REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 32 OF 2020

STEFANO UCCELLI .....DEFENDANT/APPELLANT

VERSUS

HANS JURGEN LANGER.....1ST PLAINTIFF/RESPONDENT

JAMES MAGANGA .....2ND PLAINTIFF/RESPONDENT

(Appeal against the Ruling of Hon. Onalo Resident Magistrate delivered on 7th May 2019 in Malindi CMCC No. 137 of 2017)

Coram: Hon. Justice Reuben Nyakundi

Kibunja and Associates advocates for the Appellant

Ndegwa Kiarie Advocates for the Respondents

RULING

By a memorandum of appeal dated 15th and filed on 16th of July 2020, **Stefano Uccelli** the appellant herein, appeals against the Ruling in **Malindi CMCC Magistrate Court Case No. 137 of 2017** on the following grounds:

1. The Ruling delivered on 7th May 2019 did not comply with the mandatory provision of O. 21 (3) of the Civil Procedure Rules and thus a nullity.

2. The Learned Trial Magistrate stated that she wrote the Ruling without taking into account submissions made by the Appellant. This admission negates the core principle in law that the parties have an inherent right to be heard.

3. The Appellants submissions were filed and court receipt issued two days passed the deadline. The delay was not inordinate and was excusable in view of the fact that the Respondents did not file their submissions in reply.

4. From the record of proceedings judgment against the appellant was entered on 19th October 2017 for failure (to enter appearance or file defence). This was not true as the defendant had entered appearance through the law firm of Ndegwa, Katisya & Sitonik on 18th August 2017 and the Trial Magistrate misdirected her mind on a very crucial aspect of the appellant's case.

5. Ex parte judgment was entered on 19th October 2017. Up to the time of the appellant's application the Respondent had not taken any step to list the matter for formal proof. Consequently, the respondent would suffer no prejudice if the exparte judgment was set aside.

6. The trial court held that the law firm of Kibunja & Associates had acted in violation of the provision of the Civil Procedure Rules.

7. The trial magistrate in her ruling extensively delved into extraneous matters Sui moto in view of the fact there were no submissions m reply to the appellants' submissions.

8. In law and practice the litigant duty is to pay fees and other charges demanded by the legal counsel in exchange for effective presentation To require such a litigant, like the appellant in this case to follow the matters in court and thereby draw adverse inference on the apparent lack of diligence in a material misapprehension of the law and prejudicial of the Appellant.

9. The Trial Magistrate failed to apprehend that the defence annexed to the application raised serious and triable issues and was not frivolous.

On the basis of these grounds, the appellant prays for the Honorable Court to allow the Appeal and substitute with the following orders:

1. The default judgment was set aside.

2. The annexed Defence thereto be deemed filed on payment of the requisite court fee.

Submissions

The appellant, through counsel, on 7th September 2020 filed skeleton arguments dated 3rd September 2020. It is contended therein that a suit was filed against the appellant by way of a plaint in **CMCC 137 OF 2017** on 2nd August 2017. The appellant, through the firm on **Ndegwa Katisya & Sitonik** entered appearance on 18th August 2017. The appellant's then advocates filed a defence and paid for it on 1st September 2017. However, it is submitted that this defence is not in the court file in spite of it being filed.

It is submitted that the appellant was satisfied that his matter was well taken care of by his advocates. He was at the time out of the country at his primary residence in Italy. The submission is made that on 18th June 2018, the appellant became aware a judgment had been entered against him in a letter written to the Chief Justice by the firm of **Kerandi & Manduku Advocates**. That on learning this, the appellant immediately filed an application by way of a Notice of Motion dated 24th July 2018. This application was rejected and is the basis of the instant appeal.

According to counsel, the Grounds of Appeal in the memorandum dated 18th July 2020 raise pertinent issues first among them being that the court has wide discretion to set aside exparte judgment. Reliance is placed on the decision of the Court of Appeal in **Civil Appeal No. 27 of 1982- Maina versus Mugiria.** It is further submitted that mistake of counsel cannot be visited on a client. Reliance is placed on **Murai Versus Wainaina (No. 4) (1982) KLR.** Finally, it is submitted that the matter has not been heard by the Magistrate Court and the appellant had a viable and effective defence which ought to be heard.

On this basis, counsel beseechs the court to not only allow the appeal, but also that the appellant do be allowed to file his defence.

Analysis and Determination

As this is a first appeal, I am duty-bound to reassess, reevaluate and reexamine the court record as well as the pleadings and evidence adduced before the trial court and arrive at my own independent conclusion; bearing in mind that I do not have the luxury of neither seeing nor hearing live witness testimony. This duty is as stipulated in Section 78 of the Civil Procedure Act and expounded in the case of **Selle vs Associated Motor Boat Company Ltd [1968] E.A 123.**

By plaint filed on 2nd August 2017, the respondents/plaintiffs sought against the appellant/defendant inter alia damages for libel and an injunction against further defamatory remarks by the respondents in relation to the appellant. Per the lower Court's record, interlocutory judgment was entered in favour of the plaintiffs on 19th October 2017 after which the plaintiffs sough that the matter be set down for formal proof.

Subsequently, by a Motion dated 24th July 2018, the defendant sought for orders that the default judgment be set aside and the annexed defence be deemed as duly filed.

On 25th September 2018, both Counsel representing the parties agreed to dispose of the application by way of written submissions. When the matter next came up on 16th October 2018, it was noted that neither party had filed submissions with the plaintiffs' advocate noting that the failure on their part was due to the defendant, whose application it was, having failed to file submissions. The matter consequently came before the lower court on 26th March 2019 whereupon both Counsel acceded to their failure to file submissions and each sought for 7 days within which to comply. The Court gave a Ruling date for the application being 7th May 2019 while at the same time cautioning that whichever party did not comply stood to suffer prejudice as the Ruling would nonetheless be delivered.

In its Ruling of 7th May 2019 to which the instant appeal relates, the Learned trial Magistrate in reaching a determination begun by expressing displeasure at the conduct of the matter with regards to filing submissions. It was noted:

"On the issue of filing of submissions, I vehemently state that parties to a dispute ought to respect the court's processes and not subject court to their whims and perils which effectively places the court in limbo, This court shall not be held at ransom by parties who are not willing to state their case concussively. Nine (9) months later and parties are still submitting as to when and how they will submit, is tantamount to waste of court's time and as such I will proceed to make my determination without the alleged submissions if any."

Thence, the Court delineated two issues for determination; whether the firm of **Kibunja and Associates** was properly on record; and whether the mistakes of an advocate ought to be visited upon a client. On the first issue, the learned trial magistrate reached the conclusion that

> **"…the firm of Ms Kibunja is properly on record by implication of fact and the subsequent technicality on procedure is overrule by the actions of the respondent."**

On the second issue, the Learned trial Magistrate held:

> **"I opine to this end that Judgment having been entered 19/10 2017 and the defendant having become aware of the same on 18/7/2018, tentatively a period of 9 months later, is an inexcusably too long a period for a prudent litigant and for a defendant applicant to state that he had confidence in his previous lawyer to defend the suit is rather inane for how else would have the said advocates conducted a defence without the defendant being present to record statements or appear in court for hearing of the case. The defendant applicant herein, infact at paragraph 9 of his affidavit states he had been away in Italy and only came back on 30/6/2018 which would be 8 months down the line after Judgment was entered.**
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> **I opine that a case is for the client and not an advocate, as an advocate only acts on the instructions of his her client, it is for the client to make a follow up on the progress of its case and not dump the same on its advocate for an advocate needs to be briefed and have the necessary knowledge of a case and in addition be paid his legal fees so as to prosecute or defend a case. The nitty gritty/gristles of a case or peculiarity thereof is within knowledge of a client and until the same is divulged to his advocate, it would be hard for an advocate to prosecute/defend a case and nowhere in the proceedings before are we shown of correspondence between the defendant/applicant and his advocate in seeking to know the stage of the case, what is required or when he is to attend court. There is no proof whatsoever to show any steps he made into inquiry or follow up of his case with his advocate, this is in bearing in mind that advocates have quite a number of cases, issues to deal with"**

The learned trial magistrate thus arrived at the conclusion that the ***'laxity and casual way in the conduct of the Defendant/Applicant's case is tantamount to obstruction and unwarranted delay of justice…'.*** Quoting from **Savings & Loans Limited vs Susan Wanjiru Muritu Nairobi(Milimani) HCCCs No. 397 of 2002** the lower court proceeded to dismiss the defendant's Application dated 24th July 2018 hence giving rise to the instant appeal.

With the duty to reevaluate the case dispensed with, my focus now turns to the merits of the appeal. The appellant seeks to have the decision to dismiss the application for setting aside the exparte judgment entered on 19th October 2017 reversed and that he be allowed to file his defence in **CMCC 137 of 2017**.

It cannot be gainsaid that the power to set aside exparte judgment entered in default is discretionary. Such discretion is to be exercised upon such principles as were laid bare by the Court of Appeal in **Philip Kiptoo Chemwolo & Mumias Sugar Co. Ltd Vs Augustine Kubende (1982-1988) KAR 1036** where it was held inter alia, citing with approval the English case of **Evans V Bartam [1993] AC 473: -**

> **"The discretion is in terms unconditional. The courts however have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly, there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has prima facie defence.**
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> **The reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to much the court will have regard, in exercise of its discretion. The principle is that witness and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of the coercive power where that has only been obtained by a failure to follow any of the rules of procedure."**

On the matter of discretion, in **Shah v Mbogo & another [1967] E.A,** concerning setting aside an exparte judgment the Court annotated that its use is meant to curtail the occurrence of injustice as a result of accident or inadvertent error as opposed to coming to the aid of a person seeking to bend the course of justice. In its words:

> **"The court's discretion to set aside an exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise to obstruct or delay the cause of justice, the motion should therefore be refused."**

The Court of Appeal in **James Kanyiita Nderitu & Another -vs- Marios Philotas Ghikas & Another [2016] eKLR** expressed thus:

> **"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…"**

The Learned trial Magistrate, in exercising discretion, found that Judgment having been entered on 19th October 2017 and the appellant only becoming aware of it on 18th July 2018, the intervening period was an inexcusably long period for a prudent litigant. Further, the Learned trial Magistrate pondered how the appellant had expected his previous lawyer to defend the suit in his absence given that per his affidavit, the

appellant had been away in Italy and had only returned on the 30th of June 2018, 8 months after Judgment had been entered. The Learned trial Magistrate went further to state that the appellant had failed to avail proof to show the steps he made into inquiry or follow up of his case with his advocate and that even in the application that was in Court then, the appellant was guilty of latches in that upon filing the application, he had failed to implore his advocate to file submissions on the same.

This Court, sitting on appeal, would not be inclined to interfere with the discretion exercised by the Learned trial Magistrate in declining to set aside the exparte Judgment unless the exercise of the same was wrong in principle or that the Court did act pervasively on the facts. In this regard, I harken to the words of the Court of Appeal in **William Ntomauta M'ethanga Sued As M'mauta Nkari v Baikiamba Kirimania [2017] eKLR** where it held:

> **"We are fully aware that in an application before a court to set aside an 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 judiciously. On appeal from that decision, the appellate court would not interfere with the exercise of that discretion unless the exercise of the same was wrong in principle or that the court did act perversely on the facts. (See *Magunga General Stores -vs- Pepco Distributors [1987] 2 KAR 89.)"**

Being of the above mind, does the Learned trial Magistrate's exercise of discretion warrant interference by this Court? Before answering this, I note that in arriving at the decision, the Learned trial Magistrate held that the appellant was guilty of latches and had generally been an indolent litigant hence undeserving of the prayers sought in the application.

However, no reference was made by the Learned trial Magistrate as to whether the draft Defence annexed to the application raised triable issues. To this end therefore, on whether the Learned trial Magistrate acted judiciously in the exercise of discretion, I find in the negative. My finding is buttressed by the holding of the Court in **Tree Shade Motors Limited -vs- D.T. Dobie and Company (K) Limited & Another [1998] eKLR** to wit:

> **"The learned judge did not look at the draft defence to see if it contained a valid or reasonable defence to the plaintiff's claim. Where a draft defence is tendered with the application to set aside the default judgment, the court is obliged to consider it to see if it raises a reasonable defence to the plaintiff's claim. If it does, the defendant should be given leave to enter and defend. That is what this Court decided in the case of Kingsway Tyres and Automart Ltd -vs- Rafiki Enterprises Ltd (Civil Appeal No. 220 of 1995) (Unreported). In the course of its judgment the Court said:-**
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> **"To our minds, the onus was on the respondent to fault the service. Having failed to do so, and in the absence of evidence on record to lead us to hold that the service was improper, it is our view and so hold that ex parte judgment was a regular judgment. It would only, if at all, be properly, vacated on grounds other than non-service of summons.**
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> **There are ample authorities to the effect that, notwithstanding regularity of it, a court may set aside an ex parte judgment if a defendant shows he has a reasonable defence on the merits."**

In the current instance, the appellant in his draft defence raises the issue that the letter upon which the respondents base their claim for defamation was not only confidential and privileged communication but also that its contents were true. This to my mind is a meritorious defence that the Learned trial Magistrate ought to have considered. In this regard, I see no prejudice against the respondents in allowing the case to be heard on its merits.

I share the opinion expressed by the Court of Appeal in **William Ntomauta M'ethanga Sued As M'mauta Nkari v Baikiamba Kirimania [2017] eKLR**

> **"The main concern of the court is to do justice to the parties, and it ought not to impose conditions on itself to fetter the wide discretion given it. Unlike the learned Judge, we feel that it is in the interest of justice to allow the appellant to defend the suit and the matter to be determined on merit being a family dispute. In doing so, we invoke Article 159 of the Constitution in order to render substantive justice. The Supreme Court in Law Society of Kenya -vs- The Centre for Human Rights & Democracy & 12 Others [2014] eKLR held,**
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> **"Indeed this Court had occasion to remind litigants that Article 159(2)(d) of the Constitution is not a panacea for all procedural shortfalls. All that the Courts are obliged to do is to be guided by the principle that 'justice shall be administered without undue regard to technicalities. It is plain to us that Article 159 (2) (d) is applicable on a case by case basis."**

While I am of the persuasion that the Learned trial Magistrate erred in the exercise of discretion, I do agree with remonstrations raised on account of the conduct of the appellant as regards the latches in prosecuting his suit. In the premises therefore, the Appeal succeeds and shall abide by the following orders:

1. **The default Judgment entered on 19th October 2017 in Malindi CMCC No. 137 of 2017 is set aside forthwith.**

2. **The annexed Defence of the appellant be deemed as duly filed on payment of the requisite fee no later than 7 days from the date of this Judgment.**

3. **The appellant shall pay throwaway costs assessed at Ksh.30,000/-**

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 26TH DAY OF FEBRUARY, 2021

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R. NYAKUNDI

JUDGE