REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 604 OF 2012

BURHANI DECORATORS & CONTRACTORS ......….. APPELLANT

VERSUS

MORNING FOODS LTD ……..........…………….... 1ST RESPONDENT

HEALTHY U 2000 LTD …………………......….... 2ND RESPONDENT

JUDGMENT

The suit subject matter of this appeal was filed by the plaintiff/appellant BURHANI DECORATORS & CONTRACTORS LTD against the two defendants/respondents MORNING FOODS LTD & HEALTHY U 2000 LTD on 30th November 2009 vide Milimani Chief Magistrate's Court Nairobi Civil Suit No. 8200 of 2009.

The claim was for recovery of Ksh. 861,792.16 together with interest thereon, being the cost of repair works in the sum of Ksh. 778,542.16 for structural defects occasioned by the defendant on the plaintiff/appellant's premises on plot No. LR NO. 12596/89 Industrial Area, Nairobi and the sum of Ksh. 83,250 on account of rent and service charge for the month of November 2006 which remained due and owing from the defendants/respondents who had been in occupation of the said premises by virtue of a tenancy agreement for a period of 6 years commencing 1st January 2001. The said plaintiff/appellant's plaint sets out detailed description of the facts giving rise to the cause of action.

The defendants/respondents entered appearance through the firm of Macharia-Mwangi & Njeru Advocates on 19th January 2010 and filed defence denying the plaintiff/appellant's claim and praying for its dismissal with costs. On 17th February 2010 the plaintiff/appellant filed reply to defense reiterating contents of the plaint as pleaded.

On March 5th 2010, the record shows that the plaintiff/appellant's advocates appeared in the registry and fixed a hearing date for 22nd September 2010 at 9.00 a.m. The case came up for hearing on 22nd September 2010 before **L.M. Njora (Mrs) Senior Principal Magistrate** and both parties' advocates were present in Court. The Court examined the record and realized that it did not have pecuniary jurisdiction to entertain the claim which exceeded Ksh. 800,000/- . The matter was by consent ordered placed before the Chief Magistrate for directions.

When the suit came up before **Hon. S.N. Riechi Chief Magistrate** on 22nd September 2010, the Chief Magistrate ordered that the hearing date be fixed when the diary for 2011 is opened on priority basis.

Later, the clerk for the plaintiff/appellant's advocates appeared in the court registry on 22nd December, 2010 and fixed a hearing date for 13th July 2011. Surprisingly, the record shows that on 13th August 2011 the matter came up before **A.K. Ndungu Senior Principal Magistrate** and no record of 13th July 2011 is reflected. On the said 13th August 2011 the advocate for the defendants/respondents were present and it was reported by Mr Kaikai holding brief for Mr Anzala for plaintiff/appellant that Mr Anzala was bereaved. The Court ordered for a hearing date to be taken in the registry.

On the 1st December 2011, the plaintiff/appellant's advocate's clerks fixed an exparte hearing date for 23rd May 2012. It was on this fateful 23rd May 2012 that only Mr Mutua advocate for the defendants/respondents appeared in Court before **T.W.C. Wamae Chief Magistrate** with one witness and in the absence of the plaintiff/appellant and its advocate, that Mr Mutua advocate applied for dismissal of the plaintiff/appellant's suit for non-attendance.

The Court ordered

"Suit dismissed for non attendance by the plaintiff and counsel. Costs to the defendants.

T.W.C. Wamae (Mrs)

Chief Magistrate"

Following the dismissal of the suit on 23rd May 2012 for non attendance, the plaintiff/appellant did on 18th September, 2012 vide an application by way of notice of motion dated 5th September 2012 file an application under certificate of urgency seeking to set aside the orders of the Chief Magistrate dismissing its suit for non-attendance.

The appellant herein argued that failure to attend Court with his advocate was not intentional but inadvertent as it was neither notified of the hearing date nor was his advocate made aware of the hearing date as fixed and diarized by his clerk in the latter's diary only, without transferring the date to the advocate's diary for that date.

The appellant invoked the Court's inherent jurisdiction and overriding objectives under Sections 1A, 1B and 3 and 3A of the Civil Procedure Act and the powers of the Court under Order 12 rule 7 of the Civil Procedure Rules to set aside orders dismissing the suit for non-attendance. The application was supported by the sworn affidavit of Nelson Havi advocate for the appellant and Mr Hasham Sureya, the chief accountant of the appellant company.

Counsel deponed that it was an inadvertent mistake that his firm did not attend Court on the material day when the appellant's suit was listed for hearing as the clerk who took the date did not diarize the matter in the advocate's diary and neither was the client, the appellant herein notified of the hearing date. In addition, that the advocate who was allocated the conduct of the matter Mr Dan. Anzala had left employment and that it was not until Ms Melissa Ngania joined the law firm from 1st January 2012 and took over the conduct of the file subject matter herein that upon perusal of the court file by their clerk, she learnt that the suit had been dismissed for non-attendance on 23rd May 2012 thereby necessitating the application to set aside the orders of dismissal.

The extracts of the diaries, cause lists and court attendance slips were annexed to the advocate's affidavit. It was also deponed that upon learning of failure to diarize the matter by the clerk, Mr Havi sought explanation from his clerk a Mr Odede Opany and his secretary who responded that it was an inadvertent mistake on their part. Copies of their explanation were annexed to their affidavit.

It also emerged that the respondents had been duly served with the hearing notice for the said hearing date, which hearing notice as annexed was signed by Mr Anzala advocate. Attached thereto is also a letter dated 2nd December 2011 signed by Mr. Anzala advocate informing the appellant of the hearing date for 23rd May 2012 and asking them to appear one month prior to the hearing for pre-hearing briefing. It was deponed that the said letter was not delivered to the appellant as shown by the annexed copy of extract of the delivery book.

The advocate profusely apologized to the Court for his firm's failings, seeking indulgence that his mistakes should not be visited upon his innocent client who was not a party to the misadventures detailed in the depositions before the Court.

As expected, the respondents/ defendants opposed the appellant's application and filed a replying affidavit on 8th October 2012 sworn by Mutua Molo Advocate on 8th October 2012.

The respondents sought dismissal of the appellant's application for setting aside dismissal order for non-attendance and it was deponed, among others - that there was no sufficient reasons advanced to persuade the Court to exercise its discretion in favour of the plaintiff/appellant and set aside the orders dismissing the suit for non-attendance. The advocate castigated the plaintiff/appellant's advocates for failing in their obligation of keeping their records properly. He asked the Court to disregard the annextures averring that it was clear Mr Nelson Havi and other advocates in the law firm chose to give priority to other matters and that from the annextures, they were all along aware of the hearing date. He urged the Court not to believe the appellant's advocates' who had conveniently failed to procure the affidavits of the clerk a Mr. Isaac Odede Opany who allegedly authored annexture NH7 and the alleged intended recipient Melissa Ngania advocate.

He faulted annexture NH8 for conveniently omitting mail delivery records for 5th December 2011 a Monday working day and for blacking out the record for 2nd December 2011 thereby inviting the Court to hold that the suppressed records would confirm that the letter was indeed dispatched to the plaintiff.

He blamed the appellant for being indolent in not seeking to find out from their advocates the progress of their matter since 13th July 2011. In his view, the appellant had shown lack of interest in the pursuit of his case in Court.

He also submitted that as the application had been filed 3 months after the suit had been dismissed, there had been inordinate delay which had not been explained and prayed for dismissal of the appellant's application with costs.

The record shows that the application came before **T.W.C. Wamae (Mrs) Chief Magistrate** on 10th October 2012 under certificate of urgency as certified by **T.S. Nchoe Resident Magistrate** on 18th September 2012 and a ruling was set for 12th October 2012 two days later. There is no record on 10th October 2012 that parties sought to rely on their pleadings to dispose of the application. The record only show:

"Ms Mwangi/Ngania for applicant

Mr Mobeyo for defendant/respondent

Ruling 12/10/2012"

On 12th October, the learned Chief Magistrate after considering the application and the annexed affidavits on record dismissed the same with costs to the defendant/respondent.

She gave five reasons for her decision namely, that

1) The hearing date was taken exparte by the plaintiff/appellant on 1st December 2011 and their advocate had an obligation to properly diarize the matter.

2) That even if the matter was only diarized in the diary of Mr Dan Anzala he did not go away with his diary when he left employment on 13th December, 2011 and the plaintiff's advocate have therefore not explained why they did not allocate the case to another advocate.

3) That Mr Havi Advocate avers that he became aware of the dismissal order on 15th July 2012 what was close to 2 months from the date of the dismissal.

4) Mr Havi Advocate avers that Melissa Ngania advocate became aware of the dismissal order on 18th June, 2012 about 3 months after the dismissal order.

5) That neither Mr Havi advocate nor Ngania advocate had explained why no action was taken to reinstate the suit until 3 months after they first became aware of the dismissal order.

The learned Chief Magistrate concluded that from the foregoing, the plaintiff/appellant's advocates firm failed to properly keep their records and they should bear the responsibility for so doing. Further, that the delay on the part of the said advocates in filing the present application was inordinate and inexcusable.

She further held that the advocate's failure to inform their client about the hearing date had also not been explained to the satisfaction of the Court and concluded that as the plaintiff/appellant's advocate had not acted diligently, they were solely to blame for what had befallen the plaintiff/appellant. In the end, she dismissed the application dated 5th September 2012 as having no merit with costs to the defendant/respondent.

It is that order of 12th October 2012 by **T.W.C. Wamae (Mrs) Chief Magistrate** that provoked this appeal by the plaintiff/appellant. The memorandum of appeal filed on 9th November 2012 sets out 4 grounds of appeal, attacking the order of the learned Chief Magistrate. They are:

1) The learned Magistrate erred in law and fact in holding that the delay in the making of the notice of motion dated 5th September, 2012 seeking the setting aside of the order of dismissal made on 23rd May 2012 was inordinate and inexcusable.

2) The learned Magistrate erred in fact and law in holding that the advocate's failure to diarize the hearing date for 23rd May 2012 and to attend court on the said date had not been adequately explained.

3) The learned Magistrate erred in fact and in law in holding that the appellant's advocates failure to inform the appellant of the hearing date of 23rd May 2012 and the appellant's failure to attend court on the said date had not been adequately explained.

4) The learned Magistrate erred in law in failing to give effect to the overriding objective in Sections 1A, 1B of the Civil Procedure Act and Article 159 of the Constitution of Kenya, 2010 in denying the appellant the opportunity of a just determination and in dismissing the notice of motion on account of mistakes of the appellant's advocates.

They prayed for orders allowing this appeal and setting aside the Chief Magistrate's order dismissing the application for setting aside and substitution therefore with an order allowing the notice of motion.

The appeal herein was admitted to hearing on 14th May 2014 by **Hon. Mr**. **Justice Hatari Waweru** in accordance with the provisions of Section 79B of the Civil Procedure Act and on 21st July 2014,\ the directions were given by **Hon. Justice Charles Kariuki Mutungi** pursuant to the provisions of Order 42 Rule 13 of the Civil Procedure Rules.

Advocates for both parties appeared for their respective clients and agreed to have the appeal disposed of by way of written submissions. The appellant's counsel filed theirs on 5th August 2014 whereas the respondent's counsel filed theirs on 24th September 2014 as confirmed during the mention on 26th September 2014 when judgment date was fixed for today.

I have taken the trouble to analyze and evaluate the record of the subordinate Court as I am enjoined by Section 78 of the Civil Procedure Act which provides:-

> S. 78 (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power –
>
> a) to determine a case finally
>
> b) to remand a case
>
> c) to frame issues and refer them for trial
>
> d) to take additional evidence or to require the evidence to be taken
>
> e) to order a new trial
>
> 2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

I have also examined the parties' written submissions as filed and the authorities cited in support of the rival submissions. The power vested in the trial court to set aside the order dismissing the suit for non-attendance is contained in the provisions of Order 12 rule 7 of the Civil Procedure Rules. It is a discretionary power which the learned Magistrate exercised in dismissing the applicant's application.

The only issue is whether, on the material submitted before the Court, the learned magistrate exercised that discretion correctly and in the interest of substantial justice to all the disputants before her.

In this appeal, the appellant has reiterated its passionate appeal that the mistake occasioned by its advocate as replicated in this judgment as extracted from Mr Nelson Havi's advocate's affidavit, was honest, inadvertent and not intended to obstruct the course of justice. In its view, the learned Chief Magistrate erred in law in failing to accord him an opportunity to ventilate his grievances as per the claim filed and was therefore ousted from the seat of justice.

The appellant have cited the Court of appeal decision in **Richard Ncharpi Leiyagu – Vs – IEBC and 2 Others, Nyeri CA 18 of 2013** Per **Visram, Koome & Odek JJA** decided on 20th August 2013.

The said civil appeal arose out of an order of the High Court dismissing the appellant's election petition for non attendance. The Court in allowing the appeal found that the appellant was declined a hearing as disallowing the appeal would go against the spirit of the overriding objectives and also the provisions of Article 159 of the Constitution. The court directed the petition to be heard on merit before another Judge other than the one who heard it.

As I have stated earlier, in dismissing the application for setting aside the order dismissing the appellant's suit the subordinate court was obviously exercising judicial discretion. As was espoused in the established case of **Mbogo & Another – Vs – Shah, EA 1968, p.15,** that:

> ***"An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result***

there has been misjustice."

I am bound by those principles which go further to establish that a court's discretion to set aside an exparte judgment or order, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error, but not to assist a person who deliberately seeks to obstruct or delay the course of justice.

I have considered the reasons that were presented before the learned Chief Magistrate by the appellant regarding their failure and the failure of their advocates to attend court and prosecute the case on 23rd May 2012 and keenly perused the affidavits filed in support of the application.

I have also asked myself whether failure to attend court on 23rd May 2012 by both the appellant and their advocates constituted an inadvertent excusable mistake, an error of judgment regarding failure by the advocates law firm to diarize the hearing dates as required or whether it was meant to deliberately delay the cause of justice. I have further considered whether the filing of the application for setting aside the dismissal order, 3 months after the said order was made constituted inordinate delay.

To decide on the questions posed above, I am enjoined to look at the case of **Belinda Murai & Others – Vs – Amos Wainaina [1978] KLR 278** per **Madan JA** (as he then), cited with approval in the **Nyeri CA 18/2013** (supra), where he described what constitutes a mistake in the following terms:

> ***"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of 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 certainly to do whatever is necessary to rectify it if the interests of justice so dictate."***

His Lordship went further 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…"***

In my considered view, therefore, the learned Chief Magistrate misapprehended the reasons given by the appellant and their advocates for non attendance which arose as a result of a mistake and which mistake was apparent from the affidavits and annextures thereto.

Furthermore, counsel for the appellant profusely apologized for such mistake which the learned Magistrate failed to consider in her ruling.

In the Court of appeal decision of **Phillip Chemwolo & Another – Vs – Augustine Kubede [1982-88] KAR 103 AT 1040, Apalloo J** (as he then was) and cited with approval in the **Nyeri CA 18 of 2013** (Ibid), the learned Judge of Appeal posited as follows:

> ***"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."***

In this case, the delay of 3 months to the filing of the application was sufficiently explained by learned counsel for the appellant. Nonetheless, the firm acted with alacrity upon discovery of the mistake and sought to correct the mistake by filing the application with speed and securing a hearing under certificate of urgency. From the affidavit of Nelson Havi advocate and the annextures thereto, I gather that he is a

very diligent advocate who procedurally sought to know from his staff in the office the cause for the misadventure which had caused his client loss of a suit. He demonstrated remorse for what had happened which appear to have given him sleepless nights, seeking answers.

Therefore, I find that the inconvenience caused to the respondents by the mistake and delay of 3 months could have been adequately compensated by costs. In my view, the learned Chief Magistrate failed to appreciate the overriding objective which she did not even refer to in her ruling, in arriving at the decision which she did.

The right to a hearing, in my view has always been a well protected right in our Constitution and is also the cornerstone of the rule of law. The appellant having produced all extracts of the diaries, delivery books and offering all manner of explanation, the learned Chief Magistrate by dismissing the appellant's application departed from a long line of judicial precedents set over many years that courts are always reluctant to dismiss a suit and thereby deny a claimant an opportunity to ventilate his or her grievances. The power to dismiss a suit should only be exercised sparingly as was held in the Court of Appeal decision of **D.T. Dobie & Co (K) Ltd – Vs – Joseph Mbaria Muchina CA 37 of 1978** where the court stated that

> ***"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit has shown a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."***

In this case, it was not argued that the appellant's case, from the onset, was hopeless. The submissions by counsel for the respondent in opposition to this appeal were endowed with authorities all emanating from the High Court, a court with concurrent jurisdiction and which decisions I am not bound by, however persuasive they may be.

In any event, the decisions I have referred to in this judgment emanate from the Court of Appeal, and therefore override decisions of a court with concurrent jurisdiction as myself. I am not persuaded by the decisions in **Unga Ltd – Vs - Magina Ltd [2014] eKLR, Kenya Sugar Board – Vs – Ndungu Gathinji, [2012] Eklr Per Kimondo J and Alcon Holdings Ltd – Vs - Commercial Bank Ltd [2012] eKLR Mabeya J.** In all the three decisions of the High Court, my learned brother judges held that the delay of 2 months was dilatory and inexcusable whereas in the latter decision, the learned Judge held that 30 days delay was inordinate.

I repeat myself that the overriding objective for the courts in dispensing justice must be to ensure expeditious, fair, and just proportionate and economic disposal of cases.

I do not find any casual posture demonstrated by counsel for the appellant in the manner he handled his client's case. I took time to peruse the entire record of events that had taken place and each action since the suit was instituted in court until its dismissal and I am satisfied that the advocate and his client did not, at any one moment slumber. They were not guilty of inaction as the delay/lapse was adequately explained. I do not think that counsel for the appellant derogated from the overriding objective. I therefore reject the respondent's submissions as unconvincing and incapable of advancing the overriding objectives intended by the express provisions of Section 1A and 1B of the Civil Procedure Act. The submissions also fall short of binding authorities as the ones cited are persuasive not binding on me.

In my view, when a court exercises the inherent jurisdiction to dismiss a party's suit, this must be exercised in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality. It was not demonstrated that the appellant herein with its advocate had developed a habit of absconding from court.

The matter had come for hearing the third time. On the first occasion the magistrate recused herself for want of pecuniary jurisdiction. On the second occasion, Mr Anzala advocate was reportedly bereaved but

there was counsel holding his brief and no objection to an adjournment was raised. When the matter landed before the Chief Magistrate, it had to be dismissed.

From the court record, the court itself had made mistakes which parties appear to have ignored. On 2nd December 2010, the appellant's advocates clerk Isaac fixed an exparte hearing date for 13th July 2011. Surprisingly, the matter was never listed for hearing on 13th July 2011 and instead it was fixed for 13th August 2011 before **A.K. Ndungu Senior Principal Magistrate**.

Yet the record has no explanation how 13th July 2011 turned out to be 13th August 2011, a whole month away. Is the mistake excusable just because it is made by the Court? My answer is no. A mistake is a mistake, and as long as sufficient explanation is given showing good faith like in this case, it should be excused and a party given an opportunity to be heard on their grievances on merit.

For the aforesaid reasons, I hold that on the whole, the learned Chief Magistrate was clearly wrong in exercising her discretion which resulted in an injustice. It has caused even more delay for the parties as 2 years after the appeal was filed is when it is being determined. Accordingly, I allow the appeal herein, set aside the ruling and order dated 12th October 2012 by **T.W.C. Wamae (Mrs) Chief Magistrate** and substitute thereto with an order allowing the notice of motion dated 5th September 2012.

I direct that **Milimani Commercial Court CMCC No. 8200 of 2009** be reinstated and heard on merit before another magistrate of competent jurisdiction other than **T.W.C. Wamae (Mrs)** in the event that she still serves in the same station.

I award costs of that application in the lower court to the respondents. The costs of this appeal shall abide by the outcome of the suit.

Dated, signed and delivered at Nairobi this 11th Day of December, 2014.

R.E. ABURILI

JUDGE