REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
APPELLATE SIDE
CIVIL APPEAL NO. 10 OF 2003

BETWEEN

MADISON INSURANCE CO..…….. APPELLANT

AND

SAMWEL NDEMO MAKORI ……. RESPONDENT

[An Appeal Originating from the decision and Ruling of Resident Magistrate's Court, Winam delivered on 17th March 2003 by F. B. Mokaya (Miss.) - R.M.
IN
RMCC No. 345 OF 2002]
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JUDGEMENT OF THE COURT

The principles that limit my powers in interfering with decision of the trial Court is well known. The pre-requisite factors governing the exercise of judicial discretion to set aside exparte judgement obtained indefault of either party's failure to attend Court during the hearing of the matter are:

1) There are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the Court is do justice to the parties.

2) This discretion is intended s o to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought, whether by evasion otherwise to obstruct or delay the cause of justic e.

3) The Court of Appeal should not interfere with the exercise if the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some and as a result there has been misjustice:

"See Mbogo Vs. Shah (1968) E.A. 93."

4)A discretionary power should be exercised judicially and in a selective and discriminatory Manner, not arbitrarily and idiosyncratically. In considering the above factors/matters certain important and essential ingredients must be clear in the pleading of the parties to the dispute,

to enable the Court to weigh the scales of justice between the parties and these are:

1) The facts and circum stances both prior and subsequent and all the respective merits there parties together with any other material factors which appear to have entered into the passing of the judgement, which would not or might not have been present had the judgement not bee n exparte and whether or not it would be just and reasonable, to set aside or lay the judgement, upon terms to be imposed: (**See Jesse Kimani VS. Mc Connel (1966) E.A. 547.**

2) The nature of the action should be considered, the defence if one has been brought to the notice of the Court,

however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally it should be remembered that to deny the su bject a hearing should be the last resort of a Court. See **Jamnades Case (1952) 7 ULR 7 .**

As regards whether the Court would exercise the action and/or inaction of a party's Advocate, the Court has always given liberal and objective interpretation. In **Shabir Din V. Ram Parksh Anand (1955) 22 EACA 48** it was held:

"I consider that under Order IX rule 20, the discretion of the Court is perfectly free and the only question is whether upon the facts of any particular case it should be exercised. In particular mistake or misunderstanding of the appellant's legal Advisers even though negligent may be accepted is a proper ground for granting relief."

The facts of this appeal is fairly straight forward. The respondent in this appeal sued the appellant in Winam Court and the suit was fixed for hearing on 3.12.2002 by consent of the parties Advocates. On 2nd December 2002, Mr. Nyaundi Advocate for the defendant telephoned Mr. Muma, to inquire whether he would proceed with the matter on the following day and Mr. Muma Advocate respondent in the affirmative. It is contended by Mr. Mumathat they mutually agreed to proceed with the hearing of the matter in that Mr. Nyaundi would send someone to conduct the hearing on his behalf. That person happened to be Mr. Kitur Advocate who allegedly failed to turn because of some sickness.

In turn Mr. Kitur instructed Mr. Onsongo Advocate to hold his brief and apply for adjournment for the reasons:

1) That Mr. Kitur was sick suffering from flu and cold.

2) That, Mr. Kitur had in structions to amend the defence.

3) That Mr. Kitur wanted to seek further instructions from his client and to prepare for trial.

In the morning of 3rd December 2002, Mr. Muma Advocate met Mr. Onsongo at Kisumu High Court and he informed him that he had instructions to apply for adjournment for the reason that the defendant intended to amend its defence, However Mr. Onsongo instructed Mr. Otete to hold Mr. Nyaundi's brief. The reasons given by Mr. Otete Advocate were completely different from what Mr. Kitur Advocate gave to Mr. Onsongo and the reasons Mr. Onsongo gave to Mr. Muma Advocate was that Mr. Kitur Advocate, was engaged and held up in the High Court in Eldoret and secondly an amendment of the defence. The reasons for adjournment was rejected by the trial Court as being unmeritorious and the matter proceeded to hearing, as Mr. Otete's brief was limited to applying for adjournment which he failed to secure. The matter proceeded exparte and judgement was reserved to 17.12.2004, however on 4th December 2002, the defendants Advocate made an application through Chamber Summons to:

1) That the exparte proceedings and all the consequential orders made by this

Hononurable Court on 2.12.2002 be set aside.

2) That this suit be set down for hearing afresh on merits and the defendant be allowed to tender its defence case. And:

3) That, pending the hearing and determination of this application for prayers 1 and 2 above there be stay of delivery of judgement or e xecution of decree if any.

The application was heard after the delivery of

The judgement and the same was dismissed on 30.1.2003 and as a result the appellant preferred this present appeal which is the subject matter of my decision. The conundrum for me to answer is whether faced with the above state of affairs, the trial Court was right in coming to the decision she reached and whether it is within my Powers, to fault her discretion, since in both situation, what the defendant was seeking was the discretionary power's of the Court. It is the complaint of the appellant that the trial magistrate did not exercise her discretion judicially but arbitrary and based on unsound legal proposition. It was the submission of Mrs. Manene Advocates for the appellant that inview of the circumstances the matter, which was not the fault of the appellant but the fault of its Advocates, then it was not right for the magistrate to visit such fault on the defendant/appellant. In short she urged me to absolve the client of the default of his Advocate, which should translate into allowing the appeal. She also complained that the trial Court did not consider the defence on record.

It is my view that each case would be decided on its own facts and circumstances and it must be noted that each case has its peculiar set of facts which would persuade the Court to consider the facts available incoming to a particular decision. The appellant complains that the trial Court did not consider the matter properly, However inview of what was available which was the contradictory in nature was the Court's right in coming to the decision which she arrived. The Court was faced with four different position to pertake in the exercise of her discretion:

1) The conversation between Mr. Nyaundi Advocate and Mr. Muma Advocate on 2.12.2002, where no adjournment was discussed

. 2) The conversation between Mr. Onsongo and Muma Advocate on 3.12.2002 that he Mr. Onsongo Advocate was instructed to apply for adjournment for intended amendment of the defence.

3) What Mr. Otete Advocate told the Court on 3.12. 2002, when he applied for adjournment on behalf of Mr. Kitur Advocate, which was that Mr. Kitur was held up in the High Court and wanted to make an amendment of the defence.

4) The sickness of Mr. Kitur Advocate.

The question for me to decide among others is whether all faults of Advocate would be excused and would not be visited upon their instructing clients. It must be appreciated the circumstances of the case would be a factor to be considered in different situation. So is to, achieve justice to all parties in their respective case. There is no rigid rule but the discretion is left to the Court so much so that the Court must give wide and varied consideration to a particular matter available in its decision. The trial Court acted upon the material that was presented before her, which was confusing and contradictory. There was affidavit either from Mr. Onsongo or Mr. Otete to confirm the position of the matter, with a view to give an independent position of what transpired in respect of the conflicting evidence/facts that was tendered before the trial Court. If the Court would exercise its discretion judicially and to the best interest of achieving justice between the parties, the reasons for such exercise must be based and/or laid on a good and credible foundation of sustainable facts, which would not need further explanation. It is my view that the reasons advanced or behalf of the appellant for the exercise of my judicial description are somewhat mediocre and flippantly superficial and such grounds cannot make the Court to excuse the mistakes, errors, and inadvertence of the appellant's Advocate. Some blame, mistake and blunder of an Advocate

can be and would be visited on the party the Advocate in so acting in order to do justice to the situation.

The world isdeveloping, the situation is charging and parties are becoming dinoration and inventive with a view to abuse our judicial process and it we are left that development and the daily changes, on minds would be rigid and would tend to always excuse mistakes error and blunder committed by parties, which is even deliberate and intentional. Advocates would always plead that theirs mistakes and errors shall be visited upon their clients which may sound morally and legally right but what is the use of having engaging an Advocate if he cannot shoulder the blame commensurate to his mistakes, errors and inadvertence. An employer is responsible for the safety, security and prosecution of his employees and if an employee is informed in the cause of duty, the employee is responsible. The owner of a motor vehicle is responsible for the action and/or omission of his driver and he is liable to pay for injuries suffered by a third and that is why a third and that is why a third Party Insurance Cover is mandatory for all motor vehicles using our records. It is time Advocates must be liable and be responsible for doing of the mistakes, errors and blunders committed by them in the cause of duty to their clients, and this case falls within that category I must say the trial Court properly and appropriately conducted her mind to the issues that were raised before and gave adequate consideration and in the final analysis came to the correct decision. It is manifest from the case of a whole that she has been closely right in the exercise of her discretion and as a result she did justice to the parties. She did not misdirect herself in any matter which calls for my consideration or intervention for she arrived at correct decision, which would not result in injustice and hardship and on my part I am reluctant to assist a person who has deliberately and/or intentionally sought to obstruct or delay the course of justice. There are limits and/or restriction in my discretion first must be on reasonable and/or sound basis to enable me to exercise my discretion. The facts and circumstances surrounding this matter both on 2nd December 2002 and on 3rd December 2002 clearly mitigate against the appellant and it would not be just and reasonable to set aside a proper judgement without valid proper and compelling reasons to justify the same. The scales of justice titles in favour of the respondent and this case is one of the unfortunate cases that Advocates sins and mistakes would sometimes be visited on his client, definitely to shoulder the consequences of such negligence or otherwise.

It is also my judgement that the trial magistrate sufficiently considered the defence which was on record and came to the proper decision that the said defence was a mere denial. In my assessment the defence was a sham and may be that was why the defendant's Advocate alluded to amending it. The defence had no triable issues and could not withstand judicial scrutiny for it was meant to delay the due process of justice. It would serve no purpose to even exercise my discretion, when the defence is a mere paper defence, which does not disclose issues to await a full hearing.

I would for the reasons above, dismiss the appeal with costs to the respondent and the decision of the trial Court is upheld. Dated and Delivered and Signed at Kisumu. This 26th day of April 2004.

MOHAMED A. WARSAME

AG. JUDGE

Judgement delivered and read in open Court in the presence of:

Mr. Omondi for the Appellant - present.

Mr. Muma for the respondent - present.

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