



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 68 OF 2014

PETER NDUNGU KIBE.....APPELLANT

VERSUS

LEONARD ODINDI NG'ONG'A.....RESPONDENT

(An Appeal from the ruling of Hon E. M. Ekhubi, Senior Resident Magistrate,

delivered on 26th May, 2014 in Mombasa SRMCC No. 4792 of 1997)

JUDGMENT

1. The Plaintiff (appellant) on 9th September, 1997 filed a plaint claiming the sum of Kshs.225,000/- in respect to a friendly loan he had advanced to the defendant (respondent). He also prayed for interest and costs of the suit.
2. The respondent filed a defence and counterclaim dated 15th October, 1997 wherein he claimed Kshs.1,000/- per day from the appellant for the use of motor vehicle registration No. KAG 396P from 20th September, 1996 till its delivery. He also claimed damages for breach of contract, costs and interest at court rates.
3. In the defence to the counterclaim filed on 23rd October, 1997 the appellant averred that the respondent deposited his motor vehicle with the appellant as security until the full payment of the loan and that there was no contract of user as alleged and put the respondent to strict proof thereof.
4. The case did not take off several times due to adjournments made at different times on request of Counsel for the parties herein. On 10th November, 2010, Counsel for the respondent made an application before Hon. Ole Tanchu for the appellant's case to be dismissed for want of prosecution. The Court granted the orders after being informed by Counsel for the respondent that the appellant's Counsel's law firm was served and there was an affidavit of service on record. Although the typed proceedings show that the application for dismissal of the suit for want of prosecution was made before Hon. Ole Tanchu, on 10th December, 2010, I have verified the correct date as being the 10th November, 2010, from the hand written record in the court file.
5. On 28th March, 2013 the hearing of the counterclaim proceeded in the absence of the appellant's Counsel after the respondent's Counsel informed the Court that they had duly served the appellant and showed the court an affidavit of service. Hon. Ekhubi proceeded to hear the counterclaim and entered Judgment against the appellant for the sum of Kshs.407,500.00 plus costs and interest.

6. The appellant filed a memorandum of appeal on 29th May, 2014 raising the following grounds of appeal:-

- i. That Learned Magistrate erred in law and fact by failing to set aside the *ex parte* Judgement on the counterclaim entered against the appellant on 12th August, 2013;
- ii. That the Learned Magistrate erred in law and fact by failing to stay the attachment and sale of the appellant's property as proclaimed on 27th November, 2013;
- iii. That the Learned Magistrate erred in law and fact by failing to reinstate the appellant's suit and order that the suit and counterclaim be heard on merits;
- iv. That the Learned Magistrate erred in law and fact and has directed himself contrary to the letter and spirit of the Constitution of the Republic of Kenya by failing to find that the Appellant had raised triable issues in his defence to counterclaim and in his application dated 6th December, 2013 and by upholding a determination of the suit and counterclaim by way of mere technicalities instead of allowing the same to be ventilated at a full hearing;
- v. That the Learned Magistrate erred in law and fact by failing to distinguish between a mistake on the part of counsel for the appellant at the time and subsequent to failing to make this distinction, allowed the said mistakes to be visited upon the appellant;
- vi. That the Learned Magistrate erred in law and fact by failing to determine that the respondent had committed an act of perjury by lying under oath and in particular in the respondent's replying affidavit sworn on 15th December, 1997 and marked as Annexure LON7;
- vii. That the Learned Magistrate erred in law and fact by disregarding evidence, pleadings and admission of the respondent that he owed money to the appellant and that the respondent had not settled this debt at the time of dismissal of the appellant's suit and Judgment in favour of the counterclaim.

The appellant prays that:-

- a. The appeal be allowed and the ruling of the subordinate court delivered on 26th May, 2014 be set aside in its entirety;
- b. That the appellant's suit and the respondent's counterclaim be heard and determined on merits before any other lower court of competent jurisdiction;
- c. Costs be awarded to the appellant both in the appeal and in the matter in the subordinate court; and
- d. This court be pleased to issue such other orders as it may deem fit and just to grant in the circumstances.

7. The appellant filed written submissions on 3rd June, 2015 and supplementary submissions on 23rd June, 2015. The respondent had filed his written submissions on 11th May, 2015. Parties proceeded to highlight their submissions.

APPELLANT'S SUBMISSIONS

8. Mr. Ananda, Learned Counsel for the appellant prayed for the setting aside of the Judgment on counterclaim as the appellant was never given an opportunity to defend the same. He stated that the court did not satisfy itself that the appellant's Advocates were served with a hearing notice as no affidavit of service was filed in court to ascertain compliance with the provisions of Order 7 rule 13 and Order 12 rule

3 of the Civil Procedure rules, yet the burden of proof for a counterclaim lay with the respondent. Counsel contended that the respondent did not prove the counterclaim and that although he produced an agreement about some money he had borrowed the appellant, there was no proof of payment.

9. It was argued that the lower court did not consider the defence to the counterclaim as the respondent had deposited his motor vehicle as security to guarantee the loan. Mr. Ananda informed the court that the foregoing is contradictory to what the respondent told the court. Counsel further submitted that the respondent's motor vehicle was not valued to assess whether its cost was equivalent to the amount owed.

10. Counsel further stated that the respondent reported about the loss of hospital documents and title deed to the police. There was no evidence to show that the respondent repaid the money and as such the Hon. Magistrate should not have entered Judgment on the counterclaim. He prayed for the counterclaim to be heard on merits.

RESPONDENT'S SUBMISSIONS

11. Mr. Muyala, Learned Counsel for the respondent submitted that the suit which was filed in the year 1997 was dismissed for want of prosecution. He stated that when the case came up for hearing of the counterclaim, they had served him (appellant). He made reference to page 30 of the Record of Appeal where the respondent's counsel informed the lower court that an affidavit of service had been filed, thus the appellant was aware of the hearing date. He submitted that the Hon. Magistrate was right in making an award to the respondent and litigation has to come to an end. He prayed for the appeal to be dismissed with costs to the respondent.

APPELLANT'S REJOINDER

12. Mr. Ananda responded by stating that the affidavit of service did not form part of the Record of Appeal and if at all one was filed, it would be in the court file. He reiterated that the counterclaim was heard on a date when no hearing notice had been served on them.

ANALYSIS AND DETERMINATION

The issue for determination is of the Hon. Magistrate exercised his discretion judicially in the application dated 6th December, 2013.

13. The appellant through the application dated 6th December, 2013 sought the following orders before the lower court:-

- (i) That the service of the application be dispensed with;
- (ii) That leave be granted to the firm of L.N Mbatia & Co. Advocates to come on record for the plaintiff/applicant;
- (iii) That pending the hearing and determination of the application the Honourable court be pleased to stay the execution of the decree that had been issued in respect of the judgment entered on 12th August, 2013 and the attachment and sale of the applicant's property as proclaimed on 27th November, 2013 and any other order that may be issued pursuant thereto;
- (iv) That the judgment on counterclaim entered against the plaintiff on 12th August, 2013 be set aside;
- (v) That the plaintiff's suit be reinstated and the entire suit and counterclaim be heard on merits; and
- (vi) That the costs of the application be provided for.

14. The said application was supported by the affidavit of Peter N. Kibe, the appellant, sworn on 6th December, 2013. The respondent filed a replying affidavit sworn on 18th December, 2013. The appellant subsequently filed a supplementary affidavit on 28th January, 2014. The respondent's Counsel filed a reply to the supplementary affidavit on 31st January, 2014. Counsel for the parties thereafter filed their written submissions.

15. In determining the appeal before me, I bear in mind the duty of the first appellate court which was well laid out in the **case of United India Insurance Co Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd vs East African Underwriters (Kenya) Ltd [1982-88] 1 KLR 639**, Madan J.A. (as he then was), aptly explained the essence of the discretionary power of the court as follows:

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

16. In the matter in the lower court, the Hon. Magistrate considered the application dated 6th December, 2013 and noted that the crux of the appellant's contention was that he was not informed of the proceedings by his lawyers, Ms Kamoti & Company Advocates. In the Hon. Magistrate's view, the point of argument therefore was that the mistake of Counsel should not be visited upon the litigant. He also noted that the respondent's issue was that the appellant was under duty to follow up on his case but he abandoned it.

17. The Hon. Magistrate considered the principles set out in the case of **Shah V. Mbogo [1967] E.A 116** on the court's discretion to set aside an *ex parte* Judgment, in that it is intended to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by way of evasion or otherwise to obstruct or delay, the course of justice.

18. He regarded the Judgment entered in this case as regular and relied on the case of **Muthaiga Road Trust Company Ltd vs Five Continents Stationers Ltd and 2 others [2000] eKLR** where the Court of Appeal cited the case of **Patel vs E.A Cargo Handling Services Ltd [1974] EA**. In the said decision, the court stated that it would not usually set aside a regular Judgment unless it is satisfied that there is a defence on merits, that is a defence that raises a triable issue.

19. The Hon. Magistrate considered that the case before him was an old matter filed in the year 1997 and that the plaintiff's suit was dismissed for want of prosecution. He also took into account that the last time the appellant went to court was on 27th October, 2004 after which he and his Advocate sat on their laurels leaving the file to clog and form part of the statistics of the pending suits in courts. He also noted that the appellant in his affidavit had not shown any efforts made whether by his Advocate and/or court to ensure that the suit was heard and disposed of expediently. The said Magistrate considered the defence to the counterclaim and found it to be plainly hopeless as it raised no triable issues against the Judgment delivered on 12th August, 2013 (correct date verified from the handwritten judgment).

20. The centre-point of the matter before this court is the ruling dated 26th May, 2014 for which the appellant feels aggrieved as in his view, neither he nor his Advocate was served with a hearing notice for 10th November, 2010 (sic) when the suit was dismissed for want of prosecution and on 28th March, 2013 when the counterclaim proceeded to hearing.

21. In the case of **Pithon Waweru Maina vs Thuka Mugira [1983] eKLR**, the Court of Appeal stated

that the principles governing the exercise of judicial discretion to set aside an *ex parte* judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing are:-

a) Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties;

b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah v Mbogo [1967] EA 116 at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48;

c) Thirdly, the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some manner and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. Mbogo v Shah [1968] EA 9;

d) The court has no discretion where it appears there has been no proper service (Kanji Naran v Velji Ramji (1954) 21 EACA 20); and

e) A discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically.(Smith v Middleton [1972] SC 30."

22. I have perused the Record of Appeal and the court file, none contains copies of the affidavits of service which the respondent's counsel showed the Hon. Magistrates on the dates when the appellant's suit in the lower court was dismissed for want of prosecution and on the date when the counterclaim was heard. This court did consider if the said affidavits of service could have been misfiled and made reference to the documents attached to the respondent's affidavits sworn on 18th December, 2013 and 31st January, 2014 pursuant to the appellant's application dated 6th December, 2013. Surprisingly, the respondent failed to attach a copy of the affidavit of service that is said to have been on record 10th November, 2010 and the other one shown to the Hon. Magistrate on 28th March, 2013 when adverse orders were made against the appellant. Had the affidavits of service been attached to the said respondent's affidavits mentioned above, this court would have been satisfied that there was proper service of hearing notices on the appellant or his Advocate prior to 10th November, 2010 and 28th March, 2013. It would then have been evident that they deliberately failed to attend court.

23. In the instant case, the Hon. Magistrate did consider the defence to the counterclaim which he dismissed as plainly hopeless, for not raising triable issues. I have perused the said defence to the counterclaim and I am of the considered view that it raises triable issues of whether motor vehicle KAG 396P was deposited with the appellant to hold as security until the full payment of a friendly loan or whether there was a contract for use of the said motor vehicle between the respondent and the appellant as from 20th September, 1996. It is my finding that the Hon. Magistrate misdirected himself by speculating on the possibility of the respondent having disposed of the motor vehicle used as a collateral for the debt to a 3rd party.

24. I do take note that the case took a long duration of time to take off in the lower court due to constant adjournments by Counsel for the parties on record. This in itself was however not a good reason to deny the appellant an opportunity to defend the counterclaim without an affidavit of service having been filed in court to prove service of a hearing notice on the appellant.

25. As pointed out by Counsel for the respondent the handwritten Judgment dated 12th August, 2013 is not in tandem with the typed Judgment. The appellant's Counsel submission was that he was not in charge of certifying the typed proceedings and Judgment of the lower court. In his supplementary written

submissions, he cited the case of **Mucuha vs Ripples Ltd** [2001] E.A 138 at 139 which comes to his aid. It states that:-

“As a party is entitled to rely on the certification by the High court that the supplied proceedings applied by the court were a true record of what transpired in court and in this case the proceedings were so certified. Mucuha’s counsel was not under a duty to independently check whether the typed proceedings tallied with the judges hand written notes.”

26. The respondent’s counsel cited several authorities in his written submissions, whose *ratio decidendi* is not applicable to the circumstances of this case. As earlier stated, the affidavits of service that led the appellant's case being dismissed for want of prosecution on 10th November, 2010 and subsequently to Judgment being entered against the appellant on 12th August, 2013 are not in the lower court file and they were not exhibited by the respondent in his replying affidavit filed on 19th December, 2013 and his response to the supplementary affidavit, filed on 31st January, 2014. The appellant could therefore not include a non-existent documents in the Record of Appeal. On the issue of non- inclusion of orders and the decree, it is my finding that the appellant’s counsel meticulously compiled the Record of Appeal and included copies of orders and the decree issued pursuant to the ruling and Judgment in issue, respectively.

27. The sword of justice cuts both ways and I therefore hold that in the absence of proper service, the Judgment that ensued from dismissal of the case for want of prosecution and the hearing of the counter claim was flawed and null and void. I therefore hold that the respondent's contention that he should not be denied the fruits of his Judgment is misplaced and without merit.

28. Having considered the representations made before the Hon. Magistrate and this court, I find that this appeal has merit. I therefore make the following orders:-

- i. The appeal is hereby allowed and costs are awarded to the appellant;
- ii. Mombasa SRMCC NO. 4792 of 1997 is hereby remitted to the lower court for hearing of the plaintiff’s case and the defence to counterclaim; and
- iii. The said case shall be given priority hearing before another Magistrate with competent jurisdiction save for Hon. B.M Ekhubi

DELIVERED, DATED and SIGNED at MOMBASA on this 20th day of April, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Ananda for the appellant

Mr. Sitonik holding brief for Mr. Muyala for the for the respondent

Mr. Oliver Musundi - Court Assistant