REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 247 OF 2010

A.K. ABDULGANI …….APPELLANT

VERSUS

GEOFREY NZIOKA NDUMBU …….....……RESPONDENT

JUDGMENT

1. This appeal arises from the ruling of Honourable A.K. Ndungu Senior Principal Magistrate (as he then was) in Milimani Commercial Court Nairobi CMCC No. 4942 of 2009 delivered on 24th June 2010.
2. The background to this appeal is that by a plaint dated 31st July 2009 the respondent herein Geoffrey Nzioka Ndumbu filed suit against the appellant A.K. Abdulgani in Nairobi CMCC 4942/2009 seeking or special damages in the sum of kshs 2,072,233.00 being costs of repairs to motor vehicle registration No. KAS 962K which was involved in a road accident collision with KAS 971X and whose occurrence the respondent blamed the negligence of the appellant's driver then driving motor vehicle registration No. KAS 971X .
3. The affidavit of service sworn by Nyahima Maganga of Mombasa on 2nd November 2009 and filed in court on 27th November 2009 shows that he served summons to enter appearance on the defendant at Port Reitz on Mr Kaku the Manager of A.K. Abdulgani Limited on 28th October 2009.
4. On 27th November 2009 the respondent's counsels requested for entry of judgment under Order IXA Rule 3 of the Civil Procedure Rules in default of the appellant's entry of appearance which judgment was endorsed on 26th January 2010 by the magistrate. The respondent's counsels then proceeded to request for decree and certificate of costs. On 30th March 2010, vide an application dated the same day, the appellant sought for stay of execution of decree, setting aside of the exparte judgment entered on 26th January 2010 together with all consequential orders; and for unconditional leave to defend the suit.
5. That application for setting aside exparte judgment was opposed by the respondent. The trial magistrate heard the application and by a ruling delivered on 24th June 2010, he dismissed the application by the appellant on the basis that service was properly effected and that there was indolence on the part of the appellant and its insurance company hence the lawful judgment could not be disturbed by inexcusable mistake on the part of the appellant or their agent; among other reasons.
6. It is that ruling and order that the appellant was aggrieved by and as a result, filed this appeal. The Memorandum of Appeal sets out six (6) grounds of appeal namely:

1. The Learned magistrate erred in law and in fact by finding that there were no good reasons advanced in the applicant's application to set aside interlocutory judgment consequently condemning the defendant unheard for a genuine mistake of its insurers.
2. The Learned magistrate erred in law and in fact by not finding that the affidavit on record of Linda Olweny put forward a case of an excusable error or mistake in misfiling of the summons and refused to set aside the default judgment hence occasioning injustice and hardship to the defendant.
3. The Learned magistrate erred in law and in fact by ignoring the affidavits by the applicant/defendant and relying on the respondent's grounds of opposition notwithstanding that the respondent had not filed any replying affidavit.
4. The Learned magistrate erred in law and in fact in declining to use his discretion in favour of the applicant/defendant. Consequently he condemned the defendant unheard notwithstanding that the defendant had attached a copy of its defence which raised serious legal issued as to the validity of the suit.
5. The Learned magistrate erred in law and in fact in giving more weight to the plaintiff's/respondent's default judgment obtained as against the applicant/defendant and causing great prejudice to the defendant whereas had he exercised his discretion to set aside the said interlocutory judgment , the learned magistrate would have caused no prejudice to the plaintiff who would have been compensated by being paid thrown away costs and at the same time his case be heard on merit by the Honourable court.
6. The Learned magistrate erred in law and in fact by not finding that this was an applicant's/defendant's application not his insurers' and proceeded to condemn the defendant/applicant as being indolent in which case the defendant would have to deal with the claim on its own.
7. The appellant prayed that the ruling dismissing the application for setting aside of exparte judgment in default be set aside, interlocutory judgment entered be set aside with all consequential orders and it be granted unconditional leave to defend the suit and any other or further relief the court may deem fit to grant together with costs of the suit.

7. The parties' advocates agreed to dispose of this appeal by way of written submissions but only the appellant filed their submissions dated 30th October 2014. According to the appellant, there was excusable mistake by the appellant's insurance company as explained in the affidavit of Linda Olweny that they received summons from the appellant but misfiled them inadvertently. It is also contended that the appellant had a good defence to the respondent's claim in that ownership of the motor vehicle was denied; that there was no formal proof of the claim for loss of use; there was contribution, no particulars of the damaged parts were particularized and that therefore the interlocutory judgment was irregularly entered as the pleaded special damages required strict proof by way of formal proof hearing which never took place. Reliance was placed on **Charles Mwalia V KBS HCC 1058/2000** on the principles for setting aside interlocutory judgment; **CENEAST AIRLINE LTD V Kenya Shall Ltd** cited in **Patel V EA Cargo Handling Services [1974] EA, 75; Sebei District Administration V Gasyah[1968] EA 300**. It was contended that albeit interlocutory judgment was lawful, but that the trial magistrate failed to exercise his discretion correctly in favour of the appellant. Reliance was placed on the case of **Shah V Mbogo & Another[1968] EA 93.** The appellant prayed for an order setting aside the judgment entered in the lower court and leave be granted to defend the suit on merit.
8. This being a first appeal, this court is bound by the principles espoused in Section 78 of the Civil Procedure Act, to reevaluate, reexamine and reconsider the lower court record and the affidavit evidence before it and arrive at its own independent conclusion as was settled in the case of **Selle V Associated Motor Boat Company Ltd [1968] EA 123. Thus, this** Court is not necessarily bound to follow the trial court's findings of fact if it appears that the trial court had clearly failed on some point to take into account some circumstances probabilities materially to estimate the evidence. Additionally, this court is bound by the principles settled in the case of **Mbogo V Shah & Another [1968] EA 93** where the Court of Appeal set out circumstances under which an appellate court may interfere with a decision of the trial court. It was stated thus:

" I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion."

9. The decision that is impugned was made out of evidence by affidavit and grounds of opposition. The issue of demeanor of witnesses does not therefore arise. The decision was refusal by the trial court to set aside exparte judgment entered in default of appearance so as to enable the appellant/defendant unconditionally defend the suit in the court below.
10. The established principles for setting aside interlocutory/exparte judgment are now well settled. The power to set aside interlocutory/exparte judgment is a discretionary one and freely donated by the provisions of Order IXA Rule 10 of the old Civil Procedure Rules (Now Order 10 Rule 11 of the 2010 Civil Procedure Rules). The provisions state:

"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."

11. The principles guiding the setting aside exparte judgment and in the exercise of the court's unfettered discretion were also set out in **Maina V Mugiria [1983] KLR 78, Kimani V McConnel[1966] EA 547** and **Patel V EA Cargo Handling Services [1974] EA 75.**
12. The above authorities establish that the discretion of the court to set aside exparte judgment but that such discretion was intended to be so exercised to avoid justice or hardship resulting from accidents, 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. In **Maina V Mugiria** (supra) the Court of Appeal stated:

"The principles governing the exercise of judicial discretion to set aside an exparte judgment obtained in default 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 93.***
d. ***The court has no discretion where it appears there has been no proper service (Kanyi Naran V Velji Ramji [1954] 21 EACA 20).***
e. ***A discretionary power should be exercised judicially and in a selective and discriminating manner, not arbitrarily and idiosyncratically. (Smith V Middleton [1972] SC 30."***

13. I am also inclined to accept the holding in **Jesee Kimani V MC Connel** [**1966] EA 547** where the court held that:

"Some of the matters to be considered when an application is made are, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any other material factors which appear to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been exparte and whether or not it would be just and reasonable, to set aside or vary the judgment, upon terms to be imposed ."

14. In the present case, there is no dispute that the summons to enter appearance were served upon the appellant and that there was no appearance entered within the prescribed period hence, the interlocutory judgment in default of appearance as entered was regular. However the appellant's explanation for failure to enter appearance in time was as deposed by Muradali Mohamed Hussein in his sworn affidavit dated 30th March 2010 that upon the appellant being served with summons to enter appearance, they proceeded and handed it over to their insurers Occidental Insurance Company Ltd who did not give the appellants any feedback and the appellants believed that an appearance and defence must have been filed only for them to receive notice of entry of judgment on 22nd March 2010.
15. That immediately they received notice of entry of judgment, they contacted their insurance company over the issue and were informed that the insurance had inadvertently filed away the summons without acting on them, a mistake they regretted vide the affidavit of Ms Linda Olweny the insurance company's legal officer. The appellant contended that the failure to appear and defend the suit was not intentional and that they had a good defence to the claim, urging the court not to visit on them mistakes of their insurance company which mistake was inadvertent and excusable. He annexed copy of draft defence.
16. In the affidavit of Linda Olweny sworn on 30th March 2010, the deponent who was the appellant's insurer's legal officer acknowledged receiving summons from the appellant on 2nd November 2009 and inadvertently filing them together with other documents while sorting out the department until 24th March 2010 when notice of entry of judgment and intention to execute was served on them. She regretted the mistake and apologized and urged that the same not to be visited upon the appellant who had a good defence.
17. The trial magistrate in dismissing the appellant's application for setting aside exparte judgment observed that the court would always set aside its orders where there is an excusable error or mistake in order to avoid injustice or hardship being occasioned to a party. However, he noted that " ***in a situation where service is properly effected and due to what is sheer negligence on the part of the applicant's insurers by failing to act as expected the matter proceeds and orders regularly entered. It is my view improper to interfere with such orders." " The court cannot assume a supervisory role in how persons or body of persons conduct their business. If there are administrative lapses at the defendant's insurer's firm that is not for the court to correct. In any event it is the insurance company that ought to take cause of the claim and when such lethargically attitude to court proceedings is exhibited then the firm must bear the consequences of such indolence. Equity comes to the aid of the diligent and not the indolent. The plaintiff who lawfully obtained orders should not be subjected to suffering by the inexcusable mistake as the part of the defendant or their agent. Consequently, the application before me must fail. The same is dismissed with costs to the plaintiff/respondent."***
18. From the above extract of the ruling by the trial magistrate, the issue is whether the trial magistrate correctly exercised his discretion in refusing to set aside the exparte judgment in order for the appellant to be accorded an opportunity to be heard in their defence of the respondent's claim.
19. In the Court of Appeal decision of **Philip Keipto Chemwolo &another v Augustine Kubende[1986] KLR 492-(1982-88)1KAR 1036** the court expressed itself thus concerning mistakes which are admitted:

> ***" it must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits."***

20. Nonetheless, it is not in every case that a mistake committed by a party, his advocate or insurance company that would be a ground for the court to exercise its discretion in favour of the applicant. Each case must be treated according to its circumstances. The conduct of the party seeking discretionary orders of the court is also factor to be taken into account.
21. In this case, the appellant's insurance company legal officer Linda Olweny has candidly explained that they inadvertently filed away their insurer's matter after receiving summons to ente appearance. Iam inclined to agree with the appellant on this point since misfiling or filing away

does in some instances happen and such possibility cannot be ruled out in this case.

22. In the **Belinda Murai & Others (Supra)** case, Madan JA held:

> ***"A mistake is a mistake. It is no less a mistake because it is committed by Senior Counsel. Though in the case of junior counsel the court might feel compassionate more readily. If a blunder on a point of law can be a mistake, the door to justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought to certainly to do whatever is necessary to rectify it if the interests of justice so dictate."***

23. The leaned Judge of Appeal in the Belinda Murai(supra) case further went on to state that:-

> ***" It is well known that courts of law themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of legal point of view which courts of appeal sometimes overrule……"***

24. I am in the circumstances inclined to give a benefit of doubt to the Appellant that there was a likelihood of filing away and forgetting and or archiving away of the parent file for this matter which caused the delay in instructing an advocate to take up the defence on behalf of the appellant and leading to the entry of judgment against the appellant in default of appearance and defence.
25. On the other hand, this court must also establish whether the appellant had an arguable defence that raised triable issues. The respondent's claim in the lower court was for a sum of kshs 2,072,233 being the cost of repairs of a motor vehicle KAS 962K, loss of user of the said motor vehicle, investigators fees, assessor's fees and police abstract fee.
26. The appellant's draft defence denied ownership of the accident motor vehicle KAS 971X. They also denied that there was an accident involving the two motor vehicles or that their driver was negligent in the manner he allegedly drove the alleged accident motor vehicle, while also pleading that the suit as filed was defective and that the driver of the motor vehicle KAS 962K was negligent in the manner in which he drove, steered and controlled or managed motor vehicle registration No. KAS 992K Isuzu Lorry.
27. As earlier stated, the power to set aside exparte judgment is a discretionary one, which discretion must nonetheless be exercised judicially and not arbitrarily and idiosyncratically. In **Pithon Waweru Maina V Thuga Mungiria** (supra) the Court of Appeal stated that:

> ***" 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 V Sodha Gordandas Hemraj [1952] 7 ULR 7)."***

28. In my humble view, the trial magistrate did not exercise his discretion judiciously. He did not take into account any of the established principles for setting aside exparte judgment. He concentrated on the mistake by the insurance company in filing away the served summons. That mistake was owned up and in honesty, by the said insurance company's legal officer, Linda Olweny who explained the circumstances and regretted the omission as being inadvertent and not deliberate. The trial magistrate however refused to accept that explanation and concluded that the omission was due to lethargy attitude to court proceedings.
29. The affidavit of Linda Olweny has not in my humble view demonstrated any lethargical attitude by the insurance company to court processes. She explains how she received summons and inadvertently filed them away with other documents and only came to when they were notified of entry of judgment. That explanation in my view is not one of lethargical attitude. It is a regrettable explanation which the trial magistrate harshly refused to accept.
30. In addition, the trial magistrate did not consider the draft defence on record, the fact that the plaintiff/respondent could have been adequately compensated by an award of costs for the delay occasioned and the cardinal principle that to deny the subject a hearing should be the last

resort of a court.

31. In this case, the failure to enter appearance and file defence to the respondent's claim was due to the mistake and delay occasioned by the appellant's insurance company who promptly received the summons. In my humble view, this is a matter where the respondent could have been adequately compensated by an award of costs for the delay occasioned by the insurance company's dilatoriness and the appellant should not have been denied a hearing because of the mistake of its insurance company. In my view, no injustice would have been occasioned to the respondent that could not be compensated by costs since the application for setting aside exparte judgment was made timeously and without undue delay.
32. The draft defence in my view, raised triable issues which the trial magistrate ignored. He did not examine the justice of the case for the appellant and whether there was any triable issue to be considered and accord the appellant an opportunity to ventilate its challenge to the claim by the respondent, subject to being penalized in costs, of course, so that the matter could be properly reviewed on merit.
33. Therefore, applying the principles which I have outlined herein for the setting aside of exparte judgment in default of appearance and defence, and in order to accord the appellant a hearing, I hereby allow this appeal and set aside the trial magistrate's order made on 24th June 2010 dismissing the appellant's application dated 30th March, 2010 and in its place substituting that order of dismissal with an order allowing the application dated 30th March 2010 to the effect that the exparte judgment and all consequential orders entered against the appellant in favour of the respondent are hereby set aside and the case is remitted to the Chief Magistrate's Court at Milimani for hearing and final determination on merit. Since this judgment is delivered handwritten, the appellant is hereby granted leave of 21 days from the date when the file herein is remitted to the lower court to file and serve the defence upon the respondent.
34. The respondent shall have costs of the application in the lower court as pronounced by the trial magistrate.
35. I order that each party bear their own costs of this appeal.

Dated, signed and delivered in open court at Nairobi this 17th day of March 2016.

R.E. ABURILI

JUDGE