



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 52 OF 2015

CORAM: D.S. MAJANJA J.

BETWEEN

GEORGE KIRIAMA.....APPELLANT

AND

CHARLES MARIENGA.....RESPONDENT

(Being an appeal from the Ruling and Order of Hon.M. Nyagah, RM

dated 9th April 2015 at the Chief Magistrates Court

at Kisii in Civil Case No.421 of 2013)

JUDGMENT

1. This is an appeal against the ruling and order of the trial magistrate allowing the respondent's application dated 26th August 2014 made under **Order 45** of the **Civil Procedure Rules** seeking, amongst others, the following orders:

[5] That judgment and decree entered against the defendant be reviewed, set aside and substituted with an order dismissing the case with costs.

[6] That the Annexed Defence herein be decreed as duly filed upon payment of court fees and the matter do proceed for hearing on merits.

2. The facts leading to the application for review are not in dispute. The appellant filed a suit against the respondent claiming Kshs. 183,500/- together with interest at 14% pa and costs on account of money advanced to him at his request. After filing the suit, the appellant obtained default judgment. The respondent filed a Notice of Motion dated 4th April 2014 seeking, in the main, the following order:

[4] THAT the ex-parte judgment and decree herein against the Defendant/applicant be stayed pending the hearing and determination of the suit on merit.

3. The thrust of that application from the grounds set out on the face of the application and the respondent's supporting deposition is that the failure to file the defence on time was a mistake occasioned by his advocate and that he had a good defence in that the decree was exaggerated. After considering the application before the court, the magistrate in a ruling delivered on 26th July 2014, held as follows;

[S]etting aside of an ex-parte judgment is a discretionary power. For the court to exercise the power in favour of the Defendant, he must come with clean hands before this court. As correctly submitted by the Plaintiff, the Defendant has come to Court with unclean hands hence is not entitled to equitable discretion of this Court.

As correctly submitted by Counsel for the Defendant in exercising the discretion to set aside ex-parte judgment the Court must be satisfied that the Defendant has a good defence. In the present application the Defendant did not attach a draft defence. In that regard the Court does not have a way of knowing whether he has a good defence.

4. Undeterred by the dismissal of his initial application to set aside the judgment, the respondent filed another Notice of Motion dated 3rd July 2014 in which he sought the following orders:

[3] THAT the Honourable Court be pleased to set aside the judgment entered against the Defendant/Applicant herein.

[4] THAT the Applicant do liquidate the decretal amount in instalments of Kshs. 8,000/- per month.

[5] THAT the annexed defence herein be decreed as duly filed upon payment of court fees and the matter do proceed for hearing on merits.

5. In his deposition and arguments in support of that application, the respondent contended that the judgment was irregular and that he had a strong defence, which he annexed, that raised triable issues. The learned magistrate after hearing the matter came to the conclusion that

In the application dated 4th April 2014, the applicant sought setting aside of the ex-parte judgment and decree in this case pending the hearing and determination of the suit. In the present suit he majorly seeks setting aside of the judgment of the court. Basically he is seeking the same prayer that he sought in the application of 4th April 2014. In the previous application the issue of setting aside the judgment was substantially dealt with by this Court. In the present case a draft defence has been annexed. The issue ought to have [been] made part of the previous application but did not. In the ruling delivered on 26th July 2014, the Court dealt with the issue of the draft defence though none had been annexed. That issue was dealt with substantially. As a matter of fact one of the reasons why the application was dismissed was failure by the Applicant to satisfy the court that he had a good defence on merits.

6. The issue raised by the appellant in the rather prolix memorandum of appeal dated 9th May 2015 is whether the trial magistrate erred in the exercise of his discretion properly when allowed the third application resulting in setting aside the judgment. Counsel for the appellant contended that the issue of setting aside had already been determined and the trial magistrate had already held that the issue was *res judicata*. As such, the appellant argued the trial magistrate could not, in a further application, set aside the judgment under the guise of a review.

7. Counsel for the respondent supported the trial magistrate on the ground that the contract on which the debt was founded and the subsequent charging of interest was illegal hence the court was entitled to intervene. In his view, the trial magistrate exercised his discretion properly in setting aside a judgment founded on an illegality.

8. Since I am being called upon to review the exercise of discretion by the trial court, I am guided by the decision in **Mbogo and Another v Shah [1968] EA 15** where it was stated that:

An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.

9. In this case, the application before the court was for review under **Order 45** of the **Civil Procedure Rules**. The parameters for review were summarised in **National Bank Ltd v Ndungu Njau NRB CA Civil Appeal No. 211 of 1996 [1997] eKLR** by the Court of Appeal as follows:

A review may be granted wherever the Court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omissions must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provisions of law cannot be a ground for review.

10. The trial magistrate found that the issue of illegality of the contract was a matter for argument and therefore not a ground for review but he went further and found that there was sufficient cause for an order of review as follows;

From the foregoing and in the interest of justice I do find that there is a sufficient reason for this Court to review its earlier orders. The review will no prejudice the Plaintiff since the principal amount lent is in the custody of the Court. However, should this Court fail to review the orders the Defendant stand to suffer prejudice in the event it is found that the Plaintiff did not have a licence to charge interest on the loan. This is because the Defendant will be compelled to pay a judgment arising from a contract tainted with illegality.

11. I have considered the ruling appealed from and what is apparent is that the magistrate failed to consider or totally ignored the fact that the respondent had filed two previous applications which had dealt with the issue of the defence. Further, as I have shown above, the nature of the defence was a matter which the court had already considered and could not be re-litigated for the third time dressed. As magistrate rightly observed, the issue whether the contract was illegal is one that requires argument and evidence and could not constitute a ground for review on the basis that there was an error on the face of the record.

12. I find and hold that the respondent's third application was, as the appellant pointed out, in tenor and effect, an application to set aside judgment. Since the second application had already been declared *res-judicata*, the third application was obviously an abuse of the court process. The trial magistrate, did not consider this fact and as such exercised his discretion in a manner that entitles this court to intervene. I therefore find and hold the respondent's Notice of Motion dated 26th August 2014 an abuse of the court process.

13. I allow the appeal and set aside the ruling and order of the subordinate court dated 9th April 2015 and substitute the same with an order dismissing the respondent's Notice of Motion dated 26th August 2014 with costs

14. The respondent shall bear the costs of this appeal which I assess at Kshs. 15,000/-.

DATED and DELIVERED at KISII this 27th day of June 2018.

D.S. MAJANJA

JUDGE

Ms Ochwan instructed by Oguttu-Mboya and Company Advocates for the appellant.

Mr Ochoki instructed by Ochoki and Company Advocates for the respondent.