Panij Automobiles (K) Ltd v Munguti (Suing as the legal representative of the Estate of Kevin Maingi Leonard) & another (Civil Appeal 54 of 2022) [2024] KEHC 9315 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9315 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 54 OF 2022

JK NG'ARNG'AR, J

JULY 25, 2024

BETWEEN

PANIJ AUTOMOBILES (K) LTD ..... APPELLANT

AND

CATHERINE NDUKU MUNGUTI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KEVIN MAINGI LEONARD) ..... 1ST RESPONDENT

TRINITY TRANSPORTERS SERVICES LTD ..... 2ND RESPONDENT

(An appeal from the ruling and order of the Chief Magistrate's Court at Machakos (M.A. Otindo, SRM.) delivered on 21st April, 2022 in CMCC No. 462 of 2018)

JUDGMENT

1. By Chamber Summons dated 17th January, 2022, the appellant sought for the following reliefs:
    1. .... Spent
    2. That the firm of J.A. Makau & Company Advocates be granted leave to appear and come on record for the 1st defendant/applicant instead of the firm of Kairu & McCourt/Kimondo Gachoka & Company Advocates;
    3. That this Honorable court be pleased to stay the orders issued on 14th December, 2021 freezing the 1st defendant's account at I&M Bank account pending the hearing and determination of this application;
    4. That this Honorable court be pleased to stay the execution of whatever nature, stay the judgment and decree passed in this suit pending the hearing and determination of this application;

5. That the Honorable Court be pleased to set aside the judgment entered in this suit and giving rise to the decree dated 25th September, 2020 or thereabouts against the 1st defendant/applicant and the 1st defendant be given unconditional leave to defend in this suit;

6. That costs of this application be provided for.

2. The application was supported by the grounds on the body of the application and the supporting affidavit of Trushar Dhirendrabhai Patel, the appellant's director. According to the appellant, it only became aware of the dispute when the garnishee notified it of garnishee proceedings filed on 8th December, 2021. That it was never served with the summons to enter appearance. Furthermore, the firm of Kairu & McCourt trading as Kimondo Gachoka & Company Advocates came on record on its behalf bereft of instructions. It continued that since it was in the business of selling motor vehicles, it could not have been held culpable for the accident as it did not operate to trade or ferry passengers. As such, though the suit vehicle namely KCH xxxW was once owed by it, it could not be held liable in negligence for the accident. It is for this reason that the disputed the consent on liability entered on its behalf. In its view, the proper party to blame was the 2nd defendant. It thus argued that the judgment and decree was obtained irregularly since it was not served with the summons, plaint, notice of entry of judgment, warrants of attachment and/or any proclamation notice. It lamented that following the orders of the court, it was unable to run its operations since its account held at the garnishee had been frozen. It annexed its draft defence arguing that it had raised triable issues and ought not to be condemned unheard. For those reasons, the appellant urged the trial court to allow the application.

3. In its ruling dated 21st April, 2022, the trial court found that the application lacked merit. It was consequently dismissed with costs to the respondent. The appellant is aggrieved by those findings. It filed a memorandum of appeal dated 25th April, 2022 raising eight grounds impugning the findings of the trial magistrate. It lamented that the trial court improperly upheld the consent that was not entered in its knowledge. The trial court erred in failing to allow for cross examination of the return of service when service of summons was in contention. It argued that contrary to the trial court's findings, the application was not res-judicata. That contrary to the learned magistrate's findings, the firm of Kimondo Gachoka & Company Advocates was well aware of the application and as such, they were notified of the application. For that reason, the trial court was wrong in failing to cross-examine the firm. The trial court was wrong to conclude that the said firm acted on its instructions. Finally, its application was unopposed by the said frim and that its submissions were not considered. For those reasons, the appellant prayed that the appeal be allowed by allowing the application dated 17th January, 2022.

4. The appeal was heard on the basis of the parties' written submissions. The appellant relied on its written submissions dated 5th February, 2024 where it regurgitated the contents of its application and memorandum of appeal to argue that the trial court erred to consider: that its application and the submissions on record; that the consent was invalid; the application was res judicata and the firm of Kimondo Gachoka & Company Advocates had instructions to act on its behalf. It prayed that the appeal be allowed.

5. The respondent on her part filed written submissions dated 1st February, 2024. She opposed the appeal on the following grounds: the appellant was "mean with truth and honest" as it failed to disclose that it had filed HC Misc. App. no. 546 of 2019 seeking stay and which conditional stay was granted on 27th January, 2020. As such, the trial court rightly affirmed that the subject application was res judicata. She argued that the appellant was seeking a review of the High Court ruling yet the trial court lacked the supervisory powers over the High Court. Secondly, the respondent submitted that the appellant was properly served. It is for that reason that it entered appearance and filed its statement of defence.

It thereafter entered a consent on liability. She argued that the firm instructed to act on behalf of the appellant appealed on quantum and Kshs. 3,000,000.00 has since been settled on its behalf. As such, the judgment was not ex parte. In addition, the respondent submitted that the onus was on the appellant to demonstrate that it did not instruct the firm to come on its record. Finally, on setting aside the consent, the respondent observed that the said prayer was never pleaded in its application. For those reasons, the respondent urged this court to dismiss the appeal with costs.

6. I have considered the impugned ruling, examined the memorandum of appeal and analyzed the law. This is an appeal against the trial court's exercise of its discretionary powers in setting aside an ex parte judgment. In *Pindoria Construction Ltd v Ironmongers Sanytaryware* Civil Appeal No. 16 of 1976, it was held that:

> "It is a common ground that it is a matter for discretion whether or not to set aside a judgement under rule 8 of Order 9B of the *Civil Procedure Rules*. It is also well settled that the Court of Appeal will not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice... The appellant was not altogether free from blame. He could have tried harder to be present at the date of hearing. He delayed considerably in filing his application to set aside the ex parte judgement. The trial Judge's exasperation at his behaviour was understandable. Although he should not have been precluded from defending the claim against him he has to be penalised to some extent in view of his somewhat dilatory actions."

7. The issue for determination is whether the trial court injudiciously exercised its discretion to deny the appellant leave to defend suit and in the process, failed to set aside its judgment. The principles enunciated in an application for setting aside have been well settled in our jurisdiction. In *Patel v EA Cargo Handling Services Ltd* (1974) EA 75, the court held that:

> "There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules, the principle obviously is that unless and until the count has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."

8. In the case *Mohamed & Another v Shoka* (1990) KLR 463, the court set out the tenets a court should consider in entering interlocutory judgment to include:

   i. Whether there is a regular judgment;

   ii. Whether there is a defence on merit;

   iii. Whether there is a reasonable explanation for any delay;

   iv. Whether there would be any prejudice.

9. It is also critical to distinguish between a regular and irregular judgment. The same was prominently addressed by the court in *Mwala v Kenya Bureau of Standards EA LR* (2001) 1 EA 148 where it was distinguished as follows:

> " To all that I should add my own views that a distinction is to be drawn between a regular and irregular ex-parte judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was in inadvertently overlooked the same ought to be set aside not as a matter of discretion, but ex debit justitiae for a court should never countenance an irregular judgment on its record.
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> ... [J]udgment 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.

10. By plaint filed on 26th July, 2018, the appellant was sued together the Trinity Transporters Services Limited, the 2nd defendant in Machakos CMCC No. 462 of 2018. According to the respondent, the appellant was the registered owner of motor vehicle registration number KCH xxxW involved in a road traffic accident on 1st February, 2017. On that fateful day, the deceased was aboard the suit vehicle when its driver lost control, veered off its rightful lane and collided with an oncoming vehicle registration number KAS 453W. As a result of the accident, the deceased suffered fatal injuries. It is for those reasons that the respondent sought general damages under the *Fatal Accident Act* and *Law Reform Act*, special damages of Kshs. 284,450.00, costs and interest of the suit.

11. Come 24th September, 2018, the firm of Kairu McCourt filed a statement of defence on behalf of both defendants as instructed. Consequently, Mr. Abutika, advocate for the defendants on 26th March, 2019 informed the court that he has instructions to record a consent on behalf of the appellant. As such, judgment on liability was entered in the ratio of 90:10 in favor of the respondent as against the appellant and the 2nd defendant jointly. Parties thereafter proceeded to hear the matter for assessment of quantum. The court thus entered judgment on 22nd October, 2019 in the sum of Kshs. 6,404,450.00 in favor of the respondent after considering the evidence and the submissions of the parties in totality.

12. The pertinent facts are that following the judgment, on 8th December, 2021, the respondent filed an application seeking a garnishee order. On 15th December, 2021, the garnishee, I & M Bank was restrained from releasing any monies to the appellant until the determination of the garnishee proceedings. The application was slated to be heard on 18th January, 2022. On that day, the appellant informed the court that it had filed the application dated 17th January, 2022. Since two applications

had been listed before the court, the trial court in its wisdom directed that the application dated 17th January, 2022 be canvassed first.

13. After considering the application, the affidavits and the submissions of the parties, the court found that the consent was properly filed as the grounds for setting aside were not apparent. The appellant is dissatisfied with those findings. When can a consent order be set aside? In *Broke Bond Liebig (T) Ltd v Mallya* (1975) EA 266 the then Court of Appeal for East Africa set out the circumstances in which a judgment would be set aside as follows:

> " The circumstances in which a consent judgment may be interfered with were considered by this court in *Hirani v Kassan* (1952)19 EACA 131 where the following passage from Section on judgments and orders, 7th Edition vol. 1, P. 124 was approved:
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> "Prima Facie, any order made in the presence and with the consent of the counsel is binding on all parties to the proceedings or action, and on those claiming under them and cannot be varied or discharged unless obtained by fraud of collusion or by an agreement contrary to the policy of the court or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement".
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> "The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g. on the ground of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable the court to set aside or rescind a contract.
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> In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all material facts and there could have been no mistake or misunderstanding."

14. More recently, the Court of Appeal in the case of *Board of Trustees National Social Security Fund v Micheal Mwalo* [2015] eKLR held as follows:

> " The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court."

15. The appellant contended that it did not instruct the firm of Kairu McCourt to come on record on its behalf and defend it. However, the allegations were not particularized in its affidavit. For instance, the appellant did not attach credible evidence to justify the allegation that the said firm did not receive such instructions. In addition, as rightly stated by the court, it was not demonstrated that the firm of Kairu McCourt advocates was duly notified of the order of the court directing it to file a response to the allegations presented by the appellant. Contrary to what was stated by the appellant, the said firm was not on record when those directions were issued on 25th January, 2022. It is possible that they were not aware of the proceedings and as such did not file their response. The burden of proof lay on it to demonstrate that it did not issue such instructions. It failed to do so. Ultimately, it is my finding that the appellant failed to demonstrate that the consent was obtained by fraud, collusion or an agreement contrary to the court's policy.

16. Be that as it may, there was no such orders sought in the application dated 17th January, 2022. Evidently, the arguments presented therewith are an afterthought. This court will not entertain the inclusion of orders not sought in the application.

17. Next the court observed that in High Court Misc. Application no. 546 of 2019, the court granted stay of execution in the suit at trial on condition that the appellant paid half the decretal sum with the balance paid in a joint interest earning account in thirty days failing which the stay would lapse. For those reasons, the trial court was inclined not to grant stay when the High Court had already pronounced itself on the same. In addition to this, the trial court found that it lacked the supervisory jurisdiction to review a decision of the High Court.

18. I agree with the trial court. The appellant was not only guilty of material non-disclosure but also failed to demonstrate that the orders sought for stay ought to be granted. The trial court rightly observed that since conditional stay had been granted before the High Court, it was incumbent on the appellant to comply and not seek the same orders in a lower court as it would indeed amount to *res judicata*. In my view, the appellant was in a fishy expedition to obtain protection from the law at all costs. I do not think he complied with the conditions set by the High Court in good time and thus craftily sought to have those order varied. The trial court in its wisdom found that it cannot review a decision of the High Court. I so hold as so. It is also instructive to note that the stay orders were only sought pending the hearing and determination of the application. I find that those orders lapsed the moment the application was canvassed. As such, there is nothing for consideration on the stay.

19. On the order for setting aside the judgment, firstly, it is noted that the appellant aptly participated in the proceedings at trial. For that reason, the appellant cannot be heard to set aside an ex parte judgment. In my view, taking account of the circumstances, its remedy lay in filing an appeal before the High Court. Be that as it may, I find that the judgment was regular since service had been done as the appellant came on record. I find that the appellant actively participated in the proceedings and cannot be heard to say that it is aggrieved.

20. I also find that the appellant only moved the court when the garnishee proceedings were instituted. The appellant had ample time to approach this court to set aside the orders earlier given but instead sat duck since judgment was entered in 2019. It even filed High Court Misc. Application no. 546 of 2019 which it failed to inform the trial court way back in 2019. It is certainly the author of its own misfortune.

21. On the issue of summons to cross examine the deponent that filed the return of service and counsel from the firm of Kairu McCourt, I find that the appellant did not seek those prayers. A court cannot sit in the position of a litigant and grant orders that it never prayed for. It appears that the appellant was amending the application on the floor of the court. Finally, the respondent deposed that the appellant had settled the sum of Kshs. 3,000,000.00 in her favor. I therefore do not understand why the appellant is still interested in prosecuting this application. It is foolhardy to seek to set aside yet a deposit of the said sum has been in compliance with orders from the High Court. I think the trial court was functus officio when that payment was disbursed to the respondent.

22. It is my unwavering conclusion thus that the application dated 17th January, 2022 was rightly dismissed for lacking merit. Consequently, I find that the present appeal lacks merit and it is hereby dismissed with costs to the respondent.

It is so ordered.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH DAY OF JULY, 2024.

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J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

Odere Advocate for the Appellant

Mutua Advocate for the Respondent

Court Assistant – Peter Og'indi