REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL APPEAL NO 6 OF 2018

BENSON NKAULO.....APPELLANT

VERSUS

SAMSON KAAPEI.....RESPONDENT

(Being an appeal from the judgement and decree of Hon Oanda, PM, delivered

***on 8th February 2018 in Kilgoris Principal Magistrate's Court in Civil Case NO 21 of 2018*)**

JUDGEMENT

1. The appellant has appealed against the ruling and decree, which dismissed his application that sought to set aside a default judgement that was entered against him**.**

2. In this court, the appellant has raised three grounds of appeal in his memorandum of appeal.

3. In a coalesced form, the grounds are that the trial court erred in law and fact in refusing to set aside the default judgement that had been entered prematurely; and for dismissing the motion without reasonable or lawful cause and for ignoring his written submissions. I will consider all the grounds together. Counsel submitted that the trial court was in error in refusing to allow the appellant's application to set aside the default judgement, which had been entered purely due to the error or mistake of his prior advocate (Mckay & Co. Advocates). Furthermore, counsel submitted that it is trite law that a mistake of counsel should not be visited upon an innocent litigant, citing ***Excelation Ltd V Commercial Transporters Ltd, Nairobi HCCC No. 1066 of 2001*** in support thereof. Counsel further submitted that the trial court ignored the appellant's plea that the appellant had no notice of the entry of judgement against him.

4. Counsel also cited article 159 (2) (d) of the 2010 Constitution of Kenya, which mandates courts to administer substantive justice without undue regard to rules of procedure and technicalities. He therefore submitted that the trial court dismissed the application on a technicality.

5. In addition to the foregoing, counsel has submitted that the trial court failed to consider that the appellant had a cogent, plausible and reasonable defence. The draft defence was annexed to the application.

6. Apart from the foregoing, counsel also cited **John Ndungu Njoroge v George Waweru Muchai** in Nairobi HCC Appeal No. 809 of 2005 which also cited with approval **Behinda Murai & Another v Amoi Wainaina (19780) KLR 278**, in which Madan, J in part said that: "A mistake is a mistake. It is no fewer mistakes because it is an unfortunate slip though in the case of junior counsel the court may feel compassionate readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that the courts of justice themselves make mistakes which is politely referred to erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometime overturn."

7. Finally, counsel cited **Philip Chemwolo & Another v August Kubende (1982-1988) KLR 103**, in which Apaloo, JA posited that: "blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case on merit. I think the broad equity approach to the matter is that unless there is fraud or intention to overreach there is no error or default that cannot be put right by payment of costs. The court as is often said exist for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."

8. Finally, counsel submitted that the claim of the respondent against the appellant was based on an alleged assault by the appellant. The appellant was charged with the offence of assault vide Kilgoris PM's court in criminal case no. 1271 of 2015, R. vs. Benson Nkaulo Karioki. The case was heard by Hon. R.M. Oanda, Principal Magistrate, who is the same magistrate who dismissed the appellant's notice of motion dated 2nd October 2017. Counsel therefore submitted that this proved that the respondent's claim in the civil suit was baseless and should have been dismissed with costs.

9. Based on the foregoing counsel had urged the court to allow the appeal with costs to the appellant.

THE CASE FOR THE RESPONDENT.

10. The respondent has opposed the appeal and has urged the court to dismiss it with costs.

11. Counsel has submitted that the instant counsel for the appellant (M/s Nyamwange & Co advocates) did not comply with the provisions of Order 9 Rule 9; which mandatorily required him to come on record for the appellant with the permission of the court; since the previous counsel (McKay & Co. advocates) had not consented to the instant counsel to act for the appellant**.** Counsel cited ***William Charles Fryda v Assumption Sisters of Nairobi Registered Trustees & 2 Others* [*2017] EKLR***. In that case the Court of Appeal while considering similar provisions held that; "*16. In my view, the Notice of Appeal filed on 2 October 2017 was filed by a stranger to the proceedings and the same is incompetent. Being incompetent, I am not persuaded that I have a competent Notice of Appeal in this case which can support a full appeal before the Court of Appeal. Without there being a valid Notice of Appeal one cannot then be entitled to a stay pending appeal, for the simple reason that you can only have a stay pending appeal if you have an appeal, and you cannot have an appeal if you do not have a competent Notice of Appeal."*

12. Based on the foregoing, counsel has submitted that the cited provisions of the law are peremptory and failure to comply with those mandatory provisions of the law without any explanation and excuse cannot be wished away and the law is substantive not a mere technicality.

13. Furthermore, counsel submitted that advocates and parties alike have been invoking the provisions of article 159 of the 2010 Constitution whenever they fail to abide by any provision of the law; like in the instant case. The Court of Appeal and the Supreme Court have held that those provisions are not a panacea or a cure for all the ills and was not intended to uproot the law or rules of procedure. He cited ***The Council, Jomo Kenyatta University of Agriculture and Technology v Joseph Mutuura Mbeera & Others [2015] EKLR***, in which Waki, JA., citing other authorities cautioned that article 159 (2) of the Constitution that it did not totally uproot well established principles or precedent in the exercise of the discretion of the court, which is a judicial process devoid of whim and caprice and is not a panacea for all procedural shortfalls and that it is applicable on a case to case basis. Counsel has also cited the major authorities cited by the appellant.

ISSUES FOR DETERMINATION

14. I have considered the submissions of both counsel and I find the following to be the issues for determination. Whether or not the appeal is properly before this court. I find that the trial court dismissed the appellant's motion to set aside the default judgement on the basis that the appellant had not complied with Order 9 Rule 9 of the Civil Procedure Rules. That court found that the current counsel (Mr. Nyamwange) did not have leave of the court to appear and act for the appellant in place of Mr. McKay, advocate, who was then on record for the appellant. Mr. Nyamwange also did not have a consent filed between him (being the proposed incoming advocate) and the outgoing advocate (Mr. McKay, advocate) in terms of Order 9 Rule 9 (b) of the Civil Procedure Rules. Mr. Nyamwange is a stranger to the proceedings and therefore the appeal filed by him is incompetent as set out in ***William Charles Fryda v Assumption Sisters of Nairobi Registered Trustees & 2 Others***, *supra*. The purpose of Rule 9 Rule 9 of the Civil Procedure Rules is to ensure a smooth transition from one advocate to another in respect of legal representation in court and this cannot be achieved if what happened in this case is allowed to continue.

15. In the premises, I find that the appeal is incompetent and is hereby struck out with costs to the respondent.

Judgement signed, dated and delivered in open court at Narok this 19th day of December, 2019 in the

presence of the appellant in person and Ms. Adallah holding brief for Mr. Q. M. Otieno for the Respondent.

J. M. Bwonwong'a

Judge

19/12/2019