Mwangi v Muiruri & another (Civil Appeal 7 of 2021) [2024] KEHC 2286 (KLR) (1 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2286 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 7 OF 2021

HM NYAGA, J

MARCH 1, 2024

BETWEEN

ISHAMAEL MWANIKI MWANGI .... APPELLANT

AND

MARY MUMBI MUIRURI .... 1ST RESPONDENT

JOSEPHAT CHARAGU WAMBUGU .... 2ND RESPONDENT

(Being an appeal against the Ruling of Honourable M. Kyalo – Resident Magistrate in Nakuru CMCC No. 395 of 2019 delivered on 4{{^th}} February, 2021)

JUDGMENT

1. This is an Appeal against the Ruling of the lower court delivered on 4th February, 2021. In the said Ruling the lower court dismissed the Appellants Application dated 5th May 2020, which sought to set aside the ex-parte judgment entered and that the Appellant be allowed to file its defence and defend the suit on merit.
2. The brief facts of the case are that the 1st Respondent commenced Nakuru CMCC No. 395 of 2019 seeking general and special damages for injuries sustained in a road traffic accident on 4th October, 2016.
3. The Appellant failed to enter appearance and interlocutory judgment was entered. The matter proceeded to formal proof and judgment was entered against the Appellant for;
   a. General damages – Kshs. 100,000/=
   b. Special damages – Kshs. 14,630/=
   c. Costs and interest

4. Following the delivery of the judgment, the Appellant moved through the Application dated 5th May 2020.

5. Aggrieved by the said Ruling the Appellant filed the Memorandum of Appeal dated 4th February, 2021 in which he set out five (5) grounds of Appeal. They are as follows;-

    i. Thatthe learned trial magistrate erred in law and fact in dismissing the Appellant's Application dated 5th May, 2020 without any legal justification.

    ii. Thatthe learned trial magistrate erred in law and fact in failing to evaluate the appellants' draft statement of defence and appreciate that it raises triable issues.

    iii. Thatthe learned trial magistrate erred in law and fact in failing and/or ignoring to consider the Appellant's written submissions and legal authorities relied on in response to issues raised in the Application hence arriving at an erroneous decision in the circumstances.

    iv. Thatthe learned trial magistrate erred in law and fact by over-relying on the Respondent's Written Submissions and legal authorities relied on hence arriving at an erroneous decision in the circumstances.

    v. Thatthe learned trial magistrate's decision albeit a discretionary one was plainly wrong in the circumstances.

6. The Appellant thus sought prayers that the learned magistrate's Ruling/Order issued on 4th February, 2021 dismissing the Appellants Application dated 5th May 2020 be set aside and/or varied and that this court be pleased to relook and reconsider the Application and substitute it with a proper finding as follows;

    a. That the Appeal herein be allowed with costs to the Appellant.

    b. This Honourable Court be pleased to re-evaluate, re-look and/or reconsider the Appellant's Application dated 5th May 2020 and set aside and/or vary the learned magistrate's orders by substituting the same with a proper finding.

7. After a lengthy delay, the parties appeared before me for directions on the Appeal. The court directed that the parties abandon the Application that had been pending and that the parties proceed to argue the appeal itself through Written Submissions.

Appellant's Submissions

8. The Appellant submitted that the judgement delivered in Nakuru CMCC No. 395 of 2019 was irregular because there was no proper service of summons to enter appearance and was not in conformity with Order 5 Rule 3 of the *Civil Procedure Rules*. To buttress his submissions, the Appellant referred this court to the case of *James Kanyiita Nderitu & Another -vs- Marios Philotas Ghikas & Another* [2016] eKLR.

9. The appellant submitted that it was at the commencement of execution that he learnt about the case and his good faith was demonstrated by the swift action he took. It was his submissions that his defence raises triable issues and he will be immensely prejudiced if the respondent proceeds with execution.

10. He argued that Order 10 Rule 11 of the *Civil Procedure Rules* gives the court unfettered discretion to set aside exparte judgement and in urging this court to set aside the exparte judgement, the Appellant

placed reliance on the cases of *Phillip Kiptoo Chemwolo & Mumias Sugar Co. Ltd vs Augustine Kubende* (1982-88) KAR 1036 & *Haile Selassie Avenue Development Co. Limited vs Josephat Muriithi & 10 Others* [2004] eKLR.

1st Respondent's Submissions

11. The Respondent submitted that the Record of Appeal dated 12th August,2022 is incomplete as it i*nter alia* lacks exhibits attached to the Application dated 5th May,2020 and the Respondents' submissions and that the specific documents listed in the index of the supplementary record of appeal are not in the pages shown. For these reasons, the Respondent submitted that the record of appeal is incurably defective and should be struck out with costs.

12. The respondent further submitted no satisfactory explanation was given by the Appellant for his inaction. She argued that the exparte judgment was obtained regularly and it can only be set aside when good reasons are given. She posited that the court cannot exercise its unfettered discretion to aid an indolent party who is out to obstruct the wheels of justice. In buttressing her submissions, the 1st respondent relied on the *Shah vs Mbogo* [1967] E A 116 and 123B & *Langat & another vs Muchai* (Civil Appeal 73 of 2020) [2022] KEHC 3117 (KLR) (5 May 2022) (Judgment).

Analysis & Determination

13. The duty of the Appellate court is to re-evaluate and analyze the evidence tendered before the lower court with a view to arriving at its own independent finding. This legal principle was stated in *Selle vs Associated Motor Boat Co. Ltd* (1968) E.A, where the court held that-

> " An appeal to this court from the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are; that this court must reconsider the evidence, evaluate it itself and draw its own conclusion, though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance to this respect in particular this court is not bound necessarily on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistence with the evidence in the case generally."

14. After taking into consideration the presentations made by both parties I find the following issues for determination;

    i. Whether to struck out the Record of Appeal.

    ii. Whether this court ought to set aside the lower court's decision to dismiss the Appellant's application to set aside the ex parte judgment and decree.

Issue No.1

15. There are no solid grounds for striking out the record of appeal as prayed by the 1st Respondent.

16. The respondent submitted that the record of appeal is incomplete as the exhibits attached to the application dated 5th May,2020 as well as their submissions are not attached. I have perused the record and confirm the same to be the true position. However, I note the said exhibits and submissions have been attached in the supplementary record of appeal dated 19th May, 2023 at pages 28-37 and page 65.

17. The respondent also submitted that the index in the supplementary Record of Appeal shows specific documents which are not in the pages shown. For example, Memorandum of Appeal is shown to be at pages 1 and 2 but the said pages contain the plaint and application to set aside judgement is shown to be at page 36 to 45 when those pages contain exhibits attached to the respondent's replying affidavit. This position is correct.

18. It is good practice that parties paginate their documents well, but this is not a ground for striking out the record of appeal. In addition, this court will place substantive justice over the procedural considerations as mandated by Article 159(2)(d) of the *Constitution*.

19. I therefore decline to strike out the appeal and will proceed to consider it on merits.

20. The only other issue left for determination is whether this court ought to set aside the Ruling in question.

21. The parties agree that the trial court was being asked that;

    i. If it was to find that there was no service of the summons and pleadings it would have had to set aside the ex parte judgment ex dibito justicae.

    ii. If it was to find that there was service, then it would be called upon to exercise its discretion.

22. In her Ruling, the trial magistrate found as follows;

> "From the evidence in documents filed, it shows that the defendants were served and seemed aware of the matter. This is shown by MMI, MM2, MM3 and MM4. The Directline Insurance Company sent the Plaintiff to be examined by the doctor and this was done and the insurance notified vide a letter dated 15th July 2020. The defendants while aware of the existence of the suit failed to enter appearance and the Plaintiff proceeded by way of formal proof.
>
> ....this court should not be seen to reward indolent litigants."

23. It is clear from the cited extract of the Ruling that the court was satisfied that the Appellant was fully aware of the filing of the suit. In exercise of her discretion, the trial magistrate found the Application wanting to merit and dismissed it.

24. It is well settled law that this Appellate Court will not interfere with the lower court's exercise of its discretion unless it is shown that in doing so, the trial court proceeded on wrong principles or erred in law. This position was reiterated in *Pindoria Construction Ltd vs Ironmongers Sanytaryware* Civil Appeal No. 16 of 1976 where it was held that:

> "It is a common ground that it is a matter for discretion whether or not to set aside a judgement under rule 8 of Order 9B of the *Civil Procedure Rules*. It is also well settled that the Court of Appeal will not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice...."

25. I have looked at the lower court's Ruling and record. The trial magistrate found that indeed there was service of summons upon the defendants, yet they insisted that they were not served.

26. There is ample proof that the summons were duly served. The trial court's Ruling appears to have been guided by the principles in such circumstances as set out in the case of *Shah vs Mbogo* (1967)EA 116.

27. I think that the Appellant is being dishonest as he was in the trial court. As an Appellate court I don't see any ground to hold that the trial magistrate erred in principle or an erred in law.

28. Even after re-evaluation the Application, the Affidavits and the annexures, I would have come to the same conclusion as the trial magistrate. A party seeking an equitable remedy ought to be honest. Sticking to averments that are evidently false will not come to his/her aid.

29. That being so, I find that this Appeal is devoid of merits and is dismissed with costs.

30. The lower court record will be transmitted back to it for further action.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 1ST DAY OF MARCH, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

C/A Oleperon

Mr. Mboga for Respondent

N/A for Applicant