Wagura & 2 others v Wairimu (Civil Appeal 80 of 2018)
[2022] KEHC 11196 (KLR) (Civ) (31 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11196 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 80 OF 2018

JK SERGON, J

MAY 31, 2022

BETWEEN

CHARLES WAGURA ..... 1ST APPELLANT

JOHN ONCHAGA ..... 2ND APPELLANT

MARGARET WAWIRA (SUING ON THEIR OWN BEHALF AND ON BEHALF OF THE MEMBERS OF WARUKU COMMUNITY DEVELOPMENT GROUP) ..... 3RD APPELLANT

AND

HANNAH WAIRIMU ..... RESPONDENT

(Being an appeal against the ruling and order of Honourable D.O. Mbeja (Mr.) (Senior Resident Magistrate) delivered on 31st January, 2018 in MILIMANI CMCC no. 2739 of 2016)

JUDGMENT

1. The respondent in this instance instituted a suit before the Chief Magistrate's Court by way of the plaint dated May 5, 2016 and sought for various reliefs including a permanent injunction and general damages plus costs of the suit and interest thereon against the appellants.

2. The respondent pleaded in the plaint that she was a founder member of Waruku Community Development Group ("the Group") and that the appellants were at all material times officials of the Group.

3. The respondent pleaded in the plaint that the Group had invested in various projects including the construction of paid lavatories in Wakuru Slums in Kangemi area and which members of the Group together with their families would use free of charge but that non-members would pay for the facilities.

4. The respondent further pleaded in the plaint that the Group also purchased a two (2) acre plot in Mavoko Town namely Mavoko/block3/2432 at a consideration of Kshs.1,600,000/= in 2013.

5. It is pleaded in the plaint that sometime in October, 2015 the Group officials of the Group purported to suspend the respondent for a period of six (6) months and further purported to deny her the benefits of the Group's activities, and that the appellants eventually expelled the respondent from the Group.

6. It is further pleaded in the plaint that the acts by the appellants are unwarranted and intended to deny the respondent enjoyment of her shares and property in the Group.

7. Subsequently, upon the request of the respondent, an interlocutory judgment was entered against the appellants by the trial court on January 18, 2017 and the suit was fixed for formal proof.

8. The appellants filed the application dated September 20, 2017 and sought for the setting aside of the interlocutory judgment and for leave to file their statement of defence out of time. The application was opposed by the respondent.

9. Upon hearing the parties on the abovementioned application, the trial court dismissed it with costs vide the ruling delivered on January 31, 2018.

10. Being aggrieved by the aforementioned ruling, the appellants sought to challenge the same by way of an appeal. Through their memorandum of appeal dated February 9, 2018 the appellants put in the following grounds:

    i. Thatthe learned trial magistrate erred in law by failing to have due regard, take into account and appreciate the substantive issue of law and fact raised by the appellants' counsel during the hearing of the appellants' application and in the submissions, authorities and other documents on record.

    ii. Thatthe learned trial magistrate erred in law and fact in finding that the appellants' suit lacked merit.

    iii. Thatthe learned trial magistrate erred in law by not taking into account that the defendants' statement of defence raised triable issues.

    iv. Thatthe learned trial magistrate erred in law by not giving the appellant the right to a fair hearing as such a matter involved a social development group with a wide public outlook.

    v. Thatthe learned trial magistrate erred in law and in fact by failing to find that the interlocutory judgment was entered erroneously.

    vi. Thatthe learned trial magistrate erred in fact by failing to take into account that the errors of an advocate should not be visited upon the litigant appellant.

    vii. Thatin all the circumstances of the case, the learned trial magistrate failed to render justice to the appellant.

11. This court gave directions to the parties to file written submissions on the appeal. The appellants vide their submissions dated August 20, 2019 argue that the interlocutory judgment entered is irregular for the reason that the reliefs sought in the suit are declaratory and injunctive in nature, and yet the trial court entered an interlocutory judgment which can only be entered in pecuniary claims.

12. The appellants also argue that the trial court ought to have appreciated that their statement of defence raises triable issues which ought to be ventilated at the trial, and in failing to appreciate so, committed an error of law.

13. To buttress their point above, the appellants have quoted inter alia, the case of *Tree Shade Motors Limited v D.T. Dobie And Company (K) Limited & another* [1998] eKLR in which the Court of Appeal found that where a draft statement of defence is on record, the court is obliged to consider whether it raises reasonable issues for determination.

14. It is equally the contention of the appellants that by declining to grant them an opportunity to defend the claim, the trial court essentially denied them the right to a fair hearing, referencing the case of *Martin Maurice Odhiambo v Kipsigis Traders Co-Operative Society Ltd & another* [2010] eKLR where the court held that:

> " The right of a party to be heard is paramount and it supersedes any inconvenience caused to the court or other litigants who can be compensated by costs."

15. For the foregoing reasons, the appellants urge this court to allow the appeal and to set aside the impugned ruling.

16. In retort, the respondent submits that the trial court acted correctly in dismissing the appellants' application since despite having been served with summons to enter appearance, they neither entered appearance nor filed their statement of defence nor sought leave to file the same out of time and without any reasonable explanation.

17. The respondent therefore submits that the interlocutory judgment in place is regular and cites the case of *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR where the court held the following:

> " In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment."

18. The respondent also contends that the statement of defence on record was not only filed out of time and without leave of the court, but that it does not raise any triable issues for consideration.

19. Further to the above, the respondent submits that part of the claim is monetary in nature and hence the trial court acted correctly in entering an interlocutory judgment against the appellants.

20. The respondent is of the view that the appellants' submission will only serve to delay the fair trial of the suit and therefore urges this court to dismiss the appeal and uphold the decision by the trial court.

21. I have considered the contending submissions and authorities cited on appeal. I have likewise re-evaluated the material placed before the trial court. It is clear that the appeal fundamentally lies against the trial court's decision to dismiss the appellants' application seeking to set aside the interlocutory judgment and to file their defence out of time. I will therefore deal with the grounds of appeal contemporaneously under the following limbs.

22. The first limb of appeal concerns itself with whether the interlocutory judgment entered on January 18, 2017 is regular.

23. In the application dated September 20, 2017 the appellants stated that the claim is not pecuniary in nature and that their advocate was never served with a notice before the matter was scheduled for formal proof.

24. In reply, the respondent by way of the affidavit sworn by advocate Priscah Wamucii Nyotah on October 18, 2017 stated that the summons to enter appearance and the pleadings were served upon

the appellants' advocate who had already entered appearance in the suit upon the appellants filing an application for injunction.

25. The deponent stated that despite there being evidence of service, the appellant failed to enter appearance or file their statement of defence.

26. The deponent further states that four (4) months thereafter, the respondent requested for entry of an interlocutory judgment for the above reasons and that the same was regularly entered by the trial court.

27. It is stated by the deponent that the advocate for the appellants was later invited to fix a date for formal proof and was even served with a hearing notice for the same, and that the matter eventually proceeded for formal proof on September 19, 2017.

28. It is also stated by the deponent that soon thereafter, the appellants attempted to sneak in a statement of defence and hence the application was a mere afterthought.

29. The respondent also raised a notice of preliminary objection dated September 27, 2017 featuring grounds similar to the averments made in the replying affidavit.

30. Upon hearing the parties on the Motion, the learned trial magistrate analyzed that service had properly been effected upon the appellant and therefore found the interlocutory judgment in place to be regular.

31. The learned trial magistrate further analyzed that there has been an inordinate delay on the part of the appellants in defending the suit despite having knowledge of its existence and that ultimately, litigation must come to an end.

32. Upon my study of the record, I note that the respondent had availed a copy of the affidavit of service sworn by Godfrey Oindo on November 23, 2016 and filed on January 12, 2017 whose contents support the averments made in the replying affidavit and indicated hereinabove regarding service of the summons to enter appearance; the pleadings and the application for injunction.

33. Upon my further study of the record, I note that the respondent also availed copies of the letter dated July 11, 2017 and the hearing notice dated July 31, 2017 in respect to the formal proof hearing, which supports the averments made on behalf of the respondent on service.

34. I did not come across any credible evidence by the appellants to refute the above position on service of the summons to enter appearance as well as the pleadings in the suit. It is also apparent that the appellants did not file their statement of defence in good time, despite being at all material times represented by an advocate.

35. Further to the foregoing and in relation to the subject on the nature of the claim, upon my re-examination of the pleadings, I note that the reliefs sought in the plaint are declaratory, injunctive and monetary in nature, by way of general damages.

36. This positions dispels the argument by the appellants that no monetary reliefs are sought therein.

37. In view of the foregoing circumstances, I am satisfied that the summons to enter appearance were taken out and properly served upon the appellants and hence the interlocutory judgment is regular.

38. This brings me to second limb of the appeal touching on whether the appellants' statement of defence raises triable issues.

39. In the supporting affidavit to the application, the appellants' representative acknowledged that the statement of defence; though filed out of time; raises triable issues.

40. In reply, the respondent stated that the statement of defence was indeed filed out of time and without leave of the court which speaks to fraud on the part of the appellants.

41. In his ruling, the learned trial magistrate pronounced that litigation must come to an end and that there has been an inordinate delay in bringing the application. From my reading of the impugned ruling, the learned trial magistrate did not address his mind on the subject of whether the defence raises triable issues.

42. In determining whether or not to set aside an ex parte/interlocutory judgment, a court is required to consider whether a party has a triable defence even where service of summons is found to be proper. In so saying, I cite with approval the rendition in the case of *Tree Shade Motors Ltd v D.T. Dobie & another* (1995-1998) IEA 324 relied upon in the case of *M/S Jondu Enterprises Limited v Spectre International* [2019] eKLR thus:

> " Even if service of summons is valid, the judgment will be set aside if defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside."

43. From my study of the record, it is apparent that the statement of defence was filed out of time and there is no indication that leave of the court was either sought or granted.

44. Suffice it to say that, upon my study of the appellant's draft statement of defence, I observed that the same is essentially challenging the claim by the respondent regarding her removal from membership of the Group and further denying that any removals were irregular.

45. In my view, the foregoing consist of triable issues which can only be adequately ventilated at the hearing of the suit.

46. The third limb of appeal and condition for consideration in setting aside an interlocutory/default judgment has to do with whether the respondent stands to be prejudiced. Upon my perusal of the record, I observed that the learned trial magistrate did not address his mind to this condition specifically.

47. Going by the record, it is apparent that the respondent indicated that she would be prejudiced since she had filed the suit back in 2016 and it is apparent that the appellants had no interest in defending the claim.

48. However, from my study of the record I observed that the respondent did not place any credible evidence before the trial court to show that the prejudice suffered would be so irreparable as to constitute a grave injustice to her, or that any prejudice cannot be adequately compensated by way of costs.

49. Upon taking into account all the foregoing factors hereinabove, I am convinced that notwithstanding the fact that the matter had proceeded for formal proof, it would be a proper exercise of my discretion to interfere with the impugned ruling and to grant the appellants the opportunity of defending the claim.

50. In the end, I will allow the appeal giving rise to issuance of the following orders:

    i. The ruling delivered on July 31, 2018 is hereby set aside and is substituted with an order allowing the Motion dated September 20, 2017 but with costs being awarded to the respondent.

ii. The interlocutory/default judgment entered on January 18, 2017 and all consequential orders/ proceedings are hereby set aside.

iii. The appellants are granted leave to file and serve their statement of defence within 14 days from today's date.

iv. In the circumstances of this appeal, a fair order on costs is to order each party to bear its own costs of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 31ST DAY OF MAY, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellants

..... for the Respondent