



**Henner Kenya v Bundi (Civil Appeal 412 of 2018)  
[2022] KEHC 16339 (KLR) (Civ) (16 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16339 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 412 OF 2018**

**JK SERGON, J**

**DECEMBER 16, 2022**

**BETWEEN**

**HENNER KENYA ..... APPELLANT**

**AND**

**GEORGINA BUNDI ..... RESPONDENT**

**JUDGMENT**

1. The appellant was sued by the respondent before the trial court for general damages for libel and loss of income. The appellant entered appearance and filed defence. The suit was heard *ex-parte* on August 3, 2017 and by its judgment delivered on August 29, 2017. The respondent was awarded Kshs 1,500,000/= as general damages and Kshs 3,600,000/= for loss of income. The appellant filed an application seeking to set aside the *ex parte* judgment but the same was dismissed by the trial court in its ruling of August 9, 2018. The appeal is against that ruling and is brought on the following grounds:-
  - i. The Honourable Magistrate erred in law and in fact in finding that the Application to set aside the judgment of the court lacked merit.
  - ii. The learned Magistrate misdirected himself in law in adjudging that the appellants defense fails to raise any triable issues without interrogating the same at a hear as would be envisaged in law.
  - iii. The learned magistrate erred in law in taking into account irrelevant factors in deciding that the Defence did not raise triable issues.
  - iv. The learned Magistrate erred in law and fact in arriving at the decision that no sufficient reasons were given to justify the non-attendance by the Defendant at the hearing of the suit.



- v. The learned Magistrate erred in law in failing to take into account all the relevant factors in the assessment of the reason for failing to defend the suit at the time of the hearing.
- vi. The Honourable Magistrate erred in law and in fact in failing to consider the chain of events post the hearing of the suit by the Plaintiff in failing to serve any of the pleadings and Notices therein and the consequence thereof.
- vii. The Honourable Magistrate erred in law and in fact in holding that the application to set aside the judgment was without merit.

2. Parties agreed to determine the appeal by way of written submissions. Submissions were filed for the appellant only. Counsel for the appellant contend that the appellant had a proper defence on record which raised triable issues. The plaintiff attributed malice on the part of the appellant which accusation was denied by the appellant. The trial court in its ruling held that the defence did not raise triable issues. Counsel referred to the case of *Rift Valley Water Services Board v Oriental Construction Co Limited* (2018) eKLR where it was held:-

“The principles which guide the court in exercising discretion to strike out pleadings have been stated in *DT Dobie & Co (Kenya) Limited v Muchina & another* [1982] KLR 1 and in many other cases. It is a power which should be exercised, inter alia, sparingly and with circumspection. The court would not strike out a pleading if it discloses an arguable case or raises a triable issue. Madan, JA, (as he then was) stated as follows in the said case:-

The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that

“is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way”...

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

3. It was submitted that the appellant was condemned unheard. The appellant was not served with the respondent’s submissions. Counsel referred to the Supreme Court of India’s decision on the right to be heard in *Sangram Singh v Election Tribunal Koteb*: AR 1955 SC 664 where the court at page 711 stated:-

“There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded



from participating in them.... But broadly speaking, after all the various factors have been taken into consideration and carefully weighed, the endeavour should be to avoid snap decisions and to afford litigants a real opportunity of fighting out their cases fairly and squarely.

4. Counsel further contend that the appellant did not attend the hearing before the trial court because it was not informed by its former advocate. The trial court held that the case belonged to the appellant who should not blame its counsel. It was submitted that the trial court did not exercise its discretion properly. Counsel relied on the case of *Nicholas K Cheruiyot v Kenya Midland Sacco Limited* [2021] eKLR where the court held:-

“Flowing from the foregoing rule of procedure and the precedents, it is clear that for the court to exercise its wide discretion to set aside a default judgment or an order for dismissal of a suit for non-attendance, the applicant demonstrates to the court by affidavit evidence that-

- a) The non-attendance was not deliberate or through negligence but due to inadvertence and honest mistake;
- b) The application for setting aside was made without unreasonable delay;
- c) The suit is meritorious and the applicant has not lost interest in prosecuting the same;
- d) The applicant stands to suffer more prejudice compared to the opposing party if the application is declined;
- e) The interest of justice demands that the application be allowed.”

5. Counsel further submitted that the application to set aside the *ex-parte* judgment was made without unreasonable delay. The appellant’s former advocates were informed about the judgment on February 13, 2018 and an application to set it aside was made on February 14, 2018. It is argued that the defence is merited and the appellant stands to be condemned to pay Kshs 5,640,000/= plus costs for libel which was strongly denied.

6. This is a first appeal and the court has to evaluate the record of the trial court before reaching its own conclusion. The appeal is not against the judgment of the trial court but is against a ruling which dismissed an application to set aside the judgment. The record of the trial court shows that the matter was mentioned on 1<sup>st</sup> August 2016 before Hon GA Mmasi (Mrs) (SPM) and it was certified as ready for hearing. The court directed that a hearing date be taken at the registry. On July 4, 2017 the case was fixed for hearing by counsel for the plaintiff for August 3, 2017. Although the typed record indicate that it was fixed for pre-trial, the original record indicate that it was fixed for hearing.

7. The case came up for hearing for the first time on August 3, 2017 before Hon P Gesora (Mr) CM and it proceeded *ex-parte*. Part of the record of the trial court of August 3, 2017 reads as follows:-

“ 3/08/17

Before Hon P Gesora (Mr) CM

Court Clerk - Kendeli

Plaintiff represented by Mr Morara

Defendant no appearance



PW1 Georgina K Bundi

Christian female adult sworn and states in English language

I reside in Nairobi and I do business and I am the plaintiff herein. I did record a statement and I rely on it save for the 2<sup>nd</sup> last paragraph which should read that I was not reinstated.

Hon PN Gesora (Mr)

Chief Magistrate”

8. It is evident from the above record that the trial court did not find out whether the defendant had been served or not. Even if it could be true that the appellant’s former advocates were served with a hearing notice, the trial court ought to have satisfied itself that it was proper to proceed *ex-parte* since there was evidence of service. The issue of service was not mentioned at all and the trial court simply allowed the case to proceed yet the defendant and its counsel were absent. It is good practice to find out whether the hearing date was taken by consent or *ex parte*, then the trial court should endeavor to establish whether a hearing notice was served. Such a process would enable the court satisfy itself that it is not condemning the absent party unheard, I do find that the trial court ought to have dealt with the issue of service first before hearing the case. In its judgment the trial court stated as follows:-

“This matter was set down for hearing on August 3, 2017. Although the defendant was served with a hearing notice through its counsel, they failed to appear and the matter proceeded *ex-parte*.”

9. The above finding is not supported by the trial court’s own record. Counsel for the plaintiff is not on record indicating that service was effected upon the defendant’s counsel. The date of service is not indicated.
10. Apart from the issue of service, it is submitted that the defence on record raised triable issues. Paragraphs 6 and 8 of the defence states as follows:-

“In response to paragraph 6, the defendant is a stranger to the contents therein and denies its contents in its entirety and further states that after providing the Plaintiff with recommendation letter, it was under no obligation to add nor retract what it had expressly stated in the said letter through any other mode, since it was in itself concrete. If she was subsequently suspended as alleged, that would not be as result of any act or omission on the part of the Defendant and as such puts the Plaintiff to strict proof thereof.

That further to the foregoing and without prejudice to the same the Defendant denies contents of paragraph 7 as there were no remarks whatsoever made against the Plaintiff subsequent to the termination of the employment of the Plaintiff and as such puts the Plaintiff to strict proof thereof.”

11. In its ruling of August 9, 2018, the trial court found that the defence did not raise any triable issues and stated as follows:-
- i. “On the issue of whether the defence herein raises triable issues which should go to full trial, I concur with the plaintiff’s counsel that the same contains mere denials. It is not denied that plaintiff an employee of the defendant and was laid off. There are emails from the writer by the defendant to the effect that they were not recommending her. This was after she had



secured employment with another company. This made her not secure the job. This was in the backdrop of the defendant issuing with a recommendation letter which praised her work in the defendant for 6.5years. on the second last paragraph the writer stated that she highly recommended the plaintiff herein for the position.”

12. The background to the dispute is that the respondent was employed by the appellant. Her services were terminated through redundancy. A favourable recommendation letter was issued by the appellant. The respondent secured employment and the new employer sought comments from her previous employer – the appellant.
13. According to the respondent the appellant made negative comments about the respondent and this led to termination of her contract. The effect of the appellant’s defence is that it did not make any remarks whatsoever against the respondent after terminating her employment. There was allegation that the appellant’s staff made the negative remarks through an e-mail.
14. I am of the considered view that the defence raised triable issues which ought to have been heard by the trial court. The amount of damages awarded is a colossal sum and a party should not be made to pay such an amount without being accorded the opportunity to defend itself.
15. In the case of *CMC Holdings Limited v Nzioki* (2004) 1 KLR 173, the Court of Appeal held;-
16. In an application before a court to set aside ex parte judgment, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised upon reasons and judiciously.
17. On appeal from that decision, the appellate Court would not interfere with the exercise of the discretion unless the such discretion was exercised wrong in principle or the Court acted perversely on the facts.
18. In law, the discretion on whether or not to set aside an ex parte order was meant to ensure that a litigant does not suffer injustice or hardship.
19. It would not be a proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle.
20. In the instance case, the trial magistrate did not exercise her discretion properly when she failed to address herself to a matter which might have very well amounted to an excusable mistake visited upon the appellant by its advocate.
21. In an application for setting aside ex parte judgment, the Court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues.
22. I do find that the trial court did not exercise its discretion judiciously. The appellant was improperly condemned unheard. The case came up for hearing for the first time and the hearing date had been taken ex-parte. Further, the pre-trial directions were equally conducted ex – parte. I also do find that the defence on record raises triable issues.
23. In the end, I do find that the appeal is merited and is hereby allowed. Consequently, the ruling of the trial court of August 9, 2018 is hereby set aside. The judgment of the trial court entered on August 29, 2017 and all consequential orders are hereby set aside. The matter is remitted to the Chief Magistrate’s Court for hearing. Parties shall meet their own respective costs.



DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS  
16<sup>TH</sup> DAY OF DECEMBER, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

