REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 437 OF 2010

NAOMI WANJIKU THANDE…….....….APPELLANT

VERSUS

LEVERAGE COMPANY LIMITED……..…1ST RESPONDENT

GODFREY KARANJA MURATHE…....……2ND RESPONDENT

MOSES CHIRCHIR KIPTUI …….……3RD RESPONDENT

WILLIAM WACHIRA NDIRITU ……....4TH RESPONDENT

(Appeal against the ruling and order of Hon. Mr. Okato delivered on 14th October, 2010 in Milimani CMCC No. 2213 of 2010)

JUDGMENT

Before this Court is an appeal from the ruling and order of the Lower Court dismissing the Appellants Application dated 16th April, 2010. In the said application, the Appellant had sought orders that the Lower Court do set aside a judgment entered on 6th November, 2009 in default of defence. The Application also sought stay of execution of the judgment pending the hearing and determination of the Application and suit.

The Application was supported by the Affidavit of **Naomi Wanjiru Thande**, the Appellant herein wherein she deposed that the lower court matter was heard and a judgment entered in her absence the reason being that the Advocate who was acting on her behalf passed away after she had filed a notice of appointment but before filing a Defence. She only became aware of her demise after auctioneers went to her premises and carried away two vehicles on diverse dates.

The Application was opposed by the Respondent who filed a Replying Affidavit dated 7th May, 2010 sworn by **Simon Njoroge**, the 1st Respondent's manager who replied that the judgment entered was regular, that the Appellant was rightfully indebted to the 1st Respondent and that proposed defence raises no triable issues.

The Trial Magistrate heard the application and delivered his Ruling on 14th October, 2010 dismissing the Appellant's Application with costs.

Aggrieved by the trial magistrate's ruling, the Appellant filed a Memorandum of Appeal dated 21st October, 2010 on the following eight grounds:-

i. THAT the Learned Trial Magistrate erred in law and in fact in finding and holding that the Applicant's Application dated the 16th April, 2010 was unmerited;

ii. THAT the Learned Trial Magistrate erred in law and in fact in considering extraneous, ambiguous and immaterial matters.

iii. THAT the Learned Trial Magistrate erred in law and in fact by not taking into account and or evaluating the Appellant's evidence and submissions particularly on the part of the death of her previous advocate contrary to the evidence before the Court.;

iv. THAT the Learned Magistrate erred in law and in fact in finding that no explanation had been offered by the Appellant as to why the statement of defence was not filed within time contrary to the evidence before the court.;

v. THAT the Learned Trial Magistrate erred in law and in fact in dismissing the Appellant's Application in the absence of the grounds and justification to support the same and contrary to the evidence before the Court ;

vi. THAT the Learned Trial Magistrate erred in law and in fact in finding that the Appellant's draft defence was a mere denial and did not raise triable issues contrary to the evidence before the Court.

vii. THAT the Learned Trial Magistrate erred in law and in fact in departing from established precedents without any reasonable cause; and

viii. THAT the Learned Magistrate's Ruling and order has no basis in law.

The appeal was canvased by way of written submissions which I have considered as well as the authorities cited therein.

In determining the Appeal herein, I will re-evaluate the evidence in the subordinate court both on points of law and facts and come up with my findings and conclusions as this is the role of an appellate court. In the case of **Ephantus Mwangi and Geoffrey Ngugi Ngatia Vs. Duncan Mwangi Wambugu [1982]-88 1KLR 278** the principle is that a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown to have acted on wrong principles.

In the lower Court, and from the Appellant's Supporting Affidavit and the written submissions filed therein, the Appellant was categorically clear that after she was served with the Summons and Plaint, she instructed the firm of Ms. Wangari Muchina & Company Advocates to act on her behalf who filed a memorandum of appearance on 11th September, 2009. The Appellant further avers that it is when she was confronted by auctioneers that she went to the offices of her Advocate and she found that it was closed only to learn that the proprietor of the firm died in the month of September, 2009. The Appellant submits that it is because of the demise of the Advocate that the defence was not filed and she reasonably expected her advocate to represent her. This averment is not denied by the 1st Respondent.

This Court finds that in the Ruling, the trial magistrate did not take into account this material fact. I say so because in the ruling, the trial magistrate states thus, and I quote, "*the only recourse available to the 1st Defendant is for her to sue the advocate she instructed to enter appearance and file a defence for her and recover from the advocate damages for professional negligence. I have perused the 1st Defendant's draft statement of defence annexed to the affidavit and I find that the same is a mere denial and which does not raise any triable issues since no explanation has been offered as to why the defence was not filed within the stipulated period.*" Had the trial magistrate considered the Appellant's affidavit he would not have made such a finding directing the Appellant to sue her Advocate who had already passed away which averment is on record.

I have perused the draft Statement of Defence and I find that the Appellant not only denies the contents of the Plaint but has also raised triable issues. This includes the averments that the Appellant's motor vehicle KAS 976J had been repossessed in the year 2007 and auctioned which at that time was valued at Kshs. 700,000/= and she was not given an account on the sale. She also stated that she is not aware of the alleged interest claimed.

Order 10 Rule 11 of the Civil Procedure Rules, 2010 gives this court the power to set aside judgments and states that , "*Where judgment has been entered under this Order the court may set aside or vary such Judgment and any consequential decree or order upon such terms as are just*."

The power to set aside a decree/ order is discretionary but must be exercised judiciously and in accordance with the law. The Court of appeal in the case of **PITHON WAWERU MAINA V THUKA MUGIRIA [1983] Eklr** set down the principles to be observed in the exercise of this discretion when it held that, "*The principles governing the exercise of the 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 if he does vary the judgment he does so on such terms as may be just ... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. See also* ***Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76 C and E 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 a 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 matter 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 injustice.* ***Mbogo v Shah [1968] EA 93"***

In order to ensure that the rules of natural justice are observed, I will find that unless the circumstances of the case are very clear that a litigant was an indolent one, a Court of law should shy away from denying a party an opportunity to be heard. This was the position in the case of **Pithon Waweru Maina (supra)** where it was held;. *The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered; the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered; and finally, it should be remembered that to deny the subject a hearing should be the last resort of a court.* ***(Jamnadas Sodha v Gordandas Hemraj (1952) 7 ULR 7)***

A discretionary power should be exercised judiciously and in a selective and discriminatory manner, not arbitrarily and idiosyncratically. ***(Smith v Middleton [1972] SC 30) 8.*** *The respondent could have been compensated by costs for the delay occasioned by his advocate's dilatoriness and the appellant should not have been denied a hearing because of his advocate's mistake even if it amounted to negligence…****"***

My view on the evidence on record is that the Appellant had satisfactorily made his case on why the Statement of Defence was not filed in time. It is the normal practice and expectation that when a Client instructs an Advocate to deal with his matter, the Advocate will do so with due diligence and contact the client only when necessary. Therefore, the fact that the Appellant realised that her Advocate had passed on almost 6 months later was not out of normalcy.

In the premises, I will allow this appeal, set aside the ruling and order of the lower court dated 14th October 2010 dismissing the appellant's application and substitute it with an order allowing the appellant's application dated 16th April, 2010. Therefore the unequivocal judgment of this Court is that the order of the lower court issued in a ruling delivered on 14th October, 2010 is set aside with the effect that the 1st Respondent's Suit shall be heard *de novo,* with the appellant being afforded an opportunity to file her defence.

Each party shall bear its own costs of the Appeal.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 22nd Day of September, 2017.

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L. NJUGUNA

JUDGE

In the Presence of

……. for the Appellant

……. for the Respondent