Paragon Electronics Limited v Ngiyo Investments Limited (Environment and Land Appeal 30 of 2019) [2023] KEELC 17725 (KLR) (25 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17725 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL 30 OF 2019

OA ANGOTE, J

MAY 25, 2023

BETWEEN

PARAGON ELECTRONICS LIMITED ..... APPELLANT

AND

NGIYO INVESTMENTS LIMITED ..... RESPONDENT

(Being an Appeal from the Order made by the Chief Magistrate at Nairobi (the Hon. A.N Makau, SPM) on 15th day of April, 2019)

JUDGMENT

Background

1. The present Appeal arises from the Ruling rendered by the Chief Magistrates Court on 15th April, 2019 dismissing the Appellants' application seeking the review and setting aside of the Judgement delivered by the Court.

2. By way of brief background, the Plaintiff (Respondent herein) instituted a suit against the Defendant (Appellant herein) on 28th March, 2009 seeking inter-alia, rental arrears in the sum of Kshs 921,936 and general damages for breach of the Agreement to Lease. The Defendant duly filed its Defence and Counterclaim in which it sought dismissal of the Plaint as well as refund of the sum of Kshs. 896, 842.70.

3. On 18th February, 2019, the matter proceeded for hearing in the absence of the Appellant. The Court rendered its decision on 15th March, 2019 in which it found the Respondent to have established its case on a balance of probabilities and dismissed the Defendant's Counterclaim. By an application dated 18th March, 2019, the Appellant asked the lower court to review and set aside the aforesaid Judgement. The Court rendered a Ruling on 15th April, 2019 in which it dismissed the application.

4. Aggrieved by the foregoing, the Appellant lodged this Appeal vide the Memorandum of Appeal dated 17th April, 2019, and set out the following grounds;

   i. The Magistrate erred in fact and law in downplaying the fact that the Respondent never served the Appellant with the orders and directions that were given on 18th February, 2019.

   ii. The Magistrate erred in law and fact by dismissing and disregarding the significance of the fact that the Appellants representative was appearing before the High Court (Hon Lady Justice Nzioka) at the time there was a time allocation for the hearing of the case before the Trial Court on 18th February, 2019.

   iii. The Magistrate erred in law and fact and in breach of Articles 10 and 50(1) of *the Constitution* by openly expressing a pre-judgement of the Application on two occasions before hearing it on its merit.

   iv. The Magistrate erred in law and fact and acted in breach of Articles 10 and 50(1) of *the Constitution* by treating the parties unevenly.

   v. The Magistrate erred in concluding that the Appellant is represented by Advocates in the matter and that the said Advocates came on record as early as 30th May, 2018 and should therefore have been ready for hearing on 18th February, 2019.

   vi. The Magistrate erred in law and fact by disregarding the demonstrated difficulty that the Appellant has had in retrieving its records from its previous Advocates and the fact that as at the date of the Hearing, the Appellant had not yet obtained the file.

   vii. The Court erred in overlooking the fact that the Appellant had demonstrated that its former advocates had failed to inform the Applicant of pre-trial directions given by the Court on about the 21st June, 2018.

   viii. The Magistrate erred in overlooking and not addressing the fact that the Appellant had offered to pay throw away costs for recalling the Respondents witness.

5. The Appellant therefore seeks that;

   a. The Appeal be allowed with costs to the Appellant.

   b. The Order of the Chief Magistrate Court at Nairobi (the Honourable A.N Makau, SPM), in CMCC 1785 of 2009 given on the 15th April 2019 dismissing the Appellant's Application dated 18th March, 2019 be set aside and substituted with an Order allowing the Application dated 18th March, 2019 and thereby setting aside the Judgement of 15th March 2019.

   c. All the unspent prayers in the Application dated 18th March, 2019 in CMCC 1785 of 2009 be allowed.

   d. The suit CMCC 1785 of 2009 be remitted to the Magistrate Court for hearing by any other Magistrate other than Honourable A.N Makau SPM.

Submissions

6. The Appellant's counsel submitted that the trial court proceeded with hearing of the Respondent's case on 18th February, 2019 ex parte after declining the Appellant's application for adjournment; that the Court thereafter gave directions on submissions and that on 1st March and 14th April, 2019, the

Appellant made applications in an attempt to get an opportunity to be heard before Judgment was delivered.

7. It was submitted that the Appellant further made an application on 18th March, 2019 seeking the setting aside of the Judgement, which application was dismissed and that the Court dismissed the Appellant's application despite the fact that the Respondent failed to serve the Appellant with the directions of 18th February and 8th March, 2019 as well as the submissions.

8. According to counsel, the Court overlooked the fact that the Appellant had been persistent and timely in pursing the matter and that in the case of Zablon Mokua Solomon M. Choti & 3 Others (2016) eKLR, the Court relied on the case of Chandrakhant Joshibhai Patel vs R [2004] TLR, 218 which defined an error apparent on the face of the record as one that is an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which there may be conceivably be two opinions.

9. Counsel for the Appellant submitted that in the Ruling of 15th April, 2019, the Court indicated and erroneously so, that the Appellant had deliberately absconded the hearing when the fact of the matter was that the Appellant's Counsel was before another Court and had asked another Counsel to hold his brief.

10. It was submitted that Counsel holding brief had sought and was denied an adjournment; that the Appellant's counsel had given sufficient reasons for his absence and that the Court ought to have granted him another opportunity. It was submitted that the matter should be remitted to the trial Court for hearing because the hearing date was taken ex-parte without giving the Appellant an opportunity to take a convenient date.

11. According to counsel, the Appellant's former advocates had not informed the Appellant that it had not complied with the pre-trial directions; that as expressed by the Court in Wachira Karani vs Bildad Wachira [2016] eKLR, litigants should not be punished for the mistakes of Counsel and that the right to a fair hearing is a fundamental constitutional right provided under Article 50 and which right the Courts should strive to protect.

12. The Respondent did not file submissions.

Analysis and Determination

13. The Court has considered the Memorandum of Appeal and the submissions. Whereas the Appellant has set out 8 grounds of Appeal, the only issues for determination can be summarized as follows:

    i. Whether the application for review was competent and or met the threshold prescribed by the law.

    ii. Whether the learned magistrate was justified in dismissing the Application?

14. This being a first Appeal, the Court is required to re-evaluate the evidence tendered and make its own findings and conclusions. The Court is not bound by the findings of fact and law made by the lower court and may on re-evaluation reach its own conclusion and findings. This principle was aptly enunciated in the case of Selle & Another vs Associated Motor Boat Co. Ltd & Others (1968) EA 123 where the Court of Appeal stated thus:-

> " This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence,

evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect."

15. As to the circumstances under which this Court can interfere with the decision of a subordinate Court, the Court of Appeal in Khalid Salim Abdulsheikh vs Swaleh Omar Said [2019] eKLR expressed itself as follows:

> " We nevertheless appreciate that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings."

16. The present Appeal was triggered by the trial Court's dismissal of the Appellant's application for Review. The law governing the framework of Review is set out in Section 80 of the *Civil Procedure Act* and Order 45, Rule 1(1) of the Civil Procedure Rules. Section 80 of the Act provides as follows:

> " Any person who considers himself aggrieved—
>
> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
>
> (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

17. Whereas Order 45 Rule 1 (1) of the Civil Procedure Rules provides;

> " Any person considering himself aggrieved:
>
> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgement to the court which passed the decree or made the order without unreasonable delay."

18. The power of review available to the trial court is not absolute and is hedged in by the restrictions indicated in Order 45 of the Civil Procedure Rules. The power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made.

19. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares one in the face without any elaborate argument being needed for stabling it.

20. From the foregoing, the main grounds for review are therefore discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason.

21. Looking at the Motion that was filed in the lower court, it is clear that the prayer for Review is predicated on the ground that there is an error apparent on the face of the record. What constitutes an error on the face of the record was considered by the Court of Appeal in Kenya Trypanosomiasis Research Institute vs Anthony Kabimba Gusinjilu (Suing for and on behalf of 112 Plaintiffs) [2019] eKLR where the Court referred to its various decisions as follows;

> " This Court in Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243 described an error on the face of the record as follows:
>
> > "In Nyamogo and Nyamogo v Kogo [2001] EA 174 this court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."

22. This position was also stated by the Ugandan Court of Appeal in the case of Apollo Waswa Basude & 2 Others (As administrators to the Estate of the late Sepiriya Rosiko) vs Nsabwa Ham, Civil Appeal No 288 of 2016, where the court at para 310 stated thus;

> " ...an error apparent on the face of the record is one that is evident and its incorrectness does not require any extraneous matter by way of proof. It is so manifest and clear that no court of law exercising its judicial power would allow it to remain on the court record. This error may be either of fact or of law..."

23. From the foregoing, it is apparent that an error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record.

24. So what was the error before the trial Court? According to the Appellant's counsel, when the matter came up for hearing on 18th February, 2019, they could not proceed because they had not obtained the file from the Appellant's previous counsel and sought for an adjournment on that ground.

25. According to the Appellant, its representative who was assigned to attend to the hearing was before another Court; that the application for adjournment was denied and that on 1st March, 2019, it filed an application seeking a stay of proceedings and an order recalling the Respondent's witness and to be allowed to prosecute its claim but its application was declined.

26. It is argued by the Appellant that the Court did not take the foregoing circumstances into consideration when making its final determination and that this constituted an error on the face of the record. It was submitted that the Court erred in stating that the Appellant deliberately absconded the hearing whereas it had been made aware that the Appellant's representative was before Nzioka J in HCCC 289 of 2009.

27. It is the Appellant's case that it had established sufficient reason to warrant an adjournment when the matter came up for hearing and that the Court ought to have allowed the application for adjournment; that the Appellant was denied a chance to present its case even after making efforts seeking to be heard and that the Respondent and the trial Court failed to consider the fact that the Respondent did not serve the Appellant with any directions and notices in respect of the matter as required by the law.

28. Considering the impugned application, the learned Magistrate noted that on the morning of 18th February, 2019, Counsel for both parties were present; that Counsel holding brief for Counsel for the Appellant sought an adjournment on grounds that they were yet to obtain the file from the previous advocates and that the Court declined to adjourn the matter.

29. The learned Magistrate in her Ruling further noted that when the matter proceeded at 12:15 pm, Counsel for the Appellant was not present; that notwithstanding the absence of the Appellant and Counsel, the Court was mandated to carry out its mandate which it did; that the matter was old and that the Appellant's Counsel had had sufficient time to prepare for its client case.

30. On the issue of non-service of the directions issued after the hearing and on filing of submissions, the Magistrate, while not disputing the same, noted that the Appellant should not have expected to be briefed on the next cause of action having failed to appear for hearing.

31. Indeed, looking at the trial proceedings, Counsel for the Appellant appeared before Court on the morning of the hearing and sought an adjournment on account of having failed to receive documentation from the Appellant's previous Counsel. The application was denied and a time allocation for the hearing was set by the court.

32. Despite having been made aware that the matter will proceed for hearing, the Appellant's inexplicably failed to appear in court. In light of his absence, it cannot be said, as was argued in the impugned application, that the Appellant's failure to attend court when the matter came up for hearing constituted an error on the face of the record.

33. As to the contention that the Court would have deferred the Judgement had it been privy to the applications of 1st March, 2021 and 14th March, 2021, the same is purely conjecture and cannot be said to constitute an error on the face of the record. This is especially so because on 15th March, 2021, the Court was informed about the applications but nonetheless proceeded to render its determination.

34. The question of non-service of the directions after the hearing date and the non-service of submissions equally does not constitute an error on the face of the record. All the issues raised before the learned magistrate in the application for review of her Judgment are issues that had to be established by a long-drawn process of reasoning or on points where there may conceivably be two opinions. They can hardly be said to be errors apparent on the face of the record, but issues to be argued on appeal.

35. In the end, it is the finding of this Court that the Appellant failed to establish the grounds for review as set out in Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. The Court therefore finds no reason to interfere with the findings of trial Court.

36. The upshot is that the Appeal lacks merit and is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 25TH DAY OF MAY, 2023

O. A. Angote

Judge

In the presence of;

Mr. Ataka for Appellant

No appearance for Respondent

Court Assistant - Tracy