Auto Selection (K) Limited v Mbisu & 2 others (Civil Appeal 430 of 2019) [2022] KEHC 3189 (KLR) (Civ) (26 May 2022) (Judgment)

Neutral citation: [2022] KEHC 3189 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 430 OF 2019

CW MEOLI, J

MAY 26, 2022

BETWEEN

AUTO SELECTION (K) LIMITED ..... APPELLANT

AND

ELIZABETH NDUKU MBISU ..... 1ST RESPONDENT

PAUL WAINAINA ..... 2ND RESPONDENT

FRANCIS KIBE MUIRURI ..... 3RD RESPONDENT

(Being an appeal from the ruling of E.A. Nyaloti (CM) delivered on 5th December 2018 in Nairobi Milimani CMCC No. 9114 of 2003)

JUDGMENT

1. This appeal emanates from the ruling delivered on 5th December 2018 in Nairobi CMCC No. 9114 of 2003. By a plaint filed on 4th September 2003 and amended on 29th September 2003 and further amended on 9th November 2005 Elizabeth Nduku Mbisu, the plaintiff in the lower court (hereafter the 1st Respondent) sued Auto Selection (K) Limited (hereafter the Appellant), Paul Wainaina (hereafter the 2nd Respondent) and Francis Kibe Muiruri (hereafter the 3rd Respondent) who were the 1st, 2nd, and 3rd defendants respectively in the lower court.

2. The 1st Respondent's claim was for damages on account injuries sustained in a road traffic accident that occurred on 23rd December 2002 while the 1st Respondent was lawfully travelling in motor vehicle registration no. GK R739 along Mombasa-Nairobi Road. It was averred the Appellant was the registered owner of motor vehicle registration no. KAQ 679D while the 3rd Respondent was the beneficial owner thereof. That the motor vehicle registration no. KAQ 679D was on the material date being driven or under the control, management and or direction of the 2nd Respondent the driver,

servant or agent of the Appellant and 3rd Respondent who so negligently drove, managed and or controlled motor vehicle registration no. KAQ 679D that he caused it to collide with motor vehicle registration no. GK R739 and by reason of which the 1st Respondent sustained severe injuries, suffered loss and damages. The 1st Respondent pleaded vicarious liability against the Appellant and the 3rd Respondent.

3. The Appellant filed a statement of defence on 27th February 2004 denying the key averments in the plaint while the 2nd and 3rd Respondents only entered appearance and failed to file a statement of defence. The matter proceeded to hearing and on 18th November 2016 and judgment was delivered in favour of the 1st Respondent against the Appellant, 2nd and 3rd Respondent jointly and severally for a sum of Kshs. 2,873,500/-. Over a year later, the Appellant filed the motion dated 26th January 2018 seeking to set aside the judgment and leave to file an amended defence out of the time.

4. The grounds on the face of the motion were amplified in the supporting affidavit Fredrick Murithii Thuku who described himself as the Human Resource and Administration Manger of the Appellant Company. To the effect that upon been served with summons, the Appellant had instructed M/s V.A Nyamodi & Co. Advocates to conduct the defence in the matter but that despite entering appearance and filing a defence counsel on record M/s V.A Nyamodi & Co. Advocates failed to turn up in court for the hearing. The deponent proceeded to state that the Appellant upon being served with a proclamation notice on 23rd January 2018 had instructed M/s Meritad Law Africa LLP to file the application and had learned from counsel that judgment had been entered against the Appellant on 18th November 2016 and that the matter had proceeded ex parte as M/s V.A Nyamodi & Co. Advocates not only failed to file requisite pleadings but also failed to attend the hearing; that the mistakes were by the advocates and that the Appellant ought to be accorded an opportunity to be heard.

5. The 1st Respondent had on 13th February 2018 filed a replying affidavit in opposition to the motion which was thereafter canvassed through written submissions. In a ruling delivered on 5th December 2018 the trial court dismissed the Appellant's motion provoking the instant appeal, which is premised on the following grounds:

> " 1. That the learned magistrate erred in fact and in law by failing to consider the Appellant's defence that was already on record and mainly the fact that the Appellant had sold the suit motor vehicle registration number KAQ 679D to one Francis Kibe Muiruri and it was not in possession of KAQ 679D on or about 23rd December 2002 the time of the alleged accident.
>
> 2. That the learned magistrate erred in fact and law in failing to consider evidence on record that the Appellant had issued an instruction letter to its advocates instructing them to take up the matter and defend its interest.
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> 3. That the learned magistrate erred in fact and law in dismissing the Appellant's application dated the 26th January 2018 seeking to set aside the ex-parte judgment.
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> 4. That the learned magistrate erred in fact and law in declaring that the transgression of the advocate should be visited upon the client.
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> 5. That the learned magistrate erred in fact and law in upholding the judgment dated 14th November 2016 arrived at on a procedural technicality.

6. That the learned magistrate erred in fact and law in denying the appellant an opportunity to file an amended defence and its list of documents supporting its case.

7. That the learned magistrate erred in fact and law in not setting aside the exparte judgment entered against the Appellant on the 18th November 2016.

8. That the learned magistrate erred in fact and law in declining to decide the matter on merit.

9. That the learned magistrate erred in fact and law in awarding costs against the Appellant herein." (Sic)

6. The appeal was canvassed by way of written submissions followed by oral highlighting. Counsel for the Appellant emphasized the principle that the mistake of an advocate should not be visited upon his client. He contended that the trial magistrate in dismissing the Appellant's motion gave no justifiable reasons and failed to consider the disputed ownership of the accident motor vehicle and hence liability of the Appellant; that the learned magistrate ignored the Appellant's submissions and authorities; and that the dismissal of its motion amounted to condemning the Appellant unheard. Citing the applicable principles as set out in a stream of authorities including *Philip Keipto Chemwolo & another v Augustine Kubende* (1982-88) 1 KAR 1036; *Mutua Mwangangi & another v James Mutua Mutio* [2016] eKLR; *Shah v Mbogo & another* (1967) E.A 470; and *Bachu v Wainaina* (1982) KLR 108 as cited in *Diamond Trust Bank Kenya Limited v Richard Mwangi Kamotho & 2 others* [2017] eKLR counsel asserted that the trial court failed to properly exercise its discretion. He urged that the appeal be allowed.

7. The 1st Respondent supported the trial court's decision. On the Appellant's plea that their previous advocate had failed them, the Respondent's counsel reiterated affidavit evidence that the Appellant's erstwhile counsel was served with notices of the hearing of the suit. He stated that whereas it is trite that that ideally the mistake of an advocate should not be visited upon a litigant, this adage was not intended to be applied in a blanket manner so as to inure every party in every situation, their own conduct not withstanding; and that ultimately the case belonged to the client. He pointed out that no reason was proffered by the Appellant for their failure appear in court to defend themselves. He asserted that it is not enough for the Appellant to simply blame its former advocates as the Appellant too had a corresponding duty to follow up on the case even when represented by counsel, and that no evidence of such follow up was tendered. That in any event the Appellant was not without recourse and could institute a suit for professional negligence against their erstwhile counsel. In that regard counsel relied on several authorities including *Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others* [2015] eKLR, *Charles Omata Omwoyo v African Highlands & Produce Co. Ltd* [2002] eKLR, *Savings and Loans Limited v Susan Wanjiru Muritu* – Nairobi HCC. No. 397 of 2002, and *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2016] eKLR.

8. On whether the Appellants had made a case for the setting aside of the judgment, the Respondent cited *Shah v Mbogo & another* (1967) E.A. 116 and *Stephen Ndichu v Monty's Wines and Spirit's Ltd* [2006] eKLR to argue that the circumstances of the matter militated against the grant of the Appellant's motion. He observed that while the Appellant had emphasized that it had a good defence, it had failed to demonstrate its failure to prosecute the same for over ten (10) years. Further, counsel emphasized that the dispute was very old, the cause of action having arisen in 2002, and that the suit before the lower court had been pending for more the eighteen (18) years. Thus, re-opening the matter would work prejudice against the 1st Respondent. Finally, quoting from *Judicial Hints on Civil Procedure* by Justice Kuloba, 2nd Ed. Law Africa 2011, Pg. 94, the case of *Cecilia Karuru Ngayu v Barclays Bank*

of Kenya & another [2016] eKLR counsel submitted that the right to be heard cannot be wielded as a shield from consequences arising from the negligent actions of the Appellant and or their erstwhile advocates and the appeal ought to be dismissed with costs.

9. The 2nd and 3rd Respondents did not participate in the proceedings before the lower court or this court.

10. The court has perused the record of appeal as well as the original record and considered the material canvassed in respect of the appeal. The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have opportunity to see or hear the witnesses testify. See *Peters v Sunday Post Ltd* (1958) EA 424; *Selle and anor. v Associated Motor Boat Co. Ltd and others* (1968) EA 123; *William Diamonds Ltd v Brown* [1970] EA 11 and *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) 1 KAR 278.

11. The Court of Appeal stated in *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR that:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

12. In my assessment, this appeal turns on the question whether the trial court misdirected itself in dismissing the motion before it. The motion before the lower court was expressed to be brought under Sections 3A of the *Civil Procedure Act* and Order 10 Rule 11 & Order 51 Rule 15 of the *Civil Procedure Rules*. In a brief ruling the learned magistrate while dismissing the motion expressed herself in part as follows:

> "I am guided by the case of Butt v Rent Restriction Tribunal where the Court of gave guidance on how a court should exercise discretion.....
>
> I am satisfied that the applicant has not met the threshold to grant of orders for stay of execution. The Application lacks merit and the same is dismissed with costs.
>
> The application to set aside the interlocutory judgment is similarly dismissed as the same lacks merit." (sic)

13. From the original record of proceedings, it is apparent that the Appellant upon being served with summons in Nairobi Milimani CMCC No. 9114 of 2003 had filed it memorandum of appearance on 20th February 2004 and statement of defence on 27th February 2004. The main prayers in the motion before the lower court sought to set aside the judgment entered against the Appellant on 18th November 2016 and that the Appellant be allowed to file their amended defence together with its list of documents out of time. Clearly, the judgment sought to be set aside was a final judgment pursuant to ex parte proceedings taken in the absence of counsel for the Appellant, consistent with the provisions of Order 12 Rule 2(a) which state that:

> "If on the day fixed for hearing, after the suit has been called out for hearing outside the court, only the plaintiff attends, if the court is satisfied— (a) that notice of hearing was duly served, it may proceed ex parte"

14. Evidently, the Appellant's motion invoked the wrong provisions of the Civil Procedure Rules. Based on the prayers therein, the motion ought to have been anchored on the provisions of Orders 8 and 12

of the Civil Procedure Rules. The relevant provision for the setting aside of a judgment arising from an ex-parte hearing is Order 12 Rule 7 which provides that: -

> " Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

15. Be that as it may, the grant or refusal to set aside or vary such judgment or any consequential decree or order, is discretionary. However, the discretion though unfettered must be exercised judicially and justly. Therefore, in considering this appeal, the Court is guided by the principles enunciated by Court of Appeal in *Mashreq Bank P.S.C v Kuguru Food Complex Limited* [2018] eKLR stated:

> " This Court ought not to interfere with the exercise of a Judges' discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice. Conversely, a court exercising judicial discretion must be guided by law and facts and not ulterior considerations. This much was stated by the Court of Appeal in the case of Mbogo v Shah, (supra):
>
> "A court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice".
>
> See; *United India Insurance Co Ltd v East African Underwriters (K) Ltd* [1985] E.A 898: -

16. The object of the discretion conferred by Order 12 Rule 7 was stated in the case of Shah v Mbogo and another [1967] E A 116 as follows:

> " The discretion to set aside an ex-part judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."

17. The Appellant complains that plausible reasons were given before the trial court to explain their failure to attend court. That the cause was the failure of representation by the former counsel and the advocate's failure to attend court was a mistake which ought not to be visited upon the innocent litigant. Reliance was placed on *Phillip Kiptoo Chemwolo and & anor v Augustine Kubede* (1986) eKLR wherein Apaloo, JA (as he then was) famously stated:-

> " I think a distinguished equity judge has said:
>
> > "Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merit."
> >
> > I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of parties and not for the purpose of imposing discipline...."

18. The Court of Appeal in its later decision in *Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others,* [2015] eKLR made the following remarks:

> "From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side..."

19. It is unfortunate that the trial court did not address in much depth the various issues that were placed before it. However, this court having examined the lower court proceedings notes that the suit had come up for hearing on nine (9) different occasions and once for mention to confirm filing of submissions. The relevant dates are 14th May 2015, 16th November 2015 and 18th October 2016. With respect to the 14th May 2015, a hearing notice dated 9th May 2015 was served and received by the firm of M/s V.A Nyamodi & Co. Advocates. Regarding the further hearing on 16th November 2015 a hearing notice dated 24th August 2015 had been served and received the Appellant's erstwhile advocates. The final hearing was on 18th October 2016 and equally a hearing notice dated 15th September 2016 was served and received by previous counsel. None of the hearing notices were received under any protest.

20. The learned magistrate presiding in the trial had upon perusal of the respective returns of service for the foregoing respective been satisfied that on all separate three (3) occasions, service was duly effected on firm of M/s V.A Nyamodi & Co. Advocates, and consequently the hearings proceeded ex-parte. This court having also scrutinized the said notices and returns of service is of the opinion that, hearing notices were duly effected on previous counsel for the Appellant and the exparte proceedings were properly taken.

21. No explanation was proffered by the Appellant and or M/s V.A Nyamodi & Co. Advocates for their non-attendance. Further, the Appellant did not demonstrate any attempts to follow up the on matter with their erstwhile advocates between February 2004 and 23rd January 2018, the latter being the date on which they were served with the proclamation notice that jolted them from their slumber into action. The Court of Appeal in *Daqare Transporters Limited v Chevron Kenya Limited* [2020] eKLR expressed itself as follows:

> "The discretion under Order 12 Rule 7 is exercised so as to avoid injustice as a result of inadvertent or excusable mistakes and errors. Therefore, a court needs to satisfy itself as to whether the reason given by the appellant was excusable...
>
> The adage rule that the mistake of counsel should not be visited upon an innocent litigant does not have a blanket application. Nor do we think that it has doctrinal status. The court must always look into the conduct of the party pointing the finger of blame in order to make a just decision. (sic)

22. Applying the above test to the facts of this matter, it is plain that the asserted inadvertent or excusable mistake was not demonstrated. The Appellant's advocate was duly served with hearing notices on at least three occasions and had been in conduct of the matter since 2004. The Appellants too were aware of the suit but after instructing counsel went into slumber. The Court of Appeal in *Kenya Industrial Estates Limited v John Odwory Kulohoma* [2020] eKLR while considering a situation not dissimilar to the present one observed that what the court is ultimately called upon to determine in exercising its discretion under Order 12 Rule 7 of the Civil Procedure Rules is whether an applicant was denied an

opportunity to be heard. Undoubtedly, the Appellant herein was granted but failed to avail itself of the opportunity to be heard. It is too little and too late in the day for the Appellant to blame their erstwhile counsel when they cannot demonstrate a single attempt to keep abreast with the suit in close to 14years.

23. This court agrees with the 1st Respondent that re-opening a suit whose cause of action arose in 2002 would work serious prejudice against the said Respondent who has diligently pursued her claim, as witnesses and evidentiary material may not be readily available or at all, and it seems unlikely that justice may still be done between the parties in the circumstances. Moreover, parties and counsel are duty bound to co-operate with the Court in the furtherance of the overriding objective to facilitate the just, expeditious, proportionate, and affordable resolution of disputes in accordance with section 1A and 1B of the *Civil Procedure Act*. In *Karuturi Networks Ltd & anor v Daly & Figgis Advocates,* Civil Appl. NAI. 293/09 the Court of Appeal had the following to say concerning the overriding objective in section 1A and 1B of the *Civil Procedure Act*:

> " The jurisdiction of this Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective..... and its principal aims. In our view, dealing with a case justly includes inter alia reducing delay, and costs expenses at the same time acting expeditiously and fairly. To operationalize or implement the overriding objective, in our view, calls for new thinking and innovation and actively managing the cases before the court".

24. In view of all the foregoing, and notwithstanding the trial court's failure to exhaustively address all the issues before it, this court is not persuaded that the court misdirected itself in dismissing the Appellant's motion. The Appellant evidently squandered the opportunity to be heard, and the 1st Respondent should not have to pay the price for the Appellant's tardy and indolent conduct. Consequently, the appeal is without merit and is hereby dismissed with costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 26TH DAY OF MAY 2022

C.MEOLI

JUDGE

In the presence of:

For the Appellant: N/A

For the 1st Respondent: Ms. Munyoki h/b for Dr. Musau

For the 2nd Respondent: N/A

For the 3Rd Respondent: N/A

C/A: Carol