



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 173 OF 2018**

**MOBIMEX TOURS & SAFARIS (K) LTD.....APPELLANT**

**VERSUS**

**SHAYMIC MULAA KALITU.....RESPONDENT**

*(Being an appeal from the ruling of Hon. P Muholi (SRM) delivered on 14<sup>th</sup> March 2018 in Milimani CMCC No. 3174 of 2016)*

**JUDGMENT**

1. The subject matter of this appeal is the ruling delivered by *Hon. P Muholi (SRM)* dated 14<sup>th</sup> March 2018 in which the learned trial magistrate dismissed a Notice of Motion dated 20<sup>th</sup> November 2017 in which the appellant, *Mobimex Tours & Safaris (K) Ltd* which was the defendant in a suit instituted in the lower court by the respondent seeking orders to set aside an *ex parte* judgment entered against it in favour of the respondent and for leave to enter appearance and file a defence out of time.
2. Briefly, the background against which the appeal was filed is that the respondent, *Shaymic Mulaa Kalitu* filed a suit against the appellant seeking special and general damages for injuries sustained in an accident which occurred in the course of his employment with the appellant.
3. It was the respondent's case that the accident in which he was injured was caused by the appellant's directors and/or supervisor's negligence or breach of statutory duty. The particulars of the appellant's agent's negligence or breach of statutory duty were pleaded in paragraph 5 of the plaint dated 9<sup>th</sup> May 2018.
4. Upon being served with summons to enter appearance and defence, the appellant failed to enter appearance or file a defence within the prescribed time. The respondent applied for interlocutory judgment which was entered on 16<sup>th</sup> September 2016. Subsequently, case proceeded for formal proof after which judgment was entered on 16<sup>th</sup> September 2017 in favour of the respondent against the appellant in the total sum of KShs.406,800 together with costs and interests.
5. In the memorandum of appeal filed on 4<sup>th</sup> April 2018, the appellant advanced four grounds of appeal which are as follows:
  - i. That the learned trial magistrate erred in law and in fact in finding that the appellant's draft defence consisted of mere denials and had not raised triable issues whilst the evidence on record do not support such a finding.*
  - ii. That the learned trial magistrate erred in law and in fact in failing to appreciate that the draft defence raised several triable issues including contributory negligence and extent of injuries allegedly suffered by the respondent.*
  - iii. That the learned trial magistrate failed to have regard to the appellant's supporting affidavit where the appellant provided reasons to be allowed to have a second medical opinion on the extent of the injuries allegedly suffered by the respondent considering that such input of evidence would have a bearing on the quantum of damages, if any, to be awarded to the respondent.*
  - iv. That the learned trial magistrate erred in law and in fact in failing to appreciate and apply the binding authorities cited before the court.*
6. By consent of the parties, the appeal was prosecuted by way of written submissions. The appellant filed its submissions on 6<sup>th</sup> March 2019 while those of the respondent were filed on 22<sup>nd</sup> March 2019.
7. This being a first appeal to the High Court, it is an appeal on both facts and the law. I am fully alive to the duty of the first appellate court which as summarized by the Court of Appeal in *Abok James Odera T/A A.J. Odera & Associates V John Patrick Machira & Company Advocates, [2013] eKLR* is to:

**“ . . . . re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”**

**8.** I have carefully considered the grounds of appeal, the proceedings before the trial court and the parties’ rival written submissions as well as the authorities cited. I have also read the impugned ruling.

**9.** Having done so, I find that this ruling faults the exercise of the trial magistrate’s discretion in dismissing the applicant’s notice of motion which sought the setting aside of the *ex parte* judgment entered against the appellant on 16<sup>th</sup> September 2017. The appellant contends that the learned trial magistrate failed to appreciate that the draft defence exhibited in the application raised triable issues and that therefore the appellant was entitled to leave to defend the suit.

**10.** It is trite that an appellate court will only interfere with the exercise of discretion by the trial court if it is satisfied that the trial court misdirected itself in some matter and consequently arrived at the wrong decision or 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 learned trial magistrate’s ruling reveals that the trial court was fully cognizant of the law governing setting aside of *ex parte* judgments. After a consideration of the material placed before him, the learned trial magistrate made a finding which is not contested on appeal that the appellant had been properly served with summons to enter appearance and defence and that since it had failed to do so within the requisite time, interlocutory judgment had been regularly entered. He then proceeded to examine the pleadings in the draft defence availed by the appellant and found that it did not contain any triable issue worth taking to trial.

**12.** Having looked at the material that was placed before the trial court, I am satisfied that in arriving at his decision, the learned trial magistrate meticulously analysed all the issues that were before him and applied the correct legal principles. There is nothing to suggest that he considered irrelevant factors or that he abused his discretion in any way. I am satisfied that he properly exercised his discretion in accordance with the law and I consequently find no basis to interfere with his decision.

**13.** In view of the foregoing, I have come to the conclusion that this appeal is not merited. It is accordingly dismissed with costs to the respondent.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 28<sup>th</sup> day of November, 2019.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Njoroge for the appellant

No appearance for the respondent

Mr. Salach: Court Assistant