



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 614 OF 2009

PAUL M. MWANGI.....APPELLANT

VERSUS

RHODA WANJIKU NJUGUNA.....RESPONDENT

(An appeal from the ruling and order of the Hon. Ms. W. Mokaya delivered on 13th October, 2009 in Nairobi CMCC No. EJ 214 of 2009)

JUDGMENT

1. By the chamber summons dated 11th September, 2009 brought under Order IXB Rules 13 and 8 of the Civil Procedure Rules the Appellant sought to set aside the judgment dated 18th August, 2009. The application was based on the grounds that when the matter came up for hearing on 25th March, 2009, his advocate raised some issues in the course of the hearing and the ruling was set for ruling on 8th April, 2009. He stated that on 8th April, 2009, the ruling was deferred to 18th May, 2009 then to 13th April, 2009 (I suppose the Appellant meant 13th July, 2009 and not 13th April, 2009 following the sequence of the issues). He stated that his advocates' receptionist was on 3rd June, 2009 was served with a hearing which notice indicated that the matter was coming up for hearing on 13th July, 2009. That when the advocate attended court on 13th July, 2009, he was informed by the clerk that the matter proceeded for hearing on 18th August, 2009 and judgment was delivered on the same date.
2. In reply to the application, Dominic Njuguna Mbigi, in his replying affidavit contended that the Appellant's advocate objected to the production of a document on 25th March, 2009 at the hearing of the case and a ruling on the objection was scheduled for 8th April, 2009 which deferred to 18th May, 2009. He stated that Miss. Mambiri informed him that she attended court on 18th May, 2009 at 2.30 pm when the ruling on the objection was delivered in the Respondent's favour and thereafter she was given 13th July, 2009 as the date for hearing. He stated that a hearing notice was then served on 9th June, 2009 and not 3rd June, 2009 as was alleged by the Appellant. It was contended that it was clear on the notice that the matter was scheduled for hearing and not ruling.
3. The trial court heard the application and came to the conclusion that it was apparent from the record that the Appellant's advocate was served with a hearing notice for 13th July, 2009. That the issue of service was not denied save that the Appellant's counsel stated that they had the impression that the matter was coming up for ruling on their objection and not for the main hearing. She further held that it expected the Appellant's advocates to apply for review and set

- aside the order of 13th July, 2009 rather than await the outcome of the judgment and file the application of 11th September, 2009. She proceeded and dismissed the application for lack of diligence on the part of the prosecuting counsel.
4. Aggrieved by the said ruling the Appellant filed this appeal on the following grounds:-
- i. ***That the learned senior principal magistrate erred in law and fact in failing to appreciate that the right to be heard is paramount and overriding and should only be denied to a party on an extremely good ground.***
 - ii. ***That the learned senior principal magistrate erred in law and fact in holding that the defendant has no good defence to the Plaintiff's claim where as she had not heard evidence on the defence on record.***
 - iii. ***That the learned senior principal magistrate erred in law and fact in failing to appreciate that the mistake of the advocate should not be visited on the client.***
 - iv. ***That it was a denial of justice to deny a party a chance to be heard on the grounds that he may have remedy elsewhere.***
 - v. ***That the learned senior principal magistrate erred in law and fact in failing to appreciate that the mistakes of the advocate could only be explained by the advocate himself and it was therefore wrong and unfair to punish the client for want of explanation.***
 - vi. ***That the learned senior principal magistrate exercised her discretion wrongly in failing to consider the history of the case and especially the fact that the defendant was in court already for hearing on all past attendance and more on 25th March, 2009 when the case was partly heard and adjourned.***
5. This Appeal was canvassed by way of written submissions which I have given due consideration. This being a first appeal, I am guided by the principles laid down in **Selle v. Associated Motor Boat Co. Ltd 1968 E.A 123**. The principles for setting aside were well stated in **Shah v. Mbogo & Another (1967) EA 470** where the Court of Appeal for Eastern Africa held as follows:-

“IV...the court’s discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.” (Emphasis own).

6. It was therefore upon the trial court to determine whether the failure to attend court for hearing was justified. The trial magistrate in my view tackled this issued by stating that the service effected on the Appellant's advocates was not denied rather it was said to be mistaken for a ruling date and not hearing date. I have taken the liberty to peruse the hearing notice dated 23rd May, 2009. It is evident that the hearing notice was served upon the Appellant's advocates on 9th June, 2009 and that the matter was scheduled for hearing and not ruling on 13th July, 2009 at 9.00 am. Considering that the Appellant's counsel did not refute the issue of service, they ought to have put a strong case or given sufficient explanation for failure to attend court on that day. It was stated that it was thought to be a ruling date which I refuse to buy because the notice was clearly not a ruling notice. I find that there was an error on the part of the Appellant's advocates. The question that arises is whether or not that error is excusable. The Appellant cited vast cases to buttress his argument on this issue. Among them are **Philip Chemwolo & Another v. Augustine Kubende (1982-1988) KAR 103**, **Ceneast Airlines Limited v. Habib Bank A G Zurich (2010) eKLR** and **Patrick Mutunga Mwilu & 10 Others v. Mary Katua & 2 Others (2012) eKLR**. These cases are for the proposition that an advocate’s mistakes should not be visited on a litigant since the advocate’s only loses costs unlike a litigant who has a higher stake in the suit and that the courts must guard a litigant from such losses. The Respondent on the other hand cited **Madison Insurance Co. v. Samuel Ndemo Makori (2004) eKLR** where it was held as follows:-

"that same blame mistake and blunder of an advocate can be visited upon the client in order to do justice to the situation."

7. It is apparent from the above cited authorities that every case is to be decided on its special

circumstances. Although there was a blunder on the part of the Appellant's advocate, the Appellant who is the higher stakeholder than his advocates in the case had no contribution to the blunder at all. The foregoing fact coupled with the duty of the court to sustain matters and determine them on merit, I find that it would be unjust to lock out such a litigant from prosecuting his case. The upshot is that this appeal is allowed. The orders of the trial court of 13th September, 2009 and judgment of 18th August, 2009 are set aside. I direct that the matter be reheard before another magistrate of competent jurisdiction other than Hon. Ms. W. Mokaya. Costs is awarded to the appellant.

Dated, Signed and Delivered in open court this 24th day of April, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiffs

..... for the Defendants