REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 25 OF 2019

AGA KHAN UNIVERSITY HOSPITAL..APPELLANT

-VERSUS-

CATHERIN KWAMBOKA NYAMAO..RESPONDENT

(Being an appeal from the ruling of Hon. D.O. Mbeja (Mr.) SRM

dated 23rd January, 2019 in Milimani CMCC No. 1179 of 2015)

JUDGEMENT

Introduction and Background:

1. The appeal filed herein emanates from the ruling of Hon. D.O Mbeja (Mr.) SRM delivered on the 23rd January, 2019. The brief history of CMCC No. 1179 of 2015 is as follows;

> **1) On 10th March, 2015 the Respondent's advocate Ms. Rachuonyo and Rachuonyo Advocates filed a plaint and upon extraction of the summons served upon the Appellant the summons to enter appearance but the Appellant did not enter appearance or file a defence. Interlocutory judgment was entered on the 30th March, 2016.**
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> **2) Upon entry of interlocutory judgment Ms. Rachuonyo and Rachuonyo Advocates extracted a decree and certificate of costs for Kshs.168,600.00 (including interest of Kshs.20,232.00) and Kshs.42,965.00 respectively.**
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> **3) On the 24th November, 2016 the Respondent's advocates Ms. Rachuonyo and Rachuonyo Advocates instructed the firm of Kingpin Auctioneers to attach the Appellants property to secure the decretal sum. The Appellant duly paid Kshs.247,162.30 and also settled the sum of Kshs.61,900.00 being the Auctioneers costs.**
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> **4) On the 22nd November, 2017 the firm of Rachuonyo and Rachuonyo Advocates and Begi's Law Office filed consent and firm of Begi's Law firm came on record for the Respondent. No notice of change of Advocates was issued to the Appellant.**
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> **5) A hearing date was subsequently fixed for 24th January and the matter proceeded for formal proof.**
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> **6) Judgement was delivered on the 8th August, 2018 and the Respondent's advocate M/s Begi Law Office extracted a Decree and Certificate of Costs for Kshs. 1,272,241.92 (compromising of General damages for Kshs.1,000,000/-, Special damages for Kshs.168,600- Note which had already been paid, and interest thereof.**
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> **7) M/s Begi's Law Office instructed Kindest Auctioneers and upon proclamation of the Appellants goods the Appellant perused the file and noted the Respondent and proceeded to fix the matter for formal proof and obtained fresh judgment.**
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> **8) The Appellant filed a Notice of Motion application dated 18th January, 2019 seeking stay of execution and an order for setting aside the Interlocutory Judgement and seeking to be granted leave to file a Statement of Defence.**
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> **9) On the 23rd January, 2019 Hon D.O Mbeja (Mr) SRM delivered the ruling dismissing the Appellants application dated the 23rd January, 2019 thus the appeal.**

2. Being aggrieved by ruling dated the 23/1/019 the Appellant lodged instant appeal and set out 6 grounds namely:-

> **i. The learned trial magistrate misdirected himself and failed to consider the principles laid down in setting aside an ex-parte judgement obtained regularly and thus failing to exercise his discretion judiciously.**
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> **ii. The trial magistrate misdirected himself and erred in holding that the Appellant did not give a plausible reason for not defending the matter despite the fact that the Respondent did not file a replying affidavit challenging the Appellants averments on the supporting affidavit of Valentine Achungo.**
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> **iii. The trial magistrate erred in law and in fact by proceeding to dismiss the Appellants application on grounds that part of decretal amount (special damages) had been paid and failed to consider the circumstances and explanation offered on settlement of the decretal amount.**
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> **iv. The trial magistrate erred in law and in fact in proceeding to dismiss the Appellants application by failing to consider that the Respondent has extracted a full decree and Certificate of Costs on the 12th July, 2016 thus deemed to have abandoned her claim for general damages.**
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> **v. The trial magistrate erred in law and fact in disallowing the Appellants application without considering the fact that grave injustice would be visited on the Appellant due to the Appellant's employee conduct whose mistake or error had been explained to court thus denying the Appellant's chance to present its defence on merit.**
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> **vi. The trial magistrate erred in law and in fact in ignoring the Appellant's defence and supporting affidavit which demonstrated substantial prima facie triable issues that had been raised in the same.**

3. The parties were directed to canvass appeal via submissions of which they filed and exchanged.

Appellant's Submissions:

4. The Appellant's submits that its legal counsel one Ms. Judith Odunge Otieno indeed received the summons to Enter Appearance but did not take action on the same but filed away leading to the interlocutory judgement being entered against the Appellant.

5. She resigned later but deliberately refused to hand over (this matter and others) and the Appellants Legal Department encountered difficulty and frustrations. Indeed vide letter dated the 10th November, 2016 and 30th November, 2016 the Appellant wrote to Ms. Judith Oduge to hand over but she did not.

6. The Appellant's Legal Counsel explained that he had to reconstruct all the legal documents and comb through Ms. Judith Oduge's office to capture data matters she had handled for 12 years and that the first time he encountered this matter was 24th November, 2016 when he was served with a proclamation notice and decree and certificate of costs served by the Respondent and settled the amount in good faith.

7. Firstly, Interlocutory Judgement that was entered in this matter was regular as the Appellant admits that its former Legal Counsel received the summons to Enter Appearance but did not take action on the same but as submitted hereinabove the reason for the inaction has been explained.

8. It is submitted that as stated as in case of ***Kanwal Sarjit Singh Dhirman vs Keshavji Jivraj Shah Civil Appeal No. 33 of 2007*** and cited in ***Govinda and Sons (K) Limited vs Peter Maluki Kiema (2018)*** the Court of Appeal found that:

> **"Where it is a regular judgement 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 a defence that must succeed, it means as Sheridan J. put it *"triable issue"* that is an issue which raises a prima facie defence and which should go to trial for adjudication."**

9. It is their submission that learned magistrate arrived at his decision on the basis that the Appellant was served with the summons to Enter Appearance and failed to put to test the evidence of the process server. This being a regular judgement the Appellant was under duty to demonstrate to the trial court that it has a *"triable defence"* and the consideration of the learned trial magistrate was erroneous.

10. The Appellant indeed annexed a Draft Statement of defence and in the defence raised the defence that:

> · **The Respondent was a private patient attended by her own doctor Dr. S.C. Patel.**
>
> · **The Respondent was under care and management of her private doctor, Dr. S.C. Patel who owed the Respondent duty of care.**
>
> · **The Appellant submitted Admission form of Dr. S.C. Patel giving her admission rights and privileges to treat patients at the Appellants Hospital and indeed the Respondents summary discharge indicate the Dr. S.C. Patel attended to her.**

11. The learned magistrate totally failed to consider the Appellants Draft Defence and Admission Forms enclosed therein. He did not bother to look at the Defence despite the Appellant's Advocate extensively submitting on this issue.

12. In the judgment, the learned magistrate noted that the proceedings were unchallenged and the Appellant thus failed to exercise caution and was at fault.

13. It is indeed true that the Appellant settled the Decree and Certificate of Costs for Kshs. 168,600.00 (together with interest of Kshs. 20,232.00) and Kshs. 42,965.00 respectively.

14. It is the Appellants submissions that the context and circumstances that led to the payment of the first full Decree and Certificate of Costs dated 12th July, 2016 were duly explained at paragraph 10, 11 and 12 of the Supporting Affidavit of Valentine Achungo. He indicated that;

> **(a) Upon being served with the Decree and Certificate of Costs and a proclamation notice on the 24th November, 2016 Mr. Achungo settled the amount in good faith to avert incurring further costs and saddling the court in determining a matter where the Respondent had used some funds to seek treatment.**
>
> **(b) His action making payment was purely in good faith and he believed the Respondent had abandoned her claim for general damages.**

15. The Appellants Legal Counsel's action should also be contextualized in law;

Order 10 Rule 4 (2) of the Civil Procedure Rules, 2010 provides that;-

> **"Where the plaint makes a liquidated demand together with some other claim and the Appellant fail to appear, or all the Appellants fail to appear as aforesaid, the court shall on request in Form 13 of Appendix A, enter judgement for the liquidated demand together with interest thereon as provided by sub-rule 1 – but the award of costs shall await judgement upon such other claim."**

16. In the instant case upon obtaining judgment for Kshs.168, 600.00 as the special damage claim, it the Respondent wished to proceed with the matter the Advocates Ms. Rachonyo and Rachuonyo Advocates ought not to have extracted a full Decree and Certificate of Cost.

17. The Advocates should have extracted a preliminary decree which would have put the Appellant on notice that part of the claim was still pending for determination.

18. It is submitted that, in the High Court Section 94 of the Civil Procedure Act, 2010 makes it clearer that;

> **"Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to as much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation."**

19. In view of the comparison of Order 10 Rule 4 (2) of the Civil Procedure Rules and Section 94 of the Civil Procedure Act , 2010, it should be deemed that by extracting a Decree and Certificate of Costs on the 12th July, 2016 the Respondent had abandoned her claim for general damages. It relied on case of ***Karuri Stores Pharmaceuticals Limited vs Cacia Medical Centre Limited (2015) eKLR.***

20. The Respondents Advocates conduct in prosecution of this matter is suspect as Ms. Rachuonyo and Rachuonyo upon receipt of payment (in 2016) handed over the matter to Begi Law Office who proceeded to conduct a formal proof (in 2018) and extracted a second Decree and Certificate of Costs that again encompassed amounts already settled.

Respondent's Submissions:

21. It is the Respondent's submission that the trial magistrate did not err in law and in fact in dismissing the Appellant's application for stay of execution dated 18th January, 2019. The said application sought to not only stay execution, but also to set asi9de the interlocutory judgement entered on 17th March, 2016, leave to file defence and subsequent setting aside of judgement dated 8th August, 2018.

22. It is uncontested that the Appellant being an institution with a robust legal department staffed with highly qualified Advocates of the High Court was properly served with the plaint, summons to Enter Appearance and all other pleadings.

23. It is submitted that, as a matter of fact, the same is expressly admitted by paragraph 5 of the supporting affidavit of Valentive Achungo where it states as follows;

> **"I am aware that my predecessor in house counsel, Ms Judith Odunge Otieno who received the said summons to Enter appearance (at chief of staff's office) did not take action on the same and instead filed away the pleadings resulting to the interlocutory judgement being entered against the Appellant…"**

24. The Appellant through the said Supporting Affidavit then proceeds to place the primary blame on the former in house counsel who failed to file responses or conduct any handover process. The said blame has nothing to do with the Respondent in this appeal.

25. It is submitted that the parent suit, Civil Suit 1179 of 2015 was filed in the year 2015. It thus took the Appellant a whole institution with

an entire functioning legal department, three (3) years to discover that a suit which had been properly received by them, proceeded without them and was finalized. The Appellant thus intends to take the Respondent back to the pleadings stage and restart the suit. This will be gravely unjust to the Respondent who has sought justice for all those years.

26. The decision on whether or not to set aside an ex-parte judgement is discretionary in nature. The case of ***Phiona Waweru Maina vs Thuka Mugiria (1983)*** **eKLR Civil Appeal 27 of 82** the court stated as follows:

> ***"Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgement he does so on such terms as my be just… 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 it by the rules. …………***
>
> ***Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice……***
>
> ***Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge is exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been miscarriage of justice. ……..."***

27. It is submitted that the Appellant seeks to obstruct and/or delay the course of justice. Further, the reason alluded to by the Appellant for not entering appearance or filing a defence, does not amount to an excusable mistake or error. The Appellant has throughout the documents filed both at the trial court and in this court, stated that the reason for the failure to file is due to a mistake made by a former legal counsel who failed to reply to the suit papers of hand over the same.

28. This court in the case of ***Richard Murigu Wamai vs Attorney General & Another (2018) eKLR,*** had a similar situation wherein the Applicant sought to set aside a judgement in default of defence, with the reason that the file in the matter had gotten lost in the office and took a long time to find and hence no defence could be filed on time. The court rejected this reason and stated as follows;

> **"I have considered the reasons advanced for the delay in filing the defence, being that the 2nd Appellant/Applicant could not trace its investigating file and I find that it has no merit. As rightfully submitted by the Plaintiff/Respondent, the issue is an internal matter within the Applicant's knowledge and over which the court cannot be able to authenticate. I would not set aside the interlocutory judgment on that reasoning. Further the legitimacy of reasons averred herein cannot be verified by court and in the current set of circumstances, it is just not enough to simply state that the reason for delay was a missing investigating file, so as to invoke the discretion of the court. The aggrieved party has the onus of demonstrating how this file got lost in the organization. It is the tailor of its own misfortune and should bear the consequences. That the current statue of the matter is solely because of the 2nd Appellant's indolence and lethargy in filing its defence precipitating the subsequent consequences stipulated under the law. The fundamental conclusion is that there has been no excusable mistake and/or compelling reason that has been presented before court to warrant the orders prayed for in the application. The maxim of equity aids the vigilant and not the indolent. The 2nd Appellant/Applicant seeking for a remedy for their indolence is bad in law and an afterthought, since the court rightfully exercised its discretion in issuing judgment in default of filing a defence."**

29. Respondent thus submits that the trial court applied itself correctly in dismissing the Appellant's application seeking to set aside an ex-parte judgement entered into regularly.

ISSUES:

30. After going through the proceedings, pleadings herein and parties' submissions, I find the issues are; ***whether the appeal has merit? What is the order as to costs?***

ANALYSIS AND DETERMINATION

31. It is the Applicant's case that its former employee/in-house counsel who received the summons to enter appearance and plaint in 2015 left employment of the appellant and failed to appoint an advocate to act for the Appellant.

32. It is also the Applicant's case that it settled the decree and certificate of costs for Kshs. 242,162.30 as per the interlocutory judgement of 17th March 2016. The application before court is premised on the grounds on the face of the application together with the supporting affidavit by Valentine Achungo, advocate sworn on 18th January 2019 whose contents I have considered.

33. The Respondent did not oppose the application before court. The Respondent failed to file a replying affidavit to challenge the application before court contrary to the provisions of Order 51 rule 14 which provide as follows:

> **"(1) Any respondent who wishes to oppose any application may file any one or a combination of the following documents – (a) a notice of preliminary objection; and/or (b) replying affidavit; and/or (c) a statement of grounds of opposition.**
>
> **(2) The said documents in subrule (1) and a list of authorities, if any shall be filed and served on the Applicant not less than three clear days before the date of hearing.**

(3) Any Applicant upon whom a replying affidavit or statement of grounds of opposition has been served under subrule (1) may, with the leave of the court, file a supplementary affidavit.

(4) If a respondent fails to file to comply with subrule (1) and (2), the application may be heard ex-parte."

34. The Respondent however made oral submissions in court on 21/1/2019 challenging the application before court which trial court did put into consideration.

35. There were no grounds of opposition or a replying affidavit filed by the respondent as prescribed by the rules. The respondent's advocate elected to proceed and oppose the application in the manner he did without filing any formal response.

36. The affidavit of service on record in proof of service has not been challenged. Order 19 rule 2 provides as follows:

"Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross examination of the deponent."

37. The Applicant seeks to be granted an opportunity to be heard on its defence. There is no dispute that the Appellant was duly served with the relevant court documents vide the affidavit evidence so far on record. The ex parte judgement entered in the instant case was obtained regularly, as there was proper service.

38. The appellant has not demonstrated any prejudice or injustice it stands to suffer if the orders sought are not granted. The Appellant settled part of the decretal amount in the case and there's an admission in this regard by the Applicant based on affidavit evidence so far on record.

39. It is imperative to be guided by the principles governing the exercise of judicial discretion as to the setting aside of an ex parte judgement obtained in default which were clearly set out in the judgment of the Court of Appeal in the ***Maina vs Mugiria case*** as follows:

"The principles governing the exercise of judicial discretion to set aside an exparte judgment obtained in default of either party to attend the hearing are:

a) Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.

b) Secondly, this discretion is intended so to be exercised to avoid excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah v Mbogo [1967] EA 116 at 123B, Shabir Din vs Ram Parkash Anand [1955] 22 EACA 48.

c) Thirdly, the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some manner and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. Mbogo v Shah [1968] EA 93.

d) The court has no discretion where it appears there has been no proper service (Kanji Naran v Velji Ramji [1954] 21 EACA 20).

e) A discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically. (Smith v Middleton [1972] SC 30)."

40. Some of the matters to be considered when an application is made are, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any other material factors which appear to have entered into the passing of the judgement, which would not or might not have been present had the judgment not been ex parte and whether or not it would be just and reasonable, to set aside or vary the judgment, upon terms to be imposed. See (***Jesse Kimani vs McConnel [1966] EA 547, 555F)***, which this court has put into consideration.

41. The court stands guided by the law as enunciated under Article 159 (2) (d) of the Constitution of Kenya and section 1A and 1B of the Civil Procedure Act as read together with section 3A of the same Act. It was clearly detailed in ***Joshua Werunga vs Joyce Namunyak*** as follows:

"In the case of Raila Odinga vs I.E.B. & Others [2013] eKLR, the Supreme Court said that Article 159 (2) (d) of the Constitution simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice."

42. The decision on whether or not to set aside an ex-parte judgement is discretionary in nature. The case of ***Phithon Waweru Maina vs Thuka Mugiria (1983) eKLR Civil Appeal 27 of 82*** the court stated as follows:

"Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgement he does so on such terms as my be just… 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 it by the rules. Patel V EA Cargo Handling Services Ltd (1974) EA 75 at 76 C and E b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice. Shah vs Mbogo (1967) EA 116 at 123B, Shabir Din vs Ram Parkash Anand (1955) 22 EACA 48.C) Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge is exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a hole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. Mbogo vs Shah (1968) EA 93."

43. The legitimacy of reasons averred herein cannot be verified by court and in the current set of circumstances, it is just not enough to simply state that the reason for delay the appellant employee a legal officer indeed received the summons to Enter Appearance but did not take action on the same but filed away leading to the interlocutory judgement being entered against the Appellant, so as to invoke the discretion of the court.

44. The aggrieved party has the onus of demonstrating the averments. It is the tailor of its own misfortune and should bear the consequences. That the current state of the matter was solely because of the Appellant's indolence and lethargy in filing its defence precipitating the subsequent consequences stipulated under the law.

45. The fundamental conclusion is that there has been no excusable mistake and/or compelling reason that has been presented before court to warrant the orders prayed for in the application. The maxim of equity aids the vigilant and not the indolent. The 2nd Appellant/Applicant seeking for a remedy for their indolence is bad in law and an afterthought, since the court rightfully exercised its discretion in issuing judgment in default of filing a defence. See ***Richard Murigu Wamai vs Attorney General & Another (2018) eKLR.***

46. There is no contest that that the appellant was duly served with the relevant court documents guided by the affidavit evidence so far on record. The explanation given by the appellant is not credible. It deliberately ignored court summons which was rather unfortunate which was exacerbated by its own employees and worse still a legal officer, a person with legal training.

47. The court finds **no error in decision arrived at by the trial magistrate**. **However the Executive Officer of the court will ensure that only legally and fairly due amount is contained in the decree excluding already paid amount in the matter. Save for that direction the appeal is dismissed with costs to the respondent.**

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2019.

....

C. KARIUKI

JUDGE