



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**APPELLATE SIDE**

**(Coram: Odunga, J)**

**CIVIL APPEAL NO. 86 OF 2016**

**ALICE MUNENE T/A MAINFLOW ACADEMY.....1<sup>ST</sup> APPELLANT**

**TIMOTHY KIRIMI MUNENE.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**JOHN WAMETHI MUKORA.....1<sup>ST</sup> RESPONDENT**

**REAL INSURANCE CO. EAST AFRICA LTD.....2<sup>ND</sup> RESPONDENT**

**(Appeal from the Ruling and Order of Chief Magistrate's Court at Machakos of Hon C.K. Kisiangani (RM) delivered on 24<sup>th</sup> day of August 2016 in Civil Suit 737 of 2014)**

**BETWEEN**

**JOHN WAMETHI MUKORA .....PLAINTIFF**

**VERSUS**

**ALICE MUNENE T/A MAINFLOW ACADEMY.....1<sup>ST</sup> DEFENDANT**

**REAL INSURANCE CO. EAST AFRICA LTD.....2<sup>ND</sup> DEFENDANT**

**TIMOTHY KIRIMI MUNENE.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

1. By an amended plaint dated 2<sup>nd</sup> June, 2009 and amended on 24<sup>th</sup> April, 2013, the 1<sup>st</sup> Respondent herein, **John Wameithi Mukora** (hereinafter referred to as "the Plaintiff") sued the 2<sup>nd</sup> Appellant and the Respondents claiming General Damages, Special Damages in respect of a road traffic accident which it was alleged took place on 28<sup>th</sup> July, 2006 when the plaintiff was riding his bicycle near Ngong Town along Ngong-Kibiko Road. It was contended that on that day at about 5.00 pm, the 2<sup>nd</sup> Appellant, **Timothy Kirimi Munene** (hereinafter referred to as "the driver"), negligently who was the driver of motor vehicle reg no. KWN 819, which was registered in the name of the 2<sup>nd</sup> Respondent herein, **Real Insurance Company East Africa Limited**, (hereinafter referred to as "Real Insurance") and beneficially owned by the 1<sup>st</sup> appellant, **Alice Munene T/A Mainflow Academy** (hereinafter referred to as "the Owner"), when the said driver so negligently drove the said vehicle that the same knocked down the plaintiff who sustained loss and injuries.

2. On 19<sup>th</sup> January, 2016, the suit was, ex parte, fixed for hearing by the plaintiff's representative for 4<sup>th</sup> May, 2016 and hearing notices were directed to be served on the defendants.

3. However, on 4<sup>th</sup> May, 2016 there was no appearance for the defendants and the hearing was ordered to proceed at 12.30pm after the court satisfied itself that the defendants were duly served. According to the record, the hearing proceeded at 12.20pm when the plaintiff gave evidence and closed his case after calling one other witness apart from himself. Thereafter the matter was stood over to 29<sup>th</sup> June, 2016 to confirm the filing of submissions and once against the defendants were directed to be notified. In the meantime, by an application dated 28<sup>th</sup>

June, 2016 filed on 29<sup>th</sup> June, 2016, the 1<sup>st</sup> and 3<sup>rd</sup> defendants sought to have the proceedings of 4<sup>th</sup> May, 2016 set aside. The said application was based on the fact that the insurers of the 1<sup>st</sup> and 3<sup>rd</sup> Defendants instructed the firm of Menezes & Partners to take over the matter from the firm of Mereka & Company Advocates. However, when the new advocates went to file their notice of change of advocates, they found that the matter had proceeded on 4<sup>th</sup> May, 2016 *ex parte*. As the new advocates were not aware of the hearing date, they did not have an opportunity to cross-examine the plaintiff's witnesses. It was therefore deposed that the lapse occasioned by the change of representation ought not to be visited upon the litigants hence the said proceedings ought to be set aside.

4. The said application was opposed by the plaintiff who deposed that as at the date of the hearing the 1<sup>st</sup> and 3<sup>rd</sup> Defendants were represented by the firm of Mereka and Mereka Advocates who were served three months prior to the hearing date and the notice of change of advocates was not served till 7<sup>th</sup> June, 2016. It was contended that no reasons were given for the failure to attend court and that it was not disclosed when the new firm was instructed to come on record. Further the instant application was not filed till 29<sup>th</sup> June, 2016, three weeks after the alleged discovery and after submissions had been filed. The plaintiff therefore believed that the application was an abuse of the court process as no valid or reasonable grounds had been given for the failure to attend court on the hearing date. To the plaintiff the subsequent change of advocates was an afterthought intended to cause further delay in determining the case which had been pending for over seven years.

5. In her ruling the Learned Trial Magistrate held that there was no information as to when the change of instructions was given. She further held that the suit was not against the advocates but the parties hence it was the duty of the 1<sup>st</sup> and 3<sup>rd</sup> Defendants to ensure that they were abreast with the proceedings against them and ought to have sought from their advocates the progress of the suit. The court found that the said parties could not therefore blame their former advocates for not informing them when the suit was coming up for hearing. In arriving at her findings the learned trial magistrate relied on the case of **Wanyiri Kihoro & 2 Others vs. British Airways Travel Insurance and Another [2012] eKLR**. According to the court there were no sufficient grounds advanced to justify the exercise of the court's discretion in favour of the said applicants. To the court, the plaintiff ought not to be made to shoulder the consequences of the negligence of the defendants' advocates. In her view, this was a proper case where the defendants' remedy was against their advocates for professional negligence and not in setting aside the proceedings. She therefore proceeded to dismiss the application.

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

a) **That Learned Magistrate erred in fact and in law by failing to find that the mistake of counsel ought not to be visited on the client.**

b) **That the Magistrate erred in fact and in law by failing to consider the prejudice faced by the denial of the Applicants' right to fair hearing vis-à-vis the prejudice faced by the Respondent which could easily be remedied by an award of costs.**

c) **The Learned Magistrate erred in fact and in law by adopting the assumption that the Appellants were informed that the trial suit was coming up for hearing on 4<sup>th</sup> May, 2016.**

d) **The Learned Magistrate erred in facts and in law by misdirecting herself on the applicable authorities and legal principles regarding setting aside of proceedings.**

e) **in failing to find that there were reasonable grounds for the**

#### **Determinations**

7. I have considered the foregoing, the submissions filed on behalf of the parties herein and the authorities relied upon in support thereof.

8. 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**.

9. In **Pindoria Construction Ltd vs. Ironmongers Sanyitaryware 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.”**

10. 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.**

11. In this case the defendant's failure to appear in court is attributed to the defendants' legal counsel. That the conduct of the advocate who was on record for the appellants 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 Kubende [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.”**

12. In this case the failure to attend is attributed to the change in the representation of the appellants resulting in the appellants not being able to participate at the hearing of the suit. 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 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.”**

13. 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 us erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.”**

14. From the ruling, one of the reasons which weighed in the learned trial magistrate's mind, apart from the poverty of the reason for non-attendance, was the fact that the appellants were at liberty to sue for professional negligence. However, as was stated 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."

15. Having considered this appeal, I agree that apart from the reason for non-attendance, the Learned Trial Court did not address itself to the other equally important factors and principles that govern setting aside of *ex parte* judgements and proceedings and hence misdirected itself in the exercise of its discretion.

16. 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 such as this more so since it is not contended that the delay was occasioned by the appellants. Let the appellants have their day in court and let their case be determined on merits.

17. Accordingly, this appeal succeeds, the order dismissing the appellant's application dated 28<sup>th</sup> June, 2016, filed on 29<sup>th</sup> June, 2016, is hereby set aside and is substituted with an order allowing the application, setting aside its dismissal and setting aside the proceedings of 4<sup>th</sup> May, 2016 and reinstating the case to hearing.

18. The costs of this appeal are however awarded to the 1<sup>st</sup> Respondent since the Appellant did not comply with the directions requiring it to furnish the court with soft copies of its pleadings and submissions. I have also noted that the record of appeal was incomplete as it did not incorporate the pleadings filed in the lower court. Such shoddy preparation of a record of appeal must call for sanctions.

19. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 23<sup>rd</sup> day of May, 2019**

**G V ODUNGA**

**JUDGE**

**Delivered the presence of:**

**Mr Nthiwa for Mr Mukasa for the appellant**

**CA Geoffrey**