Kavoi & another v Misingo (Civil Appeal E732 of 2022) [2024] KEHC 9645 (KLR) (Civ) (15 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9645 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E732 OF 2022

H NAMISI, J

JULY 15, 2024

BETWEEN

BERNARD MULI KAVOI .... 1ST APPELLANT

JOSEPH KIMEU .... 2ND APPELLANT

AND

SIMON LINGALWA MISINGO .... RESPONDENT

(Being an Appeal from the Ruling of Hon. C.K Cheptoo, Principal Magistrate delivered on 7th September 2022 in Milimani CMCC No. 7855 of 2018)

JUDGMENT

1. This appeal arises from a Ruling by the learned Magistrate delivered on 7th September 2022 in respect of Notice of Motion dated 8th September 2021 by the Appellants.
2. The genesis of the matter is a suit filed in the trial court by the Respondent vide Plaint dated 5th March 2018 seeking general damages for pain, suffering and loss of amenities, as well as special damages in respect of a road traffic accident that occurred on 26th November 2016. According to the Affidavit of Nelson Kaburu Advocate dated 25th January 2022 interlocutory judgement was entered against the Appellants on 29th October 2019. On 24th March 2020, the Appellants herein entered appearance through the firm of Kairu & McCourt Advocates, and filed their Statement of Defence, List of Witnesses and List of Documents.
3. It is notable that the Appellants did not provide the proceedings of the trial court nor the impugned Ruling. The same are not contained in the Record of Appeal dated 29th May 2023. Fortunately, the lower court file was placed before me, thus enabling me to put the pieces of the puzzle together.

4. On 21st September 2020, the matter proceeded for hearing. From the record, Counsel for the Appellants did not attend court. On 1st October 2020, Counsel for the Respondent confirmed that he had filed his submissions, and the trial court reserved judgement for 18th November 2020. Judgement was delivered on 16 December 2020 in the absence of Counsel for the Appellants.

The Application

5. The Appellants then filed a Notice of Motion dated 8th September 2021, seeking a number of prayers, inter alia:

   (2) That the Honourable Court do grant leave to the firm of M/s Kimondo Gachoka & Company to come on record for the Defendants/Applicants and to put in a notice of Appointment of Advocates;

   (3) That there be a stay of execution of the ex parte judgement entered on 16th December 2020 by the Hon. P. Muholi, SRM and all other consequential orders against the Defendants/ Applicants pending the hearing and determination of the Application;

   (4) That the interlocutory judgement, ex parte judgement and/or Court proceedings thereof be set aside and the matter begin de novo and the Defendants/Applicants be allowed to fairly participate in the proceedings

   (5) That the ex parte judgement and all other consequential orders thereof entered on 16 December 2020 herein against the Defendants/Applicants be set aside and the Defendants/ Applicants be granted a chance to ventilate their Defence on merit

6. The Application was supported by the Affidavit sworn by the 1st Appellant. At paragraph 4 thereof, the 1st Appellant deponed that on 30th August 2021, his insurer was served with a letter demanding for payment on account of a judgement which both him and his insurer did not know of its existence.

7. At paragraphs 8 and 9 of the Supporting Affidavit, the 1st Appellant deponed that he had previously, through his insurer instructed the firm of Kairu & McCourt to come on record and file a defence on his behalf. The said firm failed to come on record and/or file a defence on his behalf thus occasioning interlocutory judgement and ex parte judgement to be entered against the 2nd Appellant and himself. To his Affidavit, the 1st Appellant annexed a draft statement of Defence.

8. In response thereto, Counsel for the Respondent swore an Affidavit dated 25th January 2022, narrating the history of the matter. Parties filed their respective submissions and the Court delivered its Ruling thereon.

The Appeal

9. Being dissatisfied with the Ruling of the Magistrate Court, the Appellant filed a Memorandum of Appeal dated 7th September 2022 on the following grounds:

   i. That the Learned Magistrate erred in law and fact in dismissing the Appellants' applications dated 8th September 2021 and 18th May 2022;

   ii. That the Learned Magistrate erred in law and in fact by dismissing the Appellants' application dated 8th September 2021 and 18th May 2022 without considering the repercussions it would do to the Appellants and without giving consideration to the legal question thereby arriving at a wrong decision;

iii. That the learned Magistrate erred in law and fact in dismissing an application seeking to cure an injustice meted out upon the Appellants which led to the matter proceeding ex parte;

iv. That the Learned Magistrate erred in law and fact in failing to rectify an inadvertence or excusable mistake or error that could have been put right by the payment of costs;

v. That the Learned Magistrate erred in law and in fact in denying the Appellants an opportunity to ventilate their defence despite the Respondent did not demonstrate the prejudice likely to be suffered which could not be compensated with costs;

vi. That the learned Magistrate's decision occasioned a miscarriage of justice;

vii. That the learned Magistrate erred in law and in fact by failing to observe sections 1A, 1B of the *Civil Procedure Act* and Article 159 of *the Constitution* of Kenya, 2010 thereby arriving at a wrong decision;

viii. That the Learned Magistrate erred in applying the wrong principles of law thereby arriving at a wrong decision;

ix. That the learned Magistrate erred in law and in fact by wholly misapplying her judicial discretion in the circumstances obtaining the case

10. Despite directions to parties to file their written submissions, no submissions had been filed by the time of writing this judgement.

11. In the impugned Ruling, the trial court enumerated 5 issues for determination, namely:

i. Whether the Applicants are properly on record

ii. Whether the applicant was properly served with summons

iii. Whether the summary judgment entered herein is valid

iv. Whether the draft defence raises triable issues

v. Whether this court should grant the orders sought.

12. The trial court addressed each of these issues in its judgement. On issue (i), the trial court noted that the firm of Kairu & McCourt was still properly on record for the Appellants.

13. On issue (ii), the trial court found that the Appellants were duly served with summons, entered appearance and filed a defence dated 24 March 2020.

14. On issue (iii), the trial court noted that the interlocutory judgement was entered on 29th October 2019. Thereafter the Appellants entered appearance and filed a defence. Therefore, the judgement entered was regular.

15. On issue (iv) the trial court noted that there are two defences on record, and did not make a determination on this.

16. On issue (v), the trial court found that the Appellants were not entitled to orders sought. The court then dismissed the application with costs to the Respondent.

Analysis and Determination

17. Before delving into the grounds raised by the Appellants herein, it is important to first address the most pertinent issue; whether or not Counsel for the Appellants (Defendants/Applicants) were properly on

record in the lower court matter. In the submissions in the trial court, the Respondent made reference to the provisions of the Civil Procedure Rules on appointment and/or change of Advocates. The Respondent argued that the firm of Kimondo Gachoka is not properly on record and the Notice of Motion, having been filed by a firm that is not on record, must ipso facto, be struck out. Similarly, in its Ruling, the trial court noted that the firm of Kairu & McCourt was still properly on record for the Appellants.

18. Order 9 rule 5 of the Civil Procedure Rules provides as follows:

> A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause of matter, including any review or appeal.

19. Order 9 rule 9 thereof provides as follows:

> When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgement has been passed, such change or intention to act in person shall not be effect without an order of the court –
>
> a. Upon an application with notice to all parties; or
>
> b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be

20. The purpose of Order 9 rule 9 was aptly discussed in the case of Serah Wanjiru Kungu -vs- Peter Munyua Kimani [2021] eKLR where the Court struck out an application by Advocates who were not properly on record. The court observed thus:

> The above framework was introduced in the Civil Procedure Rules to deal with disruptive changes that litigants and advocates used to effect, often for the purpose of unfairly dislodging previous advocates without settling their costs. The provision on filing a consent between the outgoing and the incoming law firms was intended to ease the process of effecting change of advocates post-judgment. In my view, once the consent is executed and filed and a notice of change is filed, the new law firm is properly on record. The adoption of the consent as an order of the Court is merely intended to make the Court record clear for avoidance of doubt…"

21. Courts have not been hesitant to uphold Order 9 rule 9 of the Civil Procedure Rules. In the case of Jackline Wakesho v Aroma Cafe [2014] eKLR, the Court held as follows;

> " Although the foregoing objection appears like a technical procedural issue, this Court finds that the default by the Applicant goes to the jurisdiction of the Court to entertain the motion. The reason for the foregoing reasoning is that the Court has no jurisdiction to preside over incompetent proceedings filed by counsel who lack locus standi. The Court has been asked to invoke the oxygen principle under Section 1A and 1B of the *Civil Procedure Act* and entertain the Motion. The Court will not however do that. The reason for the foregoing is twofold. Firstly, there are several judicial pronouncements cited by the claimant

which show that Court's have over the time declined to entertain proceedings filed by new advocates appointed after judgment without complying with Order 9 rule 9....

22. Looking through the lower court file, I see no evidence that Counsel for the Appellants complied with these provisions of the Civil Procedure Rules prior to filing the application. In essence, Counsel had no locus standi before the lower court, a point that was addressed by the trial court in issue (i) before it.

23. Having found that the Application was incompetent, there would be no need to further address the grounds of appeal presented by the Appellants.

24. Be that as it may, even if this Court was to overlook the issue of locus, there are various other reasons that make me reluctant to interfere with the trial court's ruling. The inconsistency in the averments by the 1st Appellant are very telling. On the one hand, he deponed that he and the insurer were unaware of the judgement entered by the trial court. Next, he averred that through his insurer he instructed the firm of Kairu & McCourt, who did not enter appearance nor file a Defence, which averments were completely untrue. Consequently, there is a Statement of Defence filed by the first firm, and a draft Statement of Defence prepared by the second firm. It is no wonder the trial court did not want to address the issue of triable issues, as it is not clear which Statement of Defence the Appellants seek to rely on.

25. In view of the foregoing, I find no fault on the part of the trial magistrate dismissing the application by the Appellants. I would have arrived at the same decision.

26. I, therefore, find that the appeal fails.

27. Having not filed any documents herein, the Respondent is awarded costs of this appeal assessed at Kshs 10,000/-.

DATED AND DELIVERED AT NAIROBI THIS 15 DAY OF JULY 2024.

HELENE R. NAMISI

JUDGE

In the presence of:

.......N/A .... for the Appellants

......Mr. Kaburu .... for the Respondent