



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 317 OF 2019

JOSEPH NZYOKI MWANTHI T/A

JOE N. MWANTHI & CO. ADVOCATES.....APPELLANT

-VERSUS-

FRAMETECH EQUIPMENT LIMITED.....RESPONDENT

(Being an appeal from the ruling and order of Hon. D. A. Ocharo, Principal Magistrate delivered on 11th June 2019 in Chief Magistrate's Court at Nairobi (Milimani) Civil Case No. 1795(A) of 2016)

JUDGEMENT

Background:

1. A judgment in default of appearance was entered in favour of the plaintiff as against the defendant on the 28/11/2016.
2. By a notice of motion application dated 12/4/2017 and filed in court on 13/4/2017, the defendant sought orders inter alia to set aside the aforesaid default judgment and for leave to file his defence.
3. The aforesaid application was canvassed before Hon. Gichobi (Senior Resident Magistrate) by way of written submissions. However, the honourable magistrate proceeded on leave before confirming the filing and service of the written submissions.
4. On 7/6/2018 the parties and/or their respective advocates appeared before Hon. A. N. Makau who directed that the matter be mentioned before the Chief Magistrate Hon. Gesora, for re-allocation to another magistrate and/or other directions as Hon. Gichobi had been transferred to another station.
5. Ultimately the matter was mentioned before the Honourable Chief Magistrate on 12/6/2018 who gave directions that the file be forwarded to Hon. Gichobi to write a ruling.
6. The ruling was finally written and signed by the Hon. Gichobi at Kangema on the 15th day of October, 2018 and delivered at Nairobi by the Honourable Peter Gesora (Chief Magistrate) on the 22nd day of October 2018, in the absence of the parties and/or their respective advocates.
7. The parties advocates, and in particular the advocate for the appellant, were not given notice that the ruling was to be delivered on the 22/10/2018. Thus the Executive Officer wrote to the advocates on record informing them that the ruling had been delivered in the absence of both parties and invited them to visit the court registry with a view to perusing the court file.
8. As much as the said letter is purported to have been written on 22/10/2018, the same bears a "Receiving Stamp" from the court bailiffs and process section showing that the same was received on the 31/10/2018. Subsequently the same was served on the advocate for the appellant, Ms. Kang'ethe, Waitere on the same date to wit 31/10/2018 as evidence by the said advocates stamp on the face of the said letter.
9. The respondent, without any notice or other warning whatsoever, proclaimed through auctioneers, the appellant's office goods on 12th March, 2019 in purported execution of a decree dated 28/11/2016.
10. It is the above execution process that precipitated the filing of the notice of motion application dated 14/3/2019 filed under a certificate of urgency inter alia seeking enlargement of time for filing of defence and the defence on record to be deemed as properly on record and duly served. In response to the said application the respondent filed grounds of opposition.

11. The said application was canvassed by way of written submissions and a ruling thereon delivered on 11th June 2019 by Hon. D. A. Ocharo, Principal Magistrate thereby dismissing the said application with costs to the respondent.

12. The appellant, being aggrieved by the entirety of the said ruling, filed the instant appeal against the same complaining in summary that the ruling and order of Hon. D. A. Ocharo, Principal Magistrate delivered on 11th June 2019 in Chief Magistrate's Court at Nairobi (Milimani) Civil Case No. 1795(A) of 2016) was premised on the ground that the appellant never adduced sufficient material/reasons to warrant grant of orders sought,

13. Parties were directed to canvass appeal via submissions.

APPELLANT'S SUBMISSIONS:

14. The appellant submitted that, the trial magistrate misdirected himself by finding that the ruling on the appellant's application dated 13th April, 2017 was delivered on the 15th October, 2018.

15. It is contended that, on its face the ruling was dated and signed at Kangema on the 15th day of October, 2018 by Hon. I. Gichobi SRM but the same was not delivered on the same date. The same was delivered in Nairobi on the 22nd day of October, 2018 by Hon. Peter Gesora (Chief Magistrate).

16. Thus it is argued that, the Hon. D.A. Ocharo (PM) misdirected himself in his ruling when he proceeded on the premise that ruling on the application dated or filed in court on 13th April, 2017 was delivered by the Hon. Gichobi (SRM) on 15th October, 2018.

17. It was submitted that, appreciating the correct date of delivery of the ruling was very important as clear timelines were indicated therein for taking some actions by the appellant, with the reference point being the date of delivery of the said ruling. With prejudicial consequences in default on the part of the appellant. It was imperative therefore that the court did not misdirect itself on the actual date of delivery of the ruling.

18. It is contended that the application that was due for consideration by Hon. Ocharo is that dated 14th March, 2019. The prayers sought in the said application are re-stated by the court in its impugned ruling dated 11th June, 2019.

19. It is apparent, on the face of the said application that the same was substantially seeking enlargement of time for filing defence which application was anchored under Order 50 rule 6 of the Civil Procedure Rules.

20. In spite of the very clear jurisdiction of the court invoked by the appellant, the Hon. Magistrate strangely decided that the appellant was seeking a review of the orders of the Hon. Gichobi (SRM) dated 15th October, 2018 whose jurisdiction is donated by Order 45 rule 1(1) of the Civil Procedure Rules.

21. The appellant did not anywhere in his application dated 14/3/2019 indicated that he was aggrieved by the ruling of the Hon. Gichobi dated 15/10/2018 as to warrant his moving the court for view thereof under Order 45 of the Civil Procedure Rules. His issue was that he had not complied with the order to file and serve a defence within the timeline given for reasons advanced in the supporting affidavit and therefore moved the court under Order 50 rule 6 of the Civil Procedure Rules for enlargement of time.

22. Needless to say, different considerations appertain to the exercise of the court jurisdiction or powers to enlarge time and also review its orders. Thus it is submitted that, the court therefore clearly erred and/or misdirected itself to the appellant's detriment when it treated the two jurisdictions as if there were synonymous with each other.

23. In support of its application dated 14th March 2019, the appellant filed a detailed affidavit to which was annexed a myriad of documents. The allegations of fact contained in the said affidavit remained uncontroverted as the respondent chose to only file grounds of opposition which are dated 27th March 2019.

24. It is apparent from the ruling that the learned trial magistrate did not evaluate, assess, and /or analyze the affidavit and other documentary evidence exhibited by the appellant in support of his application.

25. In directing that the defence be filed and served within fourteen (14) days of the delivery of the ruling, the Hon. Magistrate must have deemed 14 days to be sufficient reasonable period within which the appellant could have complied with the order in regard to filing and service of a defence.

26. Indeed it is only logical for one to assume that the magistrate intended that the ruling be delivered upon giving notice to the parties and in particular the appellant if the appellant was to be expected to comply with the conditions that attached to the orders setting aside the default judgment.

27. That the ruling was delivered without notice to the appellant constituted a substantive error on the part of the magistrate who delivered the same. Indeed this was compounded by the fact that the appellant was only notified and/or became aware of the delivery of the said ruling on 31/10/2018 and only knew of the substance of the ruling on 9/11/2018, which was after the 14 days period given by the court to file and serve a defence.

28. It is telling that the appellant filed and served the defence on 9/11/2018 which is the same day his advocate traced the court file and

perused the same. The inference that can be drawn from this swift action, by or on behalf of the appellant, is that had the ruling dated 22/10/2018 been delivered in the presence of or with notice to the appellant then the appellant could have easily complied with the same to the later.

29. Hon. Gichobi in her ruling dated 8th September, 2018 found that the appellant had a defence that raises triable issues that merit going to full trial. A defence dated 9/11/2018 was filed and served on the same day to wit the 9/11/2018. The appellant paid and the plaintiff received thrown away costs in line with honourable court orders dated 15/10/2018.

30. In allowing the appellant's notice of motion application dated 12/4/2017 and inter alia setting aside the judgment entered in default of defence on 28/11/2016 and granting leave to the appellant to file his defence, the Hon. Magistrate directed, in the ruling dated 15/10/2018 that the appellant was:

(a) In any event to file and serve defence within fourteen (14) days of the date of delivery of the ruling; and

(b) To pay the respondent throw away costs of Ksh.5,000/= within 30 days of the delivery of the ruling failure to which the orders in the ruling would stand vacated and judgment reinstated and plaintiff be at liberty to execute.

31. It is apparent from the foregoing that the Hon. Magistrate, while setting aside the default judgment did not say that the order setting aside the judgement would stand vacated if the defence was not filed and served within 14 days of the delivery of the ruling. The setting aside orders was to be vacated only if the appellant failed to pay the respondent throw away costs of Ksh.5,000/= within 30 days of the date of delivery of the ruling.

32. Throw away costs of Ksh.5,000/= were paid to the respondent through his advocates Ms. Njeru, Nyaga & Co. Advocates on 20/11/2018 which was within the thirty days period allowed by the court for the appellant to do so.

33. The effect of complying with the court's directive to pay the throw away costs is that the order setting aside the default judgment was never vacated hence there is no judgment and decree which could form the basis of execution. Indeed it is telling that the said payment was not only received with prejudice but indeed it was not out rightly rejected by the respondent.

ISSUES:

34. After going through the proceedings, pleadings and submissions filed, I find the issues are; **whether the appellant appeal has merit? What is the order as to costs?**

ANALYSIS AND DETERMINATION:

35. This is a first appeal and I am reminded of my primary role as a first appellate court as was re-stated by the Court of Appeal in the case of **Abok James Odera t/a Odera & Associates & John Patrick Machira t/a Machira & co. Advocates [2013]** thus:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely; to re-evaluate, re-assess and re-analyse 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. See the case of Kenya Ports Authority vs Kuston (Kenya) Limited [2009] 2EA 212 wherein the Court of Appeal held inter alia that:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

36. The court has noted that, in allowing the appellant's notice of motion application dated 12/4/2017 thus setting aside the judgment entered in default of defence on 28/11/2016 and granting leave to the appellant to file his defence, the Hon. Gichobi Magistrate directed, in the ruling dated 15/10/2018 that the appellant was:

“In any event to file and serve defence within fourteen (14) days of the date of delivery of the ruling; and

To pay the respondent throw away costs of Ksh.5,000/= within 30 days of the delivery of the ruling failure to which the orders in the ruling would stand vacated and judgment reinstated and plaintiff be at liberty to execute”

37. The appellant deposed and complained that, the ruling above of Hon Gichobi was dated 15/10/018 and delivered on 22/10/018 without notice to the appellant a fact not rebutted by affidavit by the respondent. The appellant was only notified and/or became aware of the delivery of the said ruling on 31/10/2018 and only knew of the substance of the ruling on 9/11/2018, which was after the 14 days period given by the court to file and serve a defence.

38. Throw away costs of Ksh.5,000/= were paid to the respondent through his advocates Ms. Njeru, Nyaga & Co. Advocates on 20/11/2018 which was within the thirty days period allowed by the court for the appellant to do so.

39. A defence dated 9/11/2018 was filed and served on the same day to wit the 9/11/2018 when appellant traced court file. It is apparent from

the foregoing that the Hon. Magistrate, while setting aside the default judgment did not say that the order setting aside the judgement would stand vacated if the defence was not filed and served within 14 days of the delivery of the ruling.

40. The setting aside orders was to be vacated only if the appellant failed to pay the respondent throw away costs of Ksh.5,000/= within 30 days of the date of delivery of the ruling.

41. In support of its application dated 14th March 2019, the appellant filed a detailed affidavit to which was annexed a myriad of documents. The allegations of fact contained in the said affidavit remained uncontroverted as the respondent chose to only file grounds of opposition which are dated 27th March 2019.

42. It is apparent from the ruling that the learned trial magistrate did not evaluate, assess, and/or analyse the affidavit and other documentary evidence exhibited by the appellant in support of his application. Thus she arrived at an erroneous decision which cannot stand,

43. Thus court makes the following orders;

i. The ruling and order of Hon. D. A. Ocharo, Principal Magistrate delivered on 11th June 2019 in Chief Magistrate's Court at Nairobi (Milimani) Civil Case No. 1795(A) of 2016) is hereby set aside and orders/ruling dated 15/10/018 and delivered on 22/10/018 are reinstated subject to (2) below.

ii. The appellant shall serve afresh the defence upon Respondent within 14 days of this judgement.

iii. No orders as to Costs.

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

.....

C. KARIUKI

JUDGE