



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 8 OF 2006

APOLLO INSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

SILVANUS MAKEMO AYOT.....RESPONDENT

(Being an appeal from the order of the SPM's court dated 21/02/2005 in Migori SPMCC NO. 60 of 2000)

JUDGMENT

1. This is an appeal from the judgment of Hon. Ezra o. Awino Ag. SPM in Migori SPMCC.NO. 60 OF 2000 delivered on 29th September, 2005. The grounds of appeal as contained in the memorandum of appeal are:-

- a. THAT the learned magistrate erred in law and in fact in failing to set aside the judgment entered on 21st February, 2005.*
- b. THAT the learned magistrate erred in law and in fact in failing to consider that the appellant had good grounds to support its application of 30th May 2005 as set out in the affidavit of Donald B. Kipkorir in support of the same.*
- c. THAT the learned trial magistrate completely and wholly misapprehended and misunderstood the applicable law.*
- d. THAT the learned trial magistrate [erred]in law is not acting judiciously.*
- e. THAT the learned trial magistrate abused and violated his discretion.*
- f. THAT the learned trial magistrate misdirected himself and arrived at a wrong decision.*

2. The appellant prays:-

- a. That the appeal be allowed.*
- b. That the judgment delivered on 21st February, 2004 be set aside.(sic)*
- c. That the decree issued pursuant to the aforesaid judgment be set aside.*
- d. That costs of the appeal be given to the appellant.*

e. That this court be pleased to make any other or further orders as may be appropriate.

3. Briefly, the background to this appeal is that the Respondent herein commenced Migori SRMCC NO. 61 of 2000 by way of a plaint filed in court on 14th March, 2000. The same was duly served upon the appellant herein.

4. After being served with the said plaint the appellant instructed the firm of M/s Kipkorir Titoo and Kiara to enter appearance and file defence on their behalf. On the 4th of April, 2000 the above mentioned firm of advocates filed the memorandum of appearance and filed a defence by sending the same to the Executive Officer Migori Law Courts who filed on their behalf.

5. Having closed their pleadings on 27th July, 2000 the trial court went ahead and entered summary judgment for the Respondent in the sum of Kshs. 265,795 in default of attendance by the appellant on the hearing date though they were duly served with a hearing notice for the same date.

6. This prompted the firm of M/S KIPKORIR, TITOO & KIARA to move the court vide a chamber summons dated 4th September 2000 pursuant to **Order IX, Rule 8** and **Order XXI Rule 22** of the **Civil Procedure Rules** and **Section 3A** of the old **Civil Procedure Act Cap 21 Laws of Kenya** seeking:- **(a)** stay of execution and **(b)** setting aside of the summary judgment entered on July, 27 2000. Parties there after entered a consent on 20th September, 2000 allowing the application dated 4th September, 2000 whereby judgment entered against the appellant and all consequential orders were set aside.

7. The case was then fixed for hearing ex-parte by the Respondent's advocates who served a hearing notice to the appellant's Advocates KIPKORIR, TITOO & KIARA ADVOCATES indicating that the matter had been fixed for hearing on the 28th day of October, 2004 at 09.00 O'clock. The said date was not convenient for appellant's advocates who then instructed the firm of RODGERS ABISAI ADVOCATES to hold their brief and take out the matter from the hearing list of 28th October, 2004 and reschedule the matter for hearing on any Monday or Friday of the month of February, 2005.

8. After the 28th October, 2004 the firm of M/S KIPKORIRI, TITOO & KIARA did not receive any invitation for fixing hearing dates but only received the Respondent's written submissions. This made the Appellant's advocates to request for copies of proceedings. Upon perusal of the same, they discovered that only one consolidated hearing had been conducted for two matters whereas the two matters had never been consolidated.

9. Again the court granted a stay of execution on 31st May, 2005 pending the hearing of the appellant's application dated 30th May, 2005 after the Appellant moved the court under certificate of urgency seeking stay of execution. The application was fixed for inter parties hearing on the 13th June, 2005.

10. When the application came up for hearing there was a preliminary objection raised which the trial court considered and dismissed. Later the application was heard and the trial court made its ruling on the 29th September, 2006. The trial court in its ruling pointed out that it was disappointed by the manner counsel for the appellants had handled the matter. It was the trial courts finding that the issue of dates with regard to hearing and/or mention for fixing a hearing date was canvassed when Mr. Abisai for Mr. Ngaira for the appellant sought adjournment due to the confusion and it was agreed that the matter do proceed to hearing on 20th January, 2005.

11. On the 20th January, 2005 there was no appearance from the firm of KIPKORIR, TITOO & KIARA Advocates for the appellant and the case proceeded in their absence with the resultant judgment delivered on 21/2/2005. From the record, the trial court stated that to deny a party a hearing should be the last resort of the court. The trial court also stated that it was aware of the nature of the action and the defence raised and it also noted that the case was old. In making its decision the trial court was guided by the principle enunciated by J. Harris in the case of Shah -v- Mbogo & another HCCC. NO. 1087 of 1965 that:-

“Applying the principle that the court’s discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, in-advertence, 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 the motion should be refused.”

12. The court then went ahead and dismissed the said application, hence this appeal. Along the way, and after filing the memorandum of Appeal the firm of KIPKORIR, TITOO & KIARA ceased acting for the appellant and the firm of KIMARU KIPLAGAT & CO. was appointed.

13. This appeal proceeded by way of written submissions. The appellant’s submissions dated 23rd February, 2012 were filed on 29th February, 2012. The Respondent’s submissions dated 13th February, 2012 were filed on 15th February, 2012.

14. The appellant contends that the learned trial magistrate erred in law and in fact in failing to consider that the appellant had good grounds to support its application dated 30th May, 2005 and that in refusing to allow the appellant’s said application the learned trial court completely misapprehended the applicable law and proceeded to award the respondent colossal sums of money. That the respondent herein did not establish the fact that a legal relationship existed between the APA Insurance Co. Ltd and the appellant herein.

15. In his brief submissions filed in his behalf by M/s Kerario Marwa & Co. Advocates, the respondent submits that the Record of Appeal does not contain:

- a. *The proceedings of the Migori court on the hearing and arguments of the application dated 30th May, 2005 and filed on 31st May, 2005.*
- b. *The ruling of the court dated 29th September, 2009.*
- c. *The ruling of the court included in the Record of Appeal on page 157 is not relevant to this appeal.*

16. Counsel for the Respondent contends that this court would not see or appreciate the merits of the grounds of appeal without the benefit of the documents referred to above. Further that the Record of Appeal contains serious factual errors, one of them being that whereas the Record of Appeal shows that the appeal herein is against the judgment and decree of the SPMCC dated 21st February, 2005, the correct position is that this appeal is against the ruling of the SPMCC, Migori dated 29th May, 2005. That the glaring omissions pointed out by the Respondent made it difficult for the respondents to make a meaningful response to the appeal.

17. In my considered view the substance of the appellant’s complaint revolves around the exercise of the learned trial magistrate’s discretion which discretion is always unfettered. See **SHAH –VS- MBOGO [1967] E.A. 116**. It is evident that there was a date taken for the hearing of the main suit which was either not communicated to by M/s Abisai & Company Advocates who held brief for the firm of KIPKORIR, TITOO & KIARA on the 28th October, 2004 or the same was communicated and the said advocates chose to ignore it. A look at the record of the trial court shows that the firm of M/s KIPKORIR, TITOO and KIARA ADVOCATES did not properly handle the case of their client or alternatively they did not take the same seriously or had no interest in it. The appellants were given time to rectify their omissions but they did not take advantage of the same.

18. The appellants have sought to set aside a regular judgment. It is trite law that once a judgment is regular, before it is set aside the applicant ought to show merits of the defence. The learned trial magistrate considered the defence on record before reaching his conclusions, and found it wanting.

19. It is plain therefore that the learned trial magistrate in declining to set aside the ex-parte judgment not only had the correct principles in mind (See **Shah –vs- Mbogo** supra) but also properly applied the same.

20. Before I conclude this judgment, I must point out that the Record of Appeal leaves a lot to be desired. The court has not been given the correct dates for the judgment/orders appealed against and as correctly submitted by counsel for the Respondent the omissions in the Record of Appeal have made it difficult for the Respondent to respond to the appeal and for the court to clearly see the issues in controversy.

21. For the above reasons I have come to the conclusion that the learned trial magistrate having exercised his discretion properly, this court cannot interfere with the same. I find no merit in this appeal and dismiss it with costs to the Respondent.

Delivered, signed and Dated at Kisii this 31st day of July, 2014.

R.N. SITATI,

JUDGE

In the presence of:

N/A for the Appellant

Mr. Minda for Kerario Marwa for the Respondent

Mr. Bibu - Court Clerk