



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO.47 OF 2017

BETWEEN

CAROLINE AWUOR ONYANGO.....APPELLANT

AND

CFC STANBIC BANK LIMITED.....RESPONDENT

(Being an Appeal from the Ruling, Order and Decree in Kisumu CMCC No. 156 of 2015

by Hon. W.K. Onkunya (SRM) on 17th May, 2017)

JUDGMENT

1. **CFC STANBIC BANK LIMITED** (*hereinafter referred to as respondent*) sued **CAROLINE AWUOR ONYANGO** (*hereinafter referred to as appellant*) in the lower court claiming Kshs. 2,831,151.40 together with interest at 2.75% per month until settlement in full and costs of the suit on account of a balance outstanding for goods sold and supplied during the years 2014.
2. The defendant/appellant did not enter appearance nor file a statement of Defence and the court entered judgment for Kshs. 2,831,151.40 with costs and interest
3. By a notice of motion dated 13.2.17, the appellant applied for stay of execution; setting aside of the ex parte judgment and leave to defend in terms of a draft statement of that was attached to her affidavit in support of the notice of motion.
4. By a ruling dated 17.5.17, the notice of motion dated 13.2.17 was dismissed with costs to the respondent.

The Appeal

5. The Appellant being dissatisfied with the lower court's decision filed the Memorandum of Appeal dated 15.6.17 which sets out 4 grounds that: -

- 1) **The trial magistrate erred in law and in fact to dismiss the notice of motion dated 13.2.17 by applying wrong principles of law and raising the bar of drafting pleadings to higher standards despite having noted that the appellant was acting in person**
- 2) **The trial magistrate erred in law and in fact by placing a higher burden of proof on appellant's witness at a time when the matter was still at a preliminary stage**
- 3) **The trial magistrate erred in law and in fact by denying the appellant an opportunity to ventilate her case**
- 4) **The trial magistrate erred in law and in fact to uphold service yet there was a dispute on the same**

SUBMISSIONS BY THE PARTIES

6. When the appeal came before me for mention for directions on 14.12.17, I directed that the appeal be argued by way of written submissions which both parties dutifully filed.

Appellant's submissions

7. Appellant faulted the trial court to dismissing her application on technicalities. Appellant placed reliance on **Article 159(2) of the Constitution** which mandates the court to administer justice without undue regard to procedural technicalities. Appellant also relied on **Article 22 (3) of the Constitution** which provides that the Chief Justice shall make rules providing to guide court proceedings.

8. Appellant urged the court to find that she ought to have been given a chance to defend herself, first, because service was disputed. In support thereof, appellant placed reliance on ***Amayi Okumu Kasiaka & 2 others v Moses Okware Opari & another [2013] eKLR*** where the court held that the applicant ought to call a process server for cross-examination where service is denied.

9. Secondly appellant urged court to find that her draft defence raised triable issues and denying her a chance to ventilate it had caused her hardship and an injustice. She relied on ***Sammy Maina v Stephen Muriuki [1984] eKLR*** where the court relied on ***Mbogo v Shah [1968] EA 93*** where the court held:

".....discretion for setting aside judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a party which has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice".

10. Appellant also relied the case of ***Patel v EA Cargo Handling Services Ltd [1974] EA 75 at page 76***, where Sir William Duffus P held:

"In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

11. The appellant similarly relied on ***Shailesh Patel t/a Energy Company of Africa v Kessels Engineering Works Pvt. Limited & 2 others [2014] eKLR*** where she relied on the case of ***Patel v EA Cargo Handling Services Ltd*** (Supra) and set aside a regular judgment and ***Richard Nchapi Leiyagu v Independent Electoral & Boundaries Commission & 2 others [2014] eKLR*** where the court held: -

"..... nowadays pendulums have swung and the courts have shifted towards addressing substantive justice and no longer worship at the altar of technicalities".

Respondent's submissions

12. The respondent urged the court to be guided the holding in the case of ***James Wanyoike & 2 others v. CMC Motors Group Ltd & 4 others (2015) eKLR*** which discussed the principles for setting aside a regular judgment thus:-

"...The principles and tests for setting aside an ex-parte judgment can be summarized as follows: -

1. That the court has unfettered, unlimited and unrestricted jurisdiction to set aside an *ex-parte* judgment.

2. That the tests for setting aside an *ex-parte* judgment are:-

a. Whether there is a defence on the merits?

b. Whether there would be any prejudice to the plaintiff?

c. What is the explanation for any delay?

13. On the issue of service, respondent submitted that the appellant did not demonstrate that she was not served with summons or that she had sufficient cause for not appearing. In support thereof, reliance was placed on ***Wachira Karani v Bildad Wachira [2016] eKLR***.

14. The respondent also agrees with the holding in ***Patel v EA Cargo Handling Services Ltd (Supra)*** and ***Gupta v Continental Builders Limited (1976-80) 1 KLR 809*** that the court has a wide discretion to set aside a regular judgment if the defence raises triable issues. Respondent relied on the case of ***Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono [2015] eKLR*** which referred to The Black's Law Dictionary which defines the term "*triable*" as, "*subject or liable to judicial examination and trial*".

Analysis and Determination

15. I have considered the appeal in the light of the evidence on record and the cited authorities.

16. The appellant denies service of the summons. I agree with the holding in ***Amayi Okumu Kasiaka & 2 others v Moses Okware Opari & another (Supra)*** that the appellant ought to have called the process server Elijah K. Chepkwony to cross-examine him on the contents of his affidavit of service sworn on 4.9.15 but she did not. The averments thereof are not controverted. This court finds that the judgment on record

is a regular one.

17. From the numerous authorities cited by the parties, applicant is required to establish that she had a defence that raises a triable issue. Such a defence is not one that must succeed, but one that raises a prima facie defence and which should go to trial for adjudication.

18. I have considered the draft defence that was annexed to the appellant's notice of motion dated 13.2.17. While it is true that the appellant did not attach witness statements to the draft defence, what she filed was a draft defence and there is no requirement for a party to support a draft defence with witness statements. Even considering that this was a proper defence, failure to file witness statements is a technicality that does not go to the substance of the pleadings and this ought not to have been guided by **Article 159(2) of the Constitution** which mandates the court to administer justice without undue regard to procedural technicalities.

19. On whether the draft defence raises any triable issues, except for what was expressly admitted, the appellant denied the respondent's claim and put it to strict proof. The appellant has been acting in person and by expecting the appellant to draft pleadings as would an advocate, the trial court raised the bar to higher standards thereby falling into error. In the new constitutional dispensation, the pendulums have swung and the courts have shifted towards addressing substantive justice and no longer worship at the altar of technicalities (See **Richard Nchapi Leiyagu v Independent Electoral & Boundaries Commission & 2 others (Supra)**).

20. This court has considered the respondent's claim and the denials in the draft defence... The defence, from a lawyer's eye may appear hopeless but a denial of a claim such as the one filed by the respondent cannot be said not to be triable. In any case, the defence doesn't have to be one that must succeed but one that raises a prima facie defence which should go to trial for adjudication.

21. On the prejudice that is likely to be suffered by the respondent, there is no evidence that it cannot be compensated by an award for costs.

22. I am satisfied that the appellant had made out a good case for setting aside of the *ex parte* judgment. The trial court, ought to have exercised judicial discretion to set aside the judgment for the sake of justice and fairness in the case.

23. In conclusion, I find that this is a proper case that the trial court ought to have exercised its discretion in favour of the appellant. I hereby set aside the *ex parte* judgement entered on 16th October 2015 and all the consequential orders and order that the appellant files and serves her defence within 30 days from today after which the parties will appear before the Chief Magistrate's Court in Kisumu for direction as to the hearing of the suit.

24. Considering that the appellant is undefended, each party shall bear its own costs for this appeal.

DATED AND DATED IN KISUMU THIS 25th DAY OF October 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellant - Present in Person

For the Respondent - N/A