Ndiege v Arasa (Civil Appeal E043 of 2022) [2024] KEHC 5158 (KLR) (2 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5158 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CIVIL APPEAL E043 OF 2022

WA OKWANY, J

MAY 2, 2024

BETWEEN

JOHN ODHIAMBO NDIEGE ..... APPELLANT

AND

SHARON MORAA ARASA ..... RESPONDENT

(Being an Appeal from the Ruling of B. Okong'o - RM dated and delivered on 13th October 2023 in the original Nyamira Chief Magistrate's Court Civil Case No. E181 of 2021)

JUDGMENT

Background

1. The Respondent herein was the Plaintiff before the trial court where she sued the Appellant/defendant vide Plaint dated 21st October 2021 seeking compensation for injuries that she sustained in a road traffic accident that occurred on 15th July 2021. The Appellant did not enter appearance of file a Defence despite service with the Summons to Enter Appearance and Plaint thereby resulting in the entry of interlocutory judgment on 5th May 2022.

2. The matter proceeded for formal proof and *ex-parte* judgment was thereafter delivered on 30th June 2022 thus precipitating the filing of an application dated 4th August 2022 for the setting aside of the ex-parte judgment. The trial court dismissed the said application thereby setting the stage for the instant Appeal.

3. The Appellant listed the following grounds of Appeal in his Memorandum of Appeal dated 13th October 2022: -

    1. The Learned Trial Magistrate erred in law and in fact in failing to consider or sufficiently consider the explanation provided by the Appellant in relation to delaying to file his Memorandum and defence on time.

2. The Learned Trial Magistrate erred in law and in fact by exercising his discretion in a capricious manner to the detriment and prejudice of the Appellant.

3. The Learned Trial Magistrate erred in law and in fact by failing to consider and appreciate the rules of natural justice and the applicable principles in dealing with the Application dated 4th August 2022.

4. The Learned Trial Magistrate erred in law and in fact by failing to find that the prejudice the Respondent suffered or is likely to suffer can be compensated by way of payment of costs.

5. The Learned Trial Magistrate erred in law and in fact by finding that the draft defence annexed to the Application dated 4th August raised no triable issues.

6. The Learned Trial Magistrate erred in law and in fact by finding that there was unreasonable delay in filing an Application seeking to set aside the ex-parte judgment yet the ex-parte judgment was entered on 30th June 2022.

7. The Learned Trial Magistrate erred in law and in fact by finding that the Respondent served the proper party by serving the Appellant's insurer.

4. The Appellant seeks the following prayers in the Appeal: -

1. The Appeal be allowed with costs.

2. The Ruling delivered on 13th October 2022 by Hon. B Okong'o vide Nyamira CMCC No. 181 of 2021 be set aside.

3. The Application dated 4th August 2021 be allowed with costs.

4. The court orders that the ex-parte proceedings taken vide Nyamira CMCC No. 181 of 2021 be set aside and the matter starts de novo.

5. Costs of the Appeal be borne by the Respondent.

5. The Appeal was canvassed by way of written submissions which I have considered. I however note that as at the time of writing this Judgment, only the Respondent had filed her submissions.

6. As the first appellate court, I am mindful of the duty set out in the decision of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* (1968) EA 123 to reconsider the evidence, re-evaluate the evidence presented before the trial court and draw my own independent conclusions of facts and law. In this regard, I will not depart from the findings made by the trial Court unless it is shown that the same was not based on evidence on record or where the said Court is shown to have acted on wrong principles of law as was held in *Jabane vs. Olenja* (1968) KLR 661, or where its discretion was exercised injudiciously as held in *Mbogo & Another vs. Shah* (1968) EA 93.

7. In it is noteworthy that the instant appeal arises from the exercise of discretion by the trial court. In Apungu Arthur Kibira vs. Independent Electoral & Boundaries Commission & 3 Others (2019) eKLR it was held that: -

> " We reiterate that in an appeal from a decision based on an exercise of discretionary powers, an Appellant has to show that the decision was based on a whim, was prejudicial or was

capricious. This was as determined in the New Zealand Supreme Court case of *Kacem v. Bashir* (2010) NZSC 112; (2011) 2 IVZLR 1 (Kacem) where it was held:

> " In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case, the criteria for a successful appeal are stricter:(l)error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.'"

8. In *Price & Another v Hilder* [1986] KLR 95 the Court of Appeal held that it would be wrong for the court to interfere with the exercise of the trial court's discretion merely because the Court's decision would have been different.

9. In *Kiriisa v Attorney-General and Another* [1990-1994] EA 258 the Supreme Court of Uganda, held that it is settled law that the discretion must be exercised judiciously and an appellate Court would not normally interfere with the exercise of the discretion unless it has not been exercised judiciously.

10. As to what the term "discretion" connote the said Court stated that:-

> " Discretion simply means the faculty of deciding or determining in accordance with circumstances and what seems just, fair, right, equitable and reasonable in those circumstances."

11. The main issue for my determination is whether, in the circumstances of this case, the trial court was justified in dismissing the Appellant's application to set aside the *ex-parte* judgment. In answering this question, the first issue for determination is whether the judgement in question is regular or an irregular one.

12. When answering the same question, the Court of Appeal stated as follows in *Bouchard International (Services) Ltd v M'mwereria* [1987] KLR 193: -

> " The basis of approach in Kenya to the exercise of the discretion to be employed or rejected under either Rule 8 or Rule 10 (the latter dealing with judgement by default) is that if service of summons to enter appearance has not been effected, the lack of an initiating process will cause the steps taken to set aside *ex debito justitiae*. If service of notice of hearing or summons to enter appearance has been served, then the court will have before it a regular judgement which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty and the exercise must be judicial. The court in doing so is duty bound to review the whole situation and see that justice is done. The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice."

13. The Court added that:

> " A judge has to judge the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed. Hence the justice of the matter, the good sense of the matter, were certainly matters for the judge. It is an unconditional unfettered discretion, although it is to be used with reason, and so a regular judgement would not usually be set aside unless the court is satisfied that there is a defence

on the merits, namely a prima facie defence which should go to trial or adjudication. The principle obviously is that, unless and until the court has pronounced a judgement upon the merits or by consent it is to have the power to revoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure."

14. The jurisprudence that emerges from the above decision is that where the judgement is irregular in the sense that service was not effected, or that the judgement was improperly or prematurely entered, then such a judgement is irregular and must be set aside as a matter of right. In such a scenario, it does not matter whether the defendant has a defence or not. All that the defendant has to do is to satisfy the court that the judgement was irregular and that is the end of the matter. In such a case, the issue of imposing conditions for setting aside the judgment will not arise.

15. On the flip side, where the judgement is regular, the court will still retain the wide discretion to set the same aside and in the event it decides to set aside the judgement it may, depending on the circumstances, do so on conditions that are just. In exercising discretion, the court's main concern is to do justice to the parties.

16. In the case of *Kenya Power & Lighting Co Ltd vs. Abdulhakim Abdulla Mohamed & another* [2017] eKLR the Court of Appeal took the view that: -

> " The overriding consideration in an application to set aside a default judgment where the intended defence raises triable issues and, absent evidence of intention or deliberate action by the Appellant to overreach, obstruct or delay the cause of justice, is to do justice to both parties...There was not even a remote suggestion that the Appellant would be unable to pay or would delay payment of the sum in question if after a full hearing it were found that the respondents are entitled to the money. The contested order, which demands that a party pay substantial sums of money in a claim which is yet to be proved and in respect of which the court has found that there is an arguable defence raising triable issues, does not appear to us in any way to advance or facilitate the just, proportionate, affordable and resolution of disputes as demanded by the overriding objective..."

17. In the instant case, it was not disputed that the Appellant was duly served with the Summons to Enter Appearance and Plaint. The Record of Appeal includes an Affidavit of Service dated 11th April 2022 sworn by one Bernard Chakua who states that he effected personal service on the Appellant 8th March 2022. Interlocutory judgment was entered on 5th May 2022.. The record also contains a copy of a demand letter dated 1st October 2021 that was sent to the Appellant's insurer Directline Assurance Company Ltd who were also served with a Notice of Institution of Suit dated 16th November 2021.

18. It is therefore clear to this Court that both the Appellant and his insurer were aware of the suit. The Appellant conceded that the was served with the summons but explained that he was still in the process of looking for an advocate to act for him when he was advised to forward the documents to the insurance company.

19. My finding is that the reasons advanced by the Appellant for failing to enter appearance were not satisfactory and instead paint him as an indolent litigant who took court summons for granted. I note that while the Appellant claimed that he informed his insurer about the case, he did not tender any evidence of such correspondence.

20. I find that the Appellant had ample time between service with summons and the date of interlocutory judgment within which he could have engaged an advocate to act for him in the matter.

21. Having regard to the observations and findings that I have made in this judgment, I find that the instant appeal stands on very shaky ground as the Appellant's actions did not result from an excusable mistake or error so as to warrant this court's exercise of discretion in his favour. I am guided by the decision in *Pithon Waweru Maina vs. Thuka Mugiria* [1983] eKLR, Civil Appeal No 27 of 1982, where the court held: –

> " 2. The principles governing the exercise of judicial discretion to set aside an *ex-parte* judgment obtained in default of either party to attend the hearing are: -
>
> a. Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.
>
> b. Secondly, this discretion is intended so 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 has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. *Shah vs. Mbogo* [1967] EA 116 at 123B, *Shabir Din vs. Ram Parkash Anand* (1955) 22 EACA 48..."

22. In the circumstances, I find that the party who stands to suffer more prejudice and injustice is the Respondent herein who diligently pursued her cause to the end and who should not be unfairly denied the opportunity to enjoy the fruits of her judgment.

23. My above findings on the merits of the Appeal notwithstanding, this court will, reluctantly and purely in the interest of justice, exercise its discretion and allow it but on condition that the Appellant shall, within 30 days from the date of this judgment, deposit the entire decretal sum in court as security for the judgment sum. In the event of failure to comply with the above condition, the Appeal shall stand dismissed, in which case, the Respondent shall be at liberty to proceed with the execution.

24. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 2ND DAY OF MAY 2024.

W. A. OKWANY

JUDGE