REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIVASHA

CORAM: R.MWONGO, J.

CIVIL APPEAL NO. 45 OF 2014

GRACE WAMBUI MUTHONI.....APPELLANT

VERSUS

KEROCHE BREWERIES LIMITED.....RESPONDENT

(Being an appeal from the ruling of, Hon S. Mwinzi, Ag. SRM

in Naivasha Chief Magistrate Civil Suit No. 96 of 2013,

delivered on 10th December, 2014.)

JUDGMENT

1. By a plaint dated 5th March, 2014 in the lower court, the plaintiff /appellant sought damages for an accident suffered by her on or about 17th August 2011, in the respondent's factory. The accident occurred on 17th August 2011 when the appellant went to the winery for tea and the tea urn slipped causing hot tea to pour on her.

2. On 4th April, 2014, interlocutory judgment for failure to file a defence was entered against the defendant/ respondent for Kshs 189,515/= of which 153,000/= was for damages.

3. Thereafter, following an application by the defendant, the said judgment was set aside by a ruling dated 19th December, 2014. The main ground was that the failure to file a defence was due to excusable mistake of counsel. The trial magistrate relied on the case of **Shailesh Patel t/a Energy Company of Africa v Kessels Engineering Works Pvt Ltd & 2 Others [2014] eKLR**, and held that the defendant/respondent had a constitutional right under Article 50 of the Constitution to a fair hearing.

4. This is an application by the appellant against the said ruling. She argues that: the defendant was duly served with the plaint and summons; that the parties filed a consent in court on 30th September, 2014 by which the defendant agreed to pay the decretal sum and its attached vehicle was released; and that the court could not vacate the consent order suo moto.

Service of Plaint

5. The appellant's argument is that the plaint and summons were served on the defendant as shown by the fact that the defendant filed a memorandum of appearance shown at page 72 of the Record of Appeal. I have seen the memorandum of appearance, and I think there is no doubt that the plaint was served on the defendant. However, the defendant's clearly also state that their failure to file the defence on time was due to inadvertence of their court clerk, who swore an affidavit as to the error. The trial magistrate took all those facts into account and was of the opinion that the defendant ought not be denied the right to defend itself on the basis of a technicality over which they could not be responsible. The question is whether this court should reverse the trial court's exercise of discretion in the circumstances.

6. In **CMC Holdings Ltd v James Mumo Nzioki [2004] eKLR** the Court of Appeal dealing with a similar situation stated that:

> ***"[the court's discretion] in deciding whether or not to set aside an exparte order 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 a discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident, or error. Such an exercise of discretion would in our mind be wrong in principle."***

7. The lower court exercised its discretion in favour of the defaulting party which showed that its clerk had made an honest error. I therefore think that the right to a hearing should not be so readily denied so as to lock a litigant out of the doorstep of justice on a technicality which has been well explained. Such right has been a historically well protected right and should be denied only for the gravest reasons and in the most exceptional circumstances. In my view, the trial court was right to regard the protection of the right to be heard as a first constitutional principle.

Consent

8. The appellant argued that there was a consent entered into between the parties and filed in court on 30th September, 2014, and that the court could not ignore or set it aside suo moto in reaching its decision. The respondent denies the existence of such consent in that the same was never recorded and adopted by the court, and remained a mere agreement between the parties.

9. The trial court considered these arguments and stated:

> ***"I will first of all dispose with the issue of the alleged consent. First of all, I note that it was never adopted as an order of the court and is therefore not a court order for purposes of enforceability. Secondly, it does not seem to give a concrete promise of how the decretal sum would be paid"***

With that, the trial court disposed with the "consent". I have

10. The law on consent judgments was plainly put in **Hirani v Kassam (1952) EACA 131**, where the Court held:

> ***"A court cannot interfere with a consent judgment except in such circumstances that would afford a good ground for varying or rescinding a contract between the parties"***

11. I have seen the "consent" referred to by the appellant. It is a letter dated 29/9/14 on the defendants' counsel's letterhead addressed to the Chief Magistrate. It was filed in court on 30th September, 2014 as an annexure (marked "LMK 1") to a supporting affidavit of Lawrence Macharia Karanja in support of a motion for stay of execution of judgment, and for opportunity to file defence. It was exhibited to demonstrate that the parties had agreed that an attached vehicle be released provided the matter was settled within seven days.

12. I have noted that the consent exhibited in the said letter is not signed by the advocates for the plaintiff, Omwoyo Masese & Co advocates. To that extent, it is an incomplete consent, signed by one party and not by the other.

13. In this case, it is clear that the said consent was never brought to the trial court for purposes of recording as a court order. I have perused the proceedings, and do not see any evidence of the consent being brought to the court's attention for adoption. To that extent, the document cannot properly be called a consent order. The consent was, as between the parties, an agreement to treat each other in a particular manner. The parties did not involve the court, and therefore the court did not affix its imprimatur on the parties' agreement. In the absence of the court's stamp of acceptance of the consent, I am in agreement with the trial magistrate that it did not amount to an 'order of the court' and could not be treated by the court as such.

14. Accordingly, the argument that the court could not set aside the consent order suo moto does not hold any water since the consent had not been brought to the attention of the court for adoption. It thus never became a court order. There was therefore no need for the trial court to even go into a discussion of the merits of the order since the document had never been subjected to the court's scrutiny for adoption.

15. I agree with the respondent that the consent was a mere agreement between the parties, and the trial court correctly understood the document as such. I would go as far as to state that the consent exhibited in the supporting affidavit is not even a consent for the fact that it does not have the signatures of both parties, and was filed for a purpose other than for adoption by the court.

16. In light of the foregoing, I am unable to accept the appellant's arguments and the appeal fails. It is hereby dismissed with costs to the respondent.

17. Orders accordingly.

Dated and Delivered at Naivasha this 17th Day of December, 2019.

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Obino holding brief for Masese for Appellant

2. No representation for Mirugi Kariuki for the Respondent

3. Court Clerk - Fred Kamau