



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 439 OF 2017

CORPORATE INSURANCE CO. LIMITED.....APPELLANT

-VERSUS-

JAMES HORERIA T/A HORERIA & CO. LIMITED.....RESPONDENT

(Being an appeal against the ruling and order of Honourable E.K. Usui (Miss)

(Senior Principal Magistrate) made on 24th July, 2017 in Nairobi, Milimani

Commercial CMCC No. 237 OF 2014-formerly HCCC No. 1053 of 2002)

JUDGEMENT

1. The respondent instituted Nairobi Commercial Court no. CMCC No. 237 OF 2014 against the appellant vide the plaint dated 3rd September, 2002 seeking for a declaratory order together with costs and interest thereon.
2. The respondent pleaded that the appellant was at all material times its insurer and that it was covered under Professional Indemnity Insurance Policy No. 3/050/00025/89 which is to say that the appellant was bound to pay all the respondent's professional indemnity claims that arose in the course of its business trades.
3. The respondent then pleaded in its plaint that it was retained by Kenya Commercial Bank (KCB) to undertake the inspection and valuation of the property known as RUIRU/KIU BLOCK 2 (GITHUNGURI) T. 1524 registered in the name of one Joseph Kioni Itotia but that the respondent, through a genuine mistake of fact, carried out an inspection and valuation on a different property still owned by the said Joseph Itotia.
4. It was further pleaded that in relying on the report made by the respondent, KCB granted Joseph Itotia a mortgage and that Joseph eventually violated the terms of the mortgage agreement, causing KCB to institute a suit against the respondent vide HCCC No. 421 of 2001 in which judgment was ultimately entered in favour of KCB on 19th July, 2002 for the sum of Kshs.1,140,000/= plus interest.
5. The respondent was therefore seeking to have the appellant satisfy the decree pursuant to its Policy Cover taken out with the appellant.
6. Upon service of summons, the appellant entered appearance and filed its statement of defence to deny the respondent's claim. The appellant further averred that the respondent had breached the contract hence the appellant was not bound to pay the sums claimed.
7. When the suit proceeded for hearing, the respondent was the only witness who testified. The appellant failed to attend court hence the hearing proceeded *ex parte*. Judgment was entered in favour of the respondent on 24th March, 2016 as prayed in its plaint.
8. Subsequently, the appellant filed the Notice of Motion dated 13th March, 2017 seeking for *inter alia*, to have the aforesaid judgment set aside and for the appellant be allowed to tender its evidence.
9. The respondent filed a replying affidavit he swore to oppose the application prompting the appellant to file a supplementary affidavit sworn by *Tiberius Nyang'au*. A separate replying affidavit sworn by Munene Ngati Ng'ang'a, the erstwhile advocate for the appellant was also filed.
10. Parties then filed written submissions on the application dated 13th March, 2017. The trial court dismissed the same with costs to the respondent. The aforementioned ruling is the subject matter of this appeal.

11. The appellant put forward the following grounds of appeal.

- 1. THAT the Trial Magistrate erred in law and in fact and misdirected herself in dismissing the appellant's/defendant's application dated 13th March, 2017 without sound legal reasons and/or at all for so doing.**
- 2. THAT the Trial Magistrate erred in law and in fact in failing to allow the appellant/defendant to defend the suit and further applied the wrong principals of law thereby arrived at a wrong decision.**
- 3. That the Trial Magistrate did not exercise her discretion properly in failing to allow the appellant's application and accord the appellant an opportunity to defend the case on its merits.**
- 4. THAT the Trial Magistrate erred in law and in fact when she failed to properly consider the appellant's submissions given that it had submitted a meritable defence on breach of the policy terms and conditions under the Insurance policy and the issue of limitation and time bar of the respondent's claim against the appellant.**
- 5. THAT the Trial Magistrate erred in law and in fact in failing to consider the evidence placed before her by the appellant/defendant's advocates more so the great prejudice caused to the appellant by the unprofessional actions and omissions of the appellant's/defendant's previous advocates in failing to attend court and exercise due care to protect the appellant's interest in the suit.**
- 6. THAT the Trial Magistrate erred in law and in fact when she failed to consider that the appellant's had a meritable defence which raised serious triable issues thereby arriving at the wrong findings and conclusions.**
- 7. THAT the Trial Magistrate erred in law and in fact in failing to find that the appellant will suffer great prejudice and injustice if the application sought is not granted and the appellant is allowed to defend the suit on its merits and the appellant is condemned unheard and failed to properly balance the scales of justice in the circumstances of the case.**
- 8. THAT the Trial Magistrate erred in law and in fact in failing to find that the delay in the prosecution of the suit was not attributable to the appellant at all.**
- 9. THAT the Trial Magistrate erred in law and in fact in finding that there was inordinate delay by the appellant in filing the application dated 13th March, 2017 and further erred in law and fact in finding that the appellant was aware of the judgment date of the matter and failing to consider that the said application was presented to the court expeditiously once the appellant became aware of the judgment.**
- 10. That the Trial Magistrate totally misunderstood and misplaced the nature of the appellant's prayers that were placed before her for hearing and justifiable determination and therefore arrived at the wrong findings and conclusions.**

12. The appeal was canvassed through written submissions. On its part, the appellant submits that the learned trial magistrate did not consider the fact that the appellant had not been made aware of the hearing date in the suit, neither did she appreciate that there was no evidence to show that the letter purported to have been sent by its erstwhile advocate concerning the hearing date was actually received by the appellant.

13. It is also the appellant's submission that the learned trial magistrate erred by failing to appreciate that the appellant's former advocates acted unprofessionally by not protecting its interests or properly representing it, further submitting that the said magistrate ought to have acknowledged that the advocates' failure to attend the hearing prejudiced the appellant, given that the said advocates did not formally apply to cease acting in the matter.

14. The appellant also contends that the learned trial magistrate erred in concluding that it contributed to the delay in the prosecution of the suit.

15. Finally, it is the appellant's argument that the learned trial magistrate did not take into account the subject matter of the dispute nor the appellant's defence which was already on record and which raises triable issues. The appellant therefore urged this court to set aside the impugned ruling and grant it the opportunity to defend the suit.

16. In his response, the respondent argued that the appellant does not deserve to be entertained on appeal because it has never been keen on defending its case despite having been served with the relevant hearing notices.

17. It is also the respondent's contention that it should not be made to suffer for the appellant's mistakes or inaction since the appellant is intent on delaying the conclusion of the matter further thus frustrating the respondent in the process.

18. I have considered the rival submissions on record alongside the authorities cited. I have also re-evaluated the evidence placed before the trial court. It is important to note that the 10 grounds of appeal revolve around the question as to whether the learned trial magistrate correctly applied the relevant principles in dismissing the appellant's application and in refusing to set aside the ex parte judgment.

19. The appellant argued before the trial court that it failed to attend court for the hearing of the suit because it was never informed of the hearing date by its former advocates and that it only came to learn of the entry of judgment at the stage of proclamation

20. The appellant further stated that the decretal sum involved is of a colossal nature and that it has a defence on record which raises triable issues.
21. In his reply, the respondent averred *inter alia*, that the appellant's failure to attend court for hearing is inexcusable and that there was unreasonable delay in bringing the application from the date of judgment. The respondent further stated that the defence on record does not raise any triable issues.
22. In the second replying affidavit sworn by *Munene Ng'ati Ng'ang'a*, a partner with the respondent's former firm of advocates. It is deponed that his firm had previously not received any instructions from the appellant on the matter and further, that the appellant had failed to pay his legal fees for some time.
23. In his supplementary affidavit, *Tiberius Nyang'au* reiterated on behalf of the appellant that its then advocates did not discharge their professional duty of attending the hearing or informing the applicant of the same. The deponent added that the application was timeously filed and that the appellant was at all material times ready to defend its case.
24. The abovementioned deponent also swore a further affidavit in response to the replying affidavit of *Munene Ng'ati Ng'ang'a* stating that the appellant's former advocates were at all times properly instructed but that they did not adequately represent the appellant's interest. He further stated that the said firm of advocates did not formally apply to cease acting in the matter.
25. The parties filed submissions on the application before the trial court, with the appellant reiterating that the same had been brought without inordinate delay and that it has a proper defence and that it stands to be gravely prejudiced unless the application is allowed.
26. On its part, the respondent argued that the appellant failed to raise sufficient grounds to warrant the setting aside of the *ex parte* judgment in place and that the appellant should be faulted for failing to diligently follow up with its then advocates on the progress of the matter. On the subject of the defence, it was the respondent's submission that the same consists of mere denials and in no way disproves the respondent's claim. Further to that, the respondent pointed out that there was inordinate delay in bringing the application.
27. The learned trial magistrate stated in her ruling that the appellant had at all material times been updated on the progress of the matter but chose not to take any action. The trial magistrate further stated that there has been a delay in bringing the application since the appellant was made aware of the judgment date prior to its delivery.
28. In the end, the trial magistrate concluded that the appellant had taken a casual approach to the case and was therefore not entitled to the orders sought.
29. On appeal it has been argued that there was inordinate delay in bringing the application. It is apparent that the suit was originally filed in the year 2002 at the High Court before being transferred to the Chief Magistrate's Court at Milimani. The *ex parte* judgment was entered against the appellant on 24th March, 2016. The appellant then filed the Motion dated 13th March, 2017 seeking to have the *ex parte* judgment set aside but the application was dismissed on 24th July, 2017.
30. It is evident that the application was filed after a lapse of a year from the date of entry of judgment. The appellant explained that this was around the same time execution commenced against it.
31. I have examined the copy of the letter of proclamation of attachment annexed to the appellant's application and find that the same is dated 3rd March, 2017. The respondent appears to have waited close to one (1) year from the date of judgment before executing the decree. It therefore follows that the appellant has offered a reasonable explanation for filing late the application. There was no iota of evidence to show that the appellant had prior knowledge of the judgment. In the premises, I am satisfied that there was a delay in filing the application but it was not inordinate, contrary to the finding arrived at by the learned trial magistrate.
32. On the issue of whether sufficient reason was given for non-attendance of the hearing, I have re-evaluated the evidence and arguments presented before the trial court alongside the explanation given in support of the application seeking to have the *ex parte* judgment set aside.
33. There is no doubt that the appellant had instructed a firm of advocates to represent it. It was the responsibility of the advocate to update and represent the appellant's interest and where the advocate is unable to do so, to formally withdraw from acting in the matter. The evidence in this instance shows that the appellant's erstwhile advocates had previously followed up on their fees with the appellant and it would appear that firm of advocates updated them on a regular basis.
34. The evidence also shows that the respondent through its advocates served the appellant's former advocates with a hearing notice indicating the scheduled hearing date. The aforesaid firm of advocates, vide their letter dated 12th October, 2015 addressed to the appellant, updated the appellant of the hearing date but indicated that they will not be attending court on the material date.
35. I have examined the said letter and note that it does not bear the appellant's receiving stamp, which in my view supports the appellant's assertion that it was not served with the same and was therefore not aware when the matter proceeded for hearing.
36. The law sets out the appropriate procedure for advocates intending to withdraw from acting in a matter. I am of the view that an advocate cannot simply abandon a matter without formalizing the same by way of an application to cease acting. In this matter, I agree with the appellant that the aforesaid firm did not seek to protect and promote its client's interest and in failing to do so, acted unprofessionally.
37. It therefore follows that in her analysis, the learned trial magistrate ought to have appreciated the above averments which were raised in

the appellant's application and submissions.

38. The appellant brought forth the argument of its defence. I have re-evaluated the statement of defence on record and I find that the same raises issues which in my view are triable issues. Those issues include inter alia:

- a. *The purported breach of contract by the respondent.*
- b. *That the respondent's claim is time barred.*
- c. *The purported contribution to the claim by the respondent.*

39. I am satisfied that the learned trial magistrate did not consider the merits of the defence in arriving at her decision and consequently, did not address her mind to the principles to be considered before for setting aside an ex parte judgment.

40. The prejudice that would be suffered by the parties was also not considered in the impugned ruling. On the one hand, it is clear that the respondent has in place an *ex parte* judgment in its favour and is therefore entitled to enjoy the fruits of its judgment. On the other hand, the appellant stands to be condemned unheard if the *ex parte* judgment remains. As I have already re-evaluated, there is a level of laxity on the part of the appellant in not expressing diligence in defending its case; however, its advocate intentionally failed to attend the hearing. However, there is nothing to show that the appellant received the correspondence informing it of the suit hearing. It is also worth appreciating that the appellant has a defence already on record and which defence I find raises triable issues. In the circumstances, I am of the view that it is in the interest of justice to grant the appellant the opportunity of defending its case at the hearing.

41. Consequently, the appeal is allowed giving rise to issuance of the following orders:

- a) ***The ruling delivered on 24th July, 2017 is hereby set aside and is substituted with an order allowing the appellant's application dated 13th March, 2017.***
- b) ***The ex parte judgment entered on 24th March, 2016 is hereby set aside and the appellant is granted leave to defend the suit.***
- c) ***Given the age of the suit, the matter to be heard on priority basis.***
- d) ***Each party shall cater for its own costs.***

Dated, Signed and Delivered at Nairobi this 27th day of September, 2019.

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J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent