



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

HIGH COURT CIVIL APPEAL NO.33 OF 2019

BOARD OF MANAGEMENT

ST AUGUSTINE SECONDARY SCHOOL.....APPELLANTS/APPLICANTS

VERSUS

CHAMBALILI TRADING CO. LTD.....RESPONDENTS

J U D G E M E N T

1. This appeal arose from the ruling delivered by **Hon. S.Mbungu Chief Magistrate on 18th June 2019 in Kitui Chief Magistrate's Court Civil Suit No.377 of 2018**. In the said suit, the **Appellant** (Board of Management St. Augustine Secondary School) had been sued by Chambalili Trading Co. Ltd, the Respondent herein for breach of contract, wherein, the **Respondent** claimed a liquidated sum of Ksh.642,645/= from the **Appellant**. The record of proceeding from the lower court shows that the **Appellant** was duly served but failed to enter appearance or defence on time or at all leading to entry of judgment in default of appearance by the lower court although the same was misdescribed as interlocutory judgment. I will get back to the issue later in this ruling.

2. This judgement in default of appearance was entered on 9th November, 2018 and on 30th November, 2018 the Appellant vide a Notice of Motion dated 29/11/2018 sought inter alia to set aside the said interlocutory judgment entered against it.

3. The trial court entertained the application and through its ruling dated 14th June 2019 it found no merit in the said application and dismissed in its entirety on the basis of inter alia that the draft defence annexed to the said application disclosed no merit.

4. The Appellant felt aggrieved by that ruling and preferred this appeal raising the following grounds namely:

(i) That the Learned Magistrate erred in law and in fact in condemning the Appellant without affording it an opportunity to be heard.

(ii) That the Learned Magistrate erred in law and in fact in dismissing an application seeking to cure an injustice meted out upon the Appellant for failure to file defence on time.

(iii) That the Learned Magistrate erred in law and fact by shifting the burden of proof to the Appellant instead of the Respondent who should have attached the copy of the contract.

(iv) That the Learned Magistrate erred in law and fact in finding that the draft defence filed by the Appellant raised no triable issue finding it claims occasioned it a miscarriage of justice.

(v) That the Learned Magistrate erred in law and fact in failing to rectify an inadvertence or excusable mistake or error that could have been put right by the payment of costs.

(vi) That the Learned Magistrate's decision occasioned a miscarriage of justice.

(vii) In its written submissions through Martin Munene, State Counsel from the Attorney General's office, the Appellant conceded that it did not enter appearance and defence on time and as a consequence an interlocutory judgment was entered. It claims that though it was served on time, the Ministry of Education inadvertently failed to inform the Attorney General on time. It contends that it learnt about the interlocutory judgment on 21st November 2018 when It received a notifying them of the same.

5. The **Appellant** has faulted the ruling by the trial court dismissing it's application dated 29th November 2019 seeking to set aside interlocutory judgment alleging that it prejudiced its right to be heard. It contends that it has a right to be heard and cites the decision of

Pinnacle Projects Ltd. –vs- Presbyterian Church of East Africa Ngong Parish and Another [2019] eklr to support its contention. The **Appellant** also relies on the following authorities on this score

(i) *Sam Jakana & Tilda Jakana –vs- Emmanuel Msabimana (High Court Civil Suit No.428 of 2015 (UG).*

(ii) *Re-Christine Namatovu Tebajjukiva (1992 -93) HCB 85.*

6. The **Appellant** avers that it has shown good reason to merit setting aside of interlocutory judgment and contends that it meets the threshold set in the case of **James Mwangi Gathara –vs- Officer Commanding Station Loitoktok & 2 others [2018] eklr** where the court found that the discretion granted to courts to set aside Exparte judgment is to do justice to the parties before it in order to avoid injustice or hardship resulting from an 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.

7. The **Appellant** faults the trial court for failing to consider the nature of action arguing that the suit arose due to breach of contract. It claims that the Respondent was partly paid for the work done and that what was not paid is for the work not done.

8. The **Appellant** further claims that paying the **Respondent** for work not done amounts to a waste of public funds which in its view is contrary to Public Finance Act which provide for prudent utilization of public resources.

9. The **Appellant** submits that the Respondent could easily have been compensated by way of costs had the judgment been set aside.

10. The **Respondent** has opposed this appeal through written submissions dated 28th October 2020 by M/s Apollo Muinde & Partners Advocates.

11. The **Respondent** points out that the **Appellant** in it's application before the trail court relied on wrong principles about grant of stay of execution of an Exparte Judgment and that instead it proceeded as though it was basing its argument on an application of stay of execution pending appeal.

12. The **Respondent** submits that **Order 10 Rule 11 Civil Procedure Rules** gives courts unfettered discretion to the aside judgment entered in default and the primary question to be considered in such a case is whether the Learned Magistrate properly unrevised her discretion in dismissing the Appellant's application.

13. The **Respondent** avers that the **Appellant** was duly served with plaint and summons to enter appearance and that it even conceded that it was served on 8/10/2018 but failed to enter appearance or defence within stipulated time. It avers that the trial court was in order to enter judgment because it was regular and lawful so to do

14. The **Respondent** further submits that there is no affidavit from anyone from the Ministry of Education given a valid reason for the delay and cites that under Section 107 (10) of the Evidence Act, the burden rested on the **Appellant** to prove the existence of valid reasons to explain the delay.

15. The **Respondent** also contends that the draft defence annexed did not raise any triable issue as there was no copy of the contract tendered to show the agreed scope of work to be completed before payments were to be released. The **Respondent** states that the **Appellant** acquiesced and accepted the work done through partial payment and that the draft defence filed contained mere denials with no substance.

16. The **Respondent** further submits that the **Appellant** did not meet the threshold for setting aside judgment entered in default of appearance and contends that costs will not always be sufficient in every case because justice delayed is justice denied. On this score it relies on decision of **Anne Wanja Mwangi –vs- Samson Muriithis Muriuji [2019] eklr.**

17. This court has considered this appeal and the response made. The main issue in this appeal is basically one and that is basically one and that is whether the trial court properly exercised its discretion in dismissing the Appellant's application to set aside judgment entered in default of appearance and defence.

18. Before delving on the facts brought out in this appeal, it is necessary to set down the relevant provisions of the law with a view to sorting out an error or inadvertence on the part of the trial court and the Appellant in so far as the proceedings from that court is concern.

The Law

19. There is no dispute that the **Appellant** was duly served with the plaint and summons to enter appearance by the **Respondent**. In its own admission, the **Appellant** states that it was duly served with the plaint and summons to enter appearance on 8th October 2018 but failed to enter appearance or defence within stipulated time. The Provisions of **Order 7 Civil Procedure Rules** rule 1 required the **Appellant** by itself or through counsel to enter appearance within 14 days after service and thereafter enter defence within 14 days after entering appearance. The law gives defendants sufficient time or chance to file their papers because looking at the rules, a Defendant has a total of 28 days to file appearance and defence. The **Appellant** in this matter had 14 days from 8th October 2018 to enter appearance and thereafter another 14 days to file its defence. Of course like in every rule or law, there is always consequences for the breach or violations of the same.

20. The provisions of **Order 10** provides for the consequences of non – appearance and failure to file defence on time or at all. **Under Rule 4**, Judgment can be entered where a plaintiff has made a liquidated demand and under Rule 6 thereof, the law provides that where a plaintiff's claim is based on pecuniary damages, an interlocutory judgment is entered upon which the suit is set down for formal proof or

assessment of damages. The distinction between the two cited rules is quite clear to discern.

21. In this instance, the **Respondent's** claim was a liquidated demand of Ksh.642,645/=. The **Appellant** as observed above was duly served but despite being served failed to enter any appearance or defence within stipulated time. The record of proceedings from the lower court shows that the **Respondent** inadvertently applied for interlocutory judgment rather than judgment in default of appearance pursuant to **Order 10 Rule 4** of the Civil Procedure Rules. The trial court also inadvertently entered interlocutory judgment on 9th November, 2018 rather than final judgment in default of appearance and filing of defence. The Appellant in its application dated 29th November 2019 *inter alia* sought to set aside the interlocutory judgment entered against it when the judgement had been entered as prayed in the plaint as per the proceedings.

22. This court finds that judgment entered against the Appellant on 9th November, 2018 ought to have been entered pursuant to the provisions of **Order 10 Rule 4** of the **Civil Procedure Rules** because there was nothing left for the trial court to assess after entering the judgment. Since no party in this appeal is unduly prejudiced, I hereby substitute or revise the word "interlocutory" in the entry of judgment by the lower court with the entry of judgment upon a liquidated demand in default of appearance and defence.

23. Having corrected the minor error in the proceedings this court now embarks on the substance of this appeal. As I have noted above, the only issue for determination in this appeal is whether the trial court properly exercised its discretion in dismissing the **Appellant's** application to set aside the Ex parte judgment.

24. The provisions of **Order 10 Rule 11 Civil Procedure Rules** gives the court or 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 judgement and any consequential decree or order upon such terms as are just."

The facts

25. This court has carefully considered the facts presented by the **Appellant** in moving the court to set aside the Ex parte Judgment or judgment entered in default of appearance and defence. There were two reasons strongly advanced by the **Applicant** contrary to the submissions by the **Respondent** that the **Appellant** embarked on irrelevant factors related to stay of execution pending appeal. The **Appellant** was besides asking for set aside of Ex parte Judgment, was also seeking for stay of execution and that may have made the **Respondent** think that the **Appellant** was dwelling on irrelevant issues. The **Appellant** largely sought for stay of execution pending the hearing and determination of its application *inter partes*.

26. The main question for determination in my considered view is whether the reasons given by the **Applicant** in its pursuit to set aside the Ex parte Judgment met the threshold sufficient enough for the trial court to exercise its discretion in its favour. The 2 reasons given were as follows:-

(a) That while the Appellant forwarded the plaint and summons to the Ministry of Education on 12th October, 2018, the Ministry failed to inform the Attorney General on time to file defence or enter appearance.

(b) That the Appellant had a good defence that raised triable issues.

27. The trial court in its ruling duly considered the 2 grounds above and found no merit in them. As I have observed above, the provisions of **Order 10 Rule 11** of the **Civil Procedure Rule** really gives the court of first instance unfettered discretion to set aside or vary judgment entered in default of appearance and the law gives the trial court powers to even impose "terms it deems fit. This Court as an Appellate court normally exercises some restraint in interfering with the discretion granted to the lower court save for only when it is demonstrated or shown that the exercise of discretion was done injudiciously or was based on a wrong principle. The decision in **Shah –vs- Mbogo (1968) EA 93** illustrates this principal well enough and I do not find reason to delve on it much. Suffices to state that the burden of prove in demonstrating that the trial court did not properly exercise its discretion always rests on whoever alleges the same.

28. It is my considered view that it is not enough for a party moving the court to exercise its discretion in its favour or moving the **Appellate** court to interfere with the exercise of the discretion by the lower court, to just cite the right to be heard as a basis to setting aside an Ex parte Judgment. The right to be heard is of the fundamental rights yes but a party cannot use it to abuse well laid down court process.

29. The **Appellant** in this appeal relied on the reason that the Ministry of Education failed to act on time or it all in advising the Attorney General to enter appearance. However this court finds that the Appellant made a fatal omission when it failed to present evidence from the Ministry of Education on what caused the delay. There was no affidavit from any official from that Ministry to explain or given valid reasons to why there was the delay. The only conclusion that can be drawn from such omission is that there was no reasons other than indolence on the part of the **Appellant** or its Parent Ministry. The trial court properly considered this and found no merit. The Learned Magistrate certainly cannot be faulted on this score. The Appellant in this appeal has totally failed to convince this court that it had good reason or valid basis for the delay and in the absence of good reason obviously the Learned trial Magistrate was right to find that there were no sufficient ground for him to exercise his discretion in favour of the **Applicant**.

30. This court finds that the **Appellant** and indeed any party in default of appearance and defence under **Order 10 Civil Procedure Rules** cannot without good reasons use the shield provided **Article 159 (d)** of Constitution or a right to be heard to hide from clear timelines clearly stipulated in law.

31. Secondly the **Appellant** has submitted that it had a good defence and that certainly is another consideration or a factor in exercise of

court's discretion in setting aside a judgment entered in default of appearance and defence. However I have considered the draft defence exhibited by the Appellant and I have found it wanting for 2 reasons.

(i) The draft defence failed to show the details of the contract despite the fact that a defendant is now at liberty to file his defence and evidence to be relied during trial. The Appellant ought to have demonstrated through witness statement(s) and contract that the Respondent had unresolved issues before demanding for payment.

(ii) The draft defence contains partial admissions and mere denials which in my view hardly raised any triable issue.

32. The trial court in my considered view was right and correct to find no merit in the claim made by the **Appellant** that the draft defence raised serious issues or that the entry of judgment had occasioned it miscarriage of justice. I am not persuaded by the **Appellant** assertion that the trial erred by shifting the burden of proof to it. This is because as I have noted above, the **Appellant** was the one invoking the discretionary power of the trial court. It had failed to enter appearance & defence within stipulated time and it was incumbent upon it to demonstrate that notwithstanding the fact that it had failed to comply with the law and the consequential fact that judgment in default had been entered, it was just and fair in the circumstances to set aside the Ex parte Judgement. Having failed to do that for the reasons advanced above, the **Appellant** really have no basis to fault the decision of the lower court.

In the premises I find no merit in this appeal the same is dismissed with costs.

Dated, Signed and Delivered at Kitui this 28th day of January , 2021.

R.K. LIMO

JUDGE