REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL APPEAL NO. E4 OF 2020

(to apply to series Files HCCA NO. E3, E5, E6 and E7 OF 2020)

OBALLA ACHIENG BRIDGET.....APPELLANT

VERSUS

VICTOR OMOLLO ONDEGO.....RESPONDENT

(Being an appeal from the ruling and order of Hon. J.P Nandi Principal Magistrate delivered on 30th September, 2020 in Bondo PM's Court Civil Suit No.113 of 2017)

JUDGMENT

Introduction

1. The appellant, **OBALLA ACHIENG BRIDGET** the defendant in the subordinate court and having been dissatisfied with the decision of the Honourable trial Magistrate, J.P. Nandi lodged this appeal on 14.10.2020 seeking inter alia that the appeal herein be allowed with costs, the ex-parte proceedings of 14.09.2020 be set aside as well as the whole judgement passed in Bondo P.M.C.C. No 113 of 2017 on the 30.09.2020, and that this court be pleased to order the suit to start de novo. The appellant relied on the following grounds:

a) The Honourable Trial Magistrate erred in law by dismissing the Appellant's application without considering the rules of natural justice and the harm that would befall the appellant.

b) The Honourable Trial Magistrate erred in law and fact by finding that the absence of defendant's counsel in court was inadequately explained.

c) The Honourable Trial Magistrate erred in law and fact in denying the appellant his right to a fair hearing.

d) The Honourable Trial Magistrate erred in law and fact when he determined judgement on liability at 100% against the appellant despite interlocutory judgement having been entered against the third party.

e) The Honourable Trial Magistrate erred in law and fact when he pronounced himself that the defendant's application lacked merit as it is meant to delay conclusion of the matter.

f) The Honourable Trial Magistrate erred in law and fact by finding that the detailed invoice from Avenue Healthcare Hospital annexed by the defendant's counsel cannot be relied upon as it does not show the time which the defendant's counsel was in the hospital.

g) The Honourable Trial Magistrate erred in law and in fact by finding that the defendant's counsel lacked interest in the matter as she was absent in court on 14/9/2020 despite the defendant's counsel having genuinely explained the reason for her absence on the said date.

h) The Honourable Trial Magistrate erred in law and in fact when he directed that all matters in the series be heard on 14/9/2020 despite having a test suit on liability Bondo PMCC No. 116 of 2017 wherein there was an order staying the rest of the suits.

2. The parties herein agreed by consent to have this appeal as the lead file in the series of appeals including **SIAYA HCCA Nos. E003, E004, E005, E006 & E007 of 2020** as the issues raised by the appellants and to be determined are exactly the same.

3. A brief history of the matter is that the respondent sued the appellant vide plaint dated 20/11/2017 seeking general damages and costs of

the suit as a result of an accident that occurred on the 4/11/2017. In a rejoinder, the appellant filed his defence dated 10/1/2018 denying all allegations contained in the plaint. After a number of false starts, the matter was finally set down for hearing on the 14/9/2020 when the appellant's counsel was allegedly indisposed. However the trial magistrate declined an adjournment and the respondent proceeded to have their case heard and closed. The trial magistrate then ordered the appellant's case similarly closed and set a judgement date for 30/9/2020.

4. Prior to the judgement being read, the appellant's advocate filed an application dated 17/9/2020 under certificate of urgency seeking to have the ex-parte proceedings of the 14/9/2020 set aside as well as stay of delivery of the judgement set for 30/9/2020 so as to have the suit fully ventilated on the grounds that on the date set for hearing, the appellant's advocate was indisposed in hospital. The application was dismissed by the trial court and the court proceeded to give its judgement on the suit finding the respondent liable at 100% against the appellant as well as general damages of Kshs. 200,000.

5. That is the genesis of this appeal.

6. The appeal was canvassed by way of written submissions.

Appellant's Submissions

7. It was submitted that the trial magistrate vide his ruling denied the appellant a chance to participate in the hearing and put up his defense despite prior communication by the appellant's advocate to the respondent's advocate and as such violated the appellant's right to a fair hearing. In this regard, the appellant relied on the cases of **Savannah Development Company Ltd v Mercantile Company Ltd Ca No. 120 of 1992** and **Peter M. Kariuki v Attorney General [2014] eKLR** cases which espoused a court's discretion to consider a party's conduct in a case whilst considering whether to exercise its discretion to grant an adjournment.

8. It was further submitted that the aforementioned actions by the trial magistrate occasioned a miscarriage of justice on their behalf as they were denied an opportunity to call their witnesses and buttress their averments that they were not to blame for the accident. The appellant relied on the case of **Job Ohanda v Stage Coach International Services Ltd & Another [2002] eKLR** where the court held that an appellate court is entitled to interfere with a trial court's exercise of discretion where a miscarriage of justice may be occasioned on a party who is denied an adjournment.

9. It was submitted that the mistake of counsel ought not to be visited upon the client. Reliance was placed on the case of **Harrison Wanjohi Wambugu v Felista Wairimu Chege & Another [2013] eKLR** where the court held that the door of justice is not closed because a mistake is committed by a lawyer and that the court ought to do whatever is necessary to rectify it.

Respondent's Submissions

10. It was submitted that the appellant was given a chance to present their case on the 149/2020 which chance they squandered and further that the appellant failed to give evidence to show that the appellant's made any efforts to secure an adjournment on the 14/9/2020 either through sending a clerk to hold brief or calling the respondent to explain her circumstance and as such the trial court was right in proceeding with the hearing.

11. It was further submitted that it was too late to raise the issue of third party liability the same having failed when the suit on liability was dismissed.

Analysis & Determination

12. This being a first appeal, I am bound by certain principles. Firstly, as a first appellate court, I have a duty to examine matters of both law and facts and subject the whole of the evidence to afresh and exhaustive scrutiny, drawing a conclusion from that analysis bearing in mind that this court did not have an opportunity to hear the witnesses first hand and test the veracity of their evidence and demeanor. This is captured by section 78 of the Civil Procedure Act, Cap 21, Laws of Kenya, which espouses the role of a first appellate court as to *'…… re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.'* The principles were buttressed by the Court of Appeal in the case of **Peter M. Kariuki vs. Attorney-General [2014] eKLR** where court stated that;

> ***"We have also, as we are duty bound to do as a first appellate court, reconsider the evidence adduced before the trial court and revaluated it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See Ngui v Republic, (1984) KLR 729 and Susan Munyi v Keshar Shiani, Civil Appeal No. 38 of 2002 (unreported)."***

13. The issue for determination herein is whether the trial court erred in dismissing the appellant's motion to set aside the ex parte proceedings and have the matter heard de novo as determination of this will have the effect of either upholding or setting aside the judgement passed by the trial court on the 30/9/2020 without delving into its merits.

14. The hearing of the matter before the trial court proceeded ex-parte as counsel for the Appellant did not attend court during the hearing though she was well aware of the hearing date as the same had been taken by consent of both parties. The reason given for non-attendance was that the appellant was ill and attended hospital on the material day. She deposed that she informed the respondent's counsel of her unavailability and further made efforts to have the matter adjourned through the Executive Officer who informed her that the matters would commence at 2.00pm and as such she could attend to hospital in the morning and come back at 2.00pm for the hearing. Counsel for the Appellant has admitted her mistake and has urged the court not to visit his mistake upon an innocent client. She has cited several authorities to support this assertion.

15. I am alive to the fact that setting aside of an ex parte judgment is the discretion of the court and in so doing, such discretion is unfettered but the same should be exercised judiciously and not capriciously – see the case of **Kenya Pipeline Company Limited v Mafuta Products Limited (2014) eKLR** and that of **Shah v Mbugo (1967) E.A. 166** where the court held that:

> ***"This discretion to set aside as exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it's not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice. "29." However, the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique facts and circumstances. Among the factors to be considered is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit."***

16. From that background, it is not in dispute that the matter before the lower court proceeded ex-parte as the Appellant and his counsel did not attend court. The reason given for non-attendance was that the appellant's counsel was ill and attended hospital and was to attend court in the afternoon as the Executive Officer advised her the hearing would commence then. She further stated that there were no other advocates in court to hold her brief.

17. I have similarly noted the respondent's submissions in that regard to the effect that Counsel for the Appellant was well aware of the hearing date and ought to have given notice of her non-attendance earlier in advance and further that the evidence adduced by the appellant from the hospital did not show the time the appellant's counsel was attended to. The learned trial magistrate in his ruling agreed with the Respondent by stating that the invoice from Avenue Healthcare did not show the time the appellant's counsel was attended to and further that she failed to annex any treatment notes evidencing that the same was an afterthought.

18. In my considered view, the excuse tendered by counsel for the Appellant for her failure and that of Appellant to attend court is plausible and ought to have been a sufficient reason to persuade the trial magistrate to set aside the ex-parte proceedings and not drive the Appellant from the seat of justice without being given an opportunity to be heard. The justice of this case mandates that the mistake of the counsel should not be visited on the Appellant. This is in recognition of the fact that blunders will continue to be made from time to time and it does not follow that because a mistake has been made then a party should suffer the penalty of not having his case heard on merits. (See **Phillip Kiptoo Chemwolo & Mumias Sugar Co. Ltd v Augustine Kubende [1986] eKLR**).

19. I do note that this is a matter that has been in the corridors of justice for almost 4 years at this point. The respondent has similarly submitted that the appellant's aim is to prolong the case and cause delay in its determination. Article 159(2) (b) & (d) enjoins courts to ensure justice is not delayed and is administered without undue regard to procedural technicalities. **Sections 1A** and **1B** of the Civil Procedure Act enact the overriding objective which require the courts to facilitate the just, efficient, expeditious, proportionate and affordable resolution of disputes. Order 17 rule 1 of the Civil Procedure Rules requires, as a general rule, that hearing of suits once commenced continue from day to day. It stipulates:

> ***"(1) Once the suit is set down for hearing, it shall not be adjourned unless a party applying for adjournment satisfies the court that it is just to grant the adjournment.***
>
> ***(2) When the court grants an adjournment it shall give a date for further hearing or directions."***

20. It is therefore possible for the court to demand expedition in the disposal of cases and do justice at the same time; balancing the scales of justice. Balancing between the need for efficiency and expediency on the one hand and the need to accord all parties before it, a fair hearing, in my humble view, the trial court erred in failing to balance the scales of justice on the side of the appellant bearing in mind the reasons proffered for the failure of the appellant's advocate to attend court, which reasons were not frivolous.

21. The right to be heard is no longer only a **rule** of natural justice but a constitutional imperative in Kenya under Article 50(1) of the Constitution. The due process of the law as a hallmark of our legal system requires the courts to ensure that parties have their day in court. Article 48 of the Constitution too, guarantees access to justice for all. There was no inordinate delay in seeking to set aside exparte proceedings and had that been factored in, these proceedings in the series of cases similar to this one could not have been pending to date.

22. In his judgement, the learned trial magistrate stated that there exists no good defence on record as the appellant had failed to call any evidence to substantiate his averments as contained in the statement of defence. However, this failure to call evidence was because the appellant's application to set aside the ex-parte proceedings of 14/9/2020 was dismissed. It therefore goes without saying that there could have been no evidence tendered where the party was not in court and his attempt to be heard on merit was not considered in the first instance.

23. I have perused the appellant's statement of defence filed on the 17th January 2018 and note that the appellant raises issues of negligence against the respondent, issues if determined will go towards determination of liability for the material accident. In **Richard Nchapi Leiyagu v IEBC & 2 others- Civil Appeal No. 18 of 2013** the Court of Appeal expressed itself as follows:

> ***"The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."***

24. In my humble view, the learned trial magistrate ought to have set aside the ex-parte proceedings of 14/9/2020 and accord the appellant an opportunity to be heard on the same and for the suit to be determined on merit.

25. Accordingly, it is my finding that the appellant was denied the right to a fair hearing by the trial court. For that reason, the subsequent

judgement delivered on 30/9/2020 must be vacated and set aside. I proceed and set aside the said judgment rendered on 30/9/2020 and all consequential orders.

26. Having set aside the judgment of 30/9/2020. The appeal herein is allowed to the extent that the trial court files in all the matters related to this appeal shall be returned to the trial court for opening of and hearing of the appellant's defence cases in the series. This Judgment applies mutatis mutandis to the series files including **SIAYA HCCA Nos. E3 of 2020, E5 of 2020, E6 of 2020 & E7 of 2020.**

27. As the court has not delved into the merits of the suit before the lower court, each party shall bear their own costs of this appeal.

28. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 28TH DAY OF JULY, 2021 VIRTUALLY

R.E.ABURILI

JUDGE

In the presence of:

Ms Kabuteh advocate for the appellant virtually via Microsoft teams

Mr Ngala Advocate for the Respondent virtually via Microsoft teams