Menya Services Sacco Limited v Kinyanjui (Civil Appeal E069 of 2021)
[2022] KEHC 14183 (KLR) (21 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14183 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL APPEAL E069 OF 2021

EM MURIITHI, J

OCTOBER 21, 2022

BETWEEN

MENYA SERVICES SACCO LIMITED ..... APPELLANT

AND

THOMAS MUTHEE KINYANJUI ..... RESPONDENT

(An Appeal from the Ruling of Hon B Kimemia Chairperson, Hon J Mwatsama Deputy Chairperson, Mr P Gichuki member, in Nairobi Co-operative Tribunal Case No 511 of 2019 delivered on 6/05/2021)

JUDGMENT

1. The appellant filed an application dated January 13, 2021 for stay of execution of the judgment/ decree, certificate of costs and all consequential orders; setting aside of the said judgment/decree an unconditional leave to defend the claim, before the Nairobi Cooperative Tribunal. In its ruling of May 6, 2021, the Cooperative Tribunal found that the threshold for grant of stay had not been met and dismissed the application with costs.

2. The appellant was aggrieved and it has lodged an appeal on grounds set out in the memorandum of appeal that:

    1. The honourable tribunal erred in law and fact in applying the wrong provisions of law and in particular order 42 rule 6 (2) of the *Civil Procedure Rules 2010* which provide for conditions for granting stay pending appeal whereas the appellant was seeking leave to defend and not to appeal.

    2. The honourable tribunal erred in law and fact by misapplying the law thereof denying the appellant unconditional leave to defend the suit thus denying it an opportunity to be heard.

3. The honourable tribunal erred in law and fact in disregarding weighty triable issues raised in the appellant's draft statement of defence dated January 3, 2021.

4. The honourable tribunal erred in law and fact by denying the appellant an opportunity to be heard which is a fundamental right as provided under article 50 of the *Constitution of Kenya 2010*. The honourable tribunal erred in law and fact by condemning the appellant unheard.

5. The honourable tribunal erred in law and fact by misinterpreting the provisions of order 42 rule 6 (2) of the *Civil Procedure Rules 2010*.

6. The honourable tribunal erred in law and fact by holding that the resolution of the applicant in a special general meeting held on January 18, 2017 was unreasonable when the same was done unanimously for the wellbeing of the Sacco and its members.

7. The honourable tribunal erred in law and fact in failing to appreciate that section 27 of the *Co-operative Societies Act* No 12 of 1997 provides that the supreme authority of a Co-operative shall be vested in the general meeting at which members shall have the right to attend, participate and vote on all matters.

8. The honourable tribunal erred in law and fact in completely misapprehending the law relating to setting aside of judgements.

9. The entire finding and ruling of the honourable tribunal is bad and against the law and the evidence on record.

3. This being a first appeal, this court is duty bound to revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See *Selle & Anor v Associated Motor Boat Co Ltd* (1968) EA 123).

Submissions

4. The appellant faults the tribunal for misinterpreting the provisions of order 42 rule 6 (2) of the *Civil Procedure Rules* on stay pending appeal, yet what it was seeking was stay, setting aside of the judgment and unconditional leave to defend, under order 10 rule 11 of the *Civil Procedure Rules*. It admits that it entered appearance but inadvertently failed to file a defence within the stipulated. According to it, the draft defence raises triable issues, and relies on *Signature Tours & Travel Limited v National Bank of Kenya Limited* (2018) eKLR and the Court of Appeal case of *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* (2016) eKLR. It urges that it was condemned unheard and thus its appeal is merited.

5. The respondent submits that there is a consent on record where the appellant admitted to settling the sum of Ksh 483,691 in 6 equal installments of Ksh80,615 starting from July 31, 2021. He submits that the appellant stated clearly that it was not opposed to the entire award by the tribunal but was only opposed to the claim for Ksh 80,000 being unpaid dividends. He accuses the appellant of being indolent in failing to move the tribunal without unreasonable delay to set aside the ex-parte judgment, and relies on *David Kiptanui Yego & 134 others v Benjamin Rono & 3 others* (2021) eKLR and *Rayat Trading Co Limited v Bank of Baroda & Tetezi House Ltd* (2018) eKLR. He is certain that the tribunal considered all the tenets for setting aside an interlocutory judgment before reaching the decision it did. He faults the appellant for failing either to advance reasonable reasons for the unreasonable delay or raising triable issues in its defence, and relies *Jomo Kenyatta University of Agriculture and Technology v Musa Ezekiel Oebal* (2014) eKLR. He also relies on *Kimani v MC Connell* (1966) EA 547, where

the court held that, "where a regular judgment has been entered, the court will not usually set aside the judgment unless it is satisfied that the defence raises triable issues." He urges the court to dismiss the appeal, uphold the tribunal's ruling and adopt the consent entered into by the parties herein on July 6, 2021 as part of the judgment.

Analysis and Determination

6. From the grounds of appeal as framed, the issues for determination are-

   i. Whether the honourable tribunal misapplied the law in addressing leave to appeal under order 42 rule 6(2) of the *Civil Procedure Rules* as opposed to leave to defend the claim; and

   ii. Whether the tribunal erred in finding that the resolution was unreasonable; and whether there was misapprehension of the law on setting aside of judgments.

Application of Oder 42 Rule 6 (2) of the Civil Procedure Rules

7. The appellant, vide its application dated January 13, 2021 had sought stay, setting aside of the judgment and unconditional leave to defend itself, on the grounds that it had not been served with summons to enter appearance, and that its defence raised triable issues. The respondent commenced the proceedings herein vide a statement of claim dated August 20, 2019. The pleadings thereon together with the summons to enter appearance were duly served upon the appellant, who entered appearance through the firm of GM Wanjohi & Co Advocates. When the appellant failed to file its defence within the stipulated time, the respondent requested for judgment, which was entered on July 27, 2020. A decree was subsequently issued for a total sum of Ksh 561,316.20 being Ksh 496,740 (Principal sum) and Ksh 64,576.20 (interest). The appellant was further served with a notice of the entry of judgment and notice of taxation.

8. Order 42 is generally on appeals and rule 6 (2) thereunder provides for stay in case of appeal. In this case, there was no appeal preferred by the appellant as at the time the impugned decision was made.

9. Order 10 rule 11 provides for setting aside judgment 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."

10. This court finds that the honourable tribunal misapplied the law in addressing leave to appeal under order 42 rule 6 (2) of the *Civil Procedure Rules* as opposed to leave to defend the claim and setting aside of the *ex parte* judgment under order 10 rule 11 of the *Civil Procedure Rules*.

Resolution Was Unreasonable

11. Section 27 (1) of the *Co-operative Societies Act* provides that,

> " (1) The supreme authority of a co-operative society shall be vested in the general meeting at which members shall have the right to attend, participate and vote on all matters."

12. Sub section 6 provides that,

> " A special general meeting of a co-operative society may be convened— (a) by the Committee for the purpose of approving annual estimates or discussing any urgent matter which in the Committee's opinion is in the interest of the co-operative society; or (b) on receipt of a written notice for such meeting signed by such number of the members of the co-operative society as may be prescribed in the rules and stating the objects and reasons for calling the

meeting. (7) If the Committee fails to convene a meeting within fifteen days of receiving the notice under subsection (6) (b), the members demanding the meeting may themselves convene the meeting by giving notice to the other members of the cooperative society, stating the objects and reasons for the meeting and the fact that the Committee has failed to convene the meeting. (8) The Commissioner may convene a special general meeting of a society at which he may direct the matters to be discussed at the meeting. (9) The chairman or in his absence the vice-chairman or such other person as may be prescribed in the by-laws of the co-operative society shall preside at a general meeting of a co-operative society. (10) The Commissioners may preside at any meeting convened under subsection (8)."

13. The appellant convened a special general meeting on November 8, 2017, which was attended by 55 members, although the respondent was absent. It was resolved that members intending to withdraw from the Sacco would have to wait until 2022 in order to be refunded their shares. On January 30, 2018, the respondent tendered his withdrawal from the Sacco but the appellant declined to refund him his shares, in view of the resolution made in the special general meeting held on November 8, 2017.

14. In its impugned ruling of May 6, 2021, the tribunal stated that,

> " None whatsoever, since that the respondent is servicing a loan and that in a special general meeting held on January 8, 2017 it was unanimously agreed that members wishing to withdraw would only do so in the year 2022. We find the said resolution unreasonable and not fair to the claimant or members of the respondent."

15. What was restricted in the said resolution is not the withdrawal of members from the Sacco, as found by the tribunal, but the refund of their shares. This court finds that the tribunal erred in finding that the resolution of November 8, 2017 was unreasonable.

16. Having found the resolution to have been reasonable, and considering that we are already in 2022, this court finds that the respondent is entitled to a refund of his shares forthwith without any further delays.

The Law on Setting Aside of Ex Parte Judgments

17. The court respectfully agrees with the principles for setting aside of judgments as observed by the Court of Appeal in *James Kanyita Nderitu & Anor v Marios Philotas Ghikas & Anor* (2016) eKLR as follows:

> " From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. 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. Such a defendant is entitled, under order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See Mbogo & Another v Shah (supra), Patel v EA Cargo Handling Services Ltd (1975) eA 75, Chemwolo & Another v Kubende [1986] KLR 492 and CMC Holdings v Nzioki [2004] 1 KLR 173).

> In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system."

18. See also *Abdalla Mohammed & Another v Mbaraka Shoka* (1990) eKLR the Court of Appeal held:

> " Reverting now to the appellants' first ground of appeal, the tests for the correct approach in an application to set aside a default judgment are; firstly, whether there was a defence on merits; secondly, whether there would be any prejudice; and thirdly, what is the explanation for any delay – see the judgment of Kneller, JA (as he then was) in the case of Merama Nyangombe v Chacha Mwita, Court of Appeal, Civil Appeal No 79 of 1983."

19. This court notes that the appellant, in its draft defence, admits its indebtedness to the respondent, but falls back on the resolution of November 8, 2017, where it was unanimously agreed that members who had withdrawn from the Sacco would only be refunded their shares in 2022. Whereas that defence cannot be termed as frivolous, the court needs to satisfy itself that the other conditions have been met before the ex parte judgment can be set aside. After being served with summons to enter appearance, the appellant duly entered appearance on January 23, 2019, but neglected to file a defence, which necessitated the request for judgment. That judgment was entered on July 27, 2020. No explanation whatsoever has been proffered by the appellant why the defence was not filed within the stipulated time or leave sought thereafter to file the same. It has not been explained why the appellant had to wait until January 15, 2021 to apply to set aside the ex parte judgment.

20. On whether any party would be prejudiced if the ex parte judgment is set aside, this court notes that the parties recorded a consent in court on July 6, 2021 for the payment by instalment of the undisputed monies while a disputed sum of Ksh 80,000/- was to await the determination of this appeal. There is no substantial prejudice to be suffered by the respondent.

Appellate Interference with Trial Court's Discretion

21. The test of appellate interference with the trial court's discretion is set out in *Mbogo v Shah* (1968) EA 93 as follows:

> " [A] Court of Appeal should not interfere with the exercise of the discretion of a 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 from 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 misjustice".

22. In this case, the tribunal's decision on application for stay pending hearing and determination of the application for setting aside of the default judgment was plainly wrong as it was based on an incorrect provision of law on procedure. It cannot be left to stand even if only for the constructive correction

of the tribunal for future cases. By this decision, the tribunal will discover the error of its path that it followed in this matter.

Orders

1. Accordingly, for the reasons set out above, the court allows the appeal.
2. In view of the consent recorded in court on July 6, 2021 for the payment of the undisputed sum of Ksh 483,691, and properly guided by the Court of Appeal in *Continental Butchery Limited v Nthiwa* [1978]KLR, where it was held that, a court can grant conditional leave where the circumstances so call for, this court grants the appellant conditional leave to defend the claim upon payment of the admitted sum of Ksh 483,691 in 6 equal installments starting from July 31, 2021, as agreed between the parties herein.
3. The claim for the disputed sum of Ksh 80,000 shall be heard by the tribunal on its merits.
4. As the error the subject of the appeal was committed by the tribunal, each parties is directed to bear its own costs.

   Order accordingly.

DATED AND DELIVERED THIS 21ST DAY OF OCTOBER, 2022.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

M/S G. M. Wanjohi, Mutuma & Co. Advocates for the Appellant.

M/S Mithega & Kariuki Advocates for the Respondent.