Mung'ou v Invesco Assurance Company Limited (Civil Appeal E003 of 2022) [2024] KEHC 9040 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9040 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CIVIL APPEAL E003 OF 2022

AC MRIMA, J

JULY 25, 2024

BETWEEN

TITUS MUNG'OU ..... APPELLANT

AND

INVESCO ASSURANCE COMPANY LIMITED ..... RESPONDENT

(Being an appeal from the Ruling of Hon. V.W. Karanja (P.M.) in Kitale Chief Magistrate Civil Case No. 220 of 2019 delivered on 15 th December 2021)

JUDGMENT

Background

1. Titus Mung'ou, the Appellant herein, instituted the Plaint dated 24th June 2019 against Invesco Assurance Co. Limited, the Respondent herein.

2. The Respondent was the insurer of one Moses Bushudi's vehicle, KAY 188Z that got involved in a road traffic accident along Kapsokwony-Kimilili road, that fatally injured Celestine Tengan Mong'ou.

3. As a result of the accident, the Appellant herein instituted KimililiSenior Principal Magistrates Court Civil Case No. 118 of 2015, Titus Mung'ou -vs- Moses Bushdish & Bonface Sirkori Cheptorus (hereinafter referred to as 'the primary suit') seeking compensation.

4. In the said primary suit, the Defendants (Moses Bushdish & Bonface Sirkori Cheptorus) did not file a response. Accordingly, the suit proceeded to formal proof. In the end, an ex-parte judgment was entered. The Appellant pleaded that he was awarded Kshs. 6,029,415/-.

5. Subsequently, the Appellant instituted a declaratory suit in Kitale Chief Magistrates Court Civil Suit No. 220 of 2019 (hereinafter referred to as 'the declaratory suit'). He sought to have the Respondent settle the decretal sum in the primary suit.

6. Upon assessing the circumstances of the case, the Court was of the finding that the motor vehicle KAY188Z was insured by the Respondent at the material time and since the Respond did not defend the suit, it had the obligation to settle the claim.

7. As it would turn out, the Respondent instituted the Notice of Motion application dated 28th September 2021 (hereinafter referred to as 'the application'). It sought inter alia to stay the execution of the decree in the primary suit, to set-aside the ex-parte judgement and that the Respondent be granted leave to file its defence such that the case would be heard inter-partes.

8. In the alternative, the Respondent urged the Court to review its ex-parte judgment and leave be granted for it to defend the suit.

9. The Respondent disputed service. It was their case that they only became aware of the suit in the year 2020 when they were served with proclamation and warrants of attachment. The Respondent annexed a draft Defence in their application.

10. Upon considering the application, the trial Court, in its Ruling of 15th December 2021, was of the assessment that the Applicant had raised issues that warranted the setting aside of its judgment in order to allow the Respondent to defend itself. It directed it to file and serve its defence.

11. The foregoing Ruling instigated the instant appeal.

The Appeal

12. Through the Memorandum of Appeal dated 26th January 2022, the Appellant urged this Court to set aside the Ruling of the trial Court on the following grounds;

    1. That the learned trial magistrate erred in law and in fact when she set aside Judgment and yet there was no sufficient reason for doing so as the Respondent had been properly served with summons to enter appearance.

    2. That the learned trial magistrate erred in law and fact when she failed to appreciate that the respondent had made part payment of the claim and as such the Respondent had admitted the claim.

    3. That the learned trial magistrate erred in law and in fact when she failed to appreciate that for the Respondent to have a good defence to the claim, it had to have filed a case to repudiate liability which it has never done to date over six years since the accident occurred.

    4. That the learned trial magistrate erred in law and in fact when she failed to appreciate that the respondent took 10 months after paying the claim to file an application to set aside Judgment with no explanation.

    5. That the findings of the learned trial magistrate were against the weight of the available evidence.

The submissions:

13. The Appellant filed the main and supplementary submissions dated 7th July 2023 and 26th July 2023 respectively.

14. It was his case that the Respondent could not claim that it was not aware of the case since documents on record indicated that it was properly served and all along received notices in respect to the suits herein.

15. He submitted that the Respondent did not dispute service of Summons to Enter Appearance and proffered no explanation for the delay in filing the application at the trial Court. The Appellant referred to Civil Case No. E180 of 2022, Mathews -vs- Masika KEHC 1294 (KLR) where it was observed that where it was observed;

> ...the discretionary power of the Court under Order 1 rule 11 of the Civil Procedure Rules is intended to be exercised to avoid injustice and hardship and not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice. In exercising this discretion, the Court is entitled to look at the entire circumstances of the case, the conduct of the parties, whether the defendant has a defence to the claim and any prejudice that may be occasioned to the plaintiff.

16. The Appellant faulted the Respondent for lodging the application seeking to set aside the judgment one year after the service of Summons to enter appearance. He submitted that the Court ought to have been given reasons for the delay and considered the dictates of Article 159 of *the Constitution* that requires justice not to be delayed.

17. The Appellant submitted that the Respondent was under an obligation to make full payment after it had made an initial payment of Kshs. 100,000/-. The decision in Patrick Muturi -vs- Kenindia Assurance Company Ltd (1993) eKLR was referred to where it was observed that once an insurer has chosen to pay or reinstate, it is bound by the choice and cannot afterwards change its mind.

18. The Appellant further contended that upon investigations being concluded, the Respondent was under an obligation to file a suit seeking to avoid liability under the policy. Based on the decision in BlueShield Insurance Company Limited -vs- Samuel Nyaga Ngurukiri (2008) eKLR where it was held that the failure to avoid liability by obtaining a declaratory judgment on the basis of misrepresentation or non-disclosure of a material fact stripped the Appellant the right to seek solace under Section 10(4) of the *Insurance (Motor Vehicles Third Party Risks) Act*.

19. In conclusion, the Appellant submitted that for the Respondent to have a good defence, it ought to have filed a declaratory suit removing itself from liability. It was its case that before such case was filed, the Respondent was served with a Statutory Notice of the intention to sue. Reference to that end was made to Geminia Insurance Co. Ltd. -vs- Rombo Enterprise Ltd, where it was observed,

> The insurance company cannot deny liability unless it has filed a case to repudiate liability, it cannot just wake up and say it is not paying.

20. In the supplementary submissions the Appellant reiterated its arguments and fortified the position that the trial Magistrate wrongly exercised discretion in allowing the Respondent's application.

The Respondent's case:

21. Invesco Insurance Company Limited urged its case through written submissions dated 21st July 2023. It was its case that the appeal was bereft of merit since the trial Magistrate exercised her discretion judiciously based on the principles of setting aside ex-parte judgments as appreciated alongside Order 10 Rule 11 of the Civil Procedure Rules.

22. In urging this court to do justice to the parties, the Respondent drew support from the Court of Appeal decision in Patel -vs- East Africa Cargo handling Services Ltd. (1974) E.A.

23. The Respondent disputed service of summons to enter appearance. It claimed that it became aware of the case when it was served with a proclamation and warranty of attachment.

24. It was its case that even if service was effected, it had demonstrated sufficient reason for not appointing an Advocate in time when it became aware of the matter. It attributed failure to shortage of staff due to COVID-19 protocols, a fact which justified the delay.

25. The Respondent referred to the decision of the Court of Appeal in CMC Holdings Ltd. James Mumo Nzioki (2004) eKLR where discretion to set aside ex-parte orders were discussed as follows;

> The discretion that a court of law has in deciding whether or not to set aside ex-parte orders such as before us was meant to ensure that a litigant does not suffer injustice as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident to error.

26. It was the Respondent's further case that part payment was not admission of the claim. It was its case that it made the payment under duress due to the threat of eminent execution.

27. In justifying the claim that the defence raised triable issues, the Respondent submitted that under Section 5(b) of the Insurance (Third Party Risks) Act a policy was not required to cover liability in any sum in excess of three million shillings arising out of a claim by one person.

28. The decision in Direct line Assurance Company Limited -vs- Ndundu Kithonga (suing as the Personal Representative of the Estate of Betty Mutindi (Deceased) (2021) eKLR was relied upon where it was observed;

... In my considered view, the Appellant denied liability of any amount that was in excess of what the statute provided. That contestation in my view, revealed that there was a triable issue which entitled the Appellant to be heard before being condemned.

29. In conclusion, the Respondent submitted that considering that the amount sought is more than the statutory limit and that service of mandatory statutory notice, which forms basis of liability was in dispute, there was no reason to impeach the trial Magistrate's ruling.

30. It was the Respondent's plea that the appeal be dismissed with costs.

Analysis:

31. Having appreciated the parties' respective positions, the two following issues arise for determination: -

    i. Whether Summons to enter appearance were properly served upon the Respondent.

    ii. Depending on (i) above, whether in the circumstances of the suit, the trial Magistrate rightly exercised discretion in setting aside the Appellant's ex-parte judgment.

32. This being a first appeal, this Court must remind itself that its duty as was observed by the Court of Appeal in the case of Susan Munyi v Keshar Shiani [2013] eKLR is to re-look and re-analyse the evidence presented before the trial court all-over again. The Court observed: -

... As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.

33. Further, in Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR the Court set out the role of the first appellate Court in the following terms: -

.... This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-e valuate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority vs Kustron (Kenya) Limited 2000 2EA 212.

34. The Court will, hence, consider the two issues.

    a. Whether Summons to enter appearance were properly served upon the Respondent:

35. This issue is quite crucial in this appeal as its determination has far reaching impact. For instance, if it is found that the Respondent was not served with the Summons as required in law, then the ex-parte judgment ought to have been set-aside as of right.

36. The Appellant got judgment in the primary suit on 6th September 2016. Subsequently, on 24th June 2019, he lodged the declaratory suit against the Respondent herein.

37. In their submissions, the Respondent contested service of summons to enter appearance.

38. This Court has carefully sifted through the civil suit. There is 'Summons to enter appearance' dated 28th June 2019. Evidence of service upon the Respondent herein is demonstrated by their official stamp. It shows that the Respondent was served with the Summons through its Claims Department on 3rd July 2019.

39. Further, the Affidavit of Service deposed to by Concephter Oduor, a Process Server, on 20th August 2019 fortifies proof of service. The Process Server deposed that he received the Summons to enter appearance on 2nd July 2019 from the firm of M/S Munialo & Co. Advocates and effected service upon the Respondent on 3rd June 2019.

40. Be that as it may, where a party contests service, the burden of proof is upon such a party to demonstrate irregularity of service, by among other things, calling upon the process server for purposes of cross-examination.

41. The Court of Appeal discussed the foregoing in Civil Appeal No. 122 of 1986, Shadrack arap Baiywo -vs- Bodi Bach KSM CA [1987] eKLR, by quoting the scholarly works of Chitaley and Annaji Rao; The Code of Civil Procedure Volume II page 1670 where it is observed;

    .... There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service.

42. It, therefore, behoved the Respondent to travel outside the bounds of simply denying service by applying to have the Process Server subjected to the rigours of examination or to in any other manner disprove the service.

43. The Respondent just simply disputed service. However, the evidence before this Court is irrefutable. This Court is satisfied, and as such finds and hold, that the Respondent was properly served with the Summons to Enter Appearance.

44. Having so found, the judgment on record in the declaratory suit is a regular judgment.

b. Whether, in the circumstances of the suit, the trial Magistrate rightly exercised discretion in setting aside the Appellant's ex-parte judgment:

45. The factors that aid a Court in arriving at a decision to set aside an ex-parte judgment were comprehensively discussed by the Court of Appeal in CMC Holdings Ltd vs. Nzioki [2004] KLR 173. The Learned Judges observed as follows;

> ... In an application for setting aside ex parte judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously... In law, the discretion that a Court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle. In the instant case the learned trial magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant's unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place ex parte and hence it would appear was true and not if true, the effect of the same on the ex parte judgement was entered as a result of the non-appearance of the appellant and on the entire suit. The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate...The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the ex parte judgement is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues. The law is now well settled that in an application for setting aside ex parte judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues. The Court has wide discretion in such cases to set aside ex parte judgement. In the instant case, the defence and counterclaim were already in the file when the matter was heard ex parte and the trial magistrate stated that she considered the same and dismissed the same defence and counterclaim when the appellant was not in court to put forward its case. Further it appears that certain matters raised in the defence were not considered at all and indeed could not be considered without the appellant's input..... What the Trial Court should have done when hearing the application to set aside the ex parte judgement was to ignore her judgment on record and look at the matter afresh considering the pleadings before her and see if on their face value a prima facie triable issue (even if only one) was raised by the defence and counterclaim. If the same was raised, then whether the reasons for the appellant's appearance were weak, she was in law bound to exercise her discretion and set aside the ex parte judgement so as to allow the appellant to put forward its defence. Of course, in such a case, the applicant would be condemned in costs or even ordered to pay thrown away costs. The learned judge should not have considered what the learned Trial Court had concluded on the evidence before her but should have in the same way looked at the pleading and considered whether a triable issue was raised by the defence and if so, then the appeal should have been allowed.

46. In Shah vs. Mbogo & Another [1967] EA 116, the Court discussed the subject of setting aside ex-parte judgments. It was held that the decision whether or not to set aside an ex-parte judgment is discretionary and that the discretion is intended so to be exercised to avoid injustice and 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.

47. Speaking to setting aside a regular judgment, the Court of Appeal in Bouchard International (Services) Ltd v M'mwereria [1987] KLR 193, held that:

> 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 judgment 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...

48. The Court went on to state 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 judgment, if necessary, upon terms to be imposed....

49. Therefore, irregular judgments are to be set-aside as of right, that is ex debito justitiae, whereas regular judgments may or may not be set-aside depending on the peculiar circumstances in a particular case. A regular judgment may also be set-aside on conditions.

50. Returning to the case at hand, there is no doubt that the ex-parte judgment in the declaratory suit was regularly entered. That is because the Respondent was properly so served with the Summons to Enter Appearance, but it failed to enter appearance and to defend the case.

51. The Respondent gave several reasons on its failure to defend the suit. They included that the Respondent was not aware of the matter in the year 2020 until they were served with proclamation and warrants of attachment, that the Respondent was working under skeleton staff due to Covid-19 restrictions; that upon instructing an investigator, it discovered that it was not liable since the primary suit was outside the scope of the cover given to the insurer and that they did not defend the primary suit since the insured did not report the claim nor pay the requisite policy excesses.

52. Out of the reasons proffered above, the allegation that the Respondent was not aware of the matter in the year 2020 until they were served with proclamation and warrants of attachment cannot stand. That is because this Court has already found that the Respondent was properly served with the Summons to Enter Appearance.

53. As this Court considers the rest of the reasons as to ascertain whether the judgment on record ought to be interfered with, an issue emerges which ought to be considered as well. It is the effect of the Respondent making part payment of the claim.

54. The Respondent readily admitted that it truly made a payment of Kshs. 100,000/= vide two Bankers Cheques. It, however, went further to explain that it did so to forestall the execution which was eminent. According to the Respondent the payment was made under duress and on a without prejudice basis.

55. The Appellant did not see it that way. To the Appellant, the part payment was made without any duress or coercion and that the payment was in good faith and in satisfaction of the decree in the civil suit.

56. It is a well settled legal position that anyone who alleges must prove. [See Sections 107, 108 and 109 of the *Evidence Act*]. Allegations of duress or coercion are, without doubt, very serious. There is, hence, a legal obligation bestowed on a party alleging as much to prove such allegations.

57. The record does not show that the cheques were forwarded to the Appellant's Counsel on a without prejudice basis or under any protest. There was a lawful execution in situ and the payment was aimed at making good the judgment, albeit partly. This Court does not, therefore, agree with the Respondent that it made the payment under duress or coercion.

58. The next issue, which is closely related to the foregoing is the time taken between the payment and the filing of the application to set aside the judgment. The payment was made sometimes in December 2020 and the impugned application was filed on 21st September 2021. That was a period of around 9 months later. How does, therefore, the issue of coercion and duress arise?

59. None of the reasons advanced by the Respondent satisfactorily explain such a long delay. What comes to the fore is that the Respondent was intent on settling the judgment in the declaratory suit and began liquidating it in piecemeal. The unexplained filing of the application after such a long period casts serious aspersion on the Respondent's conduct and intention.

60. The Respondent raised other issues for the setting aside of the judgment. They include the issue as to whether it should satisfy the judgment beyond the statutory limit of Kshs. 3,000,000/=. There was also the issue of the manner in which the insured handled the primary suit and whether the Respondent was served with the Statutory Notice by the Appellant herein.

61. To this Court, the issues are germane. They transcend into the arena of triable issues. The Respondent, hence, ought to be accorded an opportunity to contend on those issues. That can only be possible if the judgment is set-aside. However, that should only be conditional given the Respondent's conduct.

62. One of such conditions is to deposit a sum of money which is allegedly within the Respondent's limit of liability pending the determination of the declaratory suit. On that score, this Court notes that the sum of Kshs. 100,000/= was already paid to the Appellant's Counsel.

63. On the foregoing, this Court finds that the two issues have been satisfactorily dealt with and the matter may rest here.

Disposition

64. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 thereby mostly being away from the station. Apologies galore.

65. In the end, the following final orders hereby issue: -

    a. The appeal partly succeeds.

    b. The part of the ruling dated 15th December 2021 granting the Respondent unconditional leave to defend the suit is hereby set-aside.

    c. Leave to defend Kitale Chief Magistrates Court Civil Suit No. 220 of 2019 is hereby granted to the Respondent on condition that it deposits the sum of Kshs. 2,000,000/= [Read Kenya

Shillings Two Million Only] into a joint interest earning account in the names of the Advocates on record within 21 days of this judgment.

d. In the event of default of (c) above, the Notice of Motion dated 28th September 2021 shall stand dismissed with costs and the Appellant shall be at liberty to levy execution.

e. Since the appeal has partly succeeded, each party to bear its own costs.

66. Orders accordingly.

DELIVERED, DATED and SIGNED at KITALE this 25th day of July, 2024.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of:

No appearance for Miss. Munialo, Counsel for the Appellant.

Mr. Kinyanjui, Counsel for the Respondent.

Chemosop/Duke – Court Assistants.