



Dubai Cash & Carry Limited & 2 others v First Community Bank Limited (Commercial Appeal 29 of 2020) [2022] KEHC 3259 (KLR) (Commercial and Tax) (27 May 2022) (Judgment)

Neutral citation: [2022] KEHC 3259 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL 29 OF 2020**

A MSHILA, J

MAY 27, 2022

BETWEEN

DUBAI CASH & CARRY LIMITED 1ST APPELLANT

Wafa Mahfudh Ashur 2ND APPELLANT

TALIB ABUBAKAR 3RD APPELLANT

AND

FIRST COMMUNITY BANK LIMITED RESPONDENT

(Appeal from the decision of Hon. Principal Magistrate Muholi delivered on 27th November, 2019 in Nairobi CMCC No.5672 of 2016;)

JUDGMENT

Background

1. This is an Appeal from the decision of Hon. Principal Magistrate Muholi delivered on November 27, 2019 in Nairobi CMCC No.5672 of 2016; the respondent had obtained a default judgment against the appellants and their application to set it aside was declined by the trial court on the grounds that the Appellants had no merited defence and had also failed to satisfy the conditions for setting aside of an ex-parte judgment;
2. Being dissatisfied with the decision of the trial court, the Appellants filed a Memorandum of Appeal dated December 2, 2019 against the decision and listed three (3) grounds of appeal as summarized, hereunder:-
 - a. The Magistrate erred in law and fact in his ruling dated November 27, 2019 by dismissing the Appellant's Notice of Motion dated June 19, 2019.



- b. The Magistrate erred in law and fact in his ruling dated November 27, 2019 by holding that the Appellants had no merited defence.
 - c. The Magistrate erred in law and fact in his ruling dated November 27, 2019 by holding that the Appellants had not satisfied grounds for the setting aside of an ex parte judgment.
 3. The Appellants sought the following orders;
 - a. The Appeal be allowed with costs.
 - b. The aforesaid decision to be set aside.
 - c. The Appellant's Notice of Motion dated 19th June 2019 be allowed.
 - d. The Appellant be allowed costs of the Application in Nairobi CMCC 5672 of 2016.
 4. The parties were directed to canvass the appeal by filing and exchanging written submissions; hereunder is a summary of the parties rival submissions;

Appellant's Case

5. The Appellants submitted that the basis of the suit before the Chief Magistrates' is the Letter of Offer dated January 23, 2015, which is non-existent as parties herein opted to vary the terms of engagements by signing a new letter of offer dated October 10, 2016, the new letter offer superseded the previous letter of offer, consequently the suit and decision cannot stand as there is no such contract.
6. The Respondent had admitted that they had issued a new Letter of Offer dated October 10, 2016, to the Appellants contrary to the averments made in the Complaint which refer to a letter of offer dated January 23, 2015, further the amount as claimed as per the affidavit of Claris Ajwang Ogombo is Kshs.1, 964,627.99 totally differing from the amount claimed in the Complaint of Kshs.1, 989,449.04.
7. The Appellants argued that had the Respondent's Advocates informed the Appellants that there was a formal proof hearing they would have attended, further the Respondent failed to issue Notice to the Appellants that Judgment had been entered which is quite irregular and a sign that the entire suit is laced with malice and bad faith and meant to unnecessarily punish the Appellants yet it could have been easily resolved. Contrary to Order 22 Rule 6 which makes it mandatory to serve Notice upon the Defendant that Judgment had been entered, the Respondent irregularly proceeded with execution.
8. It was the Appellants' submission that there is no prejudice to be suffered by the Respondent as the amount claimed is a liquidated sum, further any losses can be compensated by way of costs. On the other hand, the Appellants stand to suffer prejudice if committed to civil jail, yet they had made some payments with regards to the letter of offer dated October 10, 2016, no suit let alone demands have been made due by the Bank with regard to the Offer Letter dated of October 10, 2016.
9. The Appellants explanation for the delay was that the Appellants had all along believed that the debt owed had been restructured, terms varied, and the Appellants proceeded to make payments further under the new facility. Further, the 2nd Appellant had been omitted as a guarantor as per the request made by the Directors of the 1st Appellant Company to the Respondent. Throughout the entire period the hearing proceeded no letters, Hearing Notice, Notice of Judgment was ever served upon the Appellants, the Pleadings were received by the 3rd Appellant after a meeting with the Respondents Bank Officials.



10. The reason for not entering appearance was the meeting the appellant had with the Respondent's Directors and Managers and not only being offered a new facility (restructuring of the previous letter of offer) but they were given assurance that the suit would be withdrawn.
11. It was the Appellants' submission that the Court erred in Law in holding that there was no merited defence, it is clear that the amount as demanded by the Bank being Kshs.1, 964,627.99 is not the amount demanded as drawn in the suit of Kshs.1, 989,449.04, the amount as demanded in the suit is excessive. This issue alone raises a triable issue. Secondly, there was no debt owing as at the time this matter was set down for hearing. The Letter of Offer dated January 23, 2015, was non-existent yet it is the basis of the suit in the subordinate Court.
12. The Respondent after restructuring the debt was given a Motor Vehicle Log Book for Motor Vehicle KAQ 352R by the Appellants and an Original Title Deed for L.R No. 205/01 Mavoko Municipality (Refer to page 71 paragraph 24 of the Affidavit of the 3rd Respondent) the Respondent refused to acknowledge the new facility yet they hold the said documents as security.
13. The appellant urged the court to allow the appeal

Respondent's Case

14. It was the Respondent's submission that the Court exercises its discretion in determining an Application seeking to set aside default judgment, it is imperative to state the circumstances under which an Appellate Court can interfere with the discretionary orders of a Trial Court as was held in the case of *Mbogo & Another versus Shah* [1968] EA93.
15. The Trial Court exercised its discretion properly and judiciously when dismissing the Appellants' Application seeking to set aside the default judgment entered in favour of the Respondent.
16. There are three main factors which guide the court in exercising its discretion to set aside a default judgment namely; whether there was proper service of summons, whether the defendant has offered a reasonable explanation for the delay and whether the defendant has a defence on the merits.
17. The Appellants expressly admitted to have been served with Summons to enter Appearance. This is as per paragraph 14 of the Appellants' Supporting Affidavit dated June 19, 2019. Therefore, the default judgment entered by the Trial Court was regularly entered.
18. The Appellants are guilty of delay and it is the basis on which the Trial Court entered judgment against them and thereafter dismissed their Application to set aside the default judgment. This is uncontested. It was the Respondent's submission that the Appellants did not give any plausible reason for their delay in entering appearance and defending the case.
19. Further, the reason put forth by the Appellants in explanation for the delay is unsubstantiated and unfounded in law and is instead an implied admission of the debt owing. The Appellants did not provide any evidence to prove their allegations. There was no evidence before the Trial Court to prove that the Respondent's officials agreed to withdraw the suit. Their explanations therefore stand unsupported.
20. The Respondent reiterated that the Appellants made a request for a restructure of the facility on September 24, 2016 after the suit had been instituted in the lower Court and summons served upon them. It is worth noting that the request did not materialize.
21. The Appellants delayed for a period of over 3 years before filing the Application to set aside the default judgment, which delay is inordinate and unjustifiable in the circumstances.



22. It was the Respondent's position that the statement of defence annexed by the Appellants in their Application at the Trial Court does not raise any triable issues. The defence by the Appellants is a sham and it cannot be said to raise any triable issues. It is an assembly of mere denials. The alleged restructure did not materialize as alluded by the Appellants because the Appellants failed to meet the conditions precedent. Moreover, the said Letter of Offer was not executed by the parties.
23. The ground and or defence raised by the Appellants in both the Application at the Trial Court and the annexed Statement of Defence consists of gross misrepresentation and/or distortion of facts which was meant to mislead the Court.
24. The Trial Court properly and judiciously exercised its discretion in dismissing the Appellants' Application seeking to set aside the default judgment entered in favour of the Respondent. It urged the Court to uphold the Trial Court's ruling dated November 27, 2019 and dismiss this Appeal.

Issues for determination

25. This Court has carefully considered the Appellants' Appeal, the trial court's record, the Response and the written submissions and the following issues have been framed for determination;
 - (a) Whether the Magistrate erred in holding that the Appellants had no merited defence; Whether the intended defence raises triable issues;
 - (b) Magistrate erred in dismissing the Appellant's Notice of Motion dated 19th June 2019.

Analysis

26. Before addressing the above issues, it is important to state that an appellate court should be slow in moving to interfere with the findings of a trial court unless it was based on no evidence, or based on a misapprehension of the evidence or the judge had shown demonstrably to have acted on a wrong principle of law in reaching the finding he/she did. (See *Musera vs Mwechelesi & Anor* [2007]2KLR 159)

Whether the Magistrate erred in holding that the Appellants had no merited defence; Whether the intended defence raises triable issues;

27. The Appellants had filed an Application seeking to set aside the default judgment entered in favour of the Respondent. It is not in dispute that the Appellants were duly served with the Complaint and Summons to enter Appearance by the Respondent but they failed to enter appearance.
28. The provisions of Order 10 of the *Civil Procedure Rules* provide for the consequences of non – appearance and failure to file defence on time or at all.
29. The provisions of Order 10 Rule 11 *Civil Procedure Rules* gives the court unfettered discretion to set aside an *ex parte* judgment. It provides as follows;

“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”
30. In the case of *Esther Wamaitiba Njibia & two others vs. Safaricom Ltd* [2014] eKLR the court citing relevant cases on the issue held *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.”

31. The Appellants in their Statement of Defence stated that the parties had mutually agreed on a new facility which overrode, terminated and restructured the earlier agreement dated January 23, 2015.
32. The Respondent did not dispute that the Appellants made a request for a restructure of the facility on September 24, 2016 but contends that the said request did not materialize.
33. However, at page 77 of the Record of Appeal there is a signed Letter of Offer from the Respondent dated October 10, 2016 referenced to the application for restructure.
34. The Trial Court in its ruling stated that the defence contained mere denials and that the Defendants did not state whether or not they had paid the amount owed.
35. The question then arises, does the intended defence raise any triable issue? What constitutes a triable issue was defined in the case of *Job Kiloch v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Riorio* [2015] eKLR, where the court stated as follows:

“Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner.”

What then is a defence that raises no bona fide triable issue. A bona fide triable issue is any matter raised by the Defendant that would require further interrogation by the court during a full trial. The Black’s Law Dictionary defines the term “triable” as, subject or liable to judicial examination and trial”. It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.” (emphasis mine)

36. Paragraph 3 of the Statement of Defence states that there was a new facility which overrode, terminated and restructured the earlier agreement. This on its own is an issue that requires further interrogation by the court during a full trial making it a bona fide triable issue.
37. On the issue of whether the defence raises a *bona fide* triable issue, this court is satisfied that the trial court arrived at an erroneous finding that the Appellants had no merited defence; and finds that there is good reason to interfere with the trial court’s finding;
38. This ground of appeal is found to have merit and it is hereby allowed.

Whether the trial Magistrate erred in dismissing the Appellant’s Notice of Motion dated 19th June 2019;

39. The well-established principles of setting aside interlocutory judgments were laid out in the case of *Patel vs East Africa Cargo Handling Services* [1974] E.A. 75 where the Court stated;

“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where



it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

40. The prime factors that the trial court ought to have taken into consideration is one, the respective prejudice each party is likely to suffer; and secondly whether on the whole it was in the interest of justice to set aside the default judgment?
41. From the material placed before this court, it is without a doubt that if the suit proceeds to full trial, no party will be prejudiced as both parties will have been accorded a fair trial as enshrined under Article 50 of *the Constitution* of Kenya 2010 and substantive justice shall be done to both parties. The Respondent can reasonably be compensated by thrown away costs for any delay and it should be borne in mind that to deny a litigant a hearing should be the last resort of a court.
42. The Court reiterates the holding in *Patel v E.A. Cargo Handling Services Limited (supra)*, cited with approval in the case of *Stephen Wanyee Roki vs K-Rep Bank Limited & 2 Others* [2018] eKLR where the Court held:

"There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."
43. In the light of the above this court is satisfied that the trial Magistrate applied wrong principles of law and erred in dismissing the Appellant's Notice of Motion dated 19th June 2019; and there is good reason to interfere with the trial court's decision.
44. This ground of appeal has merit and it is hereby allowed.

Findings and Determination

45. For the forgoing reasons this court makes the following findings and determinations;
 - (i) The Appeal is found to have merit and it is hereby allowed in its entirety;
 - (ii) The decision of the trial court dated 27th November, 2019 is hereby set aside; and is substituted with an order allowing the application dated 19th June, 2019 on condition the appellants pay thrown away costs of Kshs.35,000/- to the respondents within thirty (30) days from the date hereof;
 - (iii) The matter is hereby referred back to the subordinate court other than the one that heard the matter for hearing and determination.
 - (iv) Each party to bear its/their own costs on appeal.

Orders Accordingly

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 27TH DAY OF MAY, 2022.



HON. A. MSHILA

JUDGE

In the presence of;

Odipo for the Appellants

Mbabu for the Respondent

Lucy.....Court Assistant

