



REPUBLIC OF KENYA

High Court at Meru

Civil Appeal 114 of 2009

JOHN PETER KIRIA.....1ST APPELLANT

ALICE M. KANYITHIA.....2ND APPELLANT

VERSUS

PAULINE KAGWIRIA.....RESPONDENT

(Being an appeal from the Ruling and Orders of Hon. S. N. K. Andriessen, PM delivered on 16th October, 2009)

J U D G M E N T

The appellants filed suit at the lower court on 8/4/2004 seeking injunctive orders against the respondents, their agents, or servants from making, disseminating, printing in press or otherwise informing the members of the public about false medical allegation by the 2nd defendant touching on the appellants on their place of work which are untrue, malicious and meant to cause irreparable damage to the appellants' reputation, calling and business. The 1st respondent filed defence on 23/11/2005 whereas 2nd respondent filed defence and counterclaim dated 18th June, 2004 and same was served upon the appellants on 27th October, 2004. The appellants did not file defence to the counterclaim within the next 15 days from the date of service.

The respondent sought judgment against the appellants on 6/12/2004 and interlocutory judgment was not entered till 19/1/2005. The court record show that the applicants purported to file reply to defence and defence to counterclaim on 21/12/2005 after interlocutory judgment had been entered against them. This was 11 months after interlocutory judgment had been passed against the appellants. The reply to defence and defence to counterclaim had been filed without court's leave. The appellants did not move court to have the interlocutory judgment set aside till 26th August, 2009, when they filed an application seeking to have interlocutory judgment entered against them in terms of 2nd respondent's counterclaim on 19th January, 2005 set aside and they be allowed to defend the counterclaim unconditionally and that the reply to defence and defence to counterclaim dated and filed on 21/12/2005 be deemed as properly filed. The application was heard and ruling was delivered on 16th October, 2009 dismissing the appellants' application.

The appellants being aggrieved by the ruling of the trial Magistrate filed an appeal on 27th October, 2009 setting out six(6) grounds of appeal as follows:-

1. That the learned Senior Resident Magistrate erred in law and facts in dismissing the appellant's application dated 24/8/2009 to set aside an interlocutory judgment against the appellant who were the

plaintiff as per the counterclaim.

- 2. That the learned Senior Resident Magistrate erred in law and facts in dismissing the appellants application when the matter was yet to go to full hearing and thus disregarded the natural principal of litigation and the law on the fact that no man should be condemned before being heard.***
- 3. That the learned Senior Resident Magistrate erred in law and facts in disregarding the principles of setting aside interlocutory judgment and thus exercised her discretion wrongly.***
- 4. That the learned Senior Resident Magistrate erred in law and facts in rejecting the explanation for the delay in filing a defence to counterclaim and rejected the Court of Appeal decision which was binding on her.***
- 5. That the Senior Resident Magistrate's ruling and orders were against the weight of need to dispense justice with fairness and thus were bad in law.***

When the appeal came up for hearing on 9/7/2012 Counsel for respondent sought directions to the effect that the appeal be determined by way of written submission. The appellant's counsel filed his submissions on 6th December, 2012 and counsel for the respondent filed his submissions on 11th December, 2012. This court has carefully considered the written submissions and attached list of authorities. It has also carefully considered the application before the trial court, affidavits thereto, and ruling of the trial court and the parties respective opposing positions.

The appellants grounds of appeal deal with the way the trial court exercised or failed to exercise its discretionary powers to set aside or vary the exparte interlocutory judgment. I therefore propose to deal with all grounds together in this judgment.

The respondent's counsel in his submission submitted that the appellants' appeal is incompetent as the same was filed without leave of court as according to the respondent the appeal herein do not lie as of right against orders issued pursuant to O.IXA Rules 5,9,10 and 11 of the Civil Procedure Rules. Under Order IXA Rule 11 now Order 10 Rule 11 of Civil Procedure Rules appeal do lie as of right as per Order 43 Rule 1(g) of Civil Procedure Rules. I therefore find that this appeal is properly before court and cannot be struck out as submitted by the respondent.

In the instant appeal there is no dispute that the appellant's did not file reply to the defence and defence to the counterclaim till after interlocutory judgment had been entered, that is after the delay of 11 months since interlocutory judgment had been entered. The application to set aside interlocutory judgment was not filed till after a period of 4 years. The appellant's reason for delay is that the delay was caused by the appellant's advocates. The advocates did not file reply to the defence and defence to claim though having fully been instructed to do so. They choose to file the reply to defence to claim 11 months after interlocutory judgment had been entered. They further did not file an application to set aside the interlocutory judgment till after 4 years since interlocutory judgment had been entered. The advocates did not even bother to file an affidavit to explain the delay on their part. The court record show that it was only on 4.6.2009 when appellants advocates realized interlocutory judgment had been entered against the appellants when the matter was coming up for hearing. That before the application was heard it is not clear as to whether the respondents had filed any replying affidavit or grounds of opposition but the court allowed all counsel to address the court.

Under provisions of Order 10 Rule 11 of Civil Procedure Rules it is provided:-

“11. 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.”

The appellant's Counsel in support of this appeal referred this court to several cases which I propose to consider in this appeal. in the case of **PHILIP KEIPTO CHEMWOLO AND MUMIAS SUGAR CO. LTD – V- AUGUSTINE KUBENDE(1982-1988)1 KAR 1036** Court of Appeal dealing with an appeal

in which interlocutory judgment had been entered in default of appearance considered whether judgment had rightly exercised his discretion in refusing to set aside the judgment under Order 9A Rule 5 held as follows:-

- 1. The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties(Kimani v Mconnell (1966) EA 547).**
- 2. Where a regular judgment had been entered the court would not usually set aside the judgment unless it was satisfied there was a triable issue.**
- 3. In this case there was a triable issue on contributory negligence which would affect the quantum of damages.**

The court of appeal in the above-mentioned appeal on page 1039 of their judgment stated:-

“The discretion is in terms unconditional. The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima facie defence. It was suggested in argument that there is another rule that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.”

Yet in the same judgment APALOO J. A, as he then was on page 104 on line 18 stated:-

“Blunders will continue to be made from time to time and it does not follow that because a mistake had been made that a party should suffer the penalty of not having his case determined on its merits.”

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 for the purpose of imposing discipline. In this case, the appellants offered to pay the respondent will not agree. I am unwilling to believe that in opposing the application for setting the judgment aside and allowing a hearing on the merits, the object of the respondent was to snap at the judgment in a case in which if the defendants were permitted a hearing, the quantum of the liability to pay damages may be much less.

In the case of SHAH – V- MBOGO & ANO(1967) E.A 470 Court of Appeal for Eastern African held:-

IV. 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, 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, the motion should be refused

Further in the case of KENYA COMMERCIAL BANK LTD – V- NYANTANGE & ANOTHER(1990) KLR 443 Bosire J, as he then was held:-

- 1. Order IXA rule 10 of the Civil Procedure Rules donates a discretionary power to the court to set aside or vary an ex-parte judgment entered in default of appearance or defence and any consequential decree or order upon such terms as are just.**

2. The discretion is a free one and is intended to be exercised to avoid injustice or hardship but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice.

Under Article 50 (1) of the Constitution of Kenya, 2010 it is provided that every person's right to have any dispute determined be decided fairly. This means every person be afforded an opportunity to be heard and case be decided on merits. Article 50(1) of the Constitution of Kenya, 2010 provides:-

50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

Article 159 (2) (a) and (b) of the Constitution of Kenya, 2010 on the other hand obliges court to do justice to all without undue regard to technicalities. Article 159(2(a) and (d) provides:

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles

(a) Justice shall be done to all, irrespective of status;

(b)

(c).....

(d) to a public trial before a court established under this Constitution

Our own Civil Procedure Act under Section 1A and 1B of the Civil Procedure Act obliges court to do substantive justice and not to dwell on technicalities.

In the instant appeal the mistake in filing reply to defence and defence to counterclaim was due to a mistake of the advocates for the appellants who had instructions to file defences in time but did not act diligently nor did they apply to set aside the exparte judgment without undue delay and in a matter which is yet to be heard and determined on merits and which matter the appellants through their draft reply to defence and defence to counterclaim raises triable issue on liability which would affect quantum of damages would cause injustice, or hardship to the appellants resulting from accident, inadvertence or excusable mistake or error if this appeal is dismissed. It has not been in this appeal been demonstrated that the appellants deliberately sought in their application to obstruct or delay the cause of justice and as such I find no cause to refuse this appeal.

I find the appellants have defence on merit and that in the interest of justice they should not be shut out of ventilating their defence. The respondent would not be prejudiced in anyway as she shall have an opportunity to be heard and prove her case on balance of probability. Further no party should be condemned unheard in any matter and especially where he demonstrates there is defence on merits and that there is no prejudice to the other party and lastly an explanation for any delay has to be given and considered. Further in this matter the court has not heard the Respondent's case and pronounced judgment on merits and justice demand that matters be heard and be determined on merits where party has satisfied the conditions for setting aside default judgment.

The upshot of this appeal is that the appeal is allowed. I therefore make the following orders:

- 1. The appeal be and is hereby allowed and ruling of the learned Senior Resident Magistrate is hereby set aside**
- 2. That the said ruling is substituted and/or replaced with orders allowing the application dated 24th August, 2009.**
- 3. That as the appellants were to blame for failure to file reply to defence and defence to**

counterclaim in time and application to set aside within reasonable time they shall meet costs of the appeal but the costs of the application at the lower court shall be in the cause.

DATED, SIGNED AND DELIVERED AT MERU THIS 28TH DAY OF MARCH, 2013.

J. A. MAKAU

JUDGE

DELIVERED AT MERU THIS 28TH DAY OF MARCH, 2013

- 1. Mr. Murango Mwenda for respondent**
- 2. Mr. Muthamia for the appellants**

J. A. MAKAU

JUDGE