



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL DIVISION

CIVIL APPEAL NO. 546 OF 2018

KIPKAI ENTERPRISES LTD.....APPELLANT

Versus

ONDIEKI ROBERT CHARLES t/a VISIONARY

TUTORIAL SERVICES.....RESPONDENT

(Being an appeal against the ruling of Mr. D. W Mburu Principal Magistrate

in Civil Suit No. 8902 of 2017 delivered on 9th November 2018)

JUDGMENT

[1] The appellant was the plaintiff in the trial court. It sued the respondent for cost for restoring and repairing property LR 209/3631, cost for preparing report, loss of rent as well as cost of the suit and interests. Interlocutory judgment was entered in favour of the appellant on 23rd February 2018. Subsequently, an application dated 24th April 2018 was made by the respondent seeking among other orders the setting aside of the judgment and leave to defend the suit. On 9th November 2018 the trial court allowed the application. The appellant being aggrieved by the said ruling filed this appeal based on eight grounds which may be collapsed into two:

- a. That the learned magistrate erred in fact and law in finding that there are triable issues and**
- b. That the trial magistrate erred in issuing orders that were not sought by the respondent**

Submissions

[2] This appeal was canvassed through written submissions. The appellant submitted that **Article 50 of the Constitution - Fair Hearing**, does not extend to a person who has failed to attend a hearing, enter appearance, file a defence or at the very least explain his failure. Thus the respondent cannot defy summons, refuse to participate and then after judgment rely on **Article 50**. Moreover, the trial magistrate determined this matter which was beyond his jurisdiction as per **Article 165(3) (b) of the Constitution**. After the finding that there was personal service, the court found that there was a triable issue, which in its opinion there is none. In any case, the respondent should have been ordered to deposit the decretal sum in court. Besides, the learned magistrate ignored to take into account the conduct of the respondent which is indolent and blatantly dishonest. At the time of writing this the respondent had not yet filed his submissions.

ANALYSIS AND DETERMINATION

[3] This being a first appeal, the court is to re-evaluate, re-assess and re-analyze the extracts on the record and to make its own determination but having in mind that it did not have the advantage of hearing witnesses. (**See: Selle & Another vs. Associated Motor Board Company Ltd. [1968] EA 123**).

Issue

[4] The issue of determination is **whether the setting aside of the default judgment was merited.**

Unfettered discretion

[5] A court has unfettered discretion to set aside or vary a judgment and any consequential decree or order upon such terms as are just under **Order 10 Rule 11 of the Civil Procedure Rules**. See the case of **Patel v EA Cargo Handling Services [1974] EA 75** where Duffus V. P stated:

"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 to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication"

The Court of Appeal in the case of **Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR** expressed itself as follows:

"We agree with the noble principles which go further to establish that the courts' discretion to set aside ex parte judgement or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.

...

The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality"

Similarly, the Court of Appeal in the case of **CMC Holdings Ltd v James Mumo Nzioki [2004] eKLR** held:

"93. Our view is that in law, the discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a 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."

[6] There is no dearth of judicial decisions on this subject. The string of judicial decisions on the matter agrees that the purpose of judicial discretion to set aside or vary a default judgment is to do justice and provide a litigant with an opportunity to be heard on merit. This is to avoid injustice being occasioned as a result of an excusable mistake or error. Accordingly, where a party demonstrates to the court that there exists a triable issue worthy judicial adjudication it should allow determination of the issue on merit. Except, however, this discretion ought not to reward a party who is bent at abusing the court process.

[7] I will apply this test. In his application dated 26th April 2018 the respondent claimed two things: (1) that he failed to enter appearance as he was not served with summons to enter appearance; and (2) that there are triable issues herein. I will discuss these matters.

[8] On service, the appellant relied on the affidavit of service herein which demonstrated how service was done. The respondent did not seek to cross examine the process server on the contents of the affidavit. Accordingly, the respondent bore the onus to prove that service was not done. He failed to do so. This led the trial magistrate to the conclusion that the respondent was duly served with the summons. I find that service was effected upon the Respondent.

[9] Despite the finding on service, is there any other sufficient cause to set aside the default judgment? The trial magistrate allowed the application on the basis that there were triable issues. The Court of Appeal in the case of **Wenedeya v Gabi [2002] 2 EA 662** reinstated an appeal that had earlier been dismissed for non-attendance stated that disputes ought to be determined on merits and that lapses ought to not necessarily debar a litigant from pursuing his rights

[10] The draft statement of defence raises triable issues worthy of adjudication on merit. I note it is claimed that the alterations made on the property were done with the knowledge of the appellant, he left the place in a good state and there was no two year tenancy agreement in the purview of **Section 57 (2) of the Land Act No. 6 of 2012** as the rent payable was on monthly basis. These are triable issues. The court's fundamental duty is to do justice to the parties by allowing them the opportunity to put their cases forward. The issues raised by the Respondent deserve evaluation through plenary hearing.

[11] In the upshot, I find the appeal to lack merit and is dismissed. I note the Appellant claimed that the Respondent's conduct is mere temporize of this case for as long as he wants. To guard against that possibility the trial court should ensure the suit is heard and concluded within reasonable time as required by the Constitution. In view of the foregoing and the conduct of the Respondent, each party shall bear own costs of the appeal. It is so ordered.

Dated and signed at Nairobi this 15th October 2019

.....

F. GIKONYO

JUDGE

Dated, signed and delivered in open court at Nairobi this 23rd day of October, 2019

.....

L. NJUGUNA

JUDGE