REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

HIGH COURT CIVIL APPEAL NO. 19 OF 2020

DIRECTLINE ASSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

NDUNDU KITHONGA (SUING AS THE PERSONAL

REPRESENTATIVE OF THE ESTATE OF BETTY MUTINDI

DECEASED).....RESPONDENT

Being an Appeal from the Ruling in Kitui Chief Magistrate Court Civil

Case number 411 of 2019, delivered on 12th May, 2020 By Hon. S. Mbungi-CM).

J U D G E M E N T

1. This appeal arose from the Ruling in *Kitui Chief Magistrate Court Civil Case number 411 of 2019*, delivered on 12th May, 2020. The trial court's ruling was in respect to the Appellant's application dated 15th January, 2020 which sought inter alia to set aside an interlocutory judgement against it on 9th December, 2019 and also leave to file defence.

2. The background of the suit in Kitui Chief Magistrate Court Civil Case Number 411 of 2019, which suit was a declaratory suit against the Appellant, was a suit filed through Kitui Chief Magistrate Civil Case Number 41 of 2018 filed by the Respondent herein, against one Titus Richard Matata Kalovya as a result of a road traffic accident involving motor vehicle Registration Number KCH 605H Toyota matatu insured by the Appellant herein. In the accident, one Betty Mutindi (deceased) died from the accident and the Respondent sued Titus Matata Kalyovya on behalf of her estate. The trial court in Kitui Chief Magistrate Court Civil Case Number 41 of 2018 entered judgement against the appellant for general damages loss of expectation of life and loss of future earnings. The total amount awarded came to Kshs. 4,332,810 out of which the Appellant paid Kshs. 3,000,000 leaving a balance of Kshs. 1,332,810. That balance was the subject of the declaratory suit in Kitui Chief Magistrate Court Civil Case number 411 of 2019.

3. In the said declaratory suit Kitui Chief Magistrate Civil Case number 411 of 2019, the Appellant failed to file defence on time or at all which led to an interlocutory judgement being entered against it. The entry of interlocutory judgement jolted the Appellant into action and it filed a Notice of Motion dated 15th January, 2020 where as I have observed above sought inter alia setting aside of interlocutory judgement and leave to be allowed to file its defence.

4. The grounds upon which its application was argued was that its failure to file defence on time was due to an inadvertent error of a clerk in the office of Counsel, then acting for the Appellant.

5. The Appellant further contended that it paid out Kshs. 3,000,000 to the Respondent which sum it claimed was the limit of its obligation under the Insurance ***(Third Party Risks) Act Cap. 405***. It was the Appellant's contention that having discharged its obligation there was no cause of action against it. It felt that it had a good defence disclosing triable issue since the amount awarded in any event was illegal as it was contrary to the provisions of ***Insurance (Motor Vehicle Third Party Risks) Act Cap. 405.***

6. The Respondent on the other hand, argued that the amount awarded was lawful and that as decided in **Peter Gichuhi Njuguna versus Jubilee Insurance Co. Limited 2016 Eklr*, Section 5(b) (v) of Insurance (Motor Vehicle Third Party Risks)*** did not take away judicial independence and discretion from courts to award damages over and above Kshs. 3 million.

7. The Respondent, argued that assessment of damages was a matter of judicial discretion for the trial court that could not be taken away. He further contended that, setting aside a default judgement was a discretional matter to be decided by a trial court depending on merits of each case.

8. The trial court, in its ruling dated 27th March, 2020, agreed with the Respondent's position and ruled that, as a trial court, it had unfettered discretion to set aside its judgement to meet the ends of justice.

Citing the decision in **Pithon Waweru Maina versus Thukamugira 1983 eKLR**, the trial court held that the judgement sought to be set aside was regular as service was not disputed and that the Applicant had not demonstrated that it had a good defence, since Section 5(b)(iv) did not take away its discretion and relied on the decision in ***APA Insurance Company Limited versus Esther Kavindu Mwongo & Another 2019 eKLR*** where it was held that judicial officers have unfettered discretion to make awards over and above Kshs. 3 million.

9. The Appellant felt aggrieved by that ruling and preferred this appeal raising the following grounds namely; -

a) The Learned Magistrate unreasonably exercised his discretion by declining to set aside the interlocutory judgement against the defendant on 9th December, 2019 despite the facts, evidence and case law presented before him.

b) The learned magistrate erred in law and fact by dismissing the application seeking to set aside the interlocutory judgement despite the Appellant meeting the required threshold for granting the orders sought.

c) The learned magistrate erred in law and fact by declining to set aside the interlocutory judgement entered against the Appellant on the 9th of December, 2019 despite arriving at the finding that failure to file the defence had been explained.

d) The learned magistrate erred in law and fact by finding that the Appellant did not have a defence on its merit despite arriving at a conclusion that the Appellant had already paid the sum of Kshs. 3,000,000 which is the statutory limit that an insurer is liable to pay per claim pursuant to Section (b) (iv) of Cap 405.

e) The magistrate failed to appreciate that the Appellant had a good defence since the Respondent's claim against the Appellant had been extinguished upon payment of the sum of Kshs. 3,000,000. Consequently, the Respondent, did not have a cause of action against the Appellant when he filed Kitui Chief Magistate Civil Case Number 411 of 2019.

f) The magistrate misapprehended the facts and the application before him.

g) The magistrate erred in law and fact by relying on the case law that was not relevant to the matter in finding that the Appellant did not have a good defence on merit.

h) The magistrate erred in fact and law by considering facts that were not in issue.

10. In its written submissions through Counsel, the Appellant submits that it raised a reasonable defence on whether it was liable to pay a further sum of Kshs. 1,322,810 after paying Kshs. 3 million which was the limit stipulated under Section 5(b) (iv) of the Insurance (Motor Vehicle Third Party Risks) Act.

11. The Appellant relies on High Court decision in ***Carl Ronming versus Societe Naval Chargeurs Vieljeux (1984)*** **eKLR,** where the court held that an appellate court can interfere with the exercise of discretion by the Lower Court where it found that the Lower Court has misapprehended the facts or misdirected itself in law when reveling its decision.

12. The Appellant has urged this court to interfere with the Lower Court's discretion when it declined to set aside the interlocutory judgement. It relies on Law Society of Kenya versus Attorney General & 3 Others 2016 **eKLR** where the court held that, the Insurance Act only limits how much an insurer should pay by apportioning a maximum of Kshs. 3 million to be paid by the insurer. It also cites the decision in **Africa Merchant Assurance Co. Limited versus William Muriithi Kamaru 2016 eKLR**, where the court also held that the insurer cannot pay any amount above 3 million and a decree holder could not recover more than the Kshs. 3 million limit.

13. The Appellant submits that the authorities it has cited shows that it had a good defence which raised a triable issue and should have been given a chance to defend the suit.

14. The Respondent has opposed this appeal and his position is that a court has unlimited discretion to set aside or vary judgement entered in default upon such terms as are found just. He submits that the right of appeal and stay of execution must be balanced against his rights to enjoy fruits of a judgement.

15. The Respondent cites the **APA Insurance Co. Limited versus Esther Kavindu Mwongo & Another (Supra)** where the High Court held that Judicial Officers had unfettered discretion to make awards over and above the limit of Kshs. 3 million. He further contends that assessment of damages is a matter of judicial discretion of a trial court and cites the decision in ***Peter K. Kariuki Versus Attorney General 2014 to*** buttress his contention.

16. He points out that this appeal is incompetent by contravening the ***Rules of Procedure Under Order 42 Rule 2 of the Civil Procedure Rules*** and avers that the ruling and order appealed from, are not certified. He relies on the case of ***Salama Beach Hotel Limited Versus Mario Rossi 2015 eKLR*** where the court dismissed an appeal because the order appealed from was missing from the record of appeal.

17. This court has considered this appeal, the submissions made and the authorities cited. I have also considered the response made by the Respondent and the authorities relied upon. The main issue in this appeal is one which is whether the Learned trial magistrate exercised his discretion well when it declined to set aside the interlocutory judgement.

18. It is uncontested fact that the Appellant entered appearance on 12th November, 2019 presumably after being served with summons to enter appearance and the declaratory suit by the Respondent's Counsel. The provisions of ***Order 7 Rule 1 of Civil Procedure Rule***, provide as follows: -

> ***''Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.''***

As observed above, the Appellant entered appearance on 12th November, 2019 and so going by the above cited Rules of Procedure, the Appellant had up to 27th, November, 2019 to file its defence if it desired to defend the suit. The record of proceedings shows that the Appellant failed to enter defence giving the Respondent liberty to apply for interlocutory judgement which he did vide a request for judgement in default of defence dated 3rd December, 2019. The trial court on 9th December, 2019, entered interlocutory judgement which actually should have been described as judgement in default of defence because the judgement was based on a liquidated demand. The judgement entered nonetheless was regular and it was in that context that the Appellant moved the trial court to set it aside.

19. It is not disputed that the provisions of **Order 10 Rule 11 of the Civil Procedure Rules** gives the trial court a discretion to set aside interlocutory judgement/ judgement in default of appearance or defence.

The provision states: -

> ***''Where judgement 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.''***

20. The exercise of the discretion depends on the circumstances of each case but the guiding factor is whether there are good reasons to explain the failure to enter appearance/defence on time or at all. Secondly, other significant factor include such factors as whether the Applicant has a reasonable defence disclosing a triable issue.

21. An Appellate court would ordinarily not interfere with exercise of discretion by a trial court, unless it is shown that, the trial court misdirected itself, taking into account irrelevant factors and failed to take into account the relevant ones. In the case of ***Muroki Estates Limited versus Mengo Farm Limited 2020 ,eKLR*** the court of Appeal in dealing with the discretion to set aside interlocutory judgement made the following observations;

> ***''…….it is well settled that, this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its discretion is clearly wrong, because it has misdirected itself or because it has not acted on matters on which it should have not have taken into consideration and in doing so arrived at wrong conclusion.***
>
> ***For myself, I like to put it in the words that 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 his 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 that as a result has been injustice''***

22. This court has considered the reasons given by the Appellant at the trial court for setting aside the interlocutory judgement and they were basically two which are; -

> ***(i) That an unnamed clerk in the Appellant's advocates firm failed to file the defence on time.***
>
> ***(ii) That the Appellant had a good defence.***

23. The first ground in my view, was lethargic, and a bit pedestrian because the Applicant was required to demonstrate good faith by not only giving the name of the so called ''Senior Clerk'' but getting the clerk to swear an affidavit to explain the circumstances that led to her/his failure to carry out the instructions of his/her employer. The trial court in my view, cannot be faulted for finding no merit in that cited ground or put another way, the trial court cannot be faulted for failing to exercise its discretion to set aside the interlocutory judgement based on that ground. The Appellant through its advocates probably just made a mistake and instead of owning up to the mistake by being honest enough and state that that there was some inadvertence on their part, chose to blame a shadowy

''Senior Clerk'' which I find a bit lame on the part of the Appellant's Counsel.

24. This court has looked at the second guiding factor in setting aside interlocutory judgement or any Exparte order for that matter. That is whether the Applicant has demonstrated that he/she/ it has an arguable defence which disclosed a triable. This is significant factor because of the need to ensure that ends of justice are met.

25. The Appellant's draft defence, was mainly hinged on the Provisions of ***Section 5 (b) (iv) of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405***, which provides that, an insurer in Public Service Vehicles in respect to third parties is only liable to pay a maximum of Kshs. 3 million per claim. The Appellant stated that it had paid Kshs. 3 million and that any amount over and above the amount paid was to be paid by the insured as it was not liable to any amount in excess of Kshs. 3 million.

26. The above provision appears to be the basis in the cited decision in ***Law Society of Kenya versus Attorney General and 3 Others***

(Supra). However, I am alive to the other school of thought enunciated in ***APA Insurance Co. Limited versus Esther Kavindu Mwongo and Another (Supra)*** cited by the Respondent, where the net effect is that the Judicial Officers have unfettered discretion to make awards over and above the limit of Kshs. 3 million.

27. The Trial Court, heavily relied on the above decision in making a finding that the defence filed ‘‘had no merit’’ and therefore found no basis in exercising its discretion to set aside the interlocutory judgement since in its view, there was no point in setting it aside when the draft defence filed was weak.

28. This court looked at the 2 decisions of ***Law Society of Kenya versus Attorney General & 3 Others (Supra) and African Merchant Assurance Co. Limited versus William Muriithi Kimaru 2016 eKLR*** and finds that there was a sense in which the Trial Court should have had a broader outlook of the two school of thoughts emerging from the said decisions and give the benefit of doubt to the Appellant’s draft defence. This court, does not wish to take any position on the two school of thoughts at this stage, because for the reasons that will became more clear at the end of this judgements suffices to state that locking a party out of the seat of judgement, suffices to state that locking a party out of the seat of judgement, should be done sparingly and only in outright cases where a party has a hopeless defence that discloses no triable issue.

This position is reinforced by the Constitutional Provisions under ***Article 48 and 50 (1)*** which provides rights to access justice and a right to be heard. ***Article 48*** provides as follows:

> ***‘‘The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.’’***

Furthermore, under ***Article 50(1)*** the Constitution provides: _

> ***‘‘*(1)** *Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.’’***

29. In my considered view, the Appellant denied liability to any amount that was in excess of what the Statute provided. The Respondent answered that the Trial Court’s discretion to increase the amount beyond the Kshs. 3 million limit. That contestation in my view, revealed that there was a triable issue which entitled the Appellant to be heard before being condemned. It is only to that extent, that this court finds that the Trial Court fell into error by finding that the draft defence failed to disclose a triable issue.

In the premises, this court finds merit in this appeal. The same is allowed. The trial Court ruling dated 27th March, 2020 and delivered on 12th May, 2020 is set aside and in its place an order is hereby issued setting aside the interlocutory judgement entered on 9th December, 2018. The Appellant is granted 14 days from the date of this ruling to file its defence. In view of the fact that the Appellant was to blame for the misfortune that befell it, I shall make no order as to costs in this appeal.

DATED, SIGNED AND DELIVERED AT KITUI THIS 26TH DAY OF MAY, 2021.

HON. JUSTICE R. K. LIMO

JUDGE