Nyoro Enterprises Limited v Pwani Oil Products Limited (Civil Appeal 034 of 2024) [2024] KEHC 9018 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9018 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL APPEAL 034 OF 2024

EM MURIITHI, J

JULY 25, 2024

BETWEEN

NYORO ENTERPRISES LIMITED ..... APPELLANT

AND

PWANI OIL PRODUCTS LIMITED ..... RESPONDENT

RULING

1. By a Notice of Motion under certificate of urgency dated 5/5/2024, brought under Sections 1A, 1B, 3A and 80 of the *Civil Procedure Act*, Article 159(2) of *the Constitution*, Order 45 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law, the Applicant seeks that:
    1. Spent
    2. The Honorable Court be pleased to review the Ruling of the Honorable Court dated 25/4/2024.
    3. The Honorable Court be pleased to issue an order for stay of execution of the ex-parte judgment dated 17/07/2023 pending the hearing and determination of this application.
    4. The Honorable Court be pleased to issue an order for stay of execution of the ex-parte judgment dated 17/07/2023 pending the hearing and determination of the appeal.
    5. Costs of this application.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Oteko Winnie, the Applicant's Advocate, sworn on even date. She avers that the proceedings herein were commenced by way of a Memorandum of Appeal dated 12/3/2024 filed by the firm of Kiruki & Kayika Advocates challenging the ruling of the trial court in Meru CMCC No. E103/2023. The said firm thereafter applied for stay of execution vide an application dated 13/3/2024,

which was dismissed on 25/4/2024. On obtaining a copy of the ruling, the Applicant realized that the same was marred with mistakes and now implores the court to review it and grant the orders sought. Primarily, the court failed to ascertain that the substance of the application was to stay an ex-parte judgment entered into by the trial court, and that oversight by the court extends to condemn the Applicant unheard as the judgment will be executed, which is a manifest breach of the Applicant's right to be heard as espoused in *the Constitution*.

3. The application was responded by a Replying Affidavit sworn by Counsel for the Respondent on 14/6/2024, primarily opposing the application on grounds of alleged want of competence and merit, as set out in paragraphs 2-8 thereof:

> "2. That I have read and understood the notice of motion dated 5/5/24 brought under certificate of urgency together with supporting affidavit, and served upon us on 14/6/24 and I have respectively concluded that the said application:
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> i. Lacks merits,
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> ii. Meant to deny the respondent from enjoying fruits of litigation;
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> iii. Brought in bad faith:
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> iv. Overtaken by events; and
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> v. An abuse of the court process:
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> 3. That the Application is defective.
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> 4. That the Application has not met the grounds seeking an Application for review. This is akin to asking the court to sit on appeal of its decision and reverse it. The fact that a party believes that the court should have reached a different conclusion or that the decision was erroneous are matters fit for appeal rather than review which is limited in scope.
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> 5. That the court was warranted to find that the Appellant was served with summons as previously in the Application filed in the lower court, the Applicant admitted to have been served with Summons but avers that they failed to enter appearance because the officer assigned the matter by the insurer did not forward the matter for action.
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> 6. That the Appellant is keen on changing goal posts to his advantage and this court should not allow an application by a litigant who is malicious. The conduct of the Appellant is punishable by law.
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> 7. That orders for stay of execution pending Appeal are discretionary and only allowed if the Applicant has met a/l the conditions. In this particular case, the court was correct in finding that the conditions had not been met.
>
> 8. That no defence has been annexed hence evidently there is no defence worth referring to the trial court."

4. When the matter came for hearing on 9/7/2024, counsel for the parties relied on the pleading and affidavits filed, and ruling was reserved.

Determination

5. In order to succeed in its quest for review, the Applicant is required to establish to the satisfaction of the court any one of the following three main grounds as stipulated under Order 45 of the Civil Procedure Rules:

> " i. That there is discovery of new and important evidence which was not available to the applicant when the judgment or order was passed despite having exercised due diligence; or
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> ii. That there was a mistake or error apparent on the face of the record; or
>
> iii. That sufficient reasons exist to warrant the review sought. In addition to proving the existence of the above grounds, the applicant must also demonstrate that the application was filed without unreasonable delay."

6. At paragraphs 6, 7, 10, 11, 12 and 13 of the supporting affidavit, the Applicant's counsel accuses the court of mistakenly and erroneously ruling on the application of 13/3/2024. At paragraph 6 thereof, the deponent avers that:

> " 6. On obtaining a copy of the ruling, the Appellant is aggrieved by the decision of the Honorable Court as the same is marred by mistakes and now humbly implores the Honorable Court to review the same and award the orders sought in the application herein.
>
> 7. Primarily, this Honorable Court failed to ascertain that the substance of the Application was to stay an ex-parte judgment entered into by the trial court in Meru CMCC No. E103 of 2023 involving the parties herein.
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> 8. The oversight by the Honorable Court extends to condemn the Applicant unheard as the ex-parte judgment will be executed which is a manifest breach of the Appellant's underogable right to be heard as espoused under *the Constitution* of Kenya.
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> 10. The Honorable Court mistakenly and erroneously ruled under paragraph 13 that the Applicant has got no substantial loss to suffer yet the Appellant is a company whose execution has many implications in the following ways.....
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> 11. The Honorable Court mistakenly ruled and found that the Applicant was served with the Court process of the trial court despite the fact that the attached summons do not contain the name or designation of the person who indeed received and signed them.
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> 12. The Honorable Court mistakenly visited the mistake of counsel and the legal office at the Applicants insurer.....
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> 13. the Honorable Court mistakenly relied on the paragraph 3 of the Notice of Motion dated 30/10/2023 filed in the lower court in a bid to set aside the judgment as the same was an honest confession on the part of the Applicant's insurer aimed at demonstrating the honest mistake on their part, a mistake which should not be relied on or used to indiscriminately condemn the Applicant."

The question is whether the grounds set out in the affidavit can found the basis for review within the ambit of Order 45 Rule 1 of the Civil Procedure Rules.

7. The Court of Appeal Mwihiko Housing Company Ltd v Equity Building Society [2007] eKLR rendered as follows:

> "It is trite law, and we reiterate, that a review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground of review that another Judge could have taken a different view of the matter. Nor can it be a ground of review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review. See Nairobi City Council vs. Thabiti Enterprises Ltd [1995-98] 2EA 251 (CAK)."

8. The court consider that to litigate the grievances set out above, the proper procedure would have been to appeal against the ruling of 25/4/2024 rather than seek review. An erroneous conclusion of law is not a ground for review. See also National Bank of Kenya Limited vs Ndungu Njau [1997] eKLR.

9. The central question in dispute between the parties is the interlocutory judgment sought to be set aside on appeal. The Court of Appeal in James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR, said the following as to setting aside of interlocutory judgements:

> "We shall first address the ground of appeal that faults the learned judge for setting aside the default judgment and consequential orders in the circumstances of the case. From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See Mbogo & Another v. Shah (supra), Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173).
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> In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned

without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango Oloo v. Attorney General [1986-1989] EA 456). The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in Sangram Singh v. Election Tribunal, Koteh, AIR 1955 SC 664, at 711:

> "[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."
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> The approach of the courts where an irregular default judgment has been entered is demonstrated the following cases. In *Frigonken Ltd v. Value Pak Food Ltd, HCCC NO. 424 of 2010*, the High Court expressed itself thus:
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> > "If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court ex debito justitiae. Such a judgment is not set a side in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process."
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> > Earlier in Kabutha v. Mucheru, HCCC No. 82 of 2002 (Nakuru) Musinga, J. (as he then was) had expressed the principle thus:
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> > > "[W]ith respect to the trial magistrate, she had no discretion to exercise in the circumstances of the case since there was no service at all and as earlier said, the default judgment had to be set aside as a matter of right. Discretion would have arisen if service was proper and there had been for example delay in entering appearance. Where there is no service of summons to enter appearance, an applicant does not have to show that he has an arguable defence so as to persuade the court to set aside an ex parte judgment. In such circumstances, the court is under a duty to remedy the situation and uphold the integrity of the judicial process.
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> > > (See also, Bouchard International (Services) Ltd v. M'Mwereria [1987] KLR 193, Remco Ltd v. Mistry Jadva Parbat & Co. Ltd. & 2 Others [2002] 1 EA 233 and Baiywo v. Bach [1987] KLR 89."

10. In its ruling subject of this review application, this Court considered the primary ground application for stay pending appeal, that is existence of an arguable case, against the principles for setting aside of interlocutory judgments set out in James Kanyiita Nderitu & another v Marios Philotas Ghikas & another, and ruled as follows:

> " 14. The Court of Appeal had occasion to consider the principles for the setting aside of interlocutory judgment in James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR. The case before the Court does

not, with respect, prima facie raise the grounds for setting aside of a regular interlocutory judgment."

11. If that conclusion be wrong, it ought to be appealed as this Court cannot correct its own conclusion of law.

12. The court finds that no proper case has been made to warrant the exercise of the court's limited powers of review.

Orders

13. Accordingly, for the reasons set out above, the Appellant's application dated 5/5/2024 is dismissed with costs to the Respondent.

    Order accordingly.

DATED AND DELIVERED ON THIS 25TH DAY OF JULY 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. Gitari for Ms. Oteko for Appellant.

Ms. Nyabuto for the Respondent.