REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL CASE NO. 119 OF 2012

DOMISIANO NJERU NJAGI.....APELLANT

VERSUS

PAUL NJERU IREMA..... RESPONDENT

(An Appeal from the Ruling the Resident Magistrate in Siakago PMCC No. 14 of 2012 delivered on 6th September 2012)

J U D G M E N T

The appellant Domisiano Njeru Njagi appeals against the ruling of Siakago Resident Magistrate delivered of 6th September 2012 dismissing his application dated 26th June 2012 in SPMCC No. 14 of 2012.

The facts leading to this appeal are that the respondent herein sued the appellant claiming restitution of his property taken unlawfully and maliciously from his business premises which included 5 crates full of beer, 3 packets of Kingmaster, liquor licence No. 9209 and cash 17,000/=. The appellant was served with summons to enter appearance on 30th April 2012. The respondent upon request made on 30/5/2012 obtained exparte judgment on 5/6/2012. The case was fixed for formal proof on 21/6/2013. The case was formally heard and proved resulting in judgment against the appellant.

The appellant attended court on 21/6/2012 unsuccessfully applied for adjournment to allow the state counsel whom he hoped would represent him to file the defence. He then filed the application to set aside exparte judgment. The application was heard interpartes and dismissed in the ruling delivered on 6/9/2012 which is now the subject of this appeal.

In his memorandum of appeal, the appellant contends that the magistrate erred in fact and in law in dismissing his application for failure to adduce sufficient grounds. He further argued that the magistrate was wrong to find that the draft defence did not raise triable issues and for holding that the appellant was insincere and inconsistent without ascertaining the insincerity or untruthfulness of the appellant.

The duty of the first appellate court was explained in the case of ***JAMES ODERA T/A A.J. ODERA & ASSOCIATES VS JOHN PATRICK MACHIRA T/A MACHIRA & CO. ADVOCATES eKLR [2013].*** The court of appeal in this case cited the case of ***KENYA AUTHORITY VS KUSTON (KENYA) LIMITED [2009] 2EA 2012*** and stated inter alia that:-

> *"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."*

Both parties filed written submissions in argument of their cases. The appellant submitted that he was denied the right to be heard by the trial magistrate who dismissed his application to set aside the interlocutory judgment.

According to him the court failed to consider the principles to be considered in an application seeking to set aside exparte judgment. He cited three authorities arguing that the court has the discretion to set aside judgment in order to accord the parties the right to be heard. The appellant also relies on Article 50(1) and 25(c) of the Constitution which provides for the right to a fair hearing and categorizes the right as one of the fundamental rights which cannot be limited.

The respondent in its submissions, argues that the magistrate followed the established principles in determining the appellant's application and reached the correct finding. It is submitted that the appellant was bound to give reasons for not filing his defence within the time prescribed by the law. He was also under an obligation to prove that he had a triable defence. Having failed to satisfy the court on the two main requirements, the appellant's appeal must fail.

The only issue in this application is whether the magistrate erred in law and in fact when he dismissed the application of the appellant in its ruling delivered on the 6th September 2012.

In the supporting affidavit, the applicant stated that he entered appearance on 10th May 2012 and that when he subsequently visited the registry he found that exparte judgment had been entered against him. The applicant did not give reasons why he failed to file his defence in the suit. In his submissions, the appellant has brought in extraneous matter of how he unsuccessfully struggled to get legal representation from the Attorney General's office. This was not a subject of the application before the magistrate whose outcome is the subject of this appeal. The magistrate correctly found that no sufficient reasons were given by the appellant.

The appellant stated that he had a meritorious defence and that it was in the interests of justice that he be allowed to defend the suit. He added that the claim against him was in bad faith and motivated by malice. In the draft defence, the appellant denied the claim and contended that the suit was brought in bad faith for he was performing his duties as the chief of the location. The issue which arises is whether the draft defence raised triable issues. The trial magistrate said in her ruling that the defence was a mere denial. Would the following statements be referred to as mere denials:-

1. *The defendant avers that the suit is brought in bad faith as I was on duty performing lawful duty as the chief of the location;*
2. *The defendant denies having taken away anything claimed from the plaintiff's premises and puts the plaintiff to strict proof thereof.*

The other paragraphs in the draft defence may be referred to as mere denials since they do not refer to any specific averment in the plaint. However, when the defendant specifically denies an averment on which the plaintiffs claim is based, this cannot be a mere denial. Paragraph 3 of the plaint reads:-

> *"On or about the 3/2/2012 and the 5/12/2012 the Defendant illegally and unlawfully with malice took away the plaintiff's premises PLOT NO. 1136 KIRIE 5 crates of full beer, 3 packets of kingmaster, liquor licence No. 9209 and cash 17,000/=".*

The allegation in paragraph 3 is what is answered specifically by the draft defence in the cited paragraph to the effect that the defendant denies taking anything as alleged from the plaintiff's premises. In my considered opinion, this is a triable issue as the appellant is sued in his personal capacity, yet he states in the draft defence that he was executing his lawful duties as the chief of the location. This is yet another triable issue which can only be determined through evidence from the parties.

It is on record that the appellant appeared in court on the first hearing date and prayed for adjournment. He told the court:-

"I was on duty and acted in my official capacity. The DC has written to the state counsel to represent me. I pray that the case be adjourned to allow the state counsel file a defence".

The appellant was unrepresented when he made the application for adjournment. He must have been ignorant of the procedure for the exparte judgment was still in force and could only be considered for setting aside through a formal application. Having entered appearance, the appellant was entitled to attend hearings and even make an application which was in the interest of his case. He may have made the wrong approach in fighting to be accorded a chance to be heard but his statement in the draft defence affirms that his position that he was acting in his official capacity at the material time.

It was at the discretion of the court to grant leave to the appellant to defend the suit. It is on record that the appellant had demonstrated through entering appearance and applying for adjournment that he was determined to defend the suit.

It was held in the case of ***KIMANI VS MacCONNEL [1966] EA 547,*** by Harris, J. that an application to set aside judgment should be considered:-

"In light of all the facts and circumstances both prior to, subsequently and of the respective merits of the parties."

The Kimani case (supra) was cited in by the Court of Appeal in the case of ***LINEAR COACH COMPANY LIMITED VS ALHUSINAIN MOTORS LIMITED & ANOTHER Civil Appeal No. 112 of 2010*** where the court allowed the appeal against refusal by the High court for leave to defend a suit. The court observed that:-

"The learned judge took into account a matter which he ought not to have taken into account and at the same time failed to take account of a matter he ought to have taken account of and in doing so arrived at the wrong conclusion. The result has been a misjustice to the appellant. There is therefore reason to interfere with the manner in which the learned Judge exercised his discretion".

It is my considered opinion that the learned magistrate failed to consider the appellant's application in the light of all the facts and circumstances prior to the filing of the application. The respondent admitted in her pleadings that the appellant was the chief of the location at the time of the incident. He communicated to the court that he was searching for legal representation from the Attorney General and this may have caused the delay in filing defence given the logistics involved. This was a factor that called for consideration by the court in determining the application.

In the case of ***MBOGO VS SHAH [1968] EA 93 and PATEL VS EA CARGO HANDLING SERVICES LTD [1974] EA 75*** the courts explained that:

The main concern of the court in an application to set aside a default judgment was to do justice to the parties and would not impose conditions on itself to fetter the wide discretion given it by the rules".

It was wrong for the magistrate to fail to consider how the applicant found himself in the circumstances he was in after the default judgment was entered. The court ought to have conidered that the defence had triable issues which is a condition precedent in determining an application of this nature.

For the foregoing reasons, I find the appeal meritorious and allow it in the following terms:-

(a) That the orders of the magistrate in her ruling dated 6th September 2012 are hereby set aside;

(b) That the judgment and all consequential orders are hereby set aside;

c. *That the appellant's draft defence dated 26th June 2012 is hereby admitted as his defence to the suit on payment of the requisite court fees;*

(d) That each party shall bear their own costs in this appeal.

It is hereby so ordered.

DELIVERED, SIGNED AND DATED AT EMBU THIS 28TH DAY OF JANUARY, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Ngari for the appellant

F. MUCHEMI

JUDGE