



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO.83 OF 2006

KYALO NGUNGA.....APPELLANT

-Versus-

KALSI TRANSPORTERS

& COMMISSION AGENTS.....1ST RESPONDENT

MALDA TRANSPORTERS CO. LIMITED.....2ND RESPONDENT

[Being an Appeal from the Ruling of the Chief Magistrate's Court at Machakos in CMCC No.648 of 2002 delivered by the Honourable Mrs. Hellen A. Omondi on 25th day of May, 2006]

BETWEEN

KYALO NGUNGA.....PLAINTIFF

VERSUS

KALSI TRANSPORTERS

& COMMISSION AGENTS.....1ST DEFENDANT

MALDA TRANSPORTERS CO. LIMITED.....2ND DEFENDANT

JUDGEMENT

1. By an amended plaint dated 6th September, 2002, the Appellant herein instituted a suit against the Respondents herein claiming General Damages, Special Damages of Kshs 1,600.00, Costs and interests.
2. The Appellant's suit as pleaded was premised on the fact that on or about the 26th March, 2001, the Appellant was lawfully travelling as a passenger in motor vehicle registration number KZQ 164E in the course of his employment when the said vehicle which was owned by the 1st Respondent herein and lawfully driven by the 1st Respondent's driver, employee and or agent in the course of his employment, was so negligently driven, managed and or controlled the said vehicle that it violently collided with motor vehicle KTS 518. Accordingly, the 1st Respondent was, according to the Appellant, vicariously liable for the acts and or commissions of its said driver, servant and or agent. The particulars of negligence, injuries and special damages were set out in the plaint.
3. On 26th February, 2003, leave was granted to the 1st Respondent to join the 2nd Respondent as a third party to the proceedings.
4. On 7th December, 2004, the suit was ex parte fixed for hearing by the appellant's representatives on 13th January, 2005 and the plaintiff was directed to serve the 1st Respondent/Defendant. When the matter came up for the said hearing on the said date, while the 1st Respondent was represented, there was no appearance either for the Appellant or the 2nd Respondent/third party and it was noted that there was no evidence that the 2nd Respondent/third party was served. The Court then, *suo moto*, proceeded to dismiss the suit with costs under the then

Order IXB rule 4 of the *Civil Procedure Rules* due to non-attendance by the Appellant.

5. Dissatisfied by the said decision, the Appellant vide an application dated 19th October, 2005, filed on 15th December, 2005, sought to have the said order dismissing the suit set aside, which application was opposed by the 1st Respondent. The application was based on the facts that the advocate for the Appellant inadvertently failed to diarise the said matter though service had been effected on the 1st Respondent. It was deposed that the Appellant had two matters involving the same parties, one of which was closed being Milimani CMCC No. 4086 of 2002 and that the hearing notice was placed in the said closed file and the anomaly was only discovered on 12th October, 2005 when the said advocate went to fix the matter from which this appeal arises for hearing. It was further contended that by the time of the said dismissal, third party directions had not been made hence the matter was prematurely dismissed. To the affidavit in support were exhibited copies of the inadvertently served notice as well as a copy of the letter from the 1st Respondent's advocates notifying the appellant's advocates of the anomalies and the fact that third party directions had not been disposed of. The 1st Respondent's advocates indicated that there was a need to first apply for the said directions before the matter could be listed for hearing.

6. In opposing the application, the 1st and Respondents contended that there was no evidence that the appellant's advocates had mis-diarised the date, that based on correspondences between the parties, the appellant's advocates ought to have realised that he had not diarised the hearing date; that the appellant was guilty of laches as the application was brought more than a year; and that the plaintiff had not paid the costs of the withdrawn suit.

7. In her ruling dated 25th May, 2005, the subject of this appeal, the Learned Trial Magistrate, **Hon H A Omondi** (as she then was), queried why the file in respect of the withdrawn matter was not closed by the appellant's advocates leading to the confusion. As regards the delay, the learned trial magistrate noted that whereas the appellant's advocates claimed that they only realised on 13th October, 2005 when they went to fix a hearing date that there had been a mixed up, the firm went on duty in the other matter which was being handled by another firm. As regards the premature fixing of the case, it was the court's view that since it was the appellant who fixed the date, he could not claim that it was prematurely fixed for hearing.

8. It was that decision that proved this appeal in which the appellant raises the following grounds:

a) The Learned Magistrate erred in Law and fact in dismissing the Plaintiff's Application dated 19th October, 2015 with costs.

b) The Learned Magistrate erred in Law and fact in failing to apply the established principles of setting aside in the Plaintiff's Application.

c) The Learned Magistrate erred in Law and fact in failing to set aside order made on 13th January, 2005 dismissing the Plaintiff's suit for non-attendance.

d) The Learned Magistrate erred in Law and fact in failing to find that there were reasonable grounds for the failure to attend the hearing.

e) The Learned Magistrate erred in Law and fact in dismissing the Plaintiff's case on his advocate's mistake.

9. On 30th October, 2017, the Court directed the parties to canvass the appeal by way of written submissions. Pursuant to the said directions, the appellant filed his submissions on 24th January, 2018 while the 2nd Respondent filed theirs on 25th April, 2018. The 1st Respondents never filed any submissions.

10. According to the Appellant, Appellant counsel clearly demonstrated inadvertence and/or mistake on his part by way of supporting affidavit to the application dismissed and annexures thereto. In support of the appeal, the appellant relied on the case of **Murai vs. Wainaina (No. 4) [1982] KLR 38** and **Philip Chemowolo & Another -vs- Augustine Kubede [1982-88] KAR 103.**

11. According to the appellant, the overriding objective in the administration of justice calls for determination of cases on merit and not technicality. The Appellant in his case in the primary suit, it was submitted, was just a passenger and stand very high chances of succeeding if allowed to prosecute his case.

12. It was therefore the appellant's submission that this Appeal herein is merited in the background of overriding objective in administration of Justice and Article 59 of the Kenya constitution as the Learned Magistrate as she then was, did not properly exercise her judicial discretion and the law in arriving at the decision that she made in her ruling. This court was therefore urged to allow the Appeal herein in order to enable the Appellant prosecute the primary suit.

13. The 2nd Respondent on its part submitted that on 24th March, 2009, the court directed the appellant to file and serve his record of appeal within 45 days failure to which the memorandum of appeal would stand struck out. However the appellant failed to comply with the said order which in the 2nd Respondent's view, led to the appeal standing struck out automatically on or about 7th May, 2009. It was further contended that the appeal had never been admitted as envisaged under section 79B of the Civil Procedure Rules (sic) which rules the court cannot waive. Despite that the appellant proceeded to procedurally file the record of appeal on 17th June, 2009.

14. It was submitted that in ignorance of the fact that the appeal stood struck out the appellant and the 1st Respondent on 3rd December, 2009 extended the time for filing the record and proceeded to take directions without reinstating the appeal. It was submitted that by so doing the appellant placed the cart before the horse. It was the appellant's case that the consent between the appellant and the 1st respondent cannot

bind the 2nd respondent who was not a party to it. As there is no valid appeal against the 2nd Respondent, it was submitted that the 2nd appellants should be discharged from further proceedings.

Determinations

15. I have considered the foregoing. Before dealing with the merits of the appeal, two preliminary issues fall for determination.

16. The first issue is whether the appeal was admitted and if not the consequences of not doing so. Section 79B of the *Civil Procedure Act* provides that:

Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily.

17. It is clear that the section places the duty of summary rejection of an appeal on the court. In this case as I have indicated, it is the court that issues directions on the manner of canvassing the appeal and proceeded to give timelines for the filing of the submissions. By so doing, it is my view and I find that the court deemed it fit not to summarily dismiss this appeal and proceeded to list the same for hearing. My view is reinforced by the decision in **Republic Ex Parte Chudasama vs. The Chief Magistrate's Court, Nairobi and Another HCCC No. 473 of 2006 [2008] 2 EA 311**, in which the Court cited with approval *The Judicial Review Handbook* (3rd Edn) by Michael Fordham at 361, **Republic vs. Kensington and Chelsea Royal LBC [1989] All ER 1202 at 1215**, *Role of a Judge* by J Cardozo 52 Harvard LR 361 at 363; **Seaford Court Estates Ltd vs. Asher [1994] 2 All ER 155 at 164** and expressed itself as hereunder:

“The Court is always faced with variety of facts and circumstances and to place it into a straight jacket of a procedure, especially in the field of very important, sensitive and special jurisdiction touching on liberties and rights of subjects shall be a blot on independence and many faceted jurisdiction and discretionary powers of the High Court...It is well settled that ‘rule of procedure cannot be allowed to become mistress of justice; it is the handmaid of justice. Rules of procedure are not themselves an end but the means to achieve the ends of justice. Rules of procedure are tools targeted to achieve justice and are not hurdles to obstruct the pathway of justice...A judge must think of himself as an artist who, although he must know the handbooks, should never trust them for his guidelines; in the end he must rely upon his almost instinctive senses of where the line lay between the word and the purpose which lay behind it. A Judge must not alter the material of which the Act is known but he can and should iron out the creases.”

18. In my view section 79B aforesaid gives the court the powers to summarily get rid of those matters which do not disclose any arguable point for the purposes of the appeal hence enabling the court to concentrate on more serious matters that deserve their day in court. As was held by the Court of Appeal in **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229**:

“In our view, the often quoted principle that a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine. Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice...in the case of *FREMAR CONSTRUCTION CO LTD v MWAKISITI NAVI SHAH 2005 e KLR* at page 6 where the Court said:-

“Trials are not merely held to glorify the hallowed principle that disputes ought to be heard and determined on oral evidence in open court. Unless a trial is on discernible issues it would be farcical to waste judicial time on it.”

19. In other words the admission of appeal is an in house judicial procedure meant to enable the courts sieve and weed out hopeless cases and where by an action of the court directions for hearing are given, the said section cannot be relied on to dismiss an appeal already deemed to be ripe for hearing.

20. However it is true that on 24th March, 2009, this Court (**Lenaola, J**, as he then was).The record of appeal herein was filed on 17th June, 2009. That was obviously outside the 45 days prescribed by the court. However on 3rd December, 2009, the court granted an order to the effect that:

“Let the record be deemed as filed within time.”

21. Order 50 rule 6 of the *Civil Procedure Rules* provides as follows:

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

22. It is therefore clear that the Court was properly entitled to enlarge the time limited for filing the record and without that order being set

aside the order bound the parties to the proceedings.

23. That now brings me to the merits of the appeal. As was held by the Court of Appeal in CMC Holdings Ltd vs. Nzioki [2004] KLR 173:

“In an application for setting aside *ex parte* judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle. In the instant case the learned trial magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant’s unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place *ex parte* and hence it would appear was true and not if true, the effect of the same on the *ex parte* judgement was entered as a result of the non-appearance of the appellant and on the entire suit. The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate...The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the *ex parte* judgement is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues. The law is now well settled that in an application for setting aside *ex parte* judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues. The Court has wide discretion in such cases to set aside *ex parte* judgement. In the instant case, the defence and counterclaim was already in the file when the matter was heard *ex parte* and the trial magistrate stated that she considered the same and dismissed the same defence and counterclaim when the appellant was not in court to put forward its case. Further it appears that certain matters raised in the defence were not considered at all and indeed could not be considered without the appellant’s input.... What the Trial Court should have done when hearing the application to set aside the *ex parte* judgement was to ignore her judgement on record and look at the matter afresh considering the pleadings before her and see if on their face value a *prima facie* triable issue (even if only one) was raised by the defence and counterclaim. If the same was raised, then whether the reasons for the appellant’s appearance were weak, she was in law bound to exercise her discretion and set aside the *ex parte* judgement so as to allow the appellant to put forward its defence. Of course in such a case, the applicant would be condemned in costs or even ordered to pay thrown away costs. The learned judge should not have considered what the learned Trial Court had concluded on the evidence before her but should have in the same way looked at the pleading and considered whether a triable issue was raised by the defence and if so, then the appeal should have been allowed”.

24. That the decision whether or not to set aside *ex parte* judgement is discretionary is not in doubt and that the discretion is intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. See Shah vs. Mbogo & Another [1967] EA 116.

25. In Pindoria Construction Ltd vs. Ironmongers Sanytaryware Civil Appeal No. 16 of 1976 it was held that:

“It is a common ground that it is a matter for discretion whether or not to set aside a judgement under rule 8 of Order 9B of the Civil Procedure Rules. It is also well settled that the Court of Appeal will not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice... The appellant was not altogether free from blame. He could have tried harder to be present at the date of hearing. He delayed considerably in filing his application to set aside the *ex parte* judgement. The trial Judge’s exasperation at his behaviour was understandable. Although he should not have been precluded from defending the claim against him he has to be penalised to some extent in view of his somewhat dilatory actions.”

26. That the judgement that was entered herein was regular cannot be in doubt. However, in considering whether or not to set aside the default judgement a judge has to consider the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed. Hence the justice of the matter and the good sense of the matter, are certainly matters for the judge. It is, as I have held elsewhere in this ruling an unfettered discretion, although it is to be used with reason, and so a regular judgement would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a *prima facie* defence which should go to trial or adjudication. The principle obviously is that, unless and until the court has pronounced a judgement upon the merits or by consent it is to have the power to invoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure. It is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail. Indeed there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an *inter partes* hearing, than the judge who acts *ex parte*. Moreover the judge is not interfering with the findings made by a fellow judge but is making sure that injustice or hardship would not result from accident, inadvertence or excusable mistake or error. The substance of his judgement would be that in view of the defence, there is *prima facie* defence. He may not be satisfied with the blunders or non-attendance of the defendant or his advocate, but nevertheless he may hold that it would be just to set aside the *ex parte* judgement. See Bouchard International (Services) Ltd vs. M’mwereria [1987] KLR 193; Evans vs. Bartlam [1937] 2 All ER 647.

27. In this case the defendant’s failure to appear in court is attributed to the defendants’ legal counsel. That the said counsel’s conduct was deserving of censure is, of course, none of the plaintiff’s business. However as was appreciated by Apaloo, J. A (as then was) in the case of Philip Chemowolo & Another –vs- Augustine Kubede [1982-88] KAR 103 at 1040:

“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”

28. In this case the failure to attend is attributed to the failure to diarise the date and bring the matter to the attention of the advocate. In Kalemera vs. Salaama Estates Ltd [1971] EA 284 a matter that has striking similarities to the present case, the Court expressed itself as follows:

“the failure to attend at the hearing was due to the fact that the applicant’s advocate wrongly diarised the date and immediately he became aware of the error he filed the present application. To treat such mistake as an indication of negligence would be to take an extreme view of the circumstances. The court prefers to treat the circumstances as arising out of honest mistake...The test to be applied under section 101 which speaks of “the ends of justice” is wider in its terms and permits a greater discretion. Poverty of the excuse is not the sole matter which must be considered, the defence, if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally it should always be remembered that to deny the subject a hearing should be the last resort of a court.. In this suit, the plaintiff’s claim is for damages for wrongful dismissal. The defendant contends that the dismissal was justified under the terms of the written contract between the parties. Clearly, the circumstances require that the defence be heard on its merits. The defendant is here and is anxious to be put in a position to defend. Looking at the matter from the plaintiff’s side, the court does not think that he will be prejudiced or suffer hardship if he can be adequately compensated by costs...The circumstances of this case are such that “ends of justice” require that a rehearing should take place. To avoid any misunderstanding about this conclusion, the court has riveted its attention to the circumstances of the error in this particular case, and not attempted to prescribe a general rule for dealing with all errors because there can be errors and errors involving circumstances of infinite variety.”

29. That mistakes do occur in the process of litigation was appreciated by the Court of Appeal in Murai vs. Wainaina (No. 4) [1982] KLR 38 where it was held that:

“A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by Senior Counsel. Though in the case of Junior Counsel the Court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of Justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The Court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that Courts of Justice themselves make mistakes which are politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.”

30. From the ruling, one of the reasons which weighed in the learned trial magistrate’s mind was that the advocate for the appellant had failed to close his file in the withdrawn matter hence leading to the confusion. It was however contended, which contention was not denied, that the said withdrawn file had not been closed as the costs therein were yet to be settled.

31. Having considered this appeal I agree that the Learned Trial Court did not address itself to the principles that govern setting aside of ex parte judgements and hence misdirected itself in the exercise of its discretion.

32. It is true that this matter has taken too long to be determined. However, I am not prepared to deny a party an opportunity of being heard in a matter where the claim arises from personal injuries arising from a road traffic accident. Let the appellant have his day in court and let his case be determined on merits.

33. Accordingly, this appeal succeeds, the order dismissing the appellant’s application dated 19th October, 2005, filed on 15th December, 2005, is hereby set aside and is substituted with an order allowing the application, setting aside the dismissal and reinstating the case to hearing.

34. The costs of this appeal are awarded to the 2nd Respondent since the 1st Respondent did not comply with the directions requiring it to file the submissions and therefore did not oppose the appeal.

35. It is so ordered.

Read, signed and delivered in open Court at Machakos this 25th day of January, 2019

G V ODUNGA

JUDGE

Delivered the absence of the parties.

CA Geoffrey