



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 149 OF 2009

PETER LOLWE OMBEE.....APPELLANT

VERSUS

DALMAS OKATCH RANDA.....RESPONDENT

J U D G M E N T

The appellant has appealed to this court citing five grounds of appeal namely:-

- (1)That the honourable acting Senior Resident Magistrate erred in law and in fact in dismissing the appellant's application for setting aside when the ingredients for setting aside had been met and properly canvassed.**
- (2)That the honourable acting Senior Resident Magistrate visited the mistake of the advocate on the client on an application for setting aside.**
- (3)Acting Senior Resident Magistrate wrongly exercised her discretion even when there was no proper explanation for the same.**
- (4)The honourable acting Senior Resident Magistrate erred for failing to consider the evidence and the defence of the defendant on record and also the explanation put forth by the defendant.**
- (5)The honourable Senior Resident Magistrate erred in completely being biased in the circumstances against the appellant.**

In their oral submissions to court counsel for the appellant stressed the following:-

- **The appeal is against the lower court's ruling of 24-9-2009.**
- **That failure to attend court was a mistake of counsel and this should not have been visited on their client.**
- **Contend that the appellant had presented sufficient reasons for seeking to be heard and he should have been heard.**
- **That the appellant has a right to be heard which is constitutional.**
- **The appellants defence should have been considered.**

The respondent has opposed the appeal on the grounds that:-

- **The learned trial magistrate exercised her discretion properly and judiciously.**
- **The defence put forth was mere denials.**
- **It was a liquidated claim and there were records to support the same.**
- **No good reasons were given for non attendance.**

In response counsel for the appellant reiterated that the appellant denied owing the money to the respondent and he should have been allowed to cross examine the respondent.

- **The record bears witness that the appellant's counsel had received the notice but failed to turn up for no apparent reason.**

Before considering the merits of the appeal, it is proper to highlight the background information to the appeal. A perusal of the record reveals that there is a brief judgment at page 46 of record whose salient features are that:-

- **The plaintiff had moved to the lower court seeking special damages of Kshs. 75,600/= being specific performance against the defendant.**
- **The defendant entered appearance on 4-9-2007 but took no action in the matter paving the way for the plaintiff to file a request for judgment and then the matter was fixed for formal proof.**

- **In the intervening period the defendant engaged counsel who filed a notice of appointment but filed no other papers.**

- **The date for formal proof was taken and notice served but there was no appearance on the part of the defendant, and since there was no defence on the record the plaintiff adduced both documentary and oral testimony on the record and judgment was given in his favour.**

At page 52 of the record, there is found a ruling whose orders led to the filing of the appeal. A perusal of the same reveals the following salient features:-

- **That the defendant alleges that he has a good defence.**

- **That counsel had urged the court not to visit the wrongs of the counsel on to the defendant.**

- **That the hearing date had been taken ex-parte and was not consented to.**

- **That although counsel for the defendant had notice and when served said that he had cases in Nyando court, he should have made alternative arrangements to seek an adjournment.**

- **That in setting aside a judgment, the court has to be guided by the principle that the defendant has a good defence to the plaintiffs claims.**

- **That the court had looked at the defence filed and in the courts opinion it consisted of bear details and no serious or arguable issues have been raised other than to call upon the plaintiff to prove his claim.**

- **Indeed natural justice demands that a party be heard on his claim. The defendant was accorded one but he chose not to utilize it.**

- **That ten days was sufficient considering that this was a 2007 case.**

By reason of the afore set out highlights the application for setting aside was dismissed hence this appeal.

The court was referred to the following case law. The case of **Pithon Waweru Maina –VS- Thuka Mugiria [1982-88] 1 KAR 171** where the court of appeal held *inter – alia* that **“the magistrate had failed to consider whether it would be just and reasonable to set aside the judgment under order 9B Rule 8 and he had not exercised his discretion properly”**.

The case of **Haji Ahmed Sheikh t/a Haja Hauliers -VS- Highway Carriers [1982-88] 1 KAR 1196** where the court of appeal held inter-alia that:- **“The exercise of the judges discretion was vitiated by the consideration of extraneous matters and in particular by derogatory and unwarranted remarks displaying hatred towards the applicants advocate”**

(2) The judge ought to have considered the defence which was on the court file and had he done so, he would have realized that it raised triable issues.

In addition, to the above cited authorities this court has judicial notice of the landmark case of **Shah –VS- Mbogo & Another [1967] EA 116** where it was held *inter-alia* that:- “...the court’s discretion to set aside an ex-parte judgment is considered to be exercised to avoid injustice or hardship resulting from inadvertence, or excusable mistakes or error, but not to assist a party who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.....”

This court has duly considered the rival arguments herein, and the same considered in the light of principles of case law reflected above and in this court’s opinion the following are findings on the same:-

(1)It is correctly submitted that the plaintiff/respondent filed his claim against the defendant /appellant. Had it served on the defendant who entered appearance but filed no defence. Later he appointed counsel who filed notice of appointment but also took no action of filing a defence.

(2)Being satisfied that he was within the rules, the plaintiff/respondent set in motion ex-parte proceedings to realise his claim, where by interlocutory judgment was entered and notice of formal proof issued to the defendant/appellant’s counsel.

(3)On the hearing date, neither the defendant/appellant nor his counsel were present, with counsel citing receiving notice under protest and being engaged in another court.

(4)Absence of the defendant/applicant paved way for proving of the plaintiff’s claims formally and entry of judgment against the defendant.

(5)The defendant moved to exercise his right of setting aside so that he can be heard. It is documented that he annexed a defence which was rejected hence the filing of this appeal.

This court as an appellate court of the first instance, is alive to its mandate in section 78 (1) (2) of the CPA namely to re-evaluate the evidence before the lower court and then arrive at its own conclusions on the matter.

It has the mandate to grant any of the following reliefs:-

(a)To determine a case finding.

(b)To remand a case.

(c) To frame issue for trial.

(d)To take additional evidence or to require the evidence to be taken.

(e)To order a new trial.

In the exercise of the said mandate in the circumstances of this case, this court has to bear in mind the fact that the case proceeded ex-parte and one party seeks to be heard on merit. It is therefore necessary for the court to call to mind the principles governing the exercise of such a discretion. These have already been reflected above and all that this court has to do is to apply them to the appellants complaint and then

determine whether the appellant has brought himself within the ambit of the ingredients required to be satisfied before one can earn such a relief.

The major reason is that the mistake not to participate in the proceedings lay with his counsel, and that he has a good defence, a defence rejected by the lower court as not being good enough to go to trial. Despite the rejection of the defence by the lower court as not being good enough this court has jurisdiction to revisit that issue. In doing so it has to bear in mind a cardinal principle that in order to allow one to defend, the court does not have to be convinced that the defence will succeed. It is enough to be satisfied that the defence is arguable. This court has perused the defence at page 3 of the record of appeal, and finds that the general theme is that there is a denial of the amount owed and the requirement that the plaintiff do strictly prove his claims. Further that if there was any transactions then the same was completed and plaintiff paid in full.

The question that this court has to answer is whether in the wake of the said facts and defence the lower court exercised its discretion judiciously and with a reason in this court's opinion it did not, because the court forgot to bear in mind the cardinal principles that this court has judicial notice of namely:-

(a) That last thing that a court of law should ever do is to deny a party the right of being heard.

(b) A defence raised with triable issues must not be one that must succeed. It is sufficient if it raises arguable points.

Applying the above two principles to the lower courts stand, this court finds that the right to be heard should not have been withheld because in as much as the plaintiff was entitled to prove his claim, the defendant had an equal right to disprove it, which disproving could only be done with his participation. The learned trial magistrate also had power and jurisdiction to curb any mischief the part of the defendant, and the power to protect the plaintiff from that mischief by granting conditional leave to defend.

In addition to the afore set traditional principles, this court can not lose sight of the current constitutional provisions which give the defendant/appellant the right of access to justice presence of technicalities notwithstanding and have his cause heard however hopeless it may be. The court is further enjoined by the same constitutional Provision to render justice without undue regard to technicalities, vide article 22 (3) (d) and 159 (2) (d). These read:- **“Article 22 (3) (d) the court while observing the rule of natural justice should not be unreasonably restricted by procedural technicalities, 159 (2) (d) justice shall be administered without undue regard to procedural technicalities”.**

Failure to file a pleading to entitle one to be heard in the time stipulated is a procedural technicality which can not be allowed to stand at the pain of substantial justice.

For the reason given in the assessment the court is inclined to allow the appeal, set aside the lower court's order which led to the filing of this appeal on the following conditions.

(1) Both the setting aside proceedings as well as the appellate proceedings were necessitated by the appellant's conduct. He is therefore ordered to pay costs of appeal, setting aside as well as thrown away costs if any to the respondent.

(2) To avoid any mischief on his part he has the right to defend on condition that the judgment sum of

Kshs. 75,600/= is deposited in an interest earning account in the joint names of counsels of both parties, Within 60 sixty days of the date of the reading of the judgment.

(3) In default of number 2 above the right to defend shall abate and the respondent will be at liberty to execute the decree.

(4) Upon compliance with condition 2 above parties will be at liberty for fix the matter for disposal in the lower court on a priority basis.

(5) There will be liberty to apply if need be.

Dated, signed and delivered this 28th day of March 2011.

ROSELYN N. NAMBUYE

JUDGE

RNN/va