



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO 530 OF 2002

FRANCIS GICHUKI APPELLANT

VERSUS

MARTIN LEPOSO TAMOO RESPONDENT

JUDGMENT

This is an appeal against the Ruling of the lower court (Hon. S. K. Koros, RM) in RMCC 13 of 1996 delivered on August 20, 2002 when the lower court declined to set aside the *ex parte* Judgment entered into in this case on July 15, 1997.

The facts briefly are as follows:

On March 28, 1996 the Respondent (Plaintiff in the lower court) filed an action for compensation for injuries sustained in a motor vehicle accident on February 13, 1996. The Appellant filed his defence on April 29, 1996. Thereafter the case was fixed for hearing on several occasions, but did not proceed to hearing because of the absence of the Appellant's advocate. Finally, on July 7, 1997 the lower court entered Judgment for the Respondent on liability, and listed the case for formal proof to assess damages.

On June 23, 1998 the case did indeed proceed to formal proof. At that time, the Appellant's Counsel did not object to the hearing, nor applied for the setting aside of the Judgment on liability. By then, he had had more than one year to take steps to set aside the default Judgment on liability. He did not do so. He did exactly the opposite: he went ahead and made submissions on quantum, and fully participated in the hearing on formal proof. Final Judgment was entered on September 26, 2000.

Two years later, on July 23, 2002 the Respondent moved the lower court to set aside the Judgment on liability entered into in 1997. The lower court declined to set aside the same, based on the facts that I have outlined above. It is against that decision that the Appellant has appealed, citing five grounds of appeal as follows:

- 1. That, the learned Resident Magistrate erred in Law and in fact in failing to grant the orders sought.***
- 2. That, the learned Resident Magistrate erred in Law and in fact in failing to appreciate the fact that the appellant was never aware of the hearing date and was never personally served.***
- 3. That, the learned Resident Magistrate erred in Law and in fact in failing to appreciate that the mistakes of an advocate on record should not be visited upon a client.***
- 4. That, the learned Resident Magistrate erred in Law and in fact in failing to exercise his***

unfettered discretion to set aside judgment properly.

5. That, the learned Resident Magistrate erred in Law and in fact in failing to consider all the facts presented before him judiciously.

The power of this court to set aside or vary its judgments obtained in default of attendance is regulated by Order IXB Rule 8 of the Rules. That Rule provides as follows:

“Where under this order judgment has been entered or the suit has been dismissed, the court, on application by summons, may set aside or vary the judgment or order upon such terms as are just.”

This is a discretionary power which is to be exercised by the courts without limitation except that if the court decides to allow an application under that Rule it must do so on terms which are just in the circumstances of the particular case. (See ***Patel vs E. A. Cargo Handling Services Ltd (1974) EA 75***). Although a reason may persuade the court to easily exercise its discretion, it is now well settled that such is not a precondition for the exercise of the court’s discretion in these matters. ***In Girado vs Alam & Sons (V) Ltd. (1971) E.A 448*** , the Appellant applied to set aside a judgment given in the absence of his Advocate a year previously. The affidavits in support of his application were contradictory. Goudie, J although not satisfied with the explanation given for the default went ahead to say as follows:

“I am ver y far from satisfied that sufficient cause for non appearance has been shown under Order 9, Rule 20. At the same time all the authorities support the view that the court has inherent power to restore a suit dismissed for default even if no sufficient cause is shown ...”

That is so. That is what the Counsel for the Applicant has urged. The reason for this is that the discretion under the Rule is to be employed to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error. (***See Shah vs Mbogo & Another (1967) EA 116*** at page 123 cited with approval in ***Njagi Kanyunguti alias Karingi Kanyunguti & 4 Others vs David N. Njogu Civil Appeal No 101 of 1994 (unreported)***).

However, did the facts in the case before this Court giving rise to the default Judgment arise from “accident, inadvertence, or excusable mistake or error”?

I think not. The Appellant here was tardy and disinterested in the outcome of his case. Default Judgment was entered herein because of the failure of his advocate to attend Court on several occasions. Even then he did nothing to set aside that Judgment. He fully participated in the hearing for formal proof, and then waited for a full two years after Judgment was passed, to make an application for setting aside.

This is definitely not the kind of litigant who deserves the discretion of this Court. In fact, this is the kind of litigant envisaged in ***Shah vs Mbogo (supra)*** as “a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

It is a cardinal principle of justice that there must be an end to litigation. The Plaintiff’s conduct in this case is an affront to that principle. He cannot be allowed to drag the litigation forever. If that is caused by his Advocate, it may achieve more justice if he were to have recourse against the Advocate than to vex the Defendant with this suit indefinitely.

Accordingly, and for reasons outlined, this appeal is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 7th day of July, 2004.

ALNASHIR VISRAM

JUDGE