REPUBLIC OF KENYA

IN THE HIGH COUT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 200 OF 2018

KENINDIA ASSURANCE COMPANY LTD…….APPELLANT

VERSUS

MOHAMED HASSAN KINI …….RESPONDENT

J U D G M E N T

1. On the 8th may 2018 the respondent filed a declaratory suit before the lower court seeking the enforcement of a decree passed in Mombasa SPMCC 2296 of 2015. In that primary suit a judgment was entered for the respondent in the sum of Kshs. 8,253,049 plus costs and interests but the respondent in the declaratory suit, in recognition of hr capping of the liability of an insurer under the Act, only sought to recover Kshs. 3,873,376, being the Kshs. 3,000,000, as limited by the Act, plus interests and cost.

2. When issued, the summons to enter appearance was served upon the appellant on the 10th may 2018 and duly acknowledged as received by the legal officer. Despite that otherwise due service, neither was an appearance entered nor defence was filed and the plaintiff sought and obtained a judgment in default pursuant to a request dated and filed on the 22nd May 2018. It is of note that even though the plaint prayed for a declaration and not a liquidated claim the respondent's request for judgment, disclosed to be founded on Order 10 Rule 4, was '***for a sum of Kshs 3,873, 367, interests and costs.***

3. On 11th June 2018, some 21 days after the request and entry of judgment, the appellant filed a notice of appointment of advocate and an application under a certificate of urgency and sought, in the main, the setting aside of the default judgment. The reason given for the default was that even though the summons was duly served, the same were assigned to a legal officer to deal but the said legal officer absconded and left employment abruptly with consequence that no steps were taken to appoint an external advocate to handle the matter till notice of entry of judgment was served. It was the appellants position that the judgment sought and obtained was so sought and obtained irregularly because the claim was never liquidated and that there was a valid defence to the claim in that there was no obligation to indemnify the defendants in the primary suit because the appellant had never issued a policy to underpin such right to indemnity. There was then exhibited a lengthy draft statement of defence in which the policy was denied with an additional pleading that if any policy was issued then it had its terms of indemnity which bound the parties and the respondent was not entitled to an indemnity outside such terms.

4. The respondent opposed the application on the foot of an own Replying Affidavit in which it was asserted that the appellant had come to court with unclean hands in that; it was denying knowledge of the primary suit while it was fully aware having been served with a statutory notice, appointed an advocate to defend the primary suit, sought and obtained stay of execution on terms but then failed to fulfil the terms by alleging that it liability was statutorily and contractually limited to Kshs. 3,000,000/. It was further contended that the Appellant did issue the policy, was aware of the suit, did not thus have a valid defence but was merely on a course to obstruct justice hence deserving no favours from court.

5. After hearing parties on the application by way of written submissions, and in a reserved ruling, the trial court dismissed the application for setting aside while underscoring the fact that the appellant had not approached the court with clean hands. The court said in the ruling: -

> **"Ï have considered the application, the supporting Affidavit, the Replying Affidavit as well as the submissions that have been filed by both sides, I am satisfied that the defendant were the owners of the motor vehicle that was involved in an accident that led to the filing of the primary suit.**
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> **I am also satisfied that they were served with the statutory notice before the primary suit was filed yet they did not take the steps required under section 10(4) of The Insurance, (motor vehicle third Party Risks) Act, to represent(sic) their liability. The defendant is consequently boned (sic) to satisfy the judgment in the primary suit.**
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> **In conclusion therefore it is my finding that through the judgment herein is regular and the court has the directive(sic) to set**

aside the judgment, the history of the matter is such that the defendant is not forthright in his application and has not come to court with clean hands since it has always known of the existence of the primary suit yet it is deliberately met to delay even the most of the obvious facts.

It is also my findings that the proposed defence does not raise triable issues."

6. It is that ruling and the decision in it which has ignited this appeal in which some twelve grounds were set out and preferred. Even if so truncated, the appeal revolves and rotates around the question whether the trial court did take into consideration the relevant factors for consideration in an application to set aside.

7. The appeal was canvassed by way of written submissions. The appellant's submissions were filed on 21.01.2020 while those by the respondent were filed on 16.01.2020.

8. In those submissions the historical facts are not contested just like the principles a court is expected to consider in an application for setting aside a default judgment. The points of disagreement and contention are whether the judgment was regular and if there was a single triable issue raised in the draft defence. I will thus seek to determine the appeal on the basis of those two questions.

9. This court appreciates that the decision now challenged was one based upon exercise of judicial discretion and on appeal, this court can only interfere with the trial court's decision if it be shown and demonstrated that the trial court failed to take into account a matter it was bound to take into account or that it took into account a matter it was not expected to take into account. Put differently, the permission and liberty to interfere with a decision made pursuant to a judicial discretion is only available where the trial court failed to consider relevant matter or opted to take into account an irrelevant matter. In ***Mbogo & Another versus Shah [1968] E.A. 93,*** at page 96 the law was laid to be that that: -

"An appellate Court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate Court 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 and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice"

10. In this matter, it is indubitable and beyond debate that, as pleaded, the respondents claim was for a single prayer for a declaration rather than a liquidated claim as the request for judgment would turn out to seek. I understand the law to be that a default judgment is only due for request where the plaint makes a liquidated claim alone, a pecuniary claim or a liquidated with other claims. Where, however no liquidated claim is made, there is no liberty to request for an interlocutory judgment rather the plaintiff is expected to set down the matter for hearing.

11. In this matter, the request for judgment was premised upon the provision of Order 10 Rule 4 to suggest that the claim was liquidated when it was not. That was a matter of law the trial court was obligated to addressed its mind to but it did not. It did not even though the appellant had specifically and repeatedly complained in the application and the Affidavit in support that the judgment was irregular because there was no liquidated claim sought. Where there is no liquidated claim or demand, as was in this case, the plaintiff is bound by law under Order 10 Rule 9 to set down the matter for hearing. I am in no doubt that the request for judgment was misconceived and unmerited and ought not to have been entered as was done. It was to that extent irregular and for an irregularly obtained default judgment the court has no discretion to exercise. It is bound to set aside and do so as of right. To the extent that the trial court opted to gloss over that issue, a relevant issue before it, there was an obvious error in the exercise of judicial discretion which entitles this court, as a first appellate court to set aside that decision. I do set aside the trial court's decision and in its place I substitute an order setting aside the default judgment for having been irregularly sought and obtained.

12. I would have stopped here but, there was also the duty upon the trial court to give regard and consideration, having found, as it did, that the judgment was regular, whether the defense raised any triable issue. In answering to that obligation the trial court did so in a liner stating *that the proposed defense does not raise any issues.* In my observation and reading of the ruling that liner was influenced more by the finding that the defendant had not acted in a forthright manner. Otherwise, to be judicious, the trial court was mandated to consider the defenses raised and give reasons why none disclosed a triable issue. No reasons, in fact not a single, were advanced in coming to that finding and I do find that it fails the test of a proper exercise of judicial discretion.

13. Being a first appellate court, I have taken time to read and understand the draft defense filed and I do consider that the draft defense raised at least two issues which I consider merited the courts consideration. The issues were that the liability of the appellant was limited by statute and a contract in the policy and that there was need to interrogate if the requirements of sections 5 and 10 of cap 405 had been complied with. I do consider such to have been sufficient, even if the judgment had been regularly obtained, to justify setting aside.

14. In effect, it is my finding that the default judgment was due for setting aside in the interests of justice and the moment the court's attention was drawn to the fact that it ought not to have been requested and entered. In fact, it falls in the category the court is entitled to move *suo motto.**[1]*** It must be remembered always that the purpose and object of the power donated to a trial court to set aside an order made on account of default is to ensure and guarantee the right to be heard. As said by the court of appeal in ***Chemwolo vs Kubende (1982-88) KAR 1036***, unless 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 its coercive power where that has only been obtained by failure to follow any of the rules of procedure. That power donated and left to the realm of judicial discretion is so wide, unfettered and designed to achieve the end of justice with a caution however that it ought not to be availed to a party who has acted in a manner not in consonance with the administration of justice like displaying unjustifiable delay of just recalcitrance and obstruction of the course of justice. It is a power that no judicial officer should feel limited in its mandate at all. In ***Patel vs E.A. Cargo Handling Services Ltd (1974) EA 75,*** *it was held and reiterated 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."

15. In the matter at hand I get the impression that the trial court felt that merely because the appellant was aware of the existence of the primary suit and failed to pay, it was not forthright. That was not the only reason to deny the appellant his right to be heard on the merits.

16. The upshot of the foregoing reasons and determinations is that the appeal is allowed, decision of the trial court is set aside and in its place is substituted an order that the application dated 11.06.2018 is allowed in terms of prayer ***c & d.*** The defence in the lower court be filed within 14 days from today to enable the matter be heard on the merits.

17. On costs, the appeal having succeeded, the costs are awarded to the appellant.

Dated, **signed** and **delivered** at **Mombasa** this **19th** day of **June 2020**

P J O Otieno

Judge

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[1] James Kanyiita Nderitu vsmarios Philotas Ghika(2016)eklr, cited with approval in Kwanza Estates Ltd Vs Dubai Bank Kenya Ltd and others (2019)eklr