Savannah Paradise Hotels Limited & 2 others v Chamunda Iron & Steel Hardware Limited (Commercial Appeal E009 of 2024) [2025] KEHC 7349 (KLR) (22 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7349 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

COMMERCIAL APPEAL E009 OF 2024

FN MUCHEMI, J

MAY 22, 2025

BETWEEN

SAVANNAH PARADISE HOTELS LIMITED ..... 1ST APPELLANT

ESTHER MUENI KITHEKA ..... 2ND APPELLANT

ECKOMAS MWENGI MUTUSE ..... 3RD APPELLANT

AND

CHAMUNDA IRON & STEEL HARDWARE LIMITED ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. Mary Kamau (RM/Adjudicator) delivered on 21st May 2024 in Thika Small Claims Court SCCCOMM No. E1969 of 2023)

RULING

Brief facts.

1. This appeal arises from the ruling of Thika Resident Magistrate/Adjudicator in SCCCOMM No. E1969 of 2023 whereas the trial court reinstated the default judgment entered against the appe11ant on/12/2023.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 4 grounds of appeal summarized as follows:-

    a. The learned trial magistrate erred in law by entering the default judgment against the appellants when the matter was fixed for hearing and both parties were present in court.

    b. The learned trial magistrate erred in law by failing to appreciate that default judgment could not be entered only on the grounds that the appellants had failed to file a Statement of Response.

3. Parties disposed of the appeal by way of written submissions.

The Appellants' Submissions

4. The appellants submit that the learned adjudicator erred in law by entering default judgment under the circumstances of the case thus occasioning a miscarriage of justice. The appellants refer to Section 3 of the *Small Claims Court Act* and submit that the adjudicator's decision to enter default judgment offended the provisions of Article 159 of *the Constitution* and by extension the *Small Claims court Act*.

5. The appellants further rely on Section 17 of the *Small Claims Court Act* and submit that the court must have regard to the principles of natural justice which include the right of a litigant not to be condemned unheard. The appellants further refer to Section 27 of the *Small Claims Court Act* and submit that the provision allows the court to consider the circumstances of each particular case before entering judgment in default.

6. The appellants argue that whilst it is true they did not file a statement of response, they offered a legitimate explanation for failure to file a response which ought to have been considered by the adjudicator. The appellants submit that the advocate who was in conduct of the case while the consent was recorded, one Mr. Ouma, was not the same advocate who attended court during the hearing, Mr. Ekisa. Thus, the omission occurred without any ill intent.

7. The appellants submit that the mistakes of an advocate should not be visited upon an innocent client. The court has a legal duty to do justice between the parties which includes the duty not to punish a party for an innocent mistake which was not intended to delay or derail the hearing of the case. To support their contentions, the appellants rely on the case of Wachira Karani v Bildad Wachira (no citation given).

8. The appellants submit that the learned adjudicator was rather harsh and failed to embrace the guiding principle on simplicity of procedure as provided for in Section 3(3) of the *Small Claims Court Act*. The appellants further submit that the fact that they had not paid filing fees for the Statement of Response was used as a procedural technicality to bar the Statement of Response from being admitted thereby infringing on their right to access of justice as enshrined in Article 48 of *the Constitution*.

9. The appellants rely on the case of Rutere v Muigai (no citation given) and submit that every court has the cardinal duty of doing justice between the parties before it. Courts ought to be cognizant that mistakes are part of our justice system and innocent clients should not be removed from the seat of justice for mistakes which can otherwise be cured by the imposition of terms and conditions geared towards a merit based determination of disputes.

The Respondent's Submissions

10. The respondent submits that the default judgment entered on 11th December 2023 pursuant to section 27 of the *Small Claims Court Act*, was as a consequence of the appellants' negligence/failure to file a response within the stipulated time in law as provided in Section 25(2) of the *Small Claims Court Act*. The said judgment was on 1st February 2024 by consent set aside and although the appellants were directed to file a response within 14 days, they once again failed to comply by the time the matter was coming up for hearing, which was four months after.

11. The respondent refers to the case of *Muhzin Express Limited v Baya (Civil Appeal E002 of 2023)* [2024] KEHC 8672 (KLR) and submits that the adjudicator did not err in law in reinstating the said default judgment as courts do not issue orders in vain. The respondent further submits that compliance with court orders is central to the rule of law and accordingly, being bound by the rule of law, the appellants ought to have complied with the order of the trial court to file their response within the

stipulated time. The respondent further submits that it had in good faith agreed to forego its right to enjoy the fruits of the default judgment entered on 11th December 2023. It was therefore fair and proper that the appellants meet their end of the bargain, to protect the respondent from being prejudiced twice.

12. The respondent submits that the reinstatement of the default judgment was not only in the interest of fairness and justice but also in strict observance of the overriding objective in regard to expeditious disposal of cases. To support its contentions, the respondent relies on Article 159(2) of *the Constitution*, Section 1A, 1B & 3A of the *Civil procedure Act* and Section 3(3)(1)(a) of the *Small Claims Court Act* and the case of Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D. Popat & Others & Another [2016] eKLR.

13. The respondent refers to the case of Mohammed Shally Sese v Fulson Company Limited & Another [2006] eKLR and submits that the appellants have themselves to blame as equity does not aid the indolent. In any event, the respondent argues that whereas the appellants have attributed their negligence to an honest mistake, no material has been adduced to corroborate the same. As it stands, the appellants' assertions amount only to excuses.

14. The respondent argues that it is disingenuous for the appellants to fault the trial adjudicator for failing to proceed with the hearing of the matter whereas their pleadings were not on record. The respondent relies on the case of John Njue Nyagah v Nicholas Njiru Nyaga & Another [2013] eKLR and submits that he who comes to equity must come with clean hands and the appellants must not be seen to apply the law only when it so gratifies them.

15. The respondent submits that the adjudicator exercised her discretion judiciously in finding that the appellants had slept on their rights and thereby reinstating the default judgment previously entered.

Issue for determination

16. The main issue for determination is whether appeal has merit.

The Law

17. The Court of Appeal while referring to a second appeal, which is essentially on points of law and thus similar to the duty of this court under Section 38 of the *Small Claims Court Act*, set out the duty of the second appellate court in the case of Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR as follows:-

    I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters that they should have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

18. In distinguishing between matters of law and fact the Court of Appeal stated in Kenya Breweries Ltd v Godfrey Odoyo [2010] eKLR as follows:-

    I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of retrial and facts must be revisited and analysed a fresh. See Selle and Another v Associated Motor Boat Company Limited and Others (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second

appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

Whether the appeal has merit.

19. Vide a Statement of Claim dated 16th November 2023, the respondent herein moved the court below in SCCCOMM No. E1969 of 2023 to enter judgment in its favour as against the appellants for a sum of Kshs. 640,000/- together with interest therein at court rates from 5th February 2020 until payment in full in default of appearance. The trial court entered default judgment against the appellants as prayed in the Statement of Claim save that interest was set to accrue as from the date of filing the suit. The appellants then filed an application dated 11th January 2024 seeking for the default judgment entered on 11/12/2023 to be set aside which the respondent opposed by filing grounds of opposition and a replying affidavit dated 29th January 2024.

20. Parties compromised the application by entering a consent on 1st February 2024 which set aside the default judgment entered on 11/12/2023 on condition that the appellants pay throw away costs of Kshs. 30,000/- by close of business 2/2/2024. Furthermore, the appellants file their response, witness statement and bundle of documents within 14 days with the respondent having corresponding leave to file any documents if need be. The matter was scheduled for hearing on 21st May 2024. The said consent was adopted as an order of the court.

21. On 21st May 2024 when the matter came up for hearing, the appellants discovered that they had not filed a response to the claim and told the court that it was an honest mistake on their part. The trial court noted that the appellants had paid throw away costs but they failed to file their response. The trial court then proceeded to hold that that the appellants had slept on their rights as the directions were given 3 months ago and she proceeded to reinstate the default judgment entered on 11/12/2023.

22. Thus, the court is called upon to interrogate whether the learned adjudicator exercised her discretion lawfully in reinstating the default judgment. The issue of discretion was discussed in the case of Shah v Mbogo & Another [1967] EA it was held that:-

    The court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should therefore be refused.

23. Similarly in Patel v EA Cargo Handling Services Ltd [1974] EA 75, where the court held that:-

    > " There are no limits or restrictions on the judge's 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 condition on itself or fetter wide discretion given to it by the rules, the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."

24. The record shows that default judgment entered on 11/12/2023 was valid and regular as the appellants admitted to having been properly served with Summons to enter appearance as well as the pleadings in the matter on 22nd November 2023. Despite being served with the said pleadings, they did not file their Statement of Response. Upon default judgment being entered on 11/12/2023, the appellants sought to set aside the default judgment which the respondent graciously accommodated them. The

parties then recorded a consent setting aside the default judgment. However even 4 months after the directions were given by the court, the appellants had not filed their response to the claim. The appellants argue that the advocate who recorded the consent Mr. Ouma was not the same advocate who attended court during the hearing. It was one Mr. Ekisa who attended court on 21/05/2024. I have perused the record and noted that both advocates work in the firm of Mwengi Mutuse & Co. Advocates therefore the court is not persuaded that the said advocates were not aware of the consent recorded by the parties on 11/12/2023 as well as the directions of the court. It is therefore evident that the appellants were indolent and abdicated their responsibility for over a period of three (3) months having been accommodated by the respondent who agreed to have the default judgment set aside. The applicant was given a chance to be herd but he lost it due to non-compliance in failing to file it response within 14 days as directed by the court. When the mate was mentioned three (3) months down the line, there was no compliance by the appellant. The court reinstated the exparte judgment in favour of the respondent to avoid delay in the case and preventing respondent from enjoying the rights of his judgment due to the indolence of the appellant.

25. It is my considered view that the learned adjudicator exercised her discretion judiciously.

26. I find that this appeal lacks merit and is hereby dismissed with costs to the respondent.

27. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 22ND DAY OF MAY 2025.

F. MUCHEMI

JUDGE