



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 265 OF 2018

ROSE WAMBUI GIKONYO APPELLANT

VERSUS

ISMAEL JUMA MATIKU RESPONDENT

JUDGMENT

1. The respondent in this appeal was the plaintiff in Milimani CMCC No. 1892 of 2015. He had sued the appellant seeking special damages in the sum of KShs.668,851 being the loss allegedly incurred by him when the appellant through her agents illegally distressed him for rent on 14th July 2011 when no rent was outstanding. In his plaint dated 8th April 2015, he averred that he had leased stall no. 62 at Kenyatta Market from the appellant at a monthly rent of KShs.700 and that he had no arrears of rent when the illegal distress was levied.
2. The appellant filed her defence and counterclaim on 7th September 2015 in which she denied the allegations made in the plaint and counterclaimed for KShs.105,000 being alleged rent arrears as at 1st May 2011.
3. The court record shows that the suit was fixed for hearing on 4th September 2017 and the appellant was served with a hearing notice on 3rd August 2017. On the hearing date however, neither the appellant nor her counsel attended the court. Hearing of the respondent's suit proceeded *ex parte* and judgement was delivered in his favour on 27th September 2017. The appellant's counterclaim was dismissed with costs to the respondent.
4. On 15th December 2017, the appellant presented a notice of motion of even date principally seeking to have the judgment entered on 27th September 2017 set aside and that the appellant be granted leave to cross examine the respondent on his evidence. The motion was canvassed by way of written submissions. After considering the rival submissions filed by both parties, the learned trial magistrate delivered his ruling on 30th May 2018 in which he dismissed the appellant's application for lack of merit.
5. The appellant was dissatisfied with the trial court's decision hence this appeal. In her memorandum of appeal dated 13th June 2018, the appellant relied on only two grounds of appeal in which she complained that the learned trial magistrate erred in law and fact in disregarding her pleas, case law and reasons advanced explaining why her advocates failed to attend court on the hearing date and in refusing to set aside the *ex parte* proceedings and the resultant judgment.
6. When the appeal came up for hearing, both parties consented to having it prosecuted by way of written submissions which both parties duly filed.
7. As the first appellate court, I have carefully considered the rival submissions filed by the parties buttressing the different positions they have taken in this appeal. I have also considered the submissions filed in the lower court in support and in opposition to the Notice of Motion which gave rise to the ruling challenged in this appeal as well as the record of appeal.
8. Having done so, I find that the only issue that arises for my determination is whether the trial court erred in law or wrongly exercised its discretion in refusing to set aside its judgment dated 27th September 2018 as sought in the appellant's notice of motion.
9. The setting aside of judgment entered *ex parte* is an equitable remedy which is granted at the discretion of the trial court. It is therefore not granted automatically as a matter of course. In order to allow an application seeking to set aside judgment entered on the basis of *ex parte* proceedings, the applicant must establish sufficient cause to justify the exercise of the court's discretion in his or her favour.
10. I must at this juncture point out that an appellate court should not interfere with the trial court's exercise of discretion unless it is satisfied that the trial court misdirected itself in some matter and consequently arrived at the wrong decision or unless it is clear from the case considered as a whole that the trial court abused its discretion and as a result occasioned a miscarriage of justice. See: **Mbogo & Another V Shah, [1968] EA 93.**

11. A reading of the impugned ruling shows that the learned trial magistrate considered the prayers that were sought in the appellants notice of motion, the rival submissions made by both parties and the reasons that were advanced for the appellant's and her counsel's non attendance on the date the suit was fixed for hearing. The learned trial magistrate was not satisfied with the explanation offered by the appellant since it was not substantiated by any evidence.

12. The court record shows that the appellant's counsel had explained that though he was duly served with the hearing notice notifying him of the hearing date, his failure to attend the court was not deliberate but was caused by an error in his office in diarizing the hearing date which was diarized on 14th October 2017 instead of 14th September 2017.

13. I have perused the affidavit that was sworn by learned counsel on record for the appellant in support of the Notice of Motion dated 15th December 2017 and I have confirmed that indeed, an extract of his diary showing mis-diarization of the suit's hearing date was not part of the documents which were annexed to the supporting affidavit as proof of his claim that his failure or that of his client to attend court on the hearing date was caused by an inadvertent error in the management of his office diary.

14. Having considered the motion and the material that was placed before the trial court, I am unable to fault the exercise of the learned trial magistrate's discretion in arriving at the impugned decision since the appellant has not demonstrated that in reaching the said decision, the learned trial magistrate abused his discretion or that he considered extraneous factors or applied the wrong legal principles. I therefore find no legal basis upon which I can interfere with his ruling dated 30th May 2018.

15. Before I pen off, I wish to observe that though it is true as contended by the appellant in her submissions that the learned trial magistrate's ruling effectively prevented her from participating in the hearing of the plaintiff's case and from prosecuting her counterclaim, this in my view does not mean that the learned trial magistrate denied her an opportunity to be heard. She was given an opportunity to be heard when she was invited to attend court on the hearing date which opportunity she failed to utilize for reasons that the trial magistrate correctly found to be unconvincing.

16. The appellant in his submissions invited this court to look at the respondent's claim in the lower court and find that it was statute barred and that it was full of irregularities which the trial court failed to consider when entering judgment in his favour. It is important to note that this appeal challenges the ruling of the trial court dated 30th May 2018 and not its judgment as evidenced by the grounds of appeal. The complaint that the suit was statute barred was not included in the grounds of appeal nor was it expressly pleaded in the appellant's statement in defence.

17. Though *Order 42 Rule 4* of the *Civil Procedure Rules* allows this court to consider, when deciding an appeal, grounds which are not included in the memorandum of appeal provided that the opposite party is given requisite notice, I find that this Rule does not apply to this appeal since there is nothing to show that the respondent was given due notice of this complaint considering that the same was not raised in the appellant's pleadings in the lower court and the record does not show that the respondent, who was acting in person was served with the appellant's submissions before he filed his submissions. In any event, parties are bound by their pleadings and an appellant cannot raise in his submissions on appeal what he had not raised in his grounds of appeal and in his pleadings before the lower court.

18. In the end, I have come to the conclusion that this appeal is not merited and it is hereby dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 24th day of May, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Ms. Tanui holding brief for Mr. Chelimo for the appellant

The respondent present in person

Mr. Salach: Court Assistant