



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
ELC APPEAL NO. 10 OF 2019
(FORMERLY CIVIL APPEAL NO 262 OF 2018)

AFRICAN BANKING CORPORATION LIMITED.....APPELLANT
VERSUS
RAJAN RAJNIKANT DHANANI.....RESPONDENT

(Being an appeal from Ruling of Honourable K. L. Orange (Mr.) Senior Resident Magistrate delivered on 26th April 2018 in CMCC 9277 of 2017)

JUDGEMENT

1. This appeal arises out of the ruling of Honourable K. L. Orange (Mr.) Senior Resident Magistrate delivered on 28th May 2018 in CMCC No 9277 of 2017. The honourable learned magistrate dismissed the appellants notice of motion dated 27th February 2018. The said application had sought orders to set aside the default judgement entered against the appellant on 21st February 2013.
2. The appellant being dissatisfied with the said ruling has appealed on the following grounds.
 1. *That the learned trial magistrate erred in law and in fact in finding that the appellant had not given sufficient reasons for filing the statement of defence out of time.*
 2. *That the learned trial magistrate erred in law for failing to consider whether the appellant had an arguable defence deserving to be heard on merits.*
 3. *That the learned trial magistrate erred in law in upholding the ex parte judgment without granting the appellant an opportunity to be heard at all.*
 4. *That the learned trial magistrate erred in law and in fact in failing to consider that no prejudice would be visited on the plaintiff if the ex parte judgment was set aside upon such terms and conditions as the court would deem fit.*
 5. *That the learned trial magistrate erred in law and fact in failing to consider that the delay in filing the statement of defence was not inordinate.*
 6. *That the learned trial magistrate erred in law in finding that the default judgment was regular yet the respondent was awarded a liquidated sum of Kshs.12,500,000.00 as rent without an iota of proof of income accounts from the premises.*
3. The appellant seeks the following orders:-
 - (a) *That this court be pleased to allow this appeal.*
 - (b) *That this court be pleased to set aside the entire ruling of the magistrate court and substitute it with a decision of this court.*
 - (c) *That this court be pleased to set aside the ex parte judgment entered on 21st February 2018.*
 - (d) *That cost be awarded to the appellant.*

4. The brief facts are that the plaintiff in Milimani CMCC 9277 of 2017 being the respondent herein, brought the suit property known as Kikuyu/Township/214 by way of public auction on 14th June 2017. The appellant being the defendant in that suit had put up the suit property for sale in exercise of the statutory power of sale conferred upon it by a charge registered against the title to the said property. On 14th June 2017 the respondent bid for the purchase of the property and was declared the highest bidder at Kshs.49,000,000/-. The sale was completed by a memorandum of sale between the appellant and the respondent. The appellant undertook to procure vacant possession of the suit property in favour of the respondent upon completion of the purchase. The suit property was transferred to the respondent on 19th July 2017.
5. On the 20th December 2017, the respondent filed a suit against the appellant claiming an order for delivery of vacant possession of the suit property Kshs.12,500,000 being five months rent per month from the date of filing suit until delivery of vacant possession. He also claimed costs of the suit and interest.
6. On the 28th May 2018 honourable K. L. Orenge declined to exercise his discretion in favour of the appellant who had applied to set aside the default judgment entered on 21st February 2011. The same was entered in default of filing a statement of defence within the prescribed period.
7. On the 20th January 2020, the court with the consent of parties directed that the appeal be canvassed by way of written submissions.

The Appellant's Submissions

8. Mr. Kiplagat learned counsel for the appellant submitted that the honourable learned magistrate failed to consider the reasons advanced by the appellant for filing the statement of defence out of time. He faulted the honourable learned magistrate for holding that it was the court clerk who was attending at the registry, who was supposed to swear the affidavit that the court file was missing and not the advocate. The honourable learned magistrate failed to address his mind to the glaring fact that there was a letter duly received at the registry addressed to the executive officer about the missing file. The letter is dated 21st February 2018 and is part of the appellants record of appeal. He has put forward the case of **Efil Enterprises Limited & 2 Others vs Air Travel & Related Studies Limited [2018] eKLR**.
9. Counsel further submitted that the trial magistrate ought to have considered among others whether the appellant's defence raises triable issues. That by turning a blind eye to the self evident triable issues raised on the defence, the trial magistrate reached a wrong conclusion. He relied on the cases of **Tree Shade Motors Ltd vs DT Dobie & Company (K) Ltd & Another Civil Appeal No 38 of 1998; CMC Holdings Ltd vs James Mumo Nzioki [2004] eKLR**. In exercising his discretion on whether or not to set aside the default judgment the trial magistrate ought to have considered among others: whether the appellant had a defence that arises triable issues as was held by the court of appeal in **James Kanyiita Nderitu & Another vs Marios Philotas Ghikas & Another [2016] eKLR**.
10. Counsel submitted that the trial magistrate upheld the ex parte judgment without granting the appellant an opportunity to be heard. It appears he (trial magistrate) was not convinced that the court file was missing. It was draconian for the learned trial magistrate to deny the appellant an opportunity to be heard and that the delay in filing defence was for nine days only. He relied on the case of **Wachira Karani vs Bildad Wachira [2016] eKLR**.
11. On the issue of whether prejudice would be visited upon the respondent if the ex parte judgment was set aside, counsel referred to the court of appeal case of **James Kanyiita Nderitu & Another vs Marios Philotas Ghikas (Supra)** where the court adopted its own diction in **Nicholas Salat vs IEBC & 6 Others CA (Application No 228 of 2013)**.
12. The learned trial magistrate erred by failing to consider that the delay in filing the statement of defence was not inordinate. Further that he erred by allowing the respondent's claim without formal proof. He relied on the case of **Edwards Kings Onyancha t/a Mantra International Associates vs China Jiangsu IETC Corporation & 8 Others [2013] eKLR** in which the court referred to the case of **Mint Holdings Ltd & Another vs Trust Bank Ltd [2014]eKLR**. The appellant prays that the appeal be allowed as prayed.

The Respondent's Submissions

13. Mr. Inyangu raised three issues. His first issue is whether this court should interfere with the lower court's discretion. He reiterated that it is trite law that an appellate court will not interfere with the exercise of discretion by the trial court unless it is satisfied that the trial court was wrong in the manner in which it exercised its discretion. The question is whether the default judgment was improper. The application for interlocutory judgment was made after the appellant failed to file its defence within 14 days of filing its appearance. He relied on the cases of **James Kanyiita Nderitu & Another vs Marios Philotas Ghikas & Another [2016] eKLR**.
14. The Appellant herein does not deny being served with summons. Once they failed to file a defence the respondent was entitled to obtain a default judgment. Once a party disregards the timelines set out in law, it is not enough for such a party to simply claim their defence raises triable issues. He has put forward the case of **Hillary Rotich vs Wilson Kipkore [2018] eKLR**. The Appellant is undeserving of the courts discretion being exercised in its favour since the explanation offered is not a genuine and excusable mistake or error.
15. As to whether the appellant provided a plausible explanation for not filing its defence within the prescribed period, the respondent relied on the case of **James Kanyiita Nderitu & Another vs Marios Philotas Ghakis (Supra)**. The explanation given by the applicant for not filing defence within the prescribed period is that the court file was missing from the court registry.
16. The appellant did not provide any evidence at the lower court or in the present appeal in support of this allegation. There is no letter or memo by the appellant to the court complaining of a missing file prior to the expiry of the time for filing a defence. Further that the affidavit sworn by the appellant's advocate ought to have been sworn by the court clerk who attended the registry. He referred to the case of **East African Foundry Works (K) Limited vs Kenya Commercial Bank Limited [2002] 1KLR**.

The unnamed clerk would have been the right person to make any averments in relation to the missing file. He relied on the case of **NWN (minor suing through next friend 2nd plaintiff), & another vs Synohydro Co. Ltd & 2 Others [2016] eKLR.**

17. As to whether the draft defence raises triable issues he has relied on the case of **Equatorial Commercial Bank Ltd vs Jodam Engineering Works Limited & 2 Others [2014] eKLR.**

The respondent adduced evidence to prove the existence of a sale agreement between the parties herein over title No Kikuyu/Township/214. There is no denial by the appellant that the respondent purchased the suit premises from it at a public auction in July 2017. The appellant does not dispute that the respondent has not been placed in possession of the said premises since the said purchase.

18. A draft defence to the effect that the appellant is not in possession, is not collecting rent in the premises or that it is presently pursuing an eviction order against the former owner cannot possibly be a reasonable defence to the respondent's suit. There is no point of staying the judgment of the court if the defence does not raise any triable issues. He has put forward the case of **Esswell International AB vs Kaab Investments Limited [2016] eKLR.**

19. The Appellant did not meet the threshold for having the default judgment set aside, leading to the dismissal of its application and rightly so the learned trial magistrate applied his discretion properly. He prays that the present appeal be found to be unmerited and the same be dismissed with costs and that the judgment dated 21st February 2018 be upheld.

20. I have considered the grounds in the memorandum of appeal, the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-

(i) Whether the honorable learned trial magistrate erred in law and in fact in finding that the appellant had not given sufficient reasons for filing the statement of defence out of time.

(ii) Whether the honourable learned trial magistrate erred in law for failing to consider whether the appellant had an arguable defence which ought to be heard on its merits.

(iii) Whether the honourable learned trial magistrate erred in law in upholding the ex parte judgment thereby denying the appellant an opportunity to be heard.

(iv) Who should bear costs of this appeal?

21. In the case of **James Kanyiita Nderitu & Another vs Marios Philotas Ghikas & Another [2016] eKLR,** the court stated thus:

“In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he has failed to enter appearance or to file defence, resulting in default judgment.”

The court went further to state:

“.....such a defendant is entitled, under Order 10 rule 11 of the Civil procedure Rules to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other.....”

The appellant herein attributes the delay in filing the statement of defence to the missing file at the court registry. It is deposed by Winnie Rohi Wafula the appellant's Legal Officer at paragraph 4 of her supporting affidavit to the notice of motion dated 12th June 2018 that the appellant's advocates made several trips to the court registry to file the statement of defence but the court file was reported missing. She further deposed that the appellant wrote a letter dated 21st February 2018 to the Executive Officer inquiring as to the missing court file.

22. The said letter is at page 38 of the Record of Appeal. In the letter, the appellant's advocates expressed their frustration. They were unable to file their statement of defence owing to the missing court file. In his ruling dated 28th May 2018 the learned trial magistrate observed:-

“...There were allegations by the defendant that the file had been missing from the registry and that this led to failure on the part of the defendant to file defence in time. There was no demonstration by the defendant that there was effort by the defendant to locate the file by way of letter to the court executive officer requesting that the file be availed.....”

I find that the learned trial magistrate failed to take into account the existence of such a letter. The same is on the record of appeal and is dated 21st February 2018. I find that the learned trial magistrate erred by failing to take this letter into account when considering whether or not to set aside the default judgment. The said letter indeed is a demonstration that the appellant's advocate had made efforts to file the statement of defence.

23. I find that the learned trial magistrate had erred by failing to take into account that the appellant had offered a sufficient explanation as to

why they failed to file the statement of defence on time. I also find that it was proper for the advocate to make averments in respect of the missing court file as he had knowledge, just as the clerk, who had visited the court registry. I find that the appellant has demonstrated that the court file was missing at the registry hence the delay in filing the statement of defence. I find that the learned trial magistrate erred by failing to take this into account.

24. It is the appellant's contention that the draft defence raises triable issues. That the learned trial magistrate completely ignored the defence and did not address himself to the questions of whether the defence raised any triable issues. The same had been filed on 21st February 2018 and was annexed to the supporting affidavit to the notice of motion dated 27th February 2018. In the case of **CMC Holdings Ltd vs James Mumo Nzioki [2014] eKLR**; the Court of Appeal held thus:-

“The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the ex parte judgment is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised any triable issues. The law is now well settled that in an application for setting aside ex parte judgment the court must consider not only reason why the defence was not filed or for that matter why the applicant.....”

25. I find that the learned trial magistrate was obliged to consider the statement of the defence attached in his ruling on whether or not to set aside the default judgment. In the case of **Equatorial Commercial Bank Ltd vs Jodam Engineering Works Limited & 2 Others [2014] eKLR**, Kasango J held that:-

“A statement of defence is said to raise reasonable defence if that defence raises a prima facie triable issue. In the case of Olympic Escort International Co. Ltd & 2 Others vs Parminder Singh Sandhu & Another (2009) eKLR, the Court of Appeal held that for an issue to be triable, it has to be bona fide. The court stated as follows:-

“it is trite law that, a triable issue is not necessarily one that the appellant would ultimately succeed. It need only be bona fide.”

I have gone through the statement of defence dated 30th January 2018. I find that it raises triable issues that go to the root of the subject matter in question.

26. It is the applicant's case that it was pursuing vacant possession, in **Milimani ELC 459 of 2015, Eliud Muigai Kiongo vs African Banking Corporation & 3 Others**. The respondent had sued for rent for 5 months from the appellant but the appellant in paragraph 10 of the statement of defence stated that it was not collecting rent but was seeking orders in evicting the occupants of the suit property. It is my view that the appellant deserves an opportunity to be heard on its defence.

27. In the case of **Toshike Construction Company Limited vs Harambee Cooperative Savings & Another [2019] eKLR**. The Court of Appeal quoting its own decision in **Piston Waweru Maina Case (Supra)** held thus:-

“ (a) Firstly, there are no limits or restrictions on the judges discretion except that if he does vary the judgment he does so on such terms as may be just.... The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. Patel vs EA Cargo Handling Services Ltd [1974] EA 75 at 76 C and E (b).

Secondly, this discretion is intended 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 had deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice. Shah vs Mbigo [1967] EA 116 at 123B, Shabir Din vs Ram Parksash Anand [1955] 22 EACA.

Thirdly, the Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in same matter and as a result has arrived at a wrong decision or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis justice Mbogo vs Shah [1968] EA 93”.

I find that the learned trial magistrate erred in upholding the ex parte judgment thereby denying the appellant an opportunity to be heard.

28. I find that he erred in finding that the judgment entered was regular yet a final money award was made without proof.

29. I note that the appellant filed its statement of defence nine days after the prescribed time had expired. I find that this delay was not inordinate given the explanation given by the appellant. I rely on the case of **James Kanyiita Nderitu & Another vs Marios Philotas Ghikas (Supra)**.

30. The upshot of the matter is that is that I find merit in this appeal and the same is allowed. I hereby set aside the ruling dated 28th May 2018 by Hon. K. L. Orange (Mr.) Senior Resident Magistrate in its entirety. The ex parte judgment entered on 21st February 2018 is hereby set aside. I hereby direct that the matter do proceed before another magistrate other than Hon. K. L. Orange (Mr.) Senior Resident Magistrate. I order that the costs of this appeal do abide the outcome of the main suit in the lower court.

It is so ordered.

Dated, signed and delivered in Nairobi on this 25th day of February 2021.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Kiplang'at for the Appellant

No appearance for the Respondent

Phyllis – Court Assistant