



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Civil Appeal 37 of 2003

KIPKEBE LIMITED APPELLANT

VERSUS

CHARLES MOSETI RESPONDENT

(Appeal from the Ruling of the Chief Magistrate's Court Kisii, Civil Case

No.159 of 2002 – O. OPONDO, SRM)

JUDGMENT

On 17th February, 2003 the appellant filed an application seeking stay of proceedings pending inter partes hearing of that application. The applicant also prayed that proceedings taken on 10th February 2003 and the decree issued thereafter be set aside and the suit be heard again. The respondent's suit had been heard in the absence of the appellant.

The appellant's application was supported by an affidavit sworn by one Chitayi Grace Nyongesa, an advocate who was then working in the firm of M/S. Mukite Musangi & Co who are on record for the appellant. She deposed that the matter was scheduled to be heard on 14th October and 2nd December 2002. The hearing could not go on because the plaintiff was absent. The court adjourned the hearing to 10th February 2003 and ordered the plaintiff to pay to the defendant costs amounting to Kshs.1,500/= before the hearing date. On 10th February 2003, Miss Nyongesa was unable to attend court because she had allegedly travelled to Bungoma for the hearing of **HCCA NO.18 of 2002**. She further stated that they had made arrangements with one Mr. Kiseru Advocate to seek an adjournment of the case on her behalf. The record shows that the one Mr. Minda Advocate held brief for Miss Nyongesa and indicated that she was on her way to court. The court adjourned the hearing to 2.00 p.m. On the same day at 3.00 p.m. the matter was called out and Miss Nyongesa was still absent. The hearing went on and was finalized in the absence of the defendant's counsel. On 17th February 2003, the court delivered its judgment and awarded a sum of Kshs.110,000/- by way of general damages and Kshs. 3000/- as special damages.

The appellant applied to set aside the proceedings of 10th February 2003 but the court dismissed the said application.

The learned trial magistrate stated in her ruling that the appellant's counsel had sent a representative to seek an adjournment up to 2 p.m. but she failed to show up when the matter was called out for hearing at 3 p.m.

In the memorandum of appeal, the appellant stated that the learned magistrate erred in law and in fact in failing to consider the circumstances of the case, the plaintiff's own previous failure to attend court, the written statement of defence and the reasons given for counsel's absence on the material day. The appellant further faulted the learned magistrate for denying the appellant the right of being heard on his defence.

In his submissions, Mr. Nyamurongi, who held brief for the appellant's advocate, stated that the trial court restricted its wide discretion in refusing the appellant's application to set aside the proceedings of 10th February 2003. He referred to the considerations as stated in the memorandum of appeal which the court failed to take into account in exercising its discretion. He cited several authorities in support of the appeal. They included **TREESHADe MOTORS LIMITED VS. D. T. DOBIE & CO. (K) LTD**, HCCA NO. 38 of 1998 at Nairobi and **MAINA VS MURIUKI**, HCCC 1079 OF 1980 at Nairobi.

Mr. Mudeyi for the respondent submitted that the appeal was frivolous, vexatious and an abuse for the court process. He pointed out that Mr. Minda advocate held brief for Miss Nyongesa for the appellant and requested that the file be placed aside until 2 p.m. The court agreed and adjourned the matter until 3 p.m. but neither Mr. Minda nor Miss Nyongesa showed up and the hearing went on. He added that there was nothing to prove that Miss Nyongesa was actually held up before the High Court at Bungoma. Mr. Minda did not state that to the court and neither did Miss Nyongesa sufficiently prove that allegation. He read bad faith on the part of appellant. He cited the case of **SHAH VS. MBOGO AND ANOTHER** [1967] EA 116 in support of his submission that that the trial court exercised its discretion appropriately.

I have considered the submissions by counsel as well as all the authorities that were filed and cited by both parties.

The learned trial magistrate exercised her discretion in refusing to set aside the proceedings of 10th February 2003. While it is true that the learned magistrate held that the hearing date had been fixed by consent and the appellant's counsel had failed to show up for the hearing, the learned magistrate did not consider whether the appellant had a valid defence on record. In **MBOGO vs. SHAH** [1968] EA 93, the Court of Appeal held that an appellate court should not interfere with the exercise of the discretion of a trial court unless it is satisfied that the court misdirected itself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as whole that the trial court was clearly wrong in the exercise of its discretion, resulting into injustice. Similar sentiments were expressed by the same court in **MAINA VS. MUGIRIA** [1983] KLR 78.

In rejecting the appellant's application to set aside the proceedings of 10th February 2003, the trial court said nothing about the statement of defence that had been filed by the appellant. A casual look at that statement of defence reveals that it is not a sham; it contained weighty issues of law that required proper determination on their merits. It is a widely accepted principle of law that as much as possible, matters ought to be resolved on their merits. The appellant's advocate was to blame for the manner in which she handled the matter before the trial court on the material day. But as was stated by the Court of Appeal in **GEORGE ROINE TITUS & OTHERS VS JOHN P. NANGURAI**, civil application No. NAI 249 of 1988, a mistake is a mistake whether or not it originates from an advocate's ignorance or negligence and so long as it is genuine it does not disentitle an applicant to the discretion of the court being exercised in its favour. The appellant's counsel's negligence should not have been visited upon the appellant.

In the circumstances, I allow the appeal and set aside the proceedings of 10th February 2003 and the subsequent judgment and decree emanating therefrom. The appellant will however pay thrown away costs of the suit including the costs of this appeal before the suit in the lower court, **CMCC No. 159 of 2002**, is set down for hearing.

DATED, SIGNED and DELIVERED at Kisii this 16th Day of May, 2008

D. MUSINGA

JUDGE.

Delivered in open court in the presence of

Mr. Nyamurongi for the appellant

N/A for the respondent

D. MUSINGA

JUDGE.