REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS'

CIVIL APPEAL NUMBER 675 OF 2003

SASINI TEA & COFFEE LTD. ……..…….. APPELLANT

VERSUS

MARY GAKUYU KAMOKO. …… RESPONDENT

(From the ruling and orders of D Morara, Resident Magistrate in Kiambu SRM CC No. 190 of 2002)

J U D G M E N T

Sasini Tea & Coffee Ltd, in an application dated 13th August, 2002, sought through their advocates, A F Gross, an order to set aside a judgment entered against it, ex parte, dated 13th August, 2003. In the judgment, the Appellant/Defendant, was ordered to pay special and general damages amounting to Ksh.71,500/- plus costs and interests.

The grounds given for the setting aside were that the Defendant's advocate had failed to attend court to defend the hearing on 16th July, 2003 because he had attended the High Court in Nairobi to conduct a part-heard case No. 369 of 2001 fixed earlier before Nyamu J (as he then was). That on being served with a hearing notice for this case then in Kiambu Law Courts, he had written several letters to Mrs. Wainaina, the advocate for the Plaintiff to notify her of his required attendance at the High Court, Nairobi. That on 16th July, 2003 the day of hearing, he asked Mr. Moses Kangoo Advocate to hold his brief and request that the file be put aside until he, Mr. Kivoi, arrived at Kiambu Court to conduct his clients defence. That, when Mr. Kangoo went to Kiambu Court, he found that the suit had been heard earlier at 12.30 p.m. and judgment reserved for 13th August, 2003, when indeed, it was delivered. Mr. Kivoi accordingly, had asserted, that he had done all he could in arriving at court or in adjourning the hearing and that his fault or mistake, were excusable enough to persuade the court to set aside the said judgment. That indeed it was in the interest of justice and fairness that the judgment should have been set aside.

However, the learned trial magistrate in a ruling dated 24th September, 2003, refused to set aside the said judgment dated 13th August, 2003 and the Defendant/Appellant, being aggrieved, filed this appeal. His grounds of appeal can be summarized as follows:-

1)The trial magistrate erred in law and fact in failing to consider the principles for setting aside ex parte judgments which, had he done so, would have persuaded him to set aside the judgment of 13th August, 2003.

2)The trial magistrate erred in law in relying on a defective replying affidavit whose jurat was on a different page of the content.

3)The trial magistrate erred in exercising his unfettered discretion against and not in favour of setting aside the judgment.

I have carefully perused the records. The impugned judgment was entered ex parte because the Appellant and his counsel failed to turn-up in court to defend the case. The counsel's reason is that he was appearing in Nairobi before Nyamu, J in a case that had been fixed earlier. He sent the day's cause list which however showed that, he was that day, appearing only for mention at 9.00 a.m. before Mutungi, J. He did not explain in his supporting affidavit or submissions why he had misled the court by saying he was appearing in a part-heard case. If he explained, the court did not believe and accept his explanation since it concluded that that reason was not true.

I have considered this issue. It is difficult to fault the trial magistrate in not accepting and believing the advocate for the Applicant. I would have done the same. Furthermore as stated by the learned trial magistrate, the Advocate, Mr. Kivoi would have easily travelled to Kiambu after mention of his case before Mutungi, J. He did not do so although the hearing did not take off until after 12.30 afternoon. He either did not explain acceptably and sensibly, why he did not find it necessary to travel after being informed that the hearing had been adjourned from morning to the afternoon aforesaid.

There are other grounds which would not make it tenable for the trial court to adjourn the hearing. They include the fact that the advocate for the Appellant/Defendant had obtained several adjournments before 16th July, 2003. The reasons he had earlier given appear similar but he nevertheless got adjournments. The impression he made to the court was that he was trying to delay the eventual hearing and final determination of the suit.

It is also clear from the record that on 16th July, 2003 when the suit came up for hearing and the advocate for reasons he gave was absent, the Defendant, herself, did not attend court. Had she attended court, she would herself have given evidence in support of her defence or would have sought for a change of Counsel who apparently valued attending to other cases than hers. Her failure to attend court besides her advocate's, confirmed a concerted conduct of both, to delay the hearing at any cost.

Taking the total conduct of the Appellant and her counsel into account, I came to the conclusion as did the trial court, that the Appellant and her counsel were not only misleading the court but were as well dishonest. Their conduct accordingly, did not deserve a favourable discretion that they sought. Accordingly, the honourable trial magistrate was entitled to refuse the setting aside of the ex parte judgment.

Furthermore, the defence filed by the defendant showed no clear grounds of defence. It was full of sheer denials. It did not raise any issue which deserved to go to trial.

For the above reasons, the appeal shows no merit. It is dismissed with costs to the Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 20th day of March 2012

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D A ONYANCHA
JUDGE