



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: R. MWONGO, J)

CIVIL APPEAL NO. 30 OF 2020

MULTIPLE HAULIERS.....APPELLANT

VERSUS

ENOCK BILINDI MUSUNDI.....1ST RESPONDENT

ROBERT KIMANI.....2ND RESPONDENT

EAST AFRICAN BREWERIES LTD.....3RD RESPONDENT

(Appeal from the decision rendered on 6/5/2020 in original Civil Suit 258 of 2012

SRM Naivasha presided over by Hon. L. Sarapai SRM)

JUDGMENT

1. The appellant applied in the lower court on 7th February 2020 for orders seeking to stay the execution of judgment in SPM 258 of 2012 pending the hearing and determination of the application. It also prayed for the setting aside of the ex parte judgment, orders arising therefrom, and the stay of the ex-parte proceedings of 2nd October 2019. In addition, the application also sought an order that the hearing of the matter commence de novo. The application was declined in the lower court.

2. This appeal seeks to overturn the lower court's ruling. The application is premised on the grounds that: the Appellant had just learnt that a judgement had been issued against it for KShs1,300,000/- and no stay of executions were in place, That the Appellant was interested in defending the suit and non-attendance on 2nd October 2019 was inadvertent as its advocate failed to diarize the same; that the Appellant was desirous of defending the suit as its advocates mistake was excusable not being intentional, and should not be visited on the applicant.

3. The appellant further argued that the 1st Respondent would not suffer any amount of prejudice that cannot be mitigated by way of reasonable costs; that it had filed the application timeously, whereas the Appellant would be bound to suffer irreparable prejudice, loss and damage because it would be condemned unheard despite having filed its evidence and a witness to testify in its support.

4. The instant appeal is premised on the following grounds:

1. That the learned trial magistrate erred in law and fact and misdirected herself in failing to grant the appellant an opportunity to defend itself.

2. That the learned trial magistrate failed to appreciate that a defence and witness statement raising triable issues had been filed by the appellant.

3. That the learned trial magistrate erred in law and fact in misdirected herself in failing to appreciate the principle of just and fair hearing.

4. That the learned trial magistrate erred in law and fact in disregarding the reasons for failure by the appellant in attending the hearing.

5. That the learned trial magistrate erred in law and fact in condemning the appellant unheard.

5. The appellant submitted that it should not suffer for the mistakes/omission of their advocates. On this, it cited the case of **Edney Adaka Ismail v Equity Bank Limited [2014] eKLR**, cited Odunga J. in **Lucy Bosire v Kehancha Div. Land Dispute Tribunal & 2 Others**.

6. Further the appellant argues that it is just and proper to set aside the ex-parte proceedings and the ex-parte judgment and relies on the cases of: **Manina Kariuki [1984] KLR 40; Patel v Cargo Handling Services; Sebei District Administration Vs Asyali & Others 1968 EA 300; Firenze investment Ltd v Kenya Way limited no.524 of 1999; Fursys(K) Ltd v Systems Integrated Ltd t/a Symphony (2005); Civil Case No. 22 of 2010 Winnie Wambui Kibinge & 2 others v Match Electricals Limited**

7. Opposing the appeal, the 1st Respondent in his written submissions states that the reasons for non-attendance by the Appellant are not sufficient for setting aside the judgment. He pointed out that on the date fixed and notified for hearing, the Appellant failed to attend without explanation, which reflects indolence. He submitted that the suit – in which he lost his wife in an accident – was over 10 years old and granting the orders for the setting aside of the proceedings and judgment; or granting an order for the matter to be heard *de novo* would be prejudicial as he is suing on behalf of the deceased's estate in the trial court.

8. Finally, he argued that granting the orders and allowing the matter to be heard afresh via this appeal would be contrary to Article 159 of the Constitution 2010 which advocates for expeditious delivery of matters. He contended that it was for Advocates to take up professional indemnity cover to address issues which counsel occasioned and that there will be no irreparable prejudice to him.

Issues for determination.

1. What harm shall the Appellant suffer if the Appeal is dismissed?

2. What harm shall the Respondent suffer if the Appeal is allowed?

Rules of Applicability

9. The application in the lower court was made under Section 3A on inherent powers of the court to do justice and prevent abuse of court process, Section 63 to make such interlocutory orders as it deems.

10. More substantively for or purposes of determination of the application, the orders invoked were **Order 10 R 11 CPR** which provides

“11. Setting aside judgment [Order 10, rule 11.] Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

and **Order 22 rule 22** which provides:

“22.(1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.

(2) Where the property or person of the judgment-debtor has been seized under an execution, the court which issued the execution may order the restitution of such property or the discharge of such person pending the results of the application.

(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.

11. In determining this type of application, the court enjoys discretion to grant stay of **execution of decree pending appeal**. In **JMM v PM [2018] e KLR** it was stated:

“As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

12. The Appellant has cited the authority of **Edney Adaka Ismail v Equity Bank Limited [2014] eKLR**, citing Odunga J. in **Lucy Bosire v Kehancha Div. Land Dispute tribunal & 2 others** where it was stated by the learned judge stated:

“It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits. See Philip Keipto Chemwolo & Another -vs- Augustine Kubende [1986] KLR 492; [1982-88] 1 KAR 1036 at 1042; [1986-1989] EA 74.”

13. In the Edney Adaka Ismail case however, the learned judge remarked:

“However, it is not in every case that a mistake committed by an Advocate would be a ground for setting aside orders of the Court....”

The Judge went on to quote Kimaru J. in **Savings and Loans Limited -vs- Susan Wanjiru Muritu Nairobi (Milimani) HCCS No.397 of 2002** where he expressed himself as follows:-

“Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a Case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her Case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigant on account of such Advocate’s failure to attend Court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present Case, it is apparent that if the Defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff’s determination to execute the decree issued in its favour, is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the Court, it would be a travesty of justice for the Court to exercise its discretion in favour of such a litigant. (emphasis added)

14. The learned Judge in **Edney Adaka case** (supra) went on to say:

“... I fully agree with the above holding, (of Kimaru J. in the Savings and Loans case). It is not enough for a party to simply blame the Advocate but must show tangible steps taken by him in following up his matter” (emphasis added)

15. What are the tangible steps shown to have been taken by the Appellant in following up its matter? None have been shown. What are the tangible steps the advocate took on behalf of the client applicant? The trial magistrate summed it up well when she said:”

“...the court finds this case represents many others in the Kenyan justice system where lack of diligence by a counsel, a professional duty, has been elevated unduly in my view to a sacred cow by which expeditious delivery of justice is denied with concluded cases coming (back) to life for another very many years”

16. The trial court must have had in mind the facts presented before her in the lower court file that: the suit had been filed in April, 2012; that there had been no movement on the matter for seven years; that the defendants never entered appearance; that a hearing date had been served on them and receipt acknowledged on 26th June, 2019; that the hearing took place *ex parte* on 2/10/2019; and that judgment was delivered on 19/12/2019.

17. The power to set aside *ex parte* orders are discretionary and the Court must use its discretion to come to a conclusion while also ensuring that justice has been done. This was stated in **Patel v E.A Cargo Handling Services Ltd (1974) EA 75**, , also relied on by the appellant, where the court held that:

“There are no limits or restrictions on the Judge’s discretion to set aside or vary an *ex-parte* judgment except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the Court is to do Justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the Rules.”

18. The Court must also be guided by whether there is sufficient cause for non-attendance and whether an injustice will be occasioned if the Application is allowed. The Applicant argued that the inadvertent mistake was caused by his Advocate who failed to diarize the hearing dates and therefore they were unable to attend Court. On the other hand, the Respondents have averred that the Applicant’s failure to attend Court without sufficient explanation does not excuse them.

19. In **Peter Mwangi Macharia v Alphaxard Warotho Komu & 2 Others [2019] eKLR**, the Environment and Land Court in allowing an appeal due to failure by an advocate to diarize stated:

“...It is evident that Advocates are mostly guided by their diaries and having numerous files to deal with, one may not know exactly what date each matter has been placed unless they check their diaries. In failing to diarize the matter, it might therefore have escaped the mind of the Counsel. This Court therefore finds that such a mistake may happen to anyone and therefore excusable.”

20. Nevertheless, the Court of Appeal in **Mbogo v Shah [1968] EA 93** long held that:

“...the discretion to set aside an *ex parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice”.

21. Further, the approach and guidance given by the Court of Appeal is clear from the case of **Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR** in dismissing the appeal on similar grounds as the present appeal stated:

“...From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that

counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side. (See. Halsbury's Laws of England, 4th Edn, Vol 44 at p 100-101) and also Re Jones [1870], 6 Ch. App 497 in which Lord Hatherley communicated the court's expectations this way:

'...I think it is the duty of the court to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards all those against whom they are concerned...'

Under this duty, counsel is unequivocally obliged to exercise candor and not aid a litigant in subversion of justice. Even though the determination of whether or not counsel has failed in this obligation is dependent on the circumstances of a case, as a custodian of justice, the court must always stay alive to the interests of both parties. This is of paramount importance. Thus, there is a corollary to the hallowed maxim that mistakes of counsel should not be visited on a client...Hence, the mistakes of Mr. Mouko's clerk became the mistakes of Mr. Mouko. This takes us back to the question, was the same excusable enough to warrant court's favour?

In determining whether to exercise the discretion in a party's favour, the court pays regard to the damage sought to be forestalled vis a vis the prejudice to be visited on the opposing party. In view of the age of this case and the timelines within which the appellant has acted, we take the view that the appellant has been less than candid with the court and that the appellant's true intentions are the derailment of the suit.....The respondents were basically being held at ransom by the appellant's laxity in having the matter laid to rest. .. As stated by this Court in the case of Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR

"It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."

22. As stated by the trial magistrate, this matter has been in court for over ten years and granting the appeal would see the balance of interest of the parties to be skewed as against the Respondent herein.
23. Ultimately, and taking the foregoing matters into account, I am not persuaded that the appellant has given sufficient reasons for this court to interfere with the trial court's decision without substantially prejudicing the respondent.
24. According the appeal fails and is hereby dismissed with costs.

Administrative directions

25. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.
26. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.
27. Orders accordingly.

DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 24TH DAY OF SEPTEMBER, 2021.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Bwire for MNM Advocates for the Appellants
2. Ochanda for the Respondent
3. Court Assistant - Quinter Ogutu