Dancan K. Owino t/a Bio Path Healthcare v Breeze Petroleum Station Limited (Civil Appeal E042 of 2023) [2024] KEHC 3831 (KLR) (19 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3831 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CIVIL APPEAL E042 OF 2023

WM MUSYOKA, J

APRIL 19, 2024

BETWEEN

DANCAN K. OWINO T/A BIO PATH HEALTHCARE ..... APPELLANT

AND

BREEZE PETROLEUM STATION LIMITED ..... RESPONDENT

(An appeal arising from ruling of Hon. Lucy Ambasi, Chief Magistrate, CM, delivered on 22nd November 2022, in Busia CMCCC No. E139 of 2022)

JUDGMENT

1. The appeal herein arises, according to the memorandum of appeal filed herein, on 30th November 2022, from orders that were made on 22nd November 2022, in Busia CMCSC no E139 of 2022, in the following terms:

> " The Notice of Motion of 9/9/2022 be and is hereby dismissed as an abuse of court process as submitted by the Respondent's Counsel. The same is dismissed with costs."

2. Being aggrieved, the appellant herein approached the High Court, in this appeal, raising 19 grounds, revolving around failing to set-aside the *ex parte* judgement, finding that the appellant had no plausible reason and explanation for not filing defence in time, failing to find that the delay was occasioned by the court itself, failing to find that the failure to attend court at formal proof was occasioned by factors beyond the control of the appellant, the *ex parte* judgement was entered despite pendency of an application to set aside the formal proof proceedings, failing to consider that the draft defence and counterclaim raised triable issues, failing to find that the respondent was seeking specific performance of an illegally initiated contract, among others.

3. I gave directions, on 21st January 2024, for canvassing of the appeal by way of written submissions. Both sides did file written submissions, that were highlighted on 4th March 2024.

4. In his written submissions, the appellant identifies 2 issues for determination: whether the appellant had met the threshold for setting aside the *ex parte* judgement, and whether leave to defend ought to be granted. The appellant cites Article 159(2)(d) of *the Constitution*; sections 1A and 1B of the *Civil Procedure Act*, Cap 21, Laws of Kenya; Order 10 rule 11 of the *Civil Procedure Rules*; *Shah v Mbogo* [1967] EA 116; *Jomo Kenyatta University of Agriculture and Technology v Musa Ezekiel Oebal* [2014] eKLR; *Royal Trading Co. Limited v Bank of Baroda & Telezi House Limited* [2018] eKLR; *CMC Holdings Ltd v Nzioki* [2004] KLR 173; *Wachira Karani v Bildad Wachira* [2016] eKLR; *Philip Keipto Chemwolo & another v Augustine Kubende* [1986] eKLR; *Murai v Wainaina* (no 4) [1982] KLR 38; *Job Kilach v Nation Media Group Limited and others* [2016] eKLR and *Gerita Nasipondi Bukunya & 2 others v Attorney-General* [2019] eKLR, to support his case.

5. The respondent, in its written submissions, identifies 3 issues for determination: whether the appellant was denied a right to be heard, whether there was credible counter-claim, and whether the impugned order ought to be set aside. To support its contentions, it has cited Order 10 Rule 4(1) of the *Civil Procedure Rules*; *Shah v Mbogo* [1967] EA 166; *Patel v EA Cargo Handling Services Ltd* [1975] EA 75; *Chemwolo & another v Kubende* [1986] KLR 492; *James Kanyiita Nderitu & another v Marios Philotas Chikas & another* [2016] eKLR; *Onyango v Attorney-General* [1986-1989] EA 456; *Bouchard (Services) Ltd v M'Mwereria* [1987] KLR 93; *Ramco Ltd v Mistry Jadva Parbat & Co. Ltd & 2 others* [2002] 1 EA 33; *Baiywo v Bach* [1987] KLR 89; *Raghbir Singh Chatte v National Bank of Kenya Limited* [1996] eKLR; *National Bank of Kenya Limited v Khunaif Trading Company Limited & 2 others* [2018] eKLR; and *Brooke Bond Liebig (T) Limited v Mallya* [1975] EA 266.

6. The impugned order of 22nd November 2022, was founded on an application dated 9th September 2022. The said application sought review or setting aside of a final judgement that had been entered on 30th August 2022, and unconditional leave to defend. The grounds were set out on the face of the application, and in the affidavit sworn in support. The appellant had been served with a hearing for 2nd August 2022, but due to technological challenges, his Advocate was unable to log in at the time the court was handling the matter, and that she only managed to go through after the matter had been disposed of. A judgement was delivered on the matter on 30th August 2022, despite pendency of an application seeking to have the formal proof proceedings set aside. It was averred that a draft defence was ready as early as 18th July 2022, but was not filed as there had been delay in the assessment of the fees payable for its filing. It was urged that the appellant had a good defence and counter-claim.

7. A copy of the application, dated 23rd August 2022, filed on 25th August 2022, was attached, which sought to have the proceedings of 2nd August 2022 set aside, and leave be granted to the appellant to defend the suit, based on the same facts as those recited in the application dated 9th September 2022. Copies of email letters, dated 18th July 2022, were attached, to demonstrate efforts by the appellant to have a defence filed. A copy of the draft defence and counter-claim was also attached.

8. The respondent reacted to that application, by way of grounds of opposition, dated 28th September 2022, filed on 29th September 2022, essentially pleading that the appellant had been lethargic, and the application was res judicata, the same prayers having been prayed for and granted previously. There was also a replying affidavit, sworn by a director of the respondent, on 9th November 2022, essentially stating that the appellant had been given chances to defend the claim, but had failed to, only to turn around and blame others. It was averred that the appellant had been served with a summons to appear and file defence, but no appearance was entered within the time allowed, neither was any defence filed. Interlocutory judgement was entered, and a date fixed for formal proof. When served with notice of the formal proof, the appellant elected to ask to have the interlocutory judgment set aside, which was done, by consent of both sides, on certain conditions, which the appellant did not eventually satisfy, leading

to the matter being fixed for formal proof. The appellant was served with a date for formal proof, but did not attend at the hearing. It was argued that the appellant had not been denied the right to be heard.

9. Justice cannot be done in this matter without going back to its history. The plaint initiating the cause at the trial court was filed on 6th May 2022. An affidavit of service, sworn on 10th June 2022, indicates that the court process relating to the suit was served on the appellant personally on 26th May 2022, at his offices in Nairobi, and he acknowledged service by signing on the summons to enter appearance. A request was made for interlocutory judgement, *vide* a document dated 1st June 2022, filed in court on 10th June 2022. Interlocutory judgement was entered on 13th June 2022, and formal proof was fixed for 7th July 2022. There is an affidavit of service on record, sworn on 5th July 2022, indicating that a notice of the formal proof date, dated 15th June 2022, was served on the appellant on 30th June 2022, and that he had acknowledged service, by signing on the notice, and embossing an official stamp of his practice.

10. Come 7th July 2022, a consent was recorded, between the Advocates for both sides, being Mr. Okutta for the respondent, and Mr. JV Juma, who was holding brief for Mr. Imanyara for the appellant, to set aside the interlocutory judgement, and to allow the filing of a defence within 7 days, together with all other documents, in default of which the interlocutory judgement was to be reinstated, and the matter would proceed for formal proof within 14 days. On 19th July 2022, the respondent lodged a request for interlocutory judgement, dated 18th July 2022, and the same was entered on even date, on the basis that no defence had been filed. The matter was then allocated, on 26th July 2022, a date for formal proof, being 2nd August 2022.

11. In the meantime, the appellant entered appearance on 26th July 2022, *vide* a memorandum, dated 18th July 2022. The memorandum was accompanied by a defence and counterclaim, dated 18th July 2022. The said appearance was entered and the defence filed after interlocutory judgement had been entered, and on the date when a date was given for formal proof. The matter was heard, on formal proof, on 2nd August 2022, at 11.00 AM. The record indicates that a Ms. Njoroge appeared online at 12.00 noon, after the matter had been disposed of, and a date for judgement allocated. The judgement was delivered on 30th August 2022.

12. I believe that the only issue for determination is whether the trial court properly exercised discretion when it disallowed the application dated 9th September 2022, for whether the appellant should be allowed to defend the claim would be dependent on how that issue is resolved.

13. The appellant was served personally with the plaint and summons to appear on 10th June 2022. He should have appeared within 15 days. He did not, and interlocutory judgement was entered against him. When the matter was fixed for formal proof, for 7th July 2022, by which date he had not yet appeared, the respondent took the trouble to serve him with a hearing notice. That was when he woke up, and instructed an Advocate to attend court for him at the formal proof. That Advocate did not file a notice of appointment, but the court and the respondent were gracious enough to entertain him. The respondent went further and conceded to the setting aside of the interlocutory judgement, without minding that the Advocate appearing had not regularised his appointment, and had not filed any application for setting aside the interlocutory judgement. The setting aside was conditional, to defence being filed within 7 days, and there was a default clause, failure would open the door for reinstatement of the interlocutory judgement and formal proof. The 7 days were set to expire on or before 14th July 2022, and if the intervening weekend was to be excluded, in the computation of time, the expiry date would be 18th July 2022. By 18th July 2022, no defence had been filed, and the interlocutory judgement was reinstated, and the matter proceeded to formal proof, and onwards to final judgement.

14. I note that the appellant lodged his defence and counter-claim on 26th July 2022, long after the 7 days allowed on 7th July 2022 had expired, and long after the interlocutory judgement had been reinstated. The appellant explains that he was unable to comply with the order of 7th July 2022 because the court systems had issues on 18th July 2022 when he sought to lodge his papers. The plaint had been served on 26th May 2022, and the 7 days allowed by the order of 7th July 2022 began to run on 8th July 2022. It has not been demonstrated that the said system was down for all those 7 days. Indeed, there is no document from the court to authenticate the claim by the appellant, that the system had issues on 18th July 2022. Even if there were problems on 18th July 2022, it has not been explained why the filing of the defence was delayed till 26th July 2022. In any event, no explanation has been offered as to why the appellant had to wait for the last day, 18th July 2022, to attempt to file his defence, when he had been served with the plaint way back on 26th May 2022.

15. Then there is the issue of the formal proof on 2nd August 2022, when it is alleged that the Advocate who was to handle the matter had problems logging in, and succeeded too late to participate in the hearing. At the previous formal proof, on 7th July 2022, when the Advocates for the appellant were not even on record, the said Advocates were able to instruct an Advocate based at Busia to hold their brief, one would wonder what was different about 2nd August 2022, which prevented them from briefing a local Advocate to intervene for them.

16. The overall picture that I get is that the appellant was indolent and lethargic. He was properly served with court process on 26th May 2022, and ignored it, only to be awakened when the matter came up for formal proof. The respondent graciously accommodated him, and had the interlocutory judgement, that it had obtained regularly, set aside, by consent, on condition that he filed defence within 7 days. Again, he did not do the right thing and time run out on him, breaching the condition, and paving way for reinstatement of the interlocutory judgement. I see no wrongdoing of any sort on the part of the respondent, and I see no improper exercise of discretion on the part of the court.

17. Both sides are in agreement on the terms upon which a regular interlocutory judgement can be set aside. They have cited more or less similar judicial precedents on setting aside of interlocutory judgements. The main decision is *Shah v Mbogo* [1967] EA 166, the rest build on the principle it stated. The respondent did not wait to have the court apply *Shah v Mbogo* [1967] EA 166, when the matter came up on 7th July 2022, for formal proof, for it conceded to setting aside, despite proper service, and absence of an application in that respect. However, the appellant either did not learn his lessons, or suffers from some sense of entitlement, for when given a second chance, he still wasted it. He surely should not have his cake and eat it. He cannot be accommodated by the respondent, to enable him rectify his previous mistakes, only for him to repeat the same mistakes, and still expect to be accommodated again. He has no one else to blame for his predicament, not the court nor the respondent, but himself, and, possibly, his legal advisers.

18. The appellant has cited Article 159(2)(d) of *the Constitution* and sections 1A and 1B of the *Civil Procedure Rules*, which state the substantive justice or oxygen principle. The principle stated in these provisions do not aid the appellant herein in my view. That principle was at play on 7th July 2022, when the respondent conceded to the setting aside of an interlocutory judgement that he had obtained regularly, and which concession he was making even before a formal application for setting aside had been filed, and even before the Advocates for the appellant had properly come on record. There is, surely, a limit to the extent to which parties, who default with respect to procedure, ought to be accommodated, and this principle should not be utilised to aid a party who is bent on abusing the process. The substantive justice principle cannot be elastic, to be applied mechanically to aid a party

who is repeatedly in default. A party cannot claim to have been denied a right to be heard, when it is his own actions or omissions that prevent him from accessing justice.

19. Finally, it is argued that since there was a pending application for setting aside of the proceedings of 2nd August 2022, the trial court should have refrained from delivering the final judgement on 30th August 2022. It is also argued that the filing of the defence and counter-claim on 26th July 2022, should have had a similar effect, of influencing the trial court not to go ahead with the hearing scheduled for 2nd August 2022, and delivery of the final judgement thereafter on 30th August 2022. There was a history to this matter. The appellant had been properly served with the plaint and summons to appear, and he did not do the needful. He was accommodated when the matter came up, for the first time for formal proof, on 7th July 2022, but he still did not do the right thing thereafter. When the matter came up for formal proof for the second time, on 2nd August 2022, he still did not do the right thing, for he did not attend court for the hearing. The mere filing of the process alluded to could not operate as an automatic bar to or stay of the ongoing process. The defence and counter-claim were filed outside the timelines set on 7th July 2022, and after an interlocutory judgement had been regularly entered, for a second time. The defence and counter-claim were not properly on record, and the trial court was not obliged to consider them. The pending application for setting aside of the proceedings of 2nd August 2022, had been filed by a party who had been properly served with notice of the said proceedings, but who was absent when the hearing commenced. No stay orders had been granted, to provide basis for the trial court not proceeding with the process.

20. In the upshot, I find no merit in the appeal herein, and I hereby dismiss it, with costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 19TH DAY OF APRIL 2024

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Ms. Ngesa, instructed by Gitobu Imanyara & Company, Advocates for the appellant.

Mr. Okutta, instructed by Ouma-Okutta & Company, Advocates for the respondent.