REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 128 OF 2006

NICHOLAS MUNYOKI MASYA ……..……..…..… APPELLANT

VERSUS

1. **JOEL NGEI KITEME**
2. **MARTHA NGEI ……...….. RESPONDENTS**

(Being an appeal from the Ruling and Order of Hon. Ng'ar Ng'ar (S.R.M) in Mwingi Senior Resident Magistrate Civil Case No. 142 of 2003)

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(Before B. Thuranira Jaden J)

J U D G M E N T

By a plaint filed before the lower court on 11/11/2003, the Respondents who were the 1st and 2nd Plaintiff sued the Defendant/Appellant for general and special damages following a Road Traffic Accident which occurred along the Thika-Garissa Road. The Plaintiffs sustained injuries in the accident. According to the Plaintiffs the accident occurred due to the Defendant's negligence. The Defendant through his statement of defence denied any negligence and attributed the accident to the 1st Plaintiff's negligence.

Part of the Plaintiffs' case was heard in the absence of the Defendant and his advocate. The Plaintiffs' case was closed and thereafter the trial court entered judgment in favour of the 1st Plaintiff at Kshs.80,000/= general damages, 3,600/= special damages plus costs and interests. Judgment was entered for the 2nd Plaintiff for Kshs.180,000/= general damages, 4,630/= special damages plus costs and interests.

The Appellants made an application before the trial court for the setting aside of the judgment dated 12/6/06 and the *exparte* proceedings of 10/4/2006 together with all other consequential orders or in the alternative the Defendant's defence be admitted for hearing and the case be determined on merits.

In a ruling delivered on 17/7/2006 the trial court dismissed the said application with costs.

The Appellants were aggrieved by the said ruling and appealed to this court on the following grounds:-

1. **"THAT the learned trial magistrate erred in law and in fact in dismissing the Defendant's application on grounds that it lacked merit.**

2. **THAT the learned trial magistrate erred in law and in fact in failing to judicially exercise his discretion to do justice to the parties.**

3. **THAT the learned trial magistrate erred in law and in fact in failing to appreciate that non-attendance in court of both defendant and his counsel were not deliberate or intended to obstruct or delay the court of justice.**

4. **THAT the learned magistrate erred in law and in fact in failing to consider the Defendant's defence on record in arriving at his ruling.**

5. **THAT the learned trial magistrate erred in law and in fact in condemning the Defendant unheard despite the Defendant's defence raising triable issues.**

6. **THAT the learned trial magistrate erred in law and in fact in failing to consider the facts and circumstances both prior to and subsequent to non attendance and *ex parte* judgment which the Applicant sought to set aside.**

7. **THAT the learned trial magistrate erred in law and in fact in failing to appreciate that the Respondent could reasonably be compensated by way of costs for any prejudice or delay occasioned.**

8. **THAT the learned trial magistrate erred in law and in fact in denying the Defendant a hearing and condemning him unheard for a mistake and/or error beyond his control."**

The Appellant's prayer is that the ruling of the lower court delivered on 17/7/2006 and the *exparte* judgment delivered on 12/6/2006 be set aside and the Appellant be granted an opportunity to be heard on his defence.

The appeal was canvassed by way of written submissions which I have duly considered.

The setting aside of judgment is a matter of discretion on the part of the court. The discretion 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 to obstruct or delay the cause of justice **(*See* Shah –vs- Mbogo & Another (1967) EALR**.

In the case at hand, the case commenced hearing on 19/1/05 in the absence of the Appellants. The Appellants were aware of the hearing date for 19/1/05 as it was fixed in the presence of both parties. The 1st Plaintiff and the doctor testified on that day.

On the next hearing date on 11/7/05, the counsels for both parties agreed by consent to have the case proceed *de novo*. The reason given to the court was that the Appellant's counsel had been misled by a letter written by the Respondents' counsel stating that the case had been taken out of the hearing list.

The case commenced afresh on 11/7/2005 with parties present. After the first Plaintiff testified as PW1, the case was adjourned to 17/10/05. On 17/10/05 the Appellant's counsel was not present. The case was adjourned at 3.55 p.m. after the Appellant's counsel who was said to be on the way failed to turn up. The counsel for the Respondents and the counsel holding brief for the Appellant's counsel by consent agreed to take the matter out of the hearing list with costs of Kshs.3,400/= to be paid to the Respondents' side. The case was then fixed for hearing on 10/4/2006 and marked as the last adjournment. On 10/4/2006, the Appellant and his counsel were not present. The court proceeded to take the evidence of PW2, PW3 and PW4. The Respondents' case was closed and the judgment date fixed. The judgment was delivered on 12/6/2006 in the absence of the Appellant and his advocate.

On 20/6/2006, the Appellant filed an application for the *ex parte* proceedings and judgment to be set aside. The application was dismissed with costs on 17/7/2006.

The Appellant on 28/10/2006 moved to this court on appeal and made an application for stay pending appeal. The application was allowed on 11/5/2007 on condition that the entire decretal sum of Kshs.320,980/= be deposited in court. On 26/3/2009, the appeal was dismissed with costs. Nobody was in court to prosecute the same. An application for setting aside of the dismissal order was allowed on 29/10/2009. The appeal was fixed for hearing on 29/4/2010. On 29/4/2010 the Appellants were granted leave to file a supplementary record of appeal.

On 1/3/2011, the Respondents filed the application dated 28/2/2011 seeking to have the appeal dismissed as the same had not been listed for directions and neither had the Appellant shown interest in having the appeal heard and determined. The application was heard and ruling delivered on 15/2/2012 giving fourteen days within which the Appellant was to file the supplementary record of appeal.

The supplementary record of appeal was filed and directions given and the appeal proceed to hearing.

I have set out the history of this case in order to evaluate whether this court ought to exercise its discretion in favour of the Appellant.

The Respondents' case proceeded before the lower court on 11/7/2005 in the presence of both parties. On the date the case proceeded to further hearing neither the Appellant nor his advocate were present despite the court having made a last adjournment order after the Appellant and his advocate failed to attend court on 17/10/05.

According to the affidavit in support of the application dated 20/6/2006 which sought the setting aside of the *exparte* proceedings, the reasons for failure to attend court were that the Appellant was engaged in some urgent duties in Mombasa. That the Appellant's counsel later telephoned the Respondents' counsel and they reached a consensus that the Respondents' counsel would indulge them with an adjournment and the Appellants were to shoulder the costs but the Appellant's counsel was shocked to later find out that the case had proceeded *exparte*. The Appellants averred that they had a good defence which raised the issue of contributory negligence and urged that the same be heard on merits. The Appellants further stated that no prejudice would be occasioned by the Respondents that cannot be remedied by thrown away costs.

In opposition to the application, the Respondents swore a replying affidavit on 27/6/06. The Respondents' counsel conceded that there was a telephone conversation with the Appellant's counsel but denied that there was consensus reached to indulge the Appellant's side.

The Respondents' counsel gave the history of the case, stating that the case had been adjourned on numerous occasions at the instance of the Appellants who he accused of not paying the Kshs.3,400/= costs ordered on 17/10/2005. The Respondents' counsel blamed the Defendant and his advocate for the *exparte* proceedings and termed the statement of defence as a mere denial. The Appellant was blamed for laches and indolence. It was averred that the Respondent would suffer prejudice in the form of delay inconvenience and costs.

Having examined the entire record herein, I find the Appellant has failed to attend court on numerous occasions. The court had previously accommodated the Appellant and had the initial proceedings set aside and the case started *de novo*. On the date in question, Counsel holding brief for the Appellant's advocate was in court when the hearing date was fixed after the court made a last adjournment order. The nature of the business that made the Appellant fail to attend court was not disclosed so that the court could weigh the same against the failure to attend court after the issuance of last adjournment orders following the setting aside of the previous proceedings. It was simply stated that the Appellant had to attend to some urgent duties in Mombasa.

The Appellant's counsel who was also aware of the history of the case did not even instruct a counsel to hold his brief and explain their position to the court. It was not the responsibility of the

Respondents' counsel to seek the court's indulgence on behalf of the Appellant's side.

Looking at the history of this case generally and specifically taking into account the reasons given by the Appellant's advocate for their failure to attend court on the date in question, the view of this court is that the applicant does not merit the exercise of this court's discretion. There has been consistent failure to attend court which has delayed the cause of justice herein. There was no excusable mistake or error. The prejudice caused by the delay has kept the Respondents away from the fruits of their judgment. The argument that the Respondents can be compensated by award of costs cannot continue to be raised indefinitely.

Although the Appellants raised the defence of contributory negligence, it is not a defence that the Appellants were keen to go and adduce evidence in support thereof. The judgment herein was given after an extensive trial.

Naturally a court will be less inclined to set aside a judgment after trial than one where there has been no trial at all (***See*** **Credit Bank Ltd –vs- Barclays Bank of Kenya Ltd**.)

With the foregoing, this court's conclusion is that the appeal lacks merit and the same is dismissed with costs.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **18th** day of **July** 2013.

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B. THURANIRA JADEN

JUDGE