has unfettered to set aside an *ex parte* judgment. See Order 10 Rule 11 Civil Procedure Rules which provides, that: -

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

[17]. Setting aside an *ex parte* judgment is, therefore, a matter of the discretion of the court. The exercise of the wide and unfettered discretion, should, nevertheless be guided by important considerations which, after considering relevant cases on the issue, were aptly captured in the case of ***Esther Wamaitha Njihia & 2 others vs. Safaricom Ltd [2014] eKLR*** *inter alia*: -

> **"The discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd.) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah vs. Mbogo). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration vs Gasyali. It also goes without saying that the reason for failure to attend should be considered."**

Mere claim of right to hearing

[18]. The right to be heard is cardinal to fair trial. However, notably as important, is the right of a party to conclude his litigation within reasonable period. Thus, under article 159 of the Constitution, justice shall be rendered without delay; a principle aided by the overriding objective of the law, which, *inter alia*, place statutory obligation on the parties and legal counsels, to assist the court attain expeditious disposal of cases. Therefore, it is not enough to merely state that the ex parte judgment denied you the right to be heard without seeking to explain the basis of the claim. What claims have been made in this case?

Whether the appellant was properly served.

[19]. The appellant contends he was not or not properly served. And, no pleadings were left given to him after service. I have perused the affidavit of service dated 10th May 2017, which is detailed on how service was effected; at the prison in the presence of the officer in charge known as Paul Kimani. Accordingly, service was in accordance with Order 5 rule 18 of CPR. Nonetheless, despite service, is there any sufficient cause to set aside the ex parte judgment in order to do justice?

Sufficient cause or reason

[20]. The facts and circumstances of the case should dictate what constitutes sufficient cause, to warrant the exercise of the court's discretion. See the Supreme Court of India in case of ***Parimal vs Veena 2011 3 SCC 545*** attempted to describe what sufficient cause was when it observed that: -

> **"Sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"**

Whether the appellant was mentally incapacitated

[1]. The appellant argued that trial magistrate ignored evidence of mental incapacity. The appellant produced an order by the High Court made in Miscellaneous Application no. 6 of 2015 in which the appellant's sister Bindya Devani and Dipen Morarji Rajani were appointed as managers of the appellant's estate under the Mental Health Act. According to the appellant, it was therefore erroneous for the trial court to claim that assessment was required when mental assessment and inquiry is a prerequisite to obtaining such orders. The appellant cited section 26(3) of the Mental Health Act. The appellant contends that the mental incapacity happened from the year 2015 way before the suit was commenced in 2017.

[2]. The respondent was of a different opinion. They urged that the issue of mental incapacity was not believed by the trial court since these proceedings are being undertaken by the appellant and not his alleged handlers. This court and the trial court cannot tell when the appellant was allegedly mentally incapacitated and the trial court was right in stating that an assessment of mental status was never availed.

[3]. They continued to submit that, by virtue that the appellant was in GK prison and was facing a criminal charge led credence to the fact that he was indeed of sound mind at the time of service. Further the alleged incapacity was not raised at the time of service and was raised two years after the respondent had obtained judgement. They blamed the appellant for deliberately failing to enter appearance. Thus, they think that there is no mistake or inadvertence that was demonstrated. They cited the case of ***Shah V Mbogo and Another [1967] EA. 116.***

[4]. The Appellant in this appeal seems to apportion the greater proportion of weight to the fact that he was mentally incapacitated during the pendency of the suit from which this appeal emanates.

[5]. I have seen the order issued in the High Court at Nairobi Miscellaneous Application No. 6 of 2015 annexed as Exhibit RD-1 dated 19th February, 2015. The orders were to the effect that the appellant is mentally incapacitated and the applicants therein were granted orders to have the appellant treated and also manage and preserve the estate of the appellant.

[6]. Under section 27(4) of the Mental Health Act, a manager appointed by court is deemed to be the trustee in relation to the subject and estate property. Such position, makes the manager concerned with all matters that relate to the subject and the estate property. I suppose, these include litigation. I wonder therefore, why the manager did not intervene in these proceedings even after the property of the subject was attached. Preservation of the estate property is one of the cardinal duties of a trustee.

[7]. Important information ought to have been provided to the court, and the manager would be in the best place to do so, such as; details on scope, extent and tenure of the guardianship and management order, as well as the medical evidence and history of the problem. This information was lacking.

[8]. Nonetheless, despite all these shortcomings, the question of mental incapacity was raised and tabled in form of a court order before the trial court. Is it not a dispatch from a higher command; the Constitution, that courts bear a constitutional duty to protect and promote rights of persons with disabilities?

[9]. The trial court failed to consider the appellant as a person with disability within the order provided, and at least call for relevant information from the managers of the appellant to satisfy itself of the status of his mental capacity during the pendency of the suit from which this appeal emanates. And, I am certain the trial court would not have considered itself unable to ascertain nothing as it thought. With such little inquiry, the trial court will be in a position to state whether the mental incapacity was relevant to the period in question. This was a grave error for which the ex parte judgment stands impeached. Accordingly, I set aside the ex parte judgment on the following terms: -

i) That the appellant shall file and serve defence within 14 days of today. Time is of the essence.

ii) That the primary suit be heard within 60 days of today. The appellant to set down the said suit for hearing within the stated period. Time is of the essence.

iii) That to avoid further delay, should the appellant fail to do any of the things I have stated above, the trial court may consider striking out the defence, and proceed with the case ex parte.

iv) That the appellant shall pay auctioneer's charges- to be taxed or agreed.

v) That given the issue upon which the decision turned, I order each party to bear own costs. It is so ordered.

Dated, signed and delivered at Narok through Teams Application, this 29th day of March, 2022.

F. M. GIKONYO

JUDGE

In the presence of:

1. Kigen for Appellant

2. Kiplagat for Respondent

3. **Mr. Kasaso CA**