



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 5 OF 2020

B.N KOTECHA & SONS LIMITED.....APPELLANT

VERSUS

NAUSHAD TRADING COMPANY LIMITED.....RESPONDENT

(Being an Appeal from the Ruling of Hon. E. Makori (CM), delivered in Mombasa on the 30th May, 2019 in Mombasa CMCC No. 1280 of 2017)

JUDGMENT

[1] This appeal arose from the ruling delivered by **Hon. E. Makori, Chief Magistrate, on 30th May 2019** in **Mombasa CMCC No. 1280 of 2017**. In the said suit, the **Appellant (B. N. Kotecha & Sons Limited)** had been sued by Respondent (**Naushad Trading Company Limited**) for the sum of **Kshs. 11, 936, 158.00/=** being the outstanding amount due and payable to the Respondent for goods supplied and delivered worth **Kshs. 9, 547, 150.00/=**, plus **Kshs. 2, 389, 008.00/=** being interest accrued up to **June, 2017** at the rate of 1.5% per month. The record of proceedings from the lower court shows that the **Appellant** was duly served but failed to enter appearance, leading to entry of an interlocutory judgment in default of appearance by the lower court.

[2] The default judgment was entered on **19th September, 2018** and thereafter, on **31st January, 2019**, the Appellant filed a Notice of Motion dated **30th January, 2019** seeking, *inter alia*, the setting aside of the interlocutory judgment. The trial court entertained the application and, vide its ruling dated **30th May, 2019**, found that the default judgment was regular as the Appellant was duly served but failed to enter appearance within the prescribed time. The trial magistrate then looked at the draft Defence attached to the application and noted that the Appellant did not deny the claim *in toto* but only took issue with the claim for interest at 1.5% per month. The trial court accordingly took the view that the said interest of 1.5% per month and how it was arrived at were triable issues. Consequently, in the exercise of its discretion, the court set aside *the ex parte* judgment entered on the **18th September, 2018** on the following conditions:

[a] That the Plaintiff/Applicant [sic] deposits the entire decretal sum of **Kshs. 11, 936, 158.00/=** minus interest and costs within 30 days;

[b] That the draft defence be deemed duly filed;

[c] That the parties comply with Order 11 of the Civil Procedure Rules within 30 days; failing which the entire decretal sum with 1.5% interest per month would be payable forthwith;

[e] That costs of this application be borne by the applicant in any event.

[3] The Appellant, being dissatisfied with the conditions imposed by the learned magistrate, filed this interlocutory appeal contending that:

[a] the learned magistrate erred in law and in fact in granting onerous and drastic conditions for the setting aside of the *ex parte* judgment entered on **18th September 2019**, to wit, that the entire decretal sum of **Kshs. 11,936,158/=** minus interest and costs be deposited in court within 30 days, failure to which execution to issue.

[b] The learned magistrate erred in law and in fact in failing to appreciate that the decretal sum of **Kshs. 11,936,158/=** was contested and there had been substantial payment of the same and it was thus prejudicial to order that the entire decretal sum be deposited in court without first hearing the parties.

[c] The learned magistrate misdirected himself when he failed to appreciate that there was no agreement on interest between the Appellant and the Respondent and it was thus improper to order that the Appellant pays interest at the rate of 1.5% per month.

[d] The learned magistrate erred in law and in fact in failing to appreciate that the Appellant's defence raised triable issues which ought to be determined through a hearing.

[e] The learned magistrate erred in law and in fact in failing to appreciate the principles for setting aside *ex parte* judgment, to wit, that even where there was one triable issue, the court is bound to order that the *ex parte* judgment be set aside.

[f] The learned magistrate erred in law and in fact by summarily determining the case without hearing the parties and without considering the defence and evidence of the Appellant.

[g] The learned magistrate erred in law and in fact in totally disregarding the Appellant's pleadings, annexures and submissions.

[4] Thus, the Appellant prayed that the ruling of the subordinate court delivered on **30th May 2019** be set aside and substituted with an order allowing the Appellant's application dated **30th January 2019** and filed in the subordinate court on **31st January 2019**; and that the costs of the appeal and the proceedings at the lower court be awarded to the Appellant.

[5] The appeal was canvassed by way of written submissions, pursuant to the directions given herein on **27th September 2021**. **Mr. Njuru** for the Appellant relied on his written submissions dated **19th November 2021** and underscored the fact that the appeal is limited to the conditions set for setting aside the *ex parte* judgment of the lower court. Counsel took the posturing that the learned magistrate exercised his discretion under **Order 10 Rule 11** of the **Civil Procedure Rules** in a capricious and arbitrary manner, even after finding that the defence raised a triable issue. He added that, in so doing, the subordinate court failed to appreciate that there was no agreement on interest between the Appellant and the Respondent. Counsel cited **Hussamudin Gulamhussein Pothiwalla administrator, Trustee and Executor of the Estate of Gulamhussein Ebrahim Pothiwalla v Kidogo Basi Housing Cooperative Society Limited & 31 Others**, Civil Appeal No. 330 of 2003, for the proposition that a court of law cannot re-write a contract between the parties.

[6] It was further submitted by counsel for the Appellant that, having found that the interest rate chargeable was a triable issue, the lower court ought to have set aside the *ex parte* judgment without any further ado. He relied on **Blue Shield Insurance Co. Ltd v Joseph Mboya Ogotu** [2009] eKLR in which it was held that the defendant was entitled to a hearing even if only one issue was raised in defence; and that an arguable defence need not be a successful defence.

[7] In faulting the conditions set by the lower court, counsel took the view that the order violated the principles of proportionality and equality of arms as envisaged under **Sections 1A and 1B** of the **Civil Procedure Act**. He added that by that order, the lower court, in effect, determined the dispute before it was heard, and put one party at an advantage from the get-go; thereby violating **Article 48** of the **Constitution of Kenya**. He referred the **Court to Kenya Power & Lighting Company Ltd v Abdulkakim Abdulla Mohamed & Another** [2017] eKLR and **Pilot Technical Services Limited v Amenan Electrical Services Ltd** [2011] eKLR and urged that the appeal be allowed with costs to the Appellant.

[8] On behalf of the Respondent, **Mr. Omwenga** relied on his written submissions dated **22nd November 2021**. He cited **Shah v Mbogo** [1967] EA 166 to underscore the fact that it was within the lower court's discretion to allow the application or not; the Appellant having been served with Summons to Enter Appearance along with the Complaint and having failed to respond thereto. He also pointed out that 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 has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice.

[9] **Mr. Omwenga** defended the decision of the lower court, contending that it was based on the pleadings filed by the parties; and therefore that the decision was not an impediment to the course of justice. In this regard, counsel made reference to **Machira T/A Machira & Co. Advocates v East African Standard (No. 2)** [2002] KLR 63, among other authorities, to demonstrate that the interests of a successful party ought to be taken into consideration as well. In his view, it is unfathomable that the Appellant should rely on the Overriding Objectives and yet, in the same breath, seek to deny the Respondent the fruits of his judgment. He made mention that the ruling was in accord with **Order 42 Rule 6(2)** of the **Civil Procedure Rules** and therefore ought not to be impeached. He therefore prayed for the dismissal of the appeal with costs to the Respondent.

[10] I have given due consideration to the appeal in the light of the proceedings held before the lower court and the written submissions filed herein by learned counsel. The brief facts emerging therefrom are that the Respondent sued the Appellant before the lower court claiming **Kshs. 11,936,158/=**, being outstanding sums due and payable to the Respondent in respect of goods supplied to it, together with interest at 1.5% per month. Thereafter, the Respondent issued the Appellant with several cheques towards settlement of the debt; but which, were returned unpaid. Thus, the Respondent opted to file the lower court suit in recovery of the outstanding amount together with interest at 1.5% per month from **1st July 2017** till payment in full. The Respondent also prayed for the costs of the suit.

[11] A perusal of the typed proceedings of the lower court (at pages 91 – 93 of the Record of Appeal) shows that the Appellant failed to enter appearance within the period stipulated in the Summons to Enter Appearance; and consequently a default judgment was recorded against it on **18th September 2018**. The Appellant then filed the application dated **30th January 2019** seeking to have the *ex parte* judgment set aside; which application culminated in the impugned Ruling dated **30th May 2019**. The lower court found, as a matter of fact, that service was effected on the Appellant; and therefore that the default judgment was a regular judgment. It then proceeded to determine whether, even then, a plausible reason had been given for setting aside that judgment.

[12] At pages 97-98 of the Record of Appeal, the learned magistrate reasoned as hereunder at paragraphs 18-21:

“When a judgment is regular the court then proceeds to exercise its discretion as to whether to set aside judgment or not, by looking at the defence whether its meritorious or not.

The draft amended defence at a glance in paragraph 3 attacks the interest of 1.5% per month other than denying the claim in toto. The defendant further talks of having issued post-dated cheques which were irregularly banked and bounced.

Considering the defence put across perhaps the only issue to try will be on the interest of 1.5% per month and how it was arrived at.

Exercising my discretion and not be seen to drive the appellant from the seat of justice application before hand will be allowed in this manner:

- i. Ex parte judgement entered herein on 18/9/2018 is hereby set aside on condition that:-**
- ii. The plaintiff/applicant deposits the entire decretal sum of Kshs. 11,936,158 minus interest and costs within 30 days hereof.**
- iii. Draft defence be deemed duly filed.**
- iv. Parties to comply with order 11 CPR, within 30 days hereof.**
- v. Failure the entire decretal sum with 1.5% interest per month payable from when the debt was due with costs to fall due and payable forthwith or execution to issue.**
- vi. Costs of the application be borne by the applicant in any event.”**

[13] It is manifest therefore that the Appellant is only aggrieved by Order No. ii; and therefore the single issue for determination is whether the trial magistrate properly exercised his discretion in making the order that the plaintiff/applicant deposits the entire decretal sum of **Kshs. 11,936,158** minus interest and costs within 30 days.

[14] The general principle is that an appellate court will not ordinarily interfere with the trial court’s discretion to set aside an ex parte judgment unless it shown the magistrate acted on wrong principles. Thus, **Philip Keipto Chemwolo & another v Augustine Kubende** [1986] eKLR the Court of Appeal had this to say:

“...this Court will not lightly interfere with the discretion of the trial 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 on 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 a miscarriage of justice.”

[15] Having found that the Appellant’s Defence raised a triable issue to warrant the setting aside of the default judgment, it was anomalous for the learned magistrate to again make mention of “**decretal sum**” and require that the same be deposited within a fixed period of time. It is to be remembered that the application before him not being one for stay. It is in the same vein that I find the submissions of **Mr. Omwenga** touching on **Order 42 Rule 6** of the **Civil Procedure Rules** and **Machira T/A Machira & Co. Advocates v East African Standard (No. 2)** (supra) to be misplaced.

[16] I therefore agree entirely with the position taken in **Pilot Technical Services Ltd v Amenan Electrical Services Ltd** [2011] eKLR thus:

“...The trial magistrate allowed an application to set aside the ex parte judgment. Once this order is given, the status of a civil suit is to go back to the beginning as if there never was a trial that had been taken or heard. This means the matter begins De novo or from the start.

The issue of a decretal sum does not therefore arise as it the case has to be proved afresh. This sum may change.

I wish further to point out that the effect of setting aside an ex parte judgment is to be functus officio on the issue of any decree that may have arisen within the ex parte judgment...”

[17] In the same vein, the Court of Appeal, when faced with similar circumstances in the case of **Kenya Power & Lighting Co Ltd v Abdulhakim Abdulla Mohamed & another** (supra) took the view that: -

“...There was not even a remote suggestion that the appellant would be unable to pay or would delay payment of the sum in question if after a full hearing it were found that the respondents are entitled to the money. The contested order, which demands that a party pay substantial sums of money in a claim which is yet to be proved and in respect of which the court has found that there is an arguable defence raising triable issues, does not appear to us in any way to advance or facilitate the just, proportionate, affordable and resolution of disputes as demanded by the overriding objective...”

[18] In the premises, and having taken into consideration the circumstances of this case, I am persuaded that the learned trial magistrate misdirected himself in ordering the appellant to deposit the sum of **Kshs. 11, 936, 158.00/=** as a condition for setting aside the ex

parte judgment; as the order was incongruent with his finding that the defence raised triable issues.

[19] In the result, the appeal succeeds, and orders are hereby granted as hereunder:

[a] Order No. ii of the final orders of **Hon. E.K. Makori, CM**, in the impugned ruling dated **30th May 2019**; namely, that the Appellant deposits the entire decretal sum of **Kshs. 11,936,158** minus interest and costs within 30 days, be and is hereby vacated; with the effect that the Appellant is hereby granted unconditional leave to defend the **Mombasa CMCC No. 1280 of 2017: Naushad Trading Company Ltd v B.N. Kotecha & Sons Ltd**.

[b] As costs follow the even, the costs of this appeal are hereby awarded to the Appellant.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 28TH DAY OF MARCH 2022.

OLGA SEWE

JUDGE