REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 622 of 2006

PARKLANDS SHADE HOTEL LTD T/A KLUB HOUSE TWO……….……………………..APPELLANT

VERSUS

JOYCE WANJIKU MBAKA………………………...RESPONDENT

(Being an appeal from the ruling of the Honourable Resident Magistrate, Mr. Kiema delivered and dated 23rd August, 2006 in CMCC No.17 of 2006 at Milimani Commercial Courts, Nairobi)

J U D G M E N T

1. This appeal arises from a ruling which was delivered by a Resident Magistrate in a suit which was filed by Joyce Wanjiku Mbaka (hereinafter referred to as the respondent). The suit was against Parklands Shade Hotel Ltd t/a Klub House Two (hereinafter referred to as the appellant). Interlocutory judgment in default of appearance was entered against the appellant on 24th February, 2006. On 15th May, 2006, hearing of the formal proof proceeded *ex-parte,* and judgment was reserved for 2nd June, 2006, on which date final judgment was delivered in favour of the respondent and general damages awarded at Kshs.250,000/= plus special damages of Kshs.9,470/=.

2. Subsequently, the appellant having been served with the notice of the judgment moved the court by way of a chamber summons under Order IXA Rule 10 and 11 and Order XX Rule 22 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act. The orders sought were *inter alia*, that the *ex-parte* judgment and decree and all consequential orders which had been entered against the appellant be set aside, and that the appellant be allowed to enter appearance and file a defence.

3. The application was anchored on the grounds that the appellant's failure to file a defence in good time was not deliberate or due to an oversight, nor was it intended to delay or defeat the course of justice. The appellant contended that it had a good defence which raises serious issues which ought to be heard on merit. The application was accompanied by an affidavit sworn by a Director of the appellant Samuel Wakaimba Mwangi. The appellant explained through the director, that it was served with summons to enter appearance with the plaint on 27th January, 2006, and it forwarded the documents to its insurance brokers, Canopy Insurance Brokers Ltd, to advise the appellant's insurers Kenindia Insurance Company Ltd, to take up the matter on the appellant's behalf.

4. The appellant's director deponed that due to a mistake occasioned by the insurance brokers, the documents were not forwarded to the insurance company in time and therefore, no appearance or defence was filed in time, a fact which the appellant only became aware of when served with the notice of judgment. The appellant annexed a copy of its intended defence to demonstrate that it had a good defence to the respondent's claim.

5. The application was opposed through a replying affidavit sworn by the respondent, in which she contended that the appellant was guilty of laches and that the delay in entering appearance and filing the defence was inordinate and inexcusable. The respondent further contended that the appellant's application was fatally defective.

6. During the hearing of the application before the trial magistrate, counsel for the appellant pointed out that a

memorandum of appearance was filed before the final judgment of the court. He submitted that a defendant is entitled to appear in a suit at any time before the final judgment and therefore, the appellant ought to have been served with the hearing notice for the formal proof. Counsel further submitted that the appellant had met the conditions for stay of execution and urged the court to grant the orders sought.

7. Counsel for the respondent on the other hand opposed the application maintaining that the appellant had not shown what loss it was likely to suffer. It was contended that the appellant was guilty of delay and that in any case the respondent was able to refund the decretal sum if the appeal is successful.

8. In his ruling, the trial magistrate considered the case of ***Waweru vs Ndiga [1983] KLR 236,*** wherein it was held that Order IXA Rule 10 of the civil Procedure Rules empowers a court to set aside or vary *ex-parte* judgment upon such terms as are just, and that there was no requirement for showing sufficient cause. And also that the court has unfettered discretion to do justice between the parties to avoid inadvertence or mistake but such discretion should not be exercised to assist anyone to delay the cause of justice. The trial magistrate also considered the following cases:

- ***Miruka vs Abok and another, [1990] KLR 541***,
- ***Wec Lines Nederlands BV vs Otrapu Destransport [1991] KLR 227***,
- ***Kaluworks Ltd vs Pepco Enterprises [1991] KLR 441***.

9. The trial magistrate noted that the appellant had admitted being served with summons to enter appearance and a plaint on 27th January, 2007. The trial magistrate further noted that the appellant filed a memorandum of appearance and defence on 25th April, 2006 without leave of the court. He ordered that those documents be expunged from the record, and ruled that the appellant was under no obligation to serve the respondent with the hearing notice for formal proof. The trial magistrate further noted that although the appellant was served on 27th January, 2007, summons were forwarded to his advocate on 18th April, 2007 and that the delay in forwarding the summons had not been explained as there was no affidavit from Canopy Insurance Brokers Ltd to explain the delay. The trial magistrate concluded that the appellant was not deserving of the exercise of the court's discretion and that the court was not obliged to consider any other ground that the appellant may have. The trial magistrate therefore dismissed the appellant's application.

10. Being aggrieved by that ruling, the appellant has lodged this appeal raising six grounds as follows:

(i) That the honourable magistrate erred in law and in fact in dismissing the appellant's application which dismissal was unwarranted in the circumstances.

(ii) That the learned magistrate erred in law and in fact in not upholding that the appellant had a good defence raising triable issues.

(iii) That the learned magistrate erred in not finding out that the appellant's failure to file defence in good time was not deliberate and/or intended to delay or defeat the cause of justice.

(iv) That the learned magistrate erred in not taking into account entirely the submissions of the appellant.

(v) That the learned magistrate erred in law and in fact by expunging the appellant's memorandum of appearance.

(vi) That the learned trial magistrate erred in law and in fact in failing to uphold the rules and principles of natural justice.

11. In support of the appeal, Mr. Abuga who appeared for the appellant contended that the trial magistrate contravened Order IXB Rule 2 of the Civil Procedure Rules in expunging the memorandum of appearance which was filed by the appellant's advocate. Mr. Abuga submitted that the memorandum of appearance was regularly filed and that no leave of the court was necessary as a defendant can enter appearance at any time before judgment. Counsel maintained that the rules of natural justice were breached as the appellant had entered appearance and therefore ought to have been served with the hearing notice for the formal proof. Mr. Abuga further submitted that the delay in entering appearance and filing the defence was duly explained by the appellant.

12. Mr. Kihara who appeared for the respondent urged the court to uphold the ruling of the lower court as there was no reason or explanation given for the delay in entering appearance or filing a defence. Mr. Kihara noted that interlocutory judgment was entered on 24th February, 2006 and that by 2nd June, 2006, when the suit was concluded, no appearance or defence had been filed. Counsel referred the court to the following cases:

- ***Miruka vs Abok and another*** (supra),
- ***Wec Lines Nederlands BV vs Otrapu Destransport*** (supra),

- ***Kaluworks Ltd vs Pepco Enterprises*** (supra),
- ***Raj Harish Devani vs National Bank of KenyaNairobi HCCC No.781 of 2002***.

13. I have carefully perused the proceedings in the trial court, the submissions made by counsel before me, and before the trial court, and the ruling of the trial magistrate. I find that interlocutory judgment in default of appearance and defence, was properly entered against the appellant on the 24th February, 2006. This is because by that date, no appearance or defence had been filed. I do note from the record of the lower court that a memorandum of appearance and defence was filed on behalf of the appellant on 25th April, 2006. The defence filed was irregular and of no effect as interlocutory judgment had already been entered against the appellant. However, since the appellant entered the appearance before the respondent's suit proceeded to formal proof, the respondent was required under Order IXB Rule 1 and 2 of the Civil Procedure Rules to serve the appellant with a notice for the hearing date of the formal proof.

14. I find that although the trial magistrate was right in expunging the defence filed by the appellant on 25th April, 2006, the trial magistrate was wrong in expunging the appearance, as the appellant could enter appearance at any stage before the entry of final judgment. The hearing of the formal proof without service of the hearing notice on the appellant, after the appellant had entered appearance, was a contravention of the rules of natural justice. Although the appellant had no proper defence on record, it was entitled to attend the formal proof through its counsel and cross-examine the respondent's witnesses if it wished to do so. Further, the appellant explained the delay in filing its defence attributing it to the delay on the part of its insurance brokers in forwarding the summons and plaint to the appellant's insurance company. The trial magistrate rejected that explanation because there was no affidavit from the appellant's insurance brokers explaining the delay.

15. The trial magistrate apparently missed the point. The appellant was blaming the insurance brokers for the delay precisely because the insurance brokers had delayed in forwarding the documents to the insurance company apparently without any reason. The insurance brokers could hardly be expected to swear an affidavit to that effect. The bottom line was that the appellant was saying that the delay was due to a mistake which was not of the appellant's making and there was no reason for the trial magistrate to doubt this. Further, the trial magistrate did not consider the appellant's defence. Had he done so, he would have noted that the appellant had an arguable defence and therefore ought to have given the appellant an opportunity to defend the suit.

16. For the above reasons, I find that the trial magistrate did not exercise his discretion judiciously and there is need for this court to intervene for the ends of justice to be met. Accordingly, I allow this appeal, set aside the order of the trial magistrate dismissing the appellant's application dated 7th July, 2006, and substitute thereof an order allowing the application and setting aside the *ex-parte* judgment entered against the appellant on 24th February, 2006 together with all consequential orders. I order that the appellant shall file and serve his defence within 15 days from the date hereof. The appellant shall further pay to the respondent thrown away costs in respect to the lower court proceedings. Each party shall bear their own costs in respect to this appeal. Those shall be the orders of this court.

Dated and delivered this 7th day of May, 2010

H. M. OKWENGU
JUDGE

In the presence of: -
Advocate for the appellant absent
Kingara for the respondent
Eric - Court clerk